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## *Arbitration, Statute of Limitations, and Uninsured Motorist Endorsements*

*Leona M. Hudak\**

**D**EATH OR PERSONAL INJURY by means of the automobile is an ubiquitous threat to modern man's daily existence. An even more dreaded menace is the financially irresponsible motorist. To help alleviate the economic plight of his remediless victim(s), the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau in December, 1956, first promulgated uninsured motorist coverage, as an endorsement to their standard family automobile policy.<sup>1</sup>

This standard-form uninsured motorist endorsement now exists by statutory mandate in some 45 states.<sup>2</sup> Two sections of it generally deal with arbitration.<sup>3</sup> The first—typically found under the heading "Protection against Uninsured Motorist"<sup>4</sup>—provides:

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.<sup>5</sup>

The second section pertaining to arbitration, generally found under the heading "Conditions," reads:

Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an insured highway vehicle

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<sup>1</sup> Plummer, Handling Claims Under the Uninsured Motorist Coverage, 1957 *Ins. L. J.* 494; Widiss, Perspectives on Uninsured Motorist Coverage, 62 *Nw. U. L. R.* 497, 499 (1967). This insurance protection is commonly termed the "uninsured motorist endorsement." Plummer, *The Uncompensated Accident Victim*, 24 *Ins. L. J.* 78 (1957).

<sup>2</sup> See Aksen, Arbitration of Automobile Accident Cases, 1 *Conn. L. Rev.* 70, 90 (1968) for a complete list. The applicable Ohio law is found in Ohio Rev. Code § 2711.01-16.

<sup>3</sup> Aksen, *supra*, n. 2 at n. 28. The insurance law of each state determines whether or not arbitration will be used to resolve disputes arising under this endorsement. Some jurisdictions prohibit the inclusion of arbitration clauses in the endorsement, on the ground that arbitration unconstitutionally denies claimants a jury trial. The majority of states have no provision affecting arbitration. A few provide for arbitration, by statute. *McKinney v. Allstate Ins. Co.*, 6 Ohio App. 2d 136, 216 N.E. 2d 887 (1966), held that uninsured-motorist arbitrations in Ohio are statutory in nature.

<sup>4</sup> See Travelers Indemnity Co., Personal Automobile Policy, Part III, at 4.

<sup>5</sup> *Id.*

because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, or such other method as may be agreed upon by the parties, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this Part.<sup>6</sup>

Arbitration is begun by serving a written demand therefor upon the insurer, delineating the claim and the amount of damages sought for personal injury. Three copies must be filed with any regional office of the AAA, together with a copy of the insurance policy and the administrative fee of \$50.<sup>7</sup> The insurer is then automatically billed a surcharge of \$100 by AAA. A discussion of the procedures employed in arbitrating an accident claims case is contained in the Association's pamphlet, "Accident Claims Rules."<sup>8</sup> Arbiters serve without fee in this type of cause. Their awards are not accompanied by opinions, nor are they published.

Although the wording of arbitration provisions in uninsured motorist endorsements of automobile policies is uniform, courts have not agreed on issues which the arbitrators may decide. Three judicial interpretations exist regarding their scope: some limit the arbiter's role to a determination of fault and damages. Here the uninsured status of the tortfeasor must be established as a condition precedent to arbitration; some permit arbitrators to resolve all issues arising under the endorsement; others have not yet resolved the intent underlying arbitration in the clauses.<sup>9</sup>

At common law, arbitration awards could only be reviewed by a court of competent jurisdiction, on a showing of fraud or some type of wilful misconduct by the arbiter. Modern arbitration laws now provide for review and judicial vacatur, variably, upon grounds of mistake of law or fact; excess of arbitral power; inadequate or excessive awards; failure by the arbiter to disclose a relationship, partiality, or prejudice; failure to grant general damages; and *ex parte* arbitration.<sup>10</sup>

Arbitration under the uninsured motorist endorsement represents the most prolific source of cases decided presently by the American Arbitration Association. It affords the aggrieved party a speedy and comparatively economical legal proceeding.

<sup>6</sup> *Id.* at 7-8.

<sup>7</sup> Amer. Arbit. Assoc. Accident Claims Rules. § 4, 6. Effective Jan. 1, 1970.

<sup>8</sup> A copy may be procured gratis from the Amer. Arbit. Assoc., 140 West 51st St., New York, New York 10020, or from any Regional AAA office.

<sup>9</sup> Aksent, Judicial Review of Uninsured-Motorist Arbitration Awards, 48 Ore. L. R. 74, 76-77 (1968).

<sup>10</sup> *Id.* at 81-91.

## Applicable Statute of Limitations

In writing up their uninsured motorist endorsements in personal automobile insurance policies, the insurers placed no time limits within which the insured had to file his claim. Apparently they intended the statute of limitations of each jurisdiction to prevail. In states where the statutes providing for uninsured motorist coverage are silent on time limits within which claims based upon such coverage must be brought, the issue soon arose as to whether the policyholder's right of action was in tort or in contract, the latter usually being considerably longer.<sup>11</sup> Insurance companies argued that the tort statute of limitations applied, sustaining their position on the dual rationale that: (1) the insured's claim for personal injuries is bottomed on negligence; and if he allows the tort statute to run, he no longer has a valid claim under the endorsement in question, which allows recovery only for sums that the insured is *legally* entitled to recover;<sup>12</sup> and, (2) if the insured permits the shorter negligence statute of limitations to lapse against the uninsured motorist, the insurer may be precluded from any subrogation rights it has under the policy.<sup>12a</sup>

Courts soon revealed themselves as favoring the longer period—for reasons which follow in the ensuing analysis.

## Common Law Decisions

*Ceccarelli v. Travelers Indemnity Co.*<sup>13</sup> appears to be the first reported case squarely on the issue. The accident in dispute occurred on March 14, 1956. The injured plaintiff made no demand for arbitration until May 28, 1959. Justice McDonald overruled defendant insurer's motion to deny arbitration, predicated on the ground that the cause of action was barred by the 3-year negligence statute of limitations. Citing no authority, he concluded:

Petitioner's claim against the respondent is based not upon the insurance contract, although a tortious act of a third party gives rise

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<sup>11</sup> In Ohio the statute of limitations on written contract actions is 15 years; Ohio Rev. Code § 2305.6; on negligence, 2 years; Ohio Rev. Code § 2305.10.

<sup>12</sup> State Farm Mutual Automobile Insurance Co. spearheaded this position with its Questions and Answers on Uninsured Motorist Coverage, Divisional Claims Superintendents' Conference, Feb. 17-19, 1960, Panel Discussion on Uninsured Motorist Coverage. Comment, 48 Calif. L. R. 516, 531-32 (1960); Notes, 14 U. Fla. L. R. 455, 471-2 (1962); Aksen, Arbitration of Uninsured Motorist Endorsement Claims, 24 Ohio St. L. J. 589, 591-2 (1963); Schulz v. Allstate, 17 Ohio Misc. 83, 244 N.E. 2d 546 (Com. Pl., Franklin Co., 1968). This argument was rejected in *Ceccarelli v. Travelers Indemnity Co.*, 204 N.Y.S. 2d 550 (Sup. Ct., Kings Co., 1960).

<sup>12a</sup> See, *Security Ins. Co. v. Rogers*, N.Y. L. J., Oct. 4, 1960, at 14/2. Aksen, *supra*, n. 8, at 592, citing Notes, 14 U. Fla. L. R. 471-2; Comment, 48 Calif. L. R. 531-2; Schulz v. Allstate, *supra*, n. 8, at 87-88.

<sup>13</sup> *Supra*, n. 12.

to the rights under the contract. The claim being made in contract, the three-year Statute of Limitations is not applicable.<sup>14</sup>

Two years later, the same court heard the same defendant—Travelers Indemnity Company—plead for a stay of an arbitration demand commenced by a policyholder.<sup>15</sup> The Company alleged estoppel for failure by the insured to comply with a condition precedent—*viz.*, not instituting an action against the tortfeasor before expiration of the tort statute of limitations, in order to protect the Company's rights as subrogee under a trust arrangement contained in the policy. Mr. and Mrs. DuBose sustained their injuries on January 10, 1958. They filed claims with the Company on November 25, 1959 and July 8, 1960, and were subsequently advised that their file had been lost. After the Company refused to pay on a submission of proof of claim forms, respondents served it, on August 11, 1961, with their written demand for arbitration.

Justice Ventiera, describing the Company's arguments as a "novelty," rejected its motion for a stay and ordered arbitration—after finding that the respondents had "strictly followed the procedure outlined in the contract," and that petitioner had "failed to show that they did not comply with the conditions of the contract."<sup>16</sup> As in *Ceccarelli*, the tort statute of limitations was held inapplicable.<sup>17</sup>

Three months after the *DeBose* decision by the King's County (New York) Supreme Court, the Queens County Supreme Court rendered a similar judgment in *LaMarsh v. Maryland Casualty Co.*<sup>18</sup>

In *Nationwide Mutual Insurance Company v. Holbert*,<sup>19</sup> the insurer also sought an order restraining arbitration demanded by the insured husband and wife. The issue was whether or not the two questions raised by the petitioner—*viz.*, timely notice by the defendants to the Company of the hit-and-run accident and the statute of limitations—could be decided by the court or should be left for determination by the arbitrators.<sup>20</sup> Justice Brink, citing several authorities,<sup>21</sup> held "that a dispute relating to a claimant's having given timely notice bears on whether he is legally entitled to recover *from the petitioner under the endorse-*

<sup>14</sup> *Id.* at 552.

<sup>15</sup> *Travelers Indemnity Co. v. DeBose*, 226 N.Y.S. 2d 16 (Sup. Ct., Kings Co., 1962), 28 A.L.R. 3d 580, decided March 14, 1962.

<sup>16</sup> *Id.* at 19-21.

<sup>17</sup> *Id.* at 18.

<sup>18</sup> 35 Misc. 2d 641, 231 N.Y.S. 2d 121 (Sup. Ct., Queens Co., 1962), 28 A.L.R. 3d 580. The same issue was again tried and identically decided in *Fitzpatrick v. MVAIC*, 40 Misc. 2d 970, 244 N.Y.S. 2d 154 (Sup. Ct., Queens Co., 1963), decided October 1, 1963.

<sup>19</sup> 19 A.D. 2d 683, 241 N.Y.S. 2d 1021 (3d Dept.), *affg.* 39 Misc. 2d 782, 241 N.Y.S. 2d 589 (Sup. Ct., Broome Co., 1962), 28 A.L.R. 580, decided September 21, 1962.

<sup>20</sup> *Id.* at 591.

<sup>21</sup> *MVAIC v. Brown*, 15 A.D. 2d 578, 579, 223 N.Y.S. 2d 309, 311 (Case No. 14) (2d Dept. 1961); *Granese v. MVAIC*, 26 Misc. 2d 646, 206 N.Y.S. 2d 292 (Sup. Ct., N.Y. Co., 1960); *Rosenbaum v. American Surety Co. of New York*, 11 N.Y. 2d 310, 229 N.Y.S. 2d 375, 183 N.E. 2d 667 (1962).

ment and not whether he is legally entitled to recover from the owner or operator of the uninsured automobile." Thus, that issue did not fall within the scope of the arbitration clause and was not proper for submission to the arbitrators over the objection of the petitioner, but was rather a factual question to be determined by a court hearing.<sup>22</sup> As to the applicable statute of limitations, the 6-year contract period was held proper in the insureds' action against the insurer; but the insureds' negligence action against the hit-and-skip driver tolled the 3-year tort statute of limitations during the interim that he concealed his identity.<sup>23</sup>

Aware that its compulsory insurance statute did not cover those individuals injured by uninsured non-residents, hit-and-run drivers, operators of stolen or unregistered vehicles, and drivers of registered but somehow uninsured automobiles, the New York State legislature in 1958 enacted the Motor Vehicle Accident Indemnification Act, to widen the scope of protection for traffic victims or their survivors, for personal injuries or death. The Corporation, comprising all the motor vehicle liability insurers authorized to do business within the state, elects a board of directors which manages the Corporation. MVAIC has authority to investigate claims and to appear on behalf of the unidentified or financially irresponsible motorist. Its liability maximum is \$10,000 for injury or death of one person and \$20,000 total for injury to two or more persons, with no provision made for property damage compensation.<sup>24</sup>

Reported cases involving the Corporation indicate it employs the same tactics of delay, harassment, and barratry, as the individual insurers, in attempting to evade liability and payment.

In *Fitzpatrick v. MVAIC*,<sup>25</sup> the Corporation sought to stay plaintiff's arbitration demand, using as grounds the 3-year negligence statute of limitations. Citing the same court's earlier opinion in *LaMarsh*,<sup>26</sup> and the *Ceccarelli*<sup>27</sup> and *DeBose*<sup>28</sup> decisions, Justice Livoti held that the claim based not upon tort, but "upon a contractual obligation": "In the absence of a provision 'in a contract setting a time limitation for instituting arbitration proceedings, the six-year statute applies.'" <sup>29</sup>

An identical decision, on identical facts, was rendered two days later by the Supreme Court of New York County in *Guinness v. MVAIC*.<sup>30</sup> Justice Brust commented:

<sup>22</sup> *Supra*, n. 19, at 592.

<sup>23</sup> *Id.* at 593.

<sup>24</sup> Bernstein, *Private Dispute Settlements*, at 190-1 (1969).

<sup>25</sup> *Supra*, n. 15, at 154.

<sup>26</sup> *Supra*, n. 18, decided June 20, 1962.

<sup>27</sup> *Supra*, n. 12.

<sup>28</sup> *Supra*, n. 15.

<sup>29</sup> *Supra*, n. 15, at 156.

<sup>30</sup> 40 Misc. 2d 775, 243 N.Y.S. 2d 746 (Sup. Ct., New York Co., 1963), 28 A.L.R. 3d 580, decided October 3, 1963.

The conduct of the respondent in this matter leaves grave doubts in this court's mind as to whether this body is faithfully fulfilling the job for which it was created.<sup>31</sup>

The over-litigated issue of *tort v. contract* statute of limitations in uninsured motorist endorsements<sup>31a</sup> at length reached the New York Court of Appeals, in 1966, in two proceedings heard simultaneously—*DeLuca v. MVAIC* and *MVAIC v. Bradanese*.<sup>32</sup> In each the petitioner had been injured in 1960, by an uninsured motorist; in each he promptly filed a claim with MVAIC, but did not serve a demand for arbitration until 1964. MVAIC moved to stay arbitration on grounds of the 3-year bar. Judge Fuld, in a 4-3 decision, affirmed the lower court's denial of the motion, commenting: "If the Statute of Limitations had been desired as a restriction on an insured's claim against MVAIC, it would have been a simple matter to expressly provide therefor—either by the insurer in the policy or by the Legislature in the statute."<sup>33</sup>

Chief Judge Desmond second-guessed the New York legislature differently:

The holding that the six-year limitation is available to respondent because this is an "action on a contract" . . . is correct if, forgetting all else, we consider only the circumstance that respondents' right to recover from MVAIC is expressed in a rider to an insurance policy. But the result (six years instead of three for beginning a litigation for personal injuries) is so obviously unreasonable and unintended that we should look at the larger picture. The whole concept of MVAIC was a legislative creation intended to secure to injured persons like these the same protection . . . they would have had as to their tort-feasors had their injuries been caused by insured cars or drivers who did not hit and run. . . . The policy rider here sued upon is a mere instrumentality for carrying out the legislative mandate and so it is legislative intent we should be looking for. To say in these days of struggle against litigation delays that the Legislature for no discoverable reason gave this class of claimants three years longer to commence suit than they would have had to sue in the more usual situation is to ascribe to the Legislature an incredible purpose.<sup>34</sup>

<sup>31</sup> *Id.* at 765.

<sup>31a</sup> In addition to cases on point already cited in this paper, the following were also litigated in New York courts: *McNamara v. MVAIC*, 22 A.D. 2d 1017, 254 N.Y.S. 2d 808 (1st Dept.) (1964), affg. 42 Misc. 2d 923, 248 N.Y.S. 2d 1009; *MVAIC v. McDonnell*, 23 A.D. 2d 773, 258 N.Y.S. 2d 735 (1965), affg. 40 Misc. 2d 657, 243 N.Y.S. 2d 229, 28 A.L.R. 3d 585; *Allstate Ins. Co. v. Guarriello*, N.Y. L. J., Mar. 14, 1963, at 15/2; *Napoli v. MVAIC*, N.Y. L. J., June 29, 1964, at 9/6; *Massa v. MVAIC*, N.Y. L. J., Nov. 4, 1964, at 17/3.

<sup>32</sup> 17 N.Y. 2d 76, 268 N.Y.S. 2d 289, 215 N.E. 2d 482, 28 A.L.R. 3d 580, 585, 586, decided Feb. 24, 1966.

<sup>33</sup> *Id.* at 293.

<sup>34</sup> *Id.* at 293-4.

Among states following New York's lead in applying the longer statute of limitations in arbitration demands under the uninsured motorist endorsement are Louisiana,<sup>35</sup> Tennessee,<sup>36</sup> Florida,<sup>37</sup> New Mexico,<sup>38</sup> and Ohio.<sup>39</sup>

### The Ohio Position

*Schulz v. Allstate Ins. Co.*<sup>40</sup> represents the only case in Ohio on the issue of applying the appropriate statute of limitations under uninsured motorist endorsement claims. Plaintiff sustained personal injuries on October 30, 1963, as a result of the negligent operation of a motor vehicle by one Allen, who was not insured. Pursuant to the terms of his policy, after being unable to agree with the defendant on a reasonable amount of recoverable damages, Schulz filed a demand for arbitration on March 29, 1967. Allstate refused to arbitrate, whereupon Schulz filed this action to compel arbitration. Allstate demurred, seeking to bar the proceeding by invoking the Ohio 2-year personal injury statute of limitations.<sup>41</sup> Judge Leach overruled the demurrer,<sup>42</sup> following the precedent of the New York courts in *Ceccarelli*,<sup>43</sup> *LaMarsh*,<sup>44</sup> and *DeBose*,<sup>45</sup> commenting (as had these cases), that if Allstate had intended to limit payment under the clause to a period of two years from the infliction of the injury, it would have been a simple matter to incorporate such words into the policy. In interpreting the language of the insurance contract, the court applied the rule of liberal construction in favor of the insured and against the drawer of the language employed—Allstate.<sup>46</sup> Judge Leach

<sup>35</sup> Accord: *Booth v. Firemen's Fund Ins. Co.*, 197 So. 2d 352 (La. App. 2, 1967). *Contra*: (action in tort) *Fremin v. Collins*, 194 So. 2d 470 (La. App. 4, 1967); (action in tort but governed by prescriptive period applicable to tort actions) *Thomas v. Employers Mut. Fire Ins. Co.*, 208 So. 2d 374 (La. App. 1, 1968), writ issued 252 La. 177, 210 So. 2d 56 (1968).

<sup>36</sup> *Schlieff v. Hardware Dealers Mut. Fire Ins. Co.*, 218 Tenn. 489, 404 S.W. 2d 490 (1966), 28 A.L.R. 3d 580, 587. Justice White here noted that the purpose of a shorter statute of limitations for tort actions was to preserve the reliability of evidence. It was inapplicable in this case since the other motorist's identity being unknown, (1) plaintiff's only action was in contract against the defendant insurer, and, (2) the defendant insurer had no subrogation rights which were prejudiced by the plaintiff's failure to sue the anonymous hit-and-run driver within the one-year tort period.

<sup>37</sup> *Hartford Accident and Indemnity Co. v. Mason*, 210 So. 2d 474 (Fla. App. 3, 1968).

<sup>38</sup> *Haury v. Allstate Ins. Co.*, 384 F. 2d 32 (C.A. 10, N.M., 1967), 28 A.L.R. 3d 580. See discussion *infra*.

<sup>39</sup> *Schulz v. Allstate Ins. Co.*, *supra*, n. 12. See discussion *infra*.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 83-5, O.R.C. § 2305.10. See *supra*, n. 11.

<sup>42</sup> *Id.* at 90.

<sup>43</sup> *Supra*, n. 12.

<sup>44</sup> *Supra*, n. 15.

<sup>45</sup> *Supra*, n. 18.

<sup>46</sup> *Supra*, n. 12, at 90, citing 30 Ohio Jur. 2d at 225.



noted further that a cause of action to enforce an agreement to arbitrate could not arise until and when one party refused to arbitrate.<sup>47</sup>

### Conflict of Laws and the Statute of Limitations

*Haury v. Allstate Ins. Co.*<sup>48</sup> represents the only case on the issue of whether or not proceedings in one state (New Mexico) under the uninsured motorist endorsement are barred by the statute of limitations of another (California). Haury, a California resident, obtained and paid for an automobile insurance policy containing uninsured motorist liability coverage. He and co-plaintiff Kelly, a passenger in his car, were injured in an accident in New Mexico, when their car collided with one driven by an uninsured motorist.

Haury then made demand for arbitration—but more than one year after the collision. Allstate raised the one-year California statute of limitations, in defense. By mutual consent, the arbitration proceeding was transferred to a state court in New Mexico, from whence it was removed to the federal court, on the ground of diversity. Plaintiff sought a declaratory judgment that the arbitration was not barred by the California statute.<sup>49</sup>

The United States District Court of New Mexico granted summary judgment for Allstate. This was reversed on appeal. Since Allstate does business in New Mexico and is subject to suit there, reasoned Judge Breitenbaugh, the state may impose its own rules on it. The court felt that the interest of the state in insurance protection for individuals injured upon its soil constituted sufficient contact to sustain its jurisdiction. In diversity cases it is established that federal courts apply the rules of the state in which they sit, when deciding questions of conflict of laws—except if the foreign statute is part of the foreign substantive law. Since the California statute was procedural rather than substantive, it was held not applicable.<sup>50</sup>

### Statutory Limitations

California is the only state whose uninsured motorist liability statute provides for an express period within which action must be taken by the insured on a personal injury claim. In the interim of one year from the date of an accident involving an uninsured motorist, the injured party

<sup>47</sup> *Supra*, n. 12, at 90.

<sup>48</sup> *Supra*, n. 38.

<sup>49</sup> West's Annotated Calif. Codes, § 1158.2 "(h): LIMITATIONS OF ACTIONS. No cause of action shall accrue to the insured under any policy or endorsement provision issued pursuant to this section unless within one year from the date of this accident: . . . (3) . . . has formally instituted arbitration proceedings."

<sup>50</sup> *Supra*, n. 38, at 34.

must make a formal demand for arbitration, settle with the insurer, or institute suit against the tortfeasor.<sup>51</sup>

In *Bell v. Travelers Indemnity Co.*,<sup>52</sup> appellant had been injured in a collision with one Muehlmann, uninsured, on November 5, 1960. Her attorney began negotiations by letter with respondent within one year thereof, for damages for personal injuries. Unable to consummate an agreement, on August 18, 1961, he filed a demand for arbitration. On December 13, 1961, he filed an action in municipal court for property damage and personal injury against Muehlmann, who suffered a default judgment and damages of \$1500 to be entered against him on December 28, 1961. The arbitration action was heard on March 23, 1962. Respondent's defenses were (1) that appellant was contributorily negligent, and (2) that her claim under the uninsured motorist endorsement of the policy was barred because the statute of limitations had run against her on the claim against Muehlmann and thus against respondent, also.

On April 10, 1962, the arbitrator awarded the appellant \$1500. On May 15, 1962, respondent company filed a petition to vacate the arbitration award, raising the statute of limitations bar in the appellant's claim against Muehlmann. The Superior Court of Los Angeles County set aside the arbitration award. Judge Lillie of the Second District Court of Appeals reversed in favor of the appellant, holding that she had complied with the terms of the insurance contract by instituting a formal demand for arbitration within a year of the accident; and that her failure to sue Muehlmann within the same period in no way prejudiced the rights of the company. In failing to defend his action, Muehlmann was deemed to have waived a valid defense of the bar of the statute.<sup>53</sup>

*State Farm Mutual Auto Ins. Co. v. Superior Court of Merced County*<sup>54</sup> was an original mandamus proceeding to compel the respondent to vacate its order directing arbitration, in an action by the guardian *ad litem* of the real party in interest, a minor, who on the date of the accident, July 16, 1963, was 12 years old. While riding a bicycle, she collided with an automobile operated by one Refugio Lopez, uninsured. Under the policy issued by State Farm Mutual to her father, she was an additional insured. However, his action in her behalf—a demand for arbitration—was not filed until 15 months after the accident. The company was at length compelled to arbitrate by the Merced County Superior Court. On appeal, the sole issue was whether or not a minor had to comply with the one-year limitation designated by statute.<sup>55</sup> Citing the rule

<sup>51</sup> *Supra*, n. 49.

<sup>52</sup> 213 Cal. App. 2d 541, 29 Cal. Rptr. 67 (C.A. 2, 1963), 28 A.L.R. 3d 580, 587.

<sup>53</sup> *Id.* at 69-71.

<sup>54</sup> 232 Cal. App. 2d 808, 43 Cal. Rptr. 209 (C.A. 5, 1965), 28 A.L.R. 3d 580, 590.

<sup>55</sup> *Supra*, n. 49.

established in a California Supreme Court case,<sup>56</sup> Justice Stone held that the disability of minority<sup>57</sup> was not applicable, and he issued the writ.<sup>58</sup>

In *Niagara Fire Ins. Co. v. Cole*,<sup>59</sup> Justice Stone declared it reasonable to apply prospectively the one-year period of limitations amendment<sup>60</sup> to the uninsured motorist statute, although it had not been enacted when the accident occurred, to bar a demand for arbitration one year from the effective date of the amendment.<sup>61</sup> The court noted, however, that the amendment shortening the period of limitations could not be applied retroactively to wipe out an accrued cause of action that was not barred by the then applicable statute of limitations.<sup>62</sup>

On the authority of *Niagara*<sup>63</sup> and *State Farm Mutual*,<sup>64</sup> *Pacific Indemnity Co. v. Superior Court of San Francisco County*<sup>65</sup> held that the one-year period of limitations, although enacted *after* the issuance of the policy and the occurrence of the accident, could also be constitutionally applied prospectively to bar the right of the real party in interest—an injured minor—to arbitrate, where more than one year had elapsed between the effective date of the statute and the filing date of the demand. Accordingly, Justice Sullivan issued a peremptory writ of mandate, ordering the lower court to enjoin the arbitration proceedings.<sup>66</sup>

In *Calhoun v. State Farm Mutual Auto. Ins. Co.*,<sup>67</sup> the widow of the insured sought declaratory relief against his insurer. The accident had

<sup>56</sup> *Artukovich v. Artukovich*, 21 Cal. 2d 329, 131 P. 2d 831, at 834 stated: "there are statutory provisions extending special consideration to minors with respect to the time within which certain proceedings must be commenced (Code Civ. Proc. § 328, 352, 1272; Prob. Code § 384, 931), but the special consideration extended is expressly limited to the proceedings therein mentioned."

<sup>57</sup> West's Ann. Code Civ. Proc. § 352, 1281.2.

<sup>58</sup> *Pacific Indemnity Co. v. Superior Ct. of San Francisco Co.*, 246 Cal. App. 2d 63, 54 Cal. Rptr. 470 (C.A. 1, 1966), 28 A.L.R. 3d, 580, 589; *Allstate Ins. Co. v. Orlando*, 262 Cal. App. 2d 858, 69 Cal. Rptr. 702 (C.A. 2, 1966), 28 A.L.R. 580, 590; and *Republic Indemnity Co. of America v. Barn Furniture Mart, Inc.*, 248 Cal. App. 2d 517, 56 Cal. Rptr. 609 (C.A. 2, 1967), 28 A.L.R. 3d 580, 590, citing the instant case as authority, declared that the statutory time limitation provision under uninsured motorist coverage for filing a claim was not extended in the case of injured minors.

<sup>59</sup> 235 Cal. App. 2d 40, 44 Cal. Rptr. 889 (C.A. 5, 1965), 28 A.L.R. 3d 580, 588.

<sup>60</sup> *Supra*, n. 49.

<sup>61</sup> The accident occurred on April 4, 1960. Appellant filed an accident report within 30 days, but did not make a claim for damages for bodily injury and demand for arbitration upon respondent until July 17, 1963. Effective Sept. 15, 1961, subdivision (h) was added to § 11580.2.

<sup>62</sup> *Supra*, n. 59, at 890-1.

<sup>63</sup> *Id.*

<sup>64</sup> *Supra*, n. 54.

<sup>65</sup> *Supra*, n. 58, at 471 *et seq.* *Key Insurance Exchange v. Biagini*, 250 Cal. App. 2d 143, 58 Cal. Rptr. 408 (C.A. 1, 1967), 28 A.L.R. 3d 580, 589, also applied Ins. Code § 11580.2 subd. (h) prospectively, even though the policy was issued prior to its enactment, where the insured initiated arbitration proceedings more than 2 years after the accident.

<sup>66</sup> *Supra*, n. 58, at 476.

<sup>67</sup> 254 Cal. App. 2d 407, 62 Cal. Rptr. 177 (C.A. 1, 1967), 28 A.L.R. 3d 580, 591-2.

occurred in New Mexico, on April 29, 1963. The driver of the other automobile, one Bach, was insured only up to \$5,000 for the death of one person. In July, 1963, defendant's representative informed Mrs. Calhoun that Bach was not an *uninsured* motorist and that his company denied coverage.

*Taylor v. Preferred Risk Mutual Ins. Co.*<sup>68</sup> had earlier held that an "uninsured motor vehicle under section 11580.2 is one carrying insurance with limits of less than the financial responsibility requirement of the Vehicle Code."<sup>69</sup> On March 20, 1964, Mrs. Calhoun's attorney made formal demand by letter on State Farm Mutual for damages for wrongful death, in the amount of \$5,000, which represented the difference between Bach's coverage and Calhoun's. Not receiving any reply, on April 20, 1964, he filed suit. Justice Agee upheld the trial court's judgment and rationale that the demand letter and the filing of the suit within one year of the accident not only satisfied, but tolled, the statute of limitations.<sup>70</sup>

In *Firemen's Ins. Co. v. Diskin*,<sup>71</sup> the automobile liability insurer sought declaratory relief and a permanent injunction against arbitration proceedings instituted by the insureds—husband and wife—who were injured in March, 1962, in Miami Beach, Florida, when the taxi in which they were passengers collided with a fire hydrant. The operator was covered by insurance issued by a company which became insolvent in May, 1963. Although the Florida statute of limitations for personal injuries is 4 years, the Diskins made no attempt to recover damages from the tortfeasor. Instead, in March, 1964, they instituted the arbitration proceedings in question against their own insurer, in Los Angeles, to obtain damages under the uninsured motorist clause. The appellate court ruled that a motorist whose insurer becomes insolvent after the collision qualifies as an uninsured motorist.<sup>72</sup> It affirmed the trial court's judgment, barring recovery under the endorsement. By failing to file suit within one year against the wrongdoer, the defendants were held to have failed to acquire a claim against their own insurer under the California code, despite the fact that they did not have an actionable claim against their own insurer until the insurer of the other motorist became insolvent—more than one year after the accident.<sup>73</sup>

The court's rationale was that if the statute were construed to allow the filing of actions within a year following the insurer's solvency, the insured would be initiating a claim when suit against the original tort-

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<sup>68</sup> 225 Cal. App. 2d 80, 37 Cal. Rptr. 63 (C.A. 1, 1964).

<sup>69</sup> *Supra*, n. 67, at 178 *et seq.*

<sup>70</sup> *Id.* at 182.

<sup>71</sup> 255 Cal. App. 2d 502, 63 Cal. Rptr. 177 (C.A. 2, 1968), 28 A.L.R. 3d 580, 587, 591.

<sup>72</sup> *Id.* at 179.

<sup>73</sup> *Supra*, n. 49 and West's Annot. Code Civ. Pro. § 340.

feasor was barred. Thus the insurer's right of subrogation against the wrongdoer would be nullified. Interpreting the language of the statute, the court thought the legislature intended a result in which the uninsured motorist liability attached to the original tortfeasor "as closely as possible."<sup>74</sup> The correct procedure under California law, according to Justice Fleming, is for the injured insured to protect his contingent claim against his own insurer by filing suit against the other motorist during the one-year period or by instituting arbitration proceedings against his own insurer within one year if the tortfeasor is uninsured.<sup>75</sup>

As to the Diskins' claim that the longer Florida statute of limitations should control, Justice Fleming ruled:

Since appellants claim pursuant to a California right in a California court, both substantively and procedurally, they are bound by California law. . . . Not only are conditions of right governed by the statute which creates the right, . . . but in accordance with the usual conflict of law rule, periods of limitations are matters of procedure controlled by the law of the forum state.<sup>76</sup>

### **Solution to the Tort-Contract Statute of Limitations Controversy**

As already noted in this paper, those courts which have upheld the longer contract statute of limitations have consistently commented that insurers could have easily solved the dilemma by expressly limiting any payment under the uninsured motorist clauses to their own policyholders upon claims filed within a specified period of time.<sup>77</sup> Since the insurance companies drafted the clauses found within their policies, omissions or ambiguities must be liberally construed against them.<sup>78</sup>

The alternative is for state legislatures to amend their uninsured motorist coverage statutes to include specific—but reasonable—time periods within which claims by the injured must be filed as a condition precedent to payment, or be barred from recovery. California is the bellwether of this kind of reform, as we have shown. Construction and interpretation of the statute of limitations statutes in multi-issue causes would remain the domain of the courts.<sup>79</sup>

Until this problem is solved, to avoid the statute of limitations pitfall, attorneys for the insured should file an action against the tortfeasor if settlement with his insurer does not appear likely within a year after the accident. Where the uninsured motorist is known and apparently *solvent*,

<sup>74</sup> *Supra*, n. 71, at 184.

<sup>75</sup> *Id.* at 182.

<sup>76</sup> *Id.* at 183.

<sup>77</sup> See DeBose, *supra*, n. 15, at 20; Fitzpatrick, *supra*, n. 18, at 156; DeLuca, *supra*, n. 32, at 293; Schulz, *supra*, n. 12, at 90.

<sup>78</sup> *Id.* (at 90).

<sup>79</sup> *Cf.* discussion of *Firemen's Ins. Co. v. Diskin*, *supra*; citation at n. 71.

the insurer should file an action within a year—if his insured has not—to preserve its subrogation right.

### Conclusion

To alleviate the hardships of uncompensated personal injury wrought by the negligence of uninsured judgment-proof operators of motor vehicles, most states have provided for some type of compulsory uninsured motorist coverage in personal automobile liability policies, which provide for recovery by the insured from his own insurer in the event of a collision with a financially irresponsible driver.

Except in California, these uninsured motorist statutes do not provide for any specified period within which the injured must file his claim for damages. The uninsured motorist coverage clauses in policies have likewise been silent on the subject.

A controversy has arisen as to whether the (usually) shorter negligence (tort) statute of limitations or the longer contract time limit governs. Insurers have favored the former and have often resorted to all manner of delay tactics to prevent their policyholders from recovery and have then raised the statute of limitations as a bar to payments where the issue has arisen. In the wake of such conduct, courts of New York, Ohio, Virginia, New Mexico, Tennessee, and Louisiana, have appropriately construed the time-period-within-which-to-file-claims omission in uninsured motorist coverage clauses against the drawers—the insurers—and have applied the more liberal contract statute of limitations. Their rationale has been that the action is *ex-contractu* against the insurer and not *ex delicto* against the tortfeasor. Insurance companies maintain this destroys their right of subrogation because the statute of limitations has run on the tort claim. The courts, however, have found little merit in this contention, since under the trust agreement of the policy, the insurer may compel his insured to sue the tortfeasor. If they fail to enforce this provision, the insurance companies alone have destroyed their subrogation rights.<sup>80</sup>

The controversy can be readily resolved: either the insurers should express a specific time period in their uninsured motorist endorsements within which their injured insureds must file their complaints; or state legislatures should amend their uninsured motorist coverage statutes to contain such express provision, as a condition precedent to recovery of damages.

In Ohio under the present law, one injured through the negligence of an uninsured motorist has 15 years within which to bring action for damages against his own insurer, under his policy.<sup>81</sup>

<sup>80</sup> Comment, 48 Calif. L. R. 532, *supra*, n. 12; Notes, 14 Fla. L. R. 472, *supra*, n. 12.

<sup>81</sup> *Supra*, n. 11.