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Uninsured Motorist Coverage, Company Insolvency, and The Ohio Insurance Guaranty Association Act

*Mario C. Ciano**

IT IS NOT OFTEN THAT A LEGISLATIVE EVENT and a happenstance of life converge almost simultaneously upon a specific and narrow issue of law. This is precisely what occurred in Ohio in the latter part of 1970. In that year, the legislature amended the Ohio Uninsured Motorist Statute to declare, in effect, that a vehicle would be considered "uninsured" when the company insuring that vehicle for some reason became financially insolvent. The amendment became effective October 1, 1970. That same year the legislature enacted legislation to provide a fund from which claims could be paid in the eventuality that an insurance company became bankrupt. That statutory framework, the Ohio Insurance Guaranty Association Act, became effective September 4, 1970. Strangely, as events would have it, the Ohio Valley Insurance Company, a domestic automobile liability carrier, was caught in financial straits and was officially declared insolvent in November of that same year.

This series of events precipitates the present inquiry into the general area of company insolvency and its effects on uninsured motorist coverage, as well as the relationship between the attachment of such coverage and the Guaranty Association Act.

Company Insolvency and Uninsured Motorists

The tremendous increase in the number of automobiles on the country's highways after World War II brought about a corresponding increase in the number of traffic victims. In turn, many of the injured were victims of negligent and financially irresponsible motorists, affording little or no source of compensation. By the early 1950's, considerable public sentiment and political pressure were brought to bear for legislative or insurance contractual schemes to provide a source of compensation for those injured by uninsured or hit-and-run motorists. Representatives of private insurance companies came up with a remedy to the problem in New York by offering to introduce a new type of insurance coverage which would indemnify an insured for injuries caused by a negligent uninsured motorist.¹ The so-called "uninsured motorist" or "family protection" endorsement has now become standard in virtually every state in which automobile liability insurance is written, as a result of both voluntary inclusion of such

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¹ See, Caverly *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, 396 *INS. L. J.* 19, 20 (1956).

coverage by the insurance companies and compulsory legislation requiring it.²

Basically, the coverage works as follows. In the event of an accident caused by the negligence of an uninsured motorist, the insured, as defined by the policy, is placed in the same position he would have been had the negligent motorist carried insurance coverage within certain limits. In order for the insured to recover from his own insurance company, he must prove that the uninsured motorist or a hit-and-run motorist was at fault, resulting in injuries. The determination of whether the insured is legally entitled to recover is restricted to the compulsory arbitration of the dispute. Despite the general scope and intent of the coverage as outlined above, one must not assume that the inclusion of such coverage in one's policy provides the insured with a ready source of indemnification in *all cases* where he is injured as a result of negligence by an unidentified hit-and-run driver, or an otherwise uninsured motorist. Indeed, the insured has basic elements of proof to satisfy on arbitration. He, of course, has to deal with the issues of negligence as well as the corresponding defenses. However, a prerequisite to these questions is the attachment of uninsured motorist coverage itself in a particular set of circumstances. One of the elements to the attachment of coverage in the first place is whether indeed the adverse motorist was in fact "uninsured". This issue often is determined by the definition of precisely what constitutes an "uninsured motor vehicle", whether that definition be contained in the policy itself, or less often, in a state statute.³ Accordingly, no sooner had uninsured motorist coverage been offered than a body of case law started to develop, defining the bounds of such coverage in disputes between the insured and the carrier.

Strangely enough, one area of conflict as to the attachment of the uninsured motorist coverage has been precipitated by the unfortunate event of an insurance company itself becoming "financially irresponsible", so to speak. More precisely, the question arises as to what occurs when a motorist, acting in good faith, purchases liability insurance coverage with a particular company. Thereafter, he is involved in an accident wherein he is negligent and another party is injured. When the injured party makes a claim against the negligent driver, he finds that much to his dismay, the driver's insurance carrier has

² *E.g.*, OHIO REV. CODE ANN. § 3937.18 (Baldwin 1971).

³ Indeed, although most states have legislation which requires the inclusion of uninsured motorist coverage on all automobile liability insurance written in the state, few, if any, statutory schemes are any more specific relative to the scope and terms of the coverage afforded. See WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE*, 16 (1969). For example, when OHIO REVISED CODE, § 3937.18 was first adopted in 1965, the statutory requirement was simply that uninsured motorist coverage be offered, without defining any conditions to the attachment of such coverage. It was not until the statute was amended in 1970 that a partial definition of what constitutes an uninsured motor vehicle was provided. OHIO REV. CODE ANN., § 3937.18(B) (Baldwin 1971).

become insolvent. Of course, this set of circumstances make the negligent driver just as "financially irresponsible" as he would have been had he in fact never been insured. Assuming that the injured party was himself insured under a liability policy which included uninsured motorist coverage, could the injured party, under the above circumstances, make a claim against his own carrier, claiming that the negligent motorist, as things turned out, was indeed "uninsured"?

As could be expected, courts have given different answers to the question in construing the endorsement language first incorporated into insurance policies. It was in 1956 that the insurance industry adopted a Standard Uninsured Motorist Endorsement to be incorporated into policies issued. The 1956 endorsement defined the term, "uninsured automobile" to mean, "an automobile with respect to . . . which there is no bodily injury liability bond or insurance policy *applicable at the time of the accident . . .*"⁴ (Emphasis added.)

A number of insurance companies presented with this situation denied coverage to the insured on the basis that the automobile of the tortfeasor was not "an uninsured automobile", since there was indeed an insurance policy "*applicable at the time of the accident*". When the question was litigated, many courts agreed with the companies' position, stating that uninsured motorist coverage did not attach by the clear and unambiguous terms of the endorsement.⁵ Of course, such an interpretation did violence to the initial policy considerations which gave rise to uninsured motorist coverage in the first place — that is, a source of compensation for injuries caused by uninsured motorists. Accordingly, a number of courts held that the endorsement language would not be construed literally but rather with an eye to the underlying public policy to provide protection to the insured as evidenced by the many statutory provisions which made such uninsured motorist coverage mandatory in all policies. Accordingly, the uninsured motorist endorsement would be construed to achieve that end, and a tortfeasor motorist would be considered uninsured whenever he actually had no insurance to cover the claim against him — for whatever reason, including his company's bankruptcy.⁶

It should be noted that some courts resolved the "company insolvency issue" to provide uninsured motorist coverage to the insured by virtue of a language change made by the industry in the definition of uninsured automobile in 1963. That year, an uninsured automobile

⁴ THE NATIONAL BUREAU OF CASUALTY UNDERWRITERS, 1956 STANDARD FORM, PART II: DEFINITIONS ("Uninsured Automobile.").

⁵ See *Apotas v. Allstate Ins. Co.*, 246 A.2d 923 (Del. 1968); *Dreher v. Aetna Cas. & Sur. Co.*, 83 Ill. App. 2d 141, 226 N.E.2d 287 (1967); *Mich. Mut. Lia. Co. v. Pakerwinski*, 8 Mich. App. 475, 154 N.W.2d, 609 (1967).

⁶ See *Katz v. American Motorist Ins. Co.*, 244 Cal. App. 2d 886, 53 Cal. Rptr. 669 (1966); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968); *State Farm Mut. Auto. Ins. Co. v. Brower*, 204 Va. 887, 134 S.E.2d 277 (1964).

was defined in the Standard Form Endorsement as "an automobile . . . with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident, *but the company writing same denies coverage thereunder.*"⁷ (emphasis added) These courts reasoned that the inability of the tortfeasor's carrier to defend or pay a claim because of insolvency was equivalent to a "denial of coverage."⁸

As more and more courts were adhering to the view that insolvency would be viewed as the equivalent of denial of coverage by a tortfeasor's carrier, and as more and more state legislatures were specifically adopting amendments to their uninsured motorist statutes requiring the attachment of uninsured motorist coverage in the event of the insolvency on the part of the tortfeasor's insurance company, the insurance industry, on May 1, 1966, adopted a specific endorsement change to the effect that the term "uninsured automobile" would be defined as:

an automobile with respect to which there is a bodily injury liability insurance policy applicable at the time of the accident, but the company writing same *becomes insolvent.*⁹ (Emphasis added.)

It should be noted that although most insurance companies incorporate into their policy the standard coverage provision for the uninsured motorist endorsement promulgated by the industry, many companies do not always conform. Because of choice or statutory directives in other states, such companies may have an uninsured motorist endorsement with language variations from the proposed standard form. Also, there is no absolute uniformity in the adoption of the proposed standard form at the same time. Accordingly, while some companies may be issuing policies with the 1966 Standard Endorsement, others may indeed still be using the language of a prior standard endorsement or some variation of it.

To remove any doubt on the insolvency issue and to resolve any conflicting policy language contained in policies issued in Ohio, the legislature moved to amend the Ohio Uninsured Motorist Statute. Effective October 1, 1970, H.B. 620 added a specific definition of an uninsured motor vehicle as follows:

For the purpose of this section, a motor vehicle is uninsured if the liability insurer denies coverage or is or becomes the subject of *insolvency proceedings* in any jurisdiction.¹⁰ (Emphasis added.)

In comparing the 1966 insurance industry endorsement and the quoted Ohio statute, it would appear that the two differ only as to

⁷ THE NATIONAL BUREAU OF CASUALTY UNDERWRITERS, 1963 STANDARD FORM, PART II: DEFINITIONS ("Uninsured Automobile.").

⁸ *Accord*, Bendelow v. Traveler's Indem. Co., 57 Misc. 2d 327, 293 N.Y.S.2d 629 (1968); Pattani v. Keystone Ins. Co., 426 Pa. 332, 231 A.2d 402 (1967) (decided under Pa. statute).

⁹ THE NATIONAL BUREAU OF CASUALTY UNDERWRITERS, 1966 STANDARD FORM, PART V: ADDITIONAL DEFINITIONS ("Uninsured Highway Vehicle").

¹⁰ OHIO REV. CODE ANN., § 3937.18(B) (Baldwin 1971).

the *time* when uninsured motorist coverage can be said to attach. It will be noted that the 1966 Endorsement requires that the insurance company insuring the tortfeasor's vehicle "become insolvent". On its face, it would seem that the judicial decree of insolvency would be required. On the other hand, the Ohio statutory language attaches coverage when the tortfeasor's insurer "is or becomes *the subject of insolvency proceedings*." Under this wording, it would seem that an insured could make a claim under his uninsured motorist coverage as soon as insolvency proceedings would be instituted against the tortfeasor's carrier, in which case, there would be no need to wait until an official insolvency decree was issued. Accordingly, by virtue of H.B. 620, and by virtue of the fact that it can be assumed that many companies underwriting insurance in Ohio have policies containing the 1966 Endorsement language, it would seem clear that in this state, at least, the onset of company insolvency gives rise to the attachment of uninsured motorist coverage.

Unfortunately, one cannot be more specific than the above statement and many questions relative to timing and application remain. The 1970 Ohio Legislature had an opportunity to do a thorough drafting job on the uninsured motorist statute as a whole and remove many areas of litigation between the insureds and their carriers. Secondly, it had an opportunity when adding Paragraph B, speaking directly to the insolvency issue, to make specific provisions especially relating to the question of the time when the uninsured coverage would attach because of insolvency. Specifically, the insolvency provision added in 1970, leaves the following questions unanswered:

1. Must the insolvency definition be incorporated only in the policies issued or renewed *after* October 1, 1970, or is that definition incorporated as a matter of law into policies issued or renewed before that time, but whose term does not expire until after October 1, 1970?
2. Does the effective date speak to the date of an *accident* or to the date when a company "becomes subject to insolvency proceedings"?

A little reflection will indicate the various possibilities. First, a company may in fact be insolvent or at least be subject to insolvency proceedings at the time an accident occurs. Therefore, a claimant could initiate his uninsured motorist claim against his own company at that time. On the other hand, a tortfeasor's carrier may be viable at the time of an accident, but not be subject to insolvency proceedings until a future time. Under present conditions of overcrowded dockets, this timing can be significant and possibly encompass a period of three, four, or more years. Indeed, a tortfeasor's carrier may be precipitated into insolvency even after the plaintiff has obtained a judgment against the tortfeasor and finds that there is no money from which to collect. In such a case, would the claimant be at liberty

to initiate an uninsured motorist claim against his carrier, even though the accident occurred three or four years before? Although many states have statutes which provide that the insolvency protection is to be applicable only where the insurer of the tortfeasor becomes insolvent, usually within one, two, or three years after the accident,¹¹ the Ohio statute and the insurance industry's standard uninsured motorist form are silent on the question.

Significantly, the time within which the insolvency is to occur is also important for the reason that many policies contain a contractual period of limitation within which to assert an uninsured motorist claim. Again, Ohio Revised Code, §3937.18 makes no provision relative to the time limitation within which to assert an uninsured motorist claim. Likewise, the standard endorsement is silent upon the issue. However, many companies have modified the standard endorsement and provided time limits within which to claim benefits under the coverage.¹² Accordingly, the claimant and his attorney may find themselves in a predicament under circumstances where he has been negotiating with a tortfeasor's carrier for a period of possibly two years after the accident has occurred and has felt no need to put his own company on notice of a potential uninsured motorist claim. Suddenly, the tortfeasor's carrier becomes subject to insolvency proceedings. Possibly, at this time, the claimant turns to his own company asserting his rights under his uninsured motorist coverage. However, by this time, he may find his company as a defense a contractual period of limitation within which to present his claim. Now, while most courts have felt that the "contract" rather than the "tort" statute of limitation governs the assertion of an uninsured motorist claim by an insured against his company,¹³ this has been in cases where the uninsured motorist endorsement was silent on the issue and did not specify *any* period. However, no cases have been found wherein the policy specified a certain period within which an uninsured motorist claim had to be asserted by the insured and generally, a contractual period of limitations placed in an insurance policy had been held to be valid, in Ohio, at least, where that period is not unreasonable.¹⁴

It is submitted that the above uncertainties facing both the claimant-insured and the carrier could be eliminated by legislative action to provide a period of limitation for the presentation of unin-

¹¹ See WIDISS, *supra* note 3, §3.9 at 140-41.

¹² *Id.*, § 2.26 at 55.

¹³ *E.g.* Hartford Accident and Indem. Co. v. Mason, 210 So.2d 474 (Fla. 1968); Booth v. Fireman's Fund Ins. Co., 207 So.2d, 925 (La. 1968); *In re DeLuca*, 17 N.Y.2d 76, 268 N.Y. Supp. 2d 289, 215 N.E.2d 482 (1966); Schultz v. Allstate Ins. Co., 17 Ohio Misc. 83 (Franklin County C. P. 1968). See generally Annot. 23 A. L. R. 3d 580 (1969); Aksen, *Arbitration of Uninsured Motorist Endorsement Claims*, 24 OHIO ST. L. J. 589, 591 (1963); Hudak, *Arbitration, Statute of Limitations, and Uninsured Motorist Endorsement*, 19 CLEV. ST. L. REV. 528, 530-40 (1970).

¹⁴ *Accord*, Apple v. Cooper Ins. Co., 76 Ohio St. 52, 80 N.E. 955 (1907); Metz v. Buckeye Union Fire Ins. Co., 104 Ohio App. 93, 147 N.E.2d, 119 (1957). See generally 30 OHIO JUR. 2d, *Insurance*, §§ 961-70 (1958).

sured motorist claims in general. It would appear that such claims can neither be properly classified as "tort" or "contract". Correspondingly, neither the two-year statutory period of limitation for personal injuries,¹⁵ nor the fifteen-year statutory period for the bringing of a claim based on a written contract¹⁶ is appropriate. Ideally, it would seem that a time period between those two extremes, perhaps a five- or six-year statute of limitations, would serve to protect the claimant by providing a sufficient period within which the uncertainties of proper liability insurance coverage of the adverse vehicle can come to fruition. Also, such a period would serve the company's interest in giving it a definitive cut-off time when the potential of an uninsured motorist claim could be eliminated as a risk under the policy.

Furthermore, it would appear desirable to provide a statutory period speaking specifically to the insolvency issue herein discussed. A period can be provided within which the tortfeasor's carrier must be subject to insolvency proceedings in order for the uninsured motorist coverage to attach. Again, such a period would have to be of sufficient length to encompass the potential time period necessitated for the total disposition of a personal injury claim; that is, from the date of an accident to judgment and execution. Thus, a claimant could be protected whether he finds the tortfeasor's carrier insolvent at the time of an accident, before instituting suit, after suit is instituted, or indeed after a judgment is obtained and he attempts to collect on it. If the claimant finds that the tortfeasor's carrier is insolvent at any of these stages, he can turn to his remedy under his uninsured motorist coverage. Again, it would seem that a period in the area of five to six years would be sufficient for this purpose.

The Ohio Insurance Guaranty Association Act

The same legislature responsible for the amendment of Ohio's uninsured motorist statute acted in a more comprehensive manner to provide a mechanism for the payment of creditor claims in general, in the unfortunate eventuality of an insurance company becoming insolvent. The Ohio Insurance Guaranty Association Act¹⁷ was enacted effective September 4, 1970. The Act creates a non-profit, unincorporated association to be known as the Ohio Insurance Guaranty Association.¹⁸ All insurance companies who write insurance in the State of Ohio, with exception of certain enumerated specialty types of insurance, are to be members of the Association.¹⁹ Membership is com-

¹⁵ See OHIO REV. CODE ANN., § 2305.10 (Baldwin 1971).

¹⁶ See OHIO REV. CODE ANN., § 2305.06 (Baldwin 1971).

¹⁷ OHIO REV. CODE ANN., §§ 3955.01-.20 (Baldwin 1971).

¹⁸ *Id.* at § 3955.06(A).

¹⁹ *Id.* at § 3955.05 (Excluded Kinds of Insurance).

pulsory as a condition of the company's authority to transact business in this state. By virtue of the assessment of each member-company,²⁰ and through a plan of operation, the object of the Association is to protect not only the policyholders of an insolvent company, but also claimants, as well as assisting in detecting and hopefully preventing insurer insolvencies in general.²¹ Generally speaking, in the handling of claims involving an insolvent insurer, the Association in essence steps into the latter's shoes.

The Ohio Valley Insolvency

No sooner had the ink dried on the legislative papers, than an Ohio company was catapulted into insolvency. On November 27, 1970, entry was filed, officially decreeing the Ohio Valley Insurance Company as insolvent.²² Ohio Valley had an estimated 8,700 policyholders at that time.²³ Liquidation was ordered by the court and the Superintendent of Insurance immediately notified the Guaranty Association to activate the newly-formed administrative machinery in the hope of having the many claims involving Ohio Valley covered by the Association. The Buckeye Union Insurance Company, a substantial underwriter in this state, and a member-company of the Association who would be proportionately assessed, challenged the applicability of the Act to the Ohio Valley insolvency.

It was Buckeye's contention that irrespective of the fact that the actual judicial decree of insolvency did not come until November 27, 1970, well after the effective date of the Guaranty Act, Ohio Valley was in fact insolvent *before* the effective date of the Act, September 4, 1970. Accordingly, to require the Guaranty Association to take up the existing claims of Ohio Valley would amount to a *post de facto* law.²⁴ On the other hand, the Superintendent of Insurance and the intervening claimants contended that it was the date of the judicial decree of insolvency which controlled and that this had occurred *after* the effective date of the Act.²⁵ The trial court held for the Superintendent and claimants and ordered the Guaranty Association was to pay *all* of the claims of Ohio Valley.

Due to the stakes involved, it was certain that the case would be appealed to the Supreme Court and so it was. The Supreme Court and the Court of Appeals indicated that the parties and the trial court had been wrongly putting the emphasis on the date of insolvency. The Supreme Court stated that what was determinative of which Ohio Valley claims were to be cov-

²⁰ *Id.* at § 3955.08 (Association Powers and Duties).

²¹ *Id.* at § 3955.03 (Purpose).

²² *Smith v. Ohio Valley Ins. Co.*, No. 241494 (Franklin County C. P., 1970).

²³ *The State Underwriter*, Jan., 1971.

²⁴ *Smith v. Ohio Valley Ins. Co.*, 27 Ohio St. 2d 268, 271 (1971).

²⁵ *Id.* at 272.

ered under the Guaranty Act was the definition of a "covered claim" as defined in the statute.²⁶ The Court emphasized that the Act did not require the Association to pay *all* claims, but only "*covered claims*" existing *prior* to the determination that an insolvent insurer exists as well as claims arising within thirty (30) days *after* such determination.²⁷ A "covered claim" was specifically defined in the Act as "an unpaid claim . . . which arises out of and is within the coverage of an insurance policy . . . when issued by an insurer which becomes an insolvent insurer on or after the effective date of this act. . . ."²⁸ Putting these two provisions together, the Supreme Court held in *Smith v. Ohio Valley Insurance Co.*²⁹ that it was clear that the Guaranty Association was to answer only for those claims which arose between September 4, 1970 and thirty (30) days after the insolvency decree, or December 27, 1970. Claims in existence or arising against Ohio Valley before the effective date of the Act were excluded. Because of the dates involved, the Supreme Court's ruling meant that approximately 75% of the claims, or estimated liabilities of approximately \$3,000,000.00, would not come within the protective cloak of the Guaranty Association Act.³⁰

Of course, a great portion of the outstanding claims, at least as to the contingent liability of the Ohio Valley Insurance Company were those represented by individuals who had been involved in automobile accidents with policyholders of Ohio Valley and had presented claims for damages to that company. These claims were at various stages of handling. Some were in the process of adjustment and settlement negotiation, while litigation had already been instituted with respect to many others. The court cases were suspended indefinitely when the judicial decree of insolvency and order of liquidation was handed down.

Now the claimants who claimed personal injury resulting from the negligence of an Ohio Valley policyholder could be assumed to have been of various classes within the context of our discussion. That is, some of these claimants were themselves uninsured at the time of the accident. As to these claimants, then, it would appear that if the accident occurred either before September 4, 1970, or after December 27, 1970, they were relegated to pursuing an uninsured defendant. On the other hand, as to such claimants where the accident occurred between those two dates, they could pursue the defendant who would then be insured, in effect, by the Guaranty Association, under the *Smith*³¹ decision.

²⁶ OHIO REV. CODE ANN., § 3955.01(B) (Baldwin 1971).

²⁷ *Id.* at § 3955.08 (A) (1).

²⁸ *Id.* at § 3955.01 (B).

²⁹ *Smith v. Ohio Valley Ins. Co.*, 27 Ohio St. 2d 268, 271 (1971).

³⁰ *The State Underwriter*, May, 1971.

³¹ 21 Ohio St. 2d 268 (1971).

A second class of claimants would be those who were themselves insured at the time of the accident involving an Ohio Valley policyholder. As to these individuals, more complicated situations can be imagined. For example, some of these claimants could have been insured under a policy with no insolvency provision. Assuming that the accident date did not encompass the limited period between September 4 and November 27, 1970, their claims would not be covered by the Guaranty Association. An alternative remedy would be to attempt to make an uninsured motorist claim against their own carrier. However, without an insolvency provision in the policy, they would be relegated to the split case law heretofore discussed,³² as to whether company insolvency gave rise to the attachment of uninsured motorist coverage in absence of a specific provision in the policy. Which line of cases an Ohio court would follow is of course unknown; however, it would be anticipated that in view of the public policy expressed by the legislature in the 1970 amendment of the Ohio Uninsured Motorist Statute specifically directed to the insolvency issue, Ohio courts would probably follow that line of cases favorable to the insured's position. Of course, limited cases would be assumed where the accident occurred subsequent to October 1, 1970, the effective date of the insolvency amendment to the Ohio Uninsured Motorist Statute. If indeed that amendment date would be held to apply to when an accident occurred rather than the date of the issuance or renewal of policies in this state, then the insured could argue that the insolvency provision was incorporated in his policy as a matter of law for an accident subsequent to the effective date of October 1, 1970.

It will be noted that in the last discussed limited cases with accidents occurring subsequent to October 1, 1970, their claims would also appear to be covered by the Guaranty Association, as long as the accident was not subsequent to December 27, 1970, the cut-off date for such claims involving the Ohio Valley insolvency. In addition, it can be assumed that probably the greater number of claimants insured at the time of the occurrence involving an Ohio Valley policyholder were themselves insured under a policy which probably had an insolvency provision comparable to the insurance industry's 1966 Standard Form. As to these individuals, it would appear that if their policy contained such a provision, they would have a legitimate claim under their uninsured motorist coverage, regardless of when the accident occurred. In addition, as to those individuals whose claims arose out of accidents occurring between September 4, 1970 and December 27, 1970, they would also, ostensibly at least, have a claim against the Guaranty Association. This possibility brings up the interesting question of the relationship between the fund available under a claimant's uninsured motorist coverage with his own carrier and the available resources under the Guaranty Association Act. Assuming then, that

³² See text at nn. 4-8 *supra*.

a claimant has a claim covered under either source, must he choose one, or can he proceed against both?

Some analysis will indicate that the choice taken by such a claimant will have a significant effect. If he proceeds against the Guaranty Association, he will in essence do so very much as if he had pursued the tortfeasor who was insured by a viable company, since by statute, the Association assumes the role occupied by the insolvent carrier who was insuring the tortfeasor. The Association, then, would insure the tortfeasor in accordance with the limits and scope of coverage afforded to him by the now defunct company. Accordingly, the claimant could proceed to file suit if his claim was not settled by the Guaranty Association, and in turn, he could proceed to trial and consequent verdict, if he is so fortunate. On the other hand, if such a claimant pursues his remedy under his uninsured motorist coverage, he will have to be satisfied by those limits of uninsured motorist coverage contained in his policy. Generally speaking, the limits of uninsured motorist coverage are the minimum amounts set forth in the state's so-called "financial responsibility law."³³ In Ohio, the usual afforded limits, effective January 1, 1970, are \$12,500.00 per person or \$25,000.00 per accident.³⁴ Of course, these limits may be lower than the limits contained in the policy insuring the tortfeasor, under which the Association would be obligated to defend. Furthermore, the non-settlement of the uninsured motorist claim leaves as the only recourse compulsory arbitration, without the choice of trial by jury.

The Guaranty Association Act seems to have a provision impinging upon the choices discussed. The intention of the Act seems to be making that fund one of "last resort" for claimants against the insolvent insurance company. Ohio Revised Code, §3955.13 (Recovery by Persons Having Covered Claims) provides as follows:

(A) Any person having a covered claim upon which recovery is also presently possible under an insurance policy written by another insurer, *shall be required first to exhaust his rights under such policy.* Any amount payable on a covered claim under . . . [the act] . . . shall be reduced by the amount of such recovery. (Emphasis added)

Under that section, it seems that the claimant under discussion must first exhaust his rights under his uninsured motorist coverage. There seems to be no limitation in the statute that "another insurer" does not include the claimant's own carrier. The last sentence of the quoted language provides that the Association have a set-off against a covered claim to the extent of the amount acquired from some other insurance source. It is interesting to note that a claimant who has a potential covered claim both under his uninsured motorist coverage as well as against the Guaranty Fund is not specifically limited to one or the

³³ *E.g.*, OHIO REV. CODE ANN., §§ 4509.01-99, (Baldwin 1971).

³⁴ *Id.* at § 3937.18(A) referring to § 4509.20(A).

other. Possibly, there is nothing in the Act to foreclose such a claimant from proceeding both ways.

Assume in the above discussion that the uninsured motorist coverage limit is \$12,500.00, while the limit in the policy insuring the tortfeasor, whose carrier is now bankrupt is \$30,000.00. Assume further that the claimant presents an uninsured motorist claim which he loses in arbitration based on the facts. The reasons could be varied—no negligence, contributory negligence, proximate cause, and so forth. In such a circumstance, would the claimant then be permitted to present a claim against the Guaranty Association? He can arguably take the position that he has indeed exhausted his rights under his policy and his is a "covered claim" to be dealt with by the Guaranty Association. It is questionable whether the legal doctrine of *res judicata* or estoppel preclude him from doing so. A second possibility is that the claimant, rather than losing the arbitration hearing, does indeed recover an award, however, he deems the amount inadequate for his damages. Again, is he free to have a second try against the Guaranty Association? The claimant would of course argue that again he has exhausted his rights under his policy and that in his opinion, his claim is worth more than the award albeit, he is willing to apply the amount of the arbitration award to any amount he may recover under the Guaranty Act, which of course could include formal trial.

The above possibilities of a claimant's having two sources to satisfy his claim brings up further complications. A major one relates to subrogation rights. Customarily, an insured who receives amounts under his uninsured motorist coverage subrogates his rights against the tortfeasor, pursuant to a receipt and trust agreement for the amounts received and an agreement to subrogate. Now, in most cases, the adverse tortfeasor is indeed uninsured in the usual sense and recovery by the insured under his uninsured motorist coverage presupposes a finding of fault on the part of such tortfeasor. Accordingly, such an individual does not draw upon sympathies when the carrier subrogates against him. However, in the case where the insured has recovered under his uninsured motorist coverage, by virtue of the fact that the tortfeasor was indeed at fault, but furthermore because the tortfeasor's carrier became insolvent, then one questions the equity of permitting the carrier to subrogate against the tortfeasor, who at least acted in good faith in paying for insurance coverage, but, through no fault of his own, that company became insolvent. Now, the Ohio Insurance Guaranty Act appears to recognize the insured of an insolvent carrier as more or less an innocent victim along with the other claimants. Accordingly, although the Guaranty Association enjoys subrogation rights of any person recovering under the Act, it has no rights whatever against the insured of an insolvent carrier.³⁵

³⁵ *Id* at § 3955.12(A).

However, while the Association is specifically precluded from pursuing subrogation against such a tortfeasor, by statute, there is no such prohibition, either in statutory or case law preventing the private insurance carrier who had made a payment to its insured because of the insolvency of the tortfeasor's carrier to proceed against that tortfeasor in subrogation. As indicated, the equity of permitting this to occur is suspect and possibly this could have been another area as to which the Ohio legislature could have directed itself when it amended the uninsured motorist statute to cover the insolvency contingency.

Conclusion.

It has been seen that unilateral efforts by the insurance industry itself as well as legislative action in the state of Ohio have moved to alleviate the potential hardships arising from the unfortunate demise of an automobile casualty underwriter. However, it would appear that the action taken by both has raised as many questions and probably engendered as much litigation as it was hoped to have eliminated. At this juncture at least, it will be up to the courts to provide the answers to the possibilities raised. It is hoped, however, that the insurance industry itself would re-evaluate its uninsured motorist coverage endorsement in general, and its insolvency provision in particular, and make specific provision speaking to the questions raised, especially relative to the time limits for the assertion of uninsured motorist claims. Likewise, the legislature can act in like manner and provide a degree of uniformity to the area and correlate the legislative provisions directed to the issue of insurance company insolvency so as to provide an equitable framework for both the insured and his carrier and to eliminate the uncertainties discussed.