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Set-Off Under Uninsured Motorist's Coverage

Leon M. Plevin*

EVER INCREASING PERSONAL INJURY and death cases, precipitated by uninsured motorists, created the necessity for a specific insurance program to indemnify innocent victims for their losses occasioned by the careless motorist. The solution to this problem was the establishment of the "uninsured motorist coverage," annexed to the standard automobile liability policy.¹ This endorsement was established by the insurance industry in 1955, with the purpose of closing the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation.²

The limits of liability under uninsured motorist coverage are fixed either by policy provisions or by statute. The limits are usually the same as those stipulated under the various financial liability laws of the State where the policy is issued and delivered.³ These limits have been affected because the situation often arises where a claimant, who has sustained injuries compensable under uninsured motorist coverage, is entitled to indemnification from several sources. Recovery limits under uninsured motorist coverage are generally subject to reduction by any amount paid under bodily injury coverage; by any amount received by the uninsured under medical payments coverage for medical expenses arising out of the accident with the uninsured motor vehicle; and by any amount paid to the insured under any workmen's compensation laws.

A standard for expressing such policy limits which is commonly used is as follows:

(a) The limit of liability stated in the declaration as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injuries sustained by one person, as a result of any one accident, and subject to the above provision respecting each person, the limit of liability stated in the declaration as applicable to "each accident" is a total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

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¹ "Uninsured Motorist Coverage" in an automobile liability policy is designed to close the gaps inherent in motor vehicle financial responsibility and compulsory insurance and legislation. An insurance coverage is intended, within fixed limits, to provide financial recompense to innocent persons who receive injuries, and to dependents of those who are killed through the wrongful conduct of the motorist who, because uninsured and not financially responsible, cannot be made to respond in damages. G.S. § 20-279 21(b) (3). *Wright v. Fidelity & Casualty Co. of New York*, 270 N.C. 577, 155 S.E. 2d 100 (1967).

² Long, *Law of Liability Insurance*, § 24.03 (1970).

³ *Id.* at § 24.15.

(b) If claim is made under this coverage and claim is also made against any person who is an insured under Coverage A because of bodily injury sustained in an accident by a person who is insured under this coverage:

(1) Any payment made under this coverage to or for any such person shall be applied to reduction of any amount which he may be entitled to recover from any person who is insured under Coverage A;

(2) Any payment made under Coverage A, to or for any such person shall be applied in reduction of any amount which he may be entitled to recover under this coverage.

(c) Any loss payable under the terms of this coverage to or for any person shall be reduced by the amount paid and the present value of all amounts payable to him under any workmen's compensation law, exclusive of non-occupational disability benefits.⁴

These various indemnity provisions were created so as to effectively limit any payments made by the insurance carrier under the uninsured motorist endorsement in combination with any other sources of indemnification to the maximum limit of the uninsured motorist coverage.⁵ The intent of the insurance underwriter is to limit its payment under the uninsured motorist coverage to the minimum amount where the insured is indemnified or partially indemnified from more than one source. The scope of this paper will specifically be concerned with the enforceability of these various limitation provisions, with respect to the insured's indemnification from medical payments and workmen's compensation sources.

Medical Payments Coverage

Numerous insurance underwriters have included in their respective policies, providing indemnity coverage for injuries or death caused by the uninsured motorist, a clause which reduces those amounts payable under the uninsured motorist endorsement by any amounts which are provided for or made payable to the insured under the medical payments provisions covering medical expenses arising out of the accident involving the uninsured motorist. This standard form provision⁶ acts as a setoff reducing the amount payable under the medical payment provisions of the policy. Such setoffs may be provided either by statute⁷ or by provisions within the policy itself. The courts have taken a

⁴ *Id.*

⁵ Widiss, *A Guide to Uninsured Motorist Coverage*, 105 (1969).

⁶ 1966 Standard Form Uninsured Motorist Endorsement, Part III: Limits of Liability (d).

⁷ For Example, Calif. Ins. Code, § 11580.2(g), providing:

(g) Any loss payable under the terms of the uninsured motorist endorsement or coverage to or for any person may be reduced: . . .

(2) by the amounts paid or due to be paid under any valid and collectible automobile medical payment insurance available to the insured.

divergent view when considering the enforceability of the medical payments limitation. Numerous jurisdictions enforce the limitation on the rationale that it is a "clear and unambiguous" term of the coverage.⁸ However, the appellate courts of several states have held that such medical payments limitation is invalid and unenforceable.⁹

The medical payments limitation has been viewed as somewhat more favorable than a provision which reduces uninsured motorist coverage by amounts paid the insured under various applicable workmen's compensation laws. This particular policy limitation concerning workmen's compensation benefits will be discussed in a later portion of the paper. The rationale behind the acceptance of the medical payments setoff is that generally, medical payments made to an insured are provided by the *same* insurer under the *same* liability policy. Under such circumstances, the policy provision or statutory enactment setting off such payments prevented the "windfall" or double recovery to the insured.¹⁰

In those jurisdictions holding such provision invalid and unenforceable the theory presented is that the particular statute requiring protection against injuries caused by the uninsured motorist would be violated. The underwriter, being permitted to reduce its liability payable under the endorsement in any manner whatsoever, would receive a reduction in its limit of liability below the statutory minimum, requiring a showing of unreimbursed loss rather than the statutory requirement of a showing of legal damage. Such practice has been held ambiguous and contrary to public policy, hence invalid and unenforceable.¹¹

Express Statutory Provisions

Express statutory authority for the reduction of coverage payable by reason of an uninsured motorist endorsement by sums equal to those made payable under medical payment coverage has been enacted in the State of California,¹² and has been held valid and enforceable as a proper setoff in that jurisdiction.¹³

⁸ *Supra*, n. 5 at 117.

⁹ *Id.* at 118.

¹⁰ *Boehler v. Ins. Co. of North America*, 290 F. Supp. 867 (E.D. Ark. 1968); *Robey v. Northwestern Ins. Co.*, 270 F. Supp. 466 (W.D. Ark. 1967), *aff'd* 399 F. 2d 330 (8th Cir. 1968); *Northwestern Mutual Ins. Co. vs. Rhodes*, 238 Cal. App. 2d 64, 470 Cal. Rptr. 467 (1965); *Fisher v. State Farm Auto. Ins. Co.*, 243 Cal. App. 2d 749, 52 Cal. Rptr. 721 (1966); *Morgan v. State Farm Mut. Auto. Ins. Co.*, 195 S. 2d 698 (1967), *writ refused*, 250 La. 638, 197 S. 2d 897; *Peterson v. State Farm Mut. Auto. Ins. Co.*, 238 Ore. 106, 393 P. 2d 651 (1964).

¹¹ *Tuggle v. Government Employees Ins. Co.*, 207 S. 2d 674 (Fla. 1968), 24 A.L.R. 3d 1342.

¹² *Supra*, n. 7.

¹³ It is noteworthy to point out that California, in redrafting its Insurance Code, § 11580.2, in 1969, clarified that state's position with regard to the medical payment

(Continued on next page)

Northwestern Mutual Life Ins. Co. v. Rhodes,¹⁴ appears to be one of the first reported cases construing statutory provisions expressly authorizing medical payment setoffs. In *Rhodes*, suit was brought for declaratory judgment by the insurance company issuing the policy. The insured, Geraldine Rhodes, complained that she had not received full payment under the uninsured motorist coverage of her policy. The same policy also contained a medical coverage provision. The uninsured motorist endorsement provided coverage of \$10,000.00, per person, which the insured would be legally entitled to recover as damages resulting from an owner or operator of an uninsured automobile. The medical payment coverage provided medical expenses of up to \$2,000.00, for each person injured. Mrs. Rhodes paid a premium for uninsured motorist coverage and also for medical payments coverage. This matter was submitted to arbitration wherein the arbitrator made an award to Mrs. Rhodes in accordance with *California Insurance Code*, Sec. 11580.2. The arbitrator did not specify medical expenses as a separate item of damages, but merely made a lump sum award. In determining the insurance company's position with regard to the payment of medical expenses, Judge Fretz in finding the setoff valid held that:

Section 11580.2 of the *Insurance Code* contains provisions which are obviously aimed at preventing a double recovery, or, as the trial court used the word, "windfall" under the uninsured motorist section.¹⁵

One year later the Second District Court of Appeals for California reviewed questions similar to those presented in the *Rhodes* decision, specifically concerning proceeds from medical payments insurance being deductible from loss payable under uninsured motorist coverage.¹⁶ In this decision, State Farm issued an automobile liability policy to William Fisher. The policy contained uninsured motorist coverage prescribed by the *Insurance Code*, Section 11580.2. As stipulated in the policy contract, the parties entered into arbitration proceedings. An award was granted to William Fisher in the amount of \$70.00, and to Lennie Fisher in the amount of \$5,756.37. The Fishers petitioned the superior court to confirm the award. Affidavits filed by State Farm revealed that State

(Continued from preceding page)

limitation. The medical payment setoff is now clearly presented. As the amended statute reads:

(e) The policy or endorsement added thereto may provide that if the insured has valid and collectible automobile medical payment insurance available to him, the damages which he shall be entitled to recover from the owner or operator of an uninsured motor vehicle shall be reduced for the purposes of uninsured motorist coverage.

¹⁴ 238 Cal. App. 2d 64, 47 Cal. Rptr. 467 (1965).

¹⁵ *Id.* at 238 Cal. App. 2d 68.

¹⁶ *Fisher v. State Farm Mut. Auto. Ins. Co.*, 243 Cal. App. 2d 749, Cal. Rptr. 721 (1966).

Farm had paid \$1,000.00, to Lennie Fisher and \$70.00, to William Fisher from the "medical payment coverage" of the policy. These medical payments were not brought to the attention of the arbitrator during the arbitration proceedings.

Judge Hufstедler, speaking for the court, refused to deduct the \$1,070.00 in medical payments from the arbitrators award for reason that the arbitrators were simply not informed as to the payment made.¹⁷ However, as to the important ancillary issue of *enforceability* of the medical payment coverage limitation, specified in *Insurance Code*, Section 11580.2, the court reaffirmed the position taken in *Rhodes*, holding that:

It is one thing to refuse a double recovery to an insured in a declaratory relief action in which the insurance company can affirmatively show that the insured already has the benefit of a certain coverage, quite another not to permit the insurance company to modify an award for the only reason that it failed to produce evidence at the arbitration on an issue which was properly before the arbitrators.¹⁸

In *Cannizzo v. Guarantee Ins. Co.*,¹⁹ the sole question presented to the Court was whether Sec. 11580.2(g) of the *Insurance Code* of California entitled the Guarantee Insurance Company to a setoff for payments made to the insured under the medical payment provision of the policy against an award made under the uninsured motorist endorsement, *when no specific language was mentioned in the policy providing for such a setoff*. While upholding the provision that an insured's coverage for bodily injury "may be reduced"²⁰ by the amount of medical payments made to the insured, the court quite clearly stated that there must be specific policy provisions setting forth the fact that deductions of medical payments will be made from sums payable under uninsured motorist coverage. As Judge Taylor held:

Thus where the code section states that the insured coverage "may be reduced" by the amount of medical payment made to the insured, it simply means that such a reduction is a matter to be determined between the insurance company and its insured. It follows that since there is no mention of the medical deduction in the insurance policy, it cannot be allowed.²¹

¹⁷ "Having agreed to submit to arbitration, not only the amount of liability of the uninsured motorist, but also 'the amount payable hereunder,' State Farm should have submitted all matters pertaining to the 'amount payable' to the arbitrator. Having failed to do so, it cannot subvert the purposes of the arbitration procedure by asking the superior court to do it later." *Id.* at 243, Cal. App. 2d 752.

¹⁸ *Id.* at 754.

¹⁹ 245 Cal. App. 2d 70, 53 Cal. Rptr. 657 (1966).

²⁰ Calif. Ins. Code, § 11580.2(g), *supra*, n. 7.

²¹ *Supra*, n. 19 at 245 Cal. App. 2d 73.

Thus, under *Rhodes*, *Fisher*, and *Canizzo* the statutory authority for setoffs of medical payments coverage from payments made under uninsured motorist coverage has been held valid and enforceable in the State of California.

Policy Setoff Provisions Construed As Valid

A number of courts²² have taken the view that the medical payment limitation is valid and enforceable, generally basing such decision upon the rationale that this particular provision is a "clear and unambiguous" term of the policy coverage.²³ The *Morgan* decision,²⁴ concerned an automobile liability policy with uninsured motorist coverage of \$5,000.00, per person and medical payment coverage of up to \$500.00, per person. The policy further provided that the uninsured motorist coverage shall be reduced by all sums paid under the medical payment coverages. The Court ruled on the sole question as to whether the insureds were entitled to medical payments of \$2,500.00, in addition to full uninsured motorist coverage. Judge Culpepper was quite candid in his opinion, stating:

Our answer to this argument is simply that the question here is the construction of the language of this particular policy. The insurer has a right to limit its liability in any way it chooses; and these limitations will be enforced as long as they are not ambiguous or contrary to statute or public policy.²⁵

In *Boehler v. Ins. Co. of North America*,²⁶ suit was brought by the administratrix of the Estate of Kenneth F. Boehler, as a result of a dispute which arose between the Administratrix and the automobile insurance carrier as to whether or not the full proceeds of the uninsured motorist endorsement amounting to \$20,000.00, would be paid. The carrier confessed judgment for \$19,000.00, claiming that it was not liable for the additional \$1,000.00, because it had paid that amount under the medical payment coverage. The uninsured motorist endorsement specifically provided that the carrier would not be obligated to pay under uninsured motorist coverage any part of the damages representing expenses for medical services paid or payable under the medical payment coverage.

The Court reasoned that a provision in the uninsured motorist

²² *Supra*, n. 10.

²³ *Morgan v. State Farm Auto Ins. Co.*, *supra*, n. 10.

²⁴ *Id.*

²⁵ *Id.* at 195 S. 2d 650. Cf. *L'Manian v. American Motors Ins. Co.*, 4 Conn. Cir. 524, 236 A. 2d 349 (1967), whose facts closely resemble those presented in *Morgan*. Judge Jacobs noted that the insured is not entitled to recover both under the medical payments clauses and the uninsured motorist coverage, but that the insured had the choice of claiming his medical expenses under the medical clause, or under the uninsured motorist clause, but not under both.

²⁶ *Supra*, n. 10.

endorsement permitting the insurer to take credit for payment made under medical payment coverage did not offend either an Arkansas statute nor public policy and as such was valid.²⁷ In so holding, Judge Henley relied upon two recent Arkansas Supreme Court decisions, *M.F.A. Mut. Ins. Co. vs. Bradshaw*,²⁸ and *M.F.A. Mut. Ins. Co. v. Wallace*,²⁹ wherein the Supreme Court of Arkansas passed upon the validity of certain provisions stated in the standard uninsured motorist endorsement. In *Bradshaw*, the court held that, in general, an insurer may contract with its insured upon the conditions expressed in his policy. Such conditions being limited only by statute or public policy. The insured, by accepting such a policy is deemed to have approved and assented to it with all conditions and limitations as are expressed in the policy; such limitations and conditions necessarily being reasonable and not contrary to public policy.³⁰

The *Wallace* Court upheld the validity of a policy provision against "stacking," of uninsured motorist coverages by an insured covered by more than one policy.³¹ This decision was contrary to that of the district court decision in *Robey v. Safeco Ins. Co.*,³² where the court held that in Arkansas an insurance company may sell as many policies to an insured as it desires and that the insured is entitled to collect under such policies, the full amount of injuries within policy limits sustained by him as a result of the negligence of the uninsured motorist. More important, however, is the ancillary issue wherein the court held that the insurance company could *reduce* the amount paid under uninsured motorist coverage by amounts received by the insured under the medical payment provisions of the policy.

Wallace and *Bradshaw*, did not discuss the medical payment limitation, but rather, both decisions emphasized that provisions contrary to public policy are invalid and unenforceable. *Robey* specifically upheld the validity of the medical payment limitation, while striking down the provision against "stacking" of uninsured motorist coverage. Through the synthesizing of reasoning found in these three decisions *supra*, Judge Henley, in predicting "state law,"³³ concluded that:

in this court's estimation the provision in question is a reasonable one and does not offend either the statute or public policy.³⁴

²⁷ *Id.* at 870.

²⁸ 245 Ark. 83, 431 S.W. 2d 252 (1968).

²⁹ 245 Ark. 227, 431 S.W. 2d 742 (1968).

³⁰ *Supra*, n. 28 at 431 S.W. 2d 254.

³¹ The *Wallace* decision was concerned with the "other insurance clause" in the policy stating that the total limit of the carrier's liability under all policies which apply to an accident with an uninsured motorist, would not exceed the highest applicable limit of liability or benefit amount under any one policy.

³² *Supra*, n. 10.

³³ *Supra*, n. 10 at 870.

³⁴ *Id.*

Setoff Provisions Held As Invalid

Public policy of several states³⁵ has dictated a somewhat divergent result from that previously discussed in this paper. The Florida courts, spearheading a more radical approach in the relatively new field of uninsured motorist coverage, have emphatically held that provisions for reducing payments made under uninsured motorist coverage by amounts payable to the insured under medical pay coverages are *void* and not enforceable.

In *Tuggle v. Government Employee's Ins. Co.*,³⁶ the insured was involved in an automobile collision with an uninsured vehicle. The defendant's insurance company had issued an automobile liability policy which included an uninsured motorist endorsement as well as medical payment provisions. However, the policy specifically provided that any payments made under the uninsured motorist endorsement would be reduced by those amounts paid or payable under the medical payment endorsement. Tuggle brought a declaratory judgment action to determine whether such a setoff provision was in conflict with Florida statutory authority.³⁷ The Supreme Court of Florida ruled that the

³⁵ Florida and Nebraska.

³⁶ *Supra*, n. 11.

³⁷ Fla. Stat., § 627.0851 (1967):

(1) No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than limits described in section 324.021(7) under provisions filed with and approved by the insurance commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured name in the policy shall reject the coverage; provided further that, unless the named insured requests such coverage in writing, the coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

(2) For the purposes of this coverage the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

(3) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insurer's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one year after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided hereunder.

(4) In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

setoff provision amounted to a reduction of the insurer's limit of liability, below the statutory minimum, and further contravened the statute by requiring a showing of unreimbursed loss rather than legal damages.

Tuggle represents the leading decision in an extremely narrow field holding such setoffs as invalid,³⁸ which evolved as a result of Florida's "increasingly restrictive attitude toward insurers attempts to limit their liability under uninsured motorist endorsements."³⁹ Prior to *Tuggle*, a somewhat similar question was considered by an appellate court in *Phoenix Ins. Co. v. Kincaid*.⁴⁰ The court held that the medical payment setoff was void, basing such ruling on the rationale that a setoff would reduce the minimum coverage of uninsured motorist protection prescribed by the Florida Legislature.⁴¹

Under the provisions of Florida Statute, Section 627.0851, *supra*, the legislature required that in every automobile liability insurance policy or supplement thereto, there is to be included uninsured motorist coverage, unless the named insured specifically rejects such coverage. The statutory minimum required by Florida⁴² is \$10,000.00, for bodily injury to one person, and \$20,000.00 for bodily injury or death of two or more persons. The *Tuggle* court's theory was that the uninsured motorist statute⁴³ was enacted to assure that each automobile liability insurance policy provided uninsured motorist coverage which would be enforceable to the full statutory minimum to exactly the same extent that the policy holder would be entitled to recover damages from a third party tort-feasor.⁴⁴

Tuggle represented an even further advance in restricting an insurer's attempt to limit liability under uninsured motorist coverage than was presented in the earlier Florida Supreme decision of *United States Fidelity & Guarantee Co. v. Sellers*,⁴⁵ holding that an insurer may not deny coverage on the ground that the insured has other insurance available to him.⁴⁶ *Tuggle* extended the setoff limitation from

³⁸ *Supra*, n. 35.

³⁹ Uninsured Motorist Coverage—Setoff of Amounts Payable Under Medical Payments Coverage, 23 Miami L. Rev. 249 (1968).

⁴⁰ 199 S. 2d 770 (Fla. 1967).

⁴¹ *Supra*, n. 37.

⁴² Fla. Stat. § 324.021 (1967).

⁴³ *Supra*, n. 37.

⁴⁴ *Supra*, n. 11 at 674.

⁴⁵ 187 S. 2d 689 (Fla. 1966).

⁴⁶ *Sellers* raised the question of the insurer's attempt to limit liability through "other insurance" or "pro-rata clauses." The effect such clauses have had on uninsured motorist endorsement setoffs has caused tremendous impact on insurance law, and while this particular area is outside the scope of this paper, a brief interpretation of the "other insurance" clauses should be provided so that the ramifications arising out of *Sellers* and *Tuggle* may be better understood. It is possible that an insured may have duplicating coverage if he is involved in an accident with an

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“other similar insurance” carried by the insured to the medical payment provision. As Judge Drew concluded:

In view of the fact that two classes of coverage involved in the policy under consideration were contracted separately, with independent premiums, we are unable to distinguish this situation from that in *Sellers*, relating to multiple carriers. Nor does there appear to be any basis for treating the setoff provision as amounting only to a contractual reduction of medical benefits, contrary to the actual language of the policy stating in the provision for uninsured motorist coverage that the company shall not be obligated to pay any part of such liability which represents expense “payable” by the insurer under its medical benefits coverage. The clause on its face is one to decrease uninsured motorist coverage beneath the statutory minimum, and one which means that under certain conditions (medical benefits in excess of \$10,000.00) there will be no uninsured motorist coverage whatever.⁴⁷

As a result of *Tuggle* and *Sellers*, *supra*, in addition to several Florida lower court decisions,⁴⁸ the uninsured motorist carrier stands in the shoes of the tort-feasor and as such, the carrier may not mitigate any payments to be received by the insured, notwithstanding the fact that it is a contractual relationship existing between the injured insured and the carrier expressly providing for such setoff. The collateral source rule has been effectively applied to exactly such situation with the resultant fact that the insurance carrier now standing in place of the tort-feasor may not diminish its damages under uninsured motorist coverage by demonstrating medical payments to the insured. The result will be the formulation of a policy “that puts a dollar in the pocket of the injured party for every dollar of compensation for medical expense.”⁴⁹ In effect, what will evolve is double recover to the insured under the uninsured motorist coverage and medical payment provision.

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uninsured motorist. *Sellers* held quite conclusively that where such a situation existed the insurer may not deny coverage on the ground that the insured has such similar insurance available to him. However, the Court went further stating that the Statutory requirement of uninsured motorist protection does not permit an insured to pyramid such coverages under separate automobile liability policies, which if allowed, would result in the insured recovery more than his actual damages. Under such circumstances, the insured could proceed against any one or more multiple insured, but in no event would he be entitled to recover from all of them more than his loss and bodily injury.

⁴⁷ *Supra*, n. 11 at 675.

⁴⁸ *Sims v. Natl. Cas. Co.*, 171 S. 2d 399 (Fla. 3d Dist. 1965), the first Florida decision restricting insurer's attempt to limit liability under uninsured motorist coverage, holding that uninsured motorist coverage and medical payments coverage were separate and independently contracted for, there being no implication of the existence of a right to setoff medical payments made;

Standard Acc. Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. 1st Dist. 1966), the First District Court of Appeals considered the question of a setoff provision of workmen's compensation benefits, the court refusing such setoffs.

⁴⁹ *Supra*, n. 39 at 254.

Simultaneously to Florida's handing down *Tuggle*, the Supreme Court of Nebraska decided *Stephens v. Allied Mutual Insurance Co.*,⁵⁰ closely paralleling the setoff question raised in *Tuggle*. Stephens sued his insurance company under the uninsured motorist provision of his automobile liability policy because the tort-feasor's carrier was unable to defend the original action due to its insolvent condition occurring subsequent to the accident, making the uninsured motorist coverage of the insured applicable. Stephens' insurance carrier contended that it was entitled to a setoff in the amount of \$1,000, for medical payments paid under the medical payments coverage provision of the policy with the applicable setoff provisions.

The Court held that a setoff of medical payments coverage against the proceeds the insured is entitled to receive under uninsured motorist coverage is void and against public policy. The Court's reasoning was directly analogous to the *Tuggle* rationale. The Court found that the medical payment and the uninsured motorist coverages were separate and independent contractual provisions for which separate premiums were charged; and to permit a limitation of the uninsured motorist protection required to be offered by statute,⁵¹ by a policy setoff provision would be void as being contrary to the statute and public policy.⁵²

Ohio Position On Setoffs

Quite simply stated, there is an absence of case law evolving around the setoff principle concerning uninsured motorist coverage. The most concise statement that might be made about Ohio's position concerning medical payment setoffs is that the arbitrators in general, hearing the numerous uninsured motorist cases have merely permitted the insurance carrier to setoff such medical payments made under the medical payment provision of the insurance policy. Acting as both plaintiff's attorney and arbitrator on uninsured motorist cases for several years it has been my observation that the medical payments setoff has been widely accepted by both plaintiff and defense counsel and as a result no litigation has been promulgated concerning the medical payment setoffs.

One statutory development has recently taken place which may very well bring the setoff controversy into the Ohio courtroom. The statutory

⁵⁰ 82 Neb. 562, 156 N.W. 2d 133 (1968).

⁵¹ Neb. Stat., R.S. Supp. 1965, § 60-509.01.

⁵² The general rule is that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through "other insurance," excess insurance or medical payment reduction clauses, and this is true even when the setoff for the reduction is claimed with respect to a separate, independent policy of insurance (workmen's compensation) or other insured motorist coverage. And this is true because the insured is entitled to recover the same amount he would have recovered if the offending motorist had maintained liability insurance. 156 N.W. 2d at 139.

requirement of mandatory offering of uninsured motorist coverage⁵³ was amended to explicitly prohibit the reduction of payments made under uninsured motorist coverage by proceeds received by the insured of any workmen's compensation benefits paid or payable as a result of the same injury or death.⁵⁴ This may very well be the first step in the direction of setoff litigation eventually resolving the setoff problem. As of October 1, 1970, no setoff may be had against the insured by reason of workmen's compensation benefits, this prohibition would seem to leave the door open for future questions regarding setoffs for medical payments, "other insurance" and "pro-rata clauses."

Conclusion

To reduce amounts payable under the uninsured motorist endorsement, the standard form of such endorsement includes a specific limitation of liability with respect to expenses paid under the medical payments coverage of the insurance policy, such limitation, where enforceable, being quite effective. As a result of this limitation, two divergent views have arisen. The majority viewpoint holds that such limitation is a "clear and unambiguous"⁵⁵ term of the coverage, and as such valid and enforceable. The second viewpoint maintains that such a term is void as being against public policy.⁵⁶

California provided the exception to the rather cut and dried acceptance or non-acceptance of setoff provision by enacting an express statutory provision⁵⁷ authorizing the reduction of coverage payable under medical payments provision of the policy. The California statutory enactment added substantial force to those jurisdictions holding that such setoff provisions are perfectly valid standards of the automobile liability policy.

The controversy has arisen but is somewhat one sided in those jurisdictions which have considered the question of enforceability of the medical payment setoff. The majority have stated that this particular reduction is a clear and unambiguous provision of the policy and enforceable on the theory that the insured should not be permitted a double recovery or windfall based upon two separate provisions of a single policy; in addition to the fact that the policy in and of itself is a contractual matter between the insured and the carrier, and such setoff is not against public policy.

⁵³ Ohio Rev. Code, § 3937.18 (1970).

⁵⁴ *Id.* at 3937.18(D). The coverage required by this section shall not be made subject to any exclusion or reduction in amount because any workmen's compensation benefits payable as a result of the same injury or death.

⁵⁵ *Supra*, n. 10.

⁵⁶ *Supra*, n. 11; n. 50.

⁵⁷ *Supra*, n. 7.

Florida, at the other end of the spectrum, has taken a somewhat more radical position in restricting the insurance carrier from reducing payments made under uninsured motorist coverage, holding such reduction by medical payments as void and against public policy. The rationale was based on the statutory authority requiring financial responsibility by all motorists. The Florida courts demanded assurance that the uninsured motorist coverage would be enforceable to the full statutory minimum, to exactly the same extent that a policy holder would be entitled to recover damages from a third party tort-feasor, thereby placing the insurance carrier in the shoes of the tort-feasor under the uninsured motorist endorsement.

In all probability this controversy cannot be resolved by a single answer. The majority of those jurisdictions litigating questions regarding the setoff provisions have remained firm, holding such setoffs as valid. In only two jurisdictions, Florida and Nebraska, have the setoffs been ruled void. There has been no carryover of the minority viewpoint to other jurisdictions and it would seem that the prevailing opinion is that the uninsured motorist endorsement and medical payments coverage being strictly contractual, would be considered binding and given full effect. The insurance companies have once again gained significant ground in limiting their liability under existing policies even in view of the fact that the medical payments coverage and uninsured motorist coverage were separately contracted and paid for separately.