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Uninsured Motorist Defined

Henry A. Hentemann*

UNSURED MOTORIST INSURANCE is an unusual coverage. The insurance company writing such coverage, as a practical matter, tends to insure someone whom they really do not want to insure; the insured who normally would pursue the tortfeasor pursues his claim against his own insurance company. The nature of the coverage often places parties to a friendly contractual agreement in the position of tortious adversaries.

Being of relatively recent origin, it is, in its posture before the law, still in an awkward stage. It is still trying to become acclimated to its environment, still attempting to find its true place and to serve its proper purpose in the insurance world. Although it has not yet fully matured, it is making rapid progress. Repeated exposure and attack has given to it some strength as well as some weakness and vulnerability.

The coverage allows an insured to collect from his own insurance carrier that which he could legally recover from the uninsured motorist, subject of course, to the limits of the policy. In the standard insuring agreement, the company promises:

...to 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 automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile. (Emphasis added.)

Notwithstanding the fact that the coverage is often referred to in the trade as uninsured motorist coverage, it is actually uninsured automobile coverage. Further, the injury claim need not exclusively be predicated upon some motorist's use of such an automobile but can also arise out of the mere ownership or maintenance of the vehicle. One of the most important considerations, therefore, under this coverage is determining the automobile to be an uninsured automobile within the terms of the contract. What is an uninsured automobile?

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2 Protection against Uninsured Motorists first appeared as part of the standard automobile policy package in 1958. However, for a couple years prior thereto it was available only by special endorsement. Risjord-Austen, Standard Provisions, 69 (15th Supplement, Dec. 1964).

3 State Farm Mutual Automobile Policy, Insuring Agreement III, effective January, 1966.
Negatively speaking, the standard policy says through its specific exclusions that an uninsured automobile shall not be the insured automobile on the policy; nor a vehicle furnished for the regular use of the named insured or any resident relative of his household; nor one owned or operated by a self-insurer according to law; nor one owned by the U. S. A., Canada, a state, a political subdivision of any such government or agency of any; nor one designed for use principally off public roads except when such are actually on public roads; nor one while located for use on a premises.  

This article, however, is concerned with the positive definition of an uninsured automobile, not the exclusions. The standard policy defines, in a positive sense, the term "uninsured automobile" to mean:

1. A land motor vehicle with respect to the ownership, maintenance or use of which there is in at least the amounts specified by the Financial Responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance bond applicable at the time of the accident, with respect to any person or organization legally responsible for the use of such vehicle, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies that there is any coverage thereunder; or

2. A Hit-and-Run automobile as defined.  

An attempt will be made to explore the court interpretations of this definition. However, when reviewing such, three basic considerations must be borne in mind. One is that many states have so-called uninsured motorist statutes which contain purpose and intent sections upon which the courts may have relied in allowing a liberal construction to achieve the purpose intended by the legislature. The second is that simple contract law, without statutory influence, requires that the words employed be given their plain and commonly understood meaning. Thirdly, however, any ambiguity in an insurance contract, it being a contract of adhesion, shall be construed against the company and will be given an interpretation most favorable to the insured.

The obvious admonition, therefore, is that the court rulings cited herein must be correlated to the particular contract wording considered by the court and/or a determination made as to whether or not a statutory scheme is involved.

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4 Id.
5 Ibid.
6 29 Am. Jur. 450.
7 Id. at 628.
8 Id. at 640.
Land Motor Vehicle vs. Automobile

It should be noted that in the insuring clause the policy speaks of an automobile whereas when such uninsured automobile is defined it states that it must merely be a Land Motor Vehicle. These terms are not employed in all policies. Many policies still state that an uninsured automobile must be an "automobile." 9 If such a policy definition is involved, consideration will have to be given to the legal distinctions between trucks, motorcycles and automobiles, etc.

Under the definition quoted, the policy requires only that the vehicle involved be a Land Motor Vehicle. The broadness of the term is obvious.

Applicable at the Time of the Accident

Another part of the Uninsured Automobile definition quoted is that it must be a land motor vehicle:

. . . with respect to the ownership, maintenance or use of which there is . . . no bodily injury liability bond or insurance policy applicable at the time of the accident. . . . (emphasis added).

As mentioned earlier, the sole criterion is not only that the operator have no liability insurance, but that there be no such insurance "applicable" at the time of the loss. Therefore, when investigating these losses, inquiry should go beyond merely determining whether the operator has an automobile liability policy, but also should explore other policies in the family as well as ownership of other vehicles and insurance regarding them. Other policies may encompass the allegedly uninsured automobile.

For example, the tortfeasor may be operating a newly acquired automobile which was not reported to his insurance carrier, while he also owned another car which was specifically covered. An Uninsured Motorist claim may be denied due to the fact that under the existing policy a newly acquired automobile may also be covered automatically in spite of lack of notice of such new acquisition by the tortfeasor to his carrier. 10 It is obvious from the policy language that if there is no insurance applicable at the time of the loss, the insured may then proceed under his own policy.

A situation where a truck driver tortfeasor was not operating within the scope of his employer's business, and had no insurance of his own, would be a proper uninsured motorist situation allowing an injured insured with uninsured motorist coverage to present a claim, even though there was insurance on the truck itself. It has been held that since the carrier for the trucking company properly excluded coverage to a

driver without permission, the driver was uninsured and there was no applicable insurance at the time of the loss.\textsuperscript{11}

In \textit{Whitney v. American Fidelity Company},\textsuperscript{12} the Supreme Judicial Court of Massachusetts was confronted with a situation in which a guest, in an automobile which did have liability insurance but which excluded claims of guests, attempted to bring an uninsured motorist claim under the owner's policy. His owner's carrier argued there was a liability policy on such auto "applicable at the time of the accident," notwithstanding that it didn't cover the guest. It was argued, therefore, that the automobile did not qualify as an uninsured automobile. The lower court ruled in favor of the uninsured motorist coverage insurer. The reviewing court reversed, holding that the dictionary definition of "applicable" includes the words "fit," "suitable," "pertinent," "appropriate," or "capable of being applied." In view of these definitions, the court held that at the time of the accident the driver's automobile qualified as an uninsured automobile within the definition of the uninsured motorist policy in that there was no insurance with respect to the driver "capable of being applied" to the bodily injuries of the passenger although there was a liability policy on the car. The court further reasoned that there was an ambiguity in the definition of "uninsured automobile" which must be resolved against the company who wrote the policy.

\textbf{Subsequent Disclaimer by the Carrier}

Further, the coverage being of relatively recent origin, constant changes are being made. Again, with respect to the clause "Applicable at the time of the accident," there are many older cases holding that an insured could not recover under his uninsured motorist coverage if the tortfeasor was insured at the time of the loss but later the tortfeasor's carrier denied coverage on the grounds of lack of cooperation on the part of the tortfeasor. The courts in those cases,\textsuperscript{13} giving full weight to the clause in question, denied coverage under the uninsured motorist policy, holding the wrongdoing automobile was not uninsured "at the time of the accident."

One of the cases supporting this reasoning and denying uninsured motorist coverage because there was insurance at the time of the accident, although the company subsequently disclaimed thereon, is the

\textsuperscript{11} Buck v. United States Fidelity and Guarantee Co., 265 N.C. 285, 144 S.E.2d 34 (1965).
\textsuperscript{12} 215 N.E.2d 767 (Mass. 1966).
Application of Vanguard Ins. Co.\textsuperscript{14} The New York court was confronted with the simple policy definition of "applicable at the time of the accident," without further elaboration. The Appellate Division court of that state held that the language of the policy was "clear and unambiguous and no strained or unnatural construction can be given to it to provide otherwise" than to deny that the automobile was an uninsured automobile within the terms of the policy.

However, the case was ultimately further appealed to the highest court in New York,\textsuperscript{15} which decided the matter on November 22, 1966. The New York Court of Appeals disagreed with the Appellate Division's decision that the language was clear and unambiguous and stated that construction was necessary, that it must be construed within the context of the clause wherein it is found and in light of the purpose sought to be accomplished by the clause. Interestingly, the court also stated that although New York's statutory definition of an uninsured motorist was not controlling, this being a contract matter, it still was not to be completely ignored since the purpose of the contract coverage was the same as that of the statutes.

The tortfeasor in that case was one named Smith, and his liability insurer was Glens Falls Ins. Company. Vanguard was the uninsured motorist carrier of the injured party. The highest court of New York stated:

The disclaimer by Glens Falls related back to the time of the accident and left Smith uninsured against liability arising out of the accident. Smith was just as financially irresponsible as a result of the disclaimer as he would have been if he never took out a policy. The view, therefore, that a disclaimed uncollectible policy is a policy applicable at the time of the accident is an unnecessarily restrictive one which defeats the very purpose of the uninsured motorist clause and ignores the spirit, if not the letter, of Section 167 (Subd. 2-a). (emphasis added).\textsuperscript{16}

The New York Court of Appeals further reasoned that the policy's negative definition of an uninsured automobile did not exclude an auto upon which there has been a disclaimer of coverage. Thus, by inference the court stated an auto upon which there is a disclaimer of coverage is an uninsured auto. If the insurance company intended to exclude cases involving subsequent disclaimers of coverage, they should have explicitly written them into the exclusionary clauses which negatively define an uninsured automobile.

The New York ruling in the Vanguard case,\textsuperscript{17} and its "relating back" theory, is noteworthy in that it held the simple clause "applicable

\textsuperscript{14} 23 A.D.2d 625, 257 N.Y.S.2d 740 (1965).
\textsuperscript{15} 18 N.Y.2d 376, 275 N.Y.S.2d 515 (1966).
\textsuperscript{16} Id. at 381.
\textsuperscript{17} Appl. of Vanguard Ins. Co., supra n. 15.
at the time of the accident" to be ambiguous and, therefore, allowed the purpose and intent of the contract, guided by that state's statutory scheme, to be applied with a liberal construction as a result. It seems that the New York court abrogated strict contract interpretation principles to achieve a desired result.

Nevertheless, even before that decision, many policies expanded on their uninsured automobile definition clause of no insurance "applicable at the time of the accident" to also include:

.or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies that there is any coverage thereunder. (emphasis added).

On first blush the language employed seems to be extremely broad. It would appear that the only thing needed in situations where valid insurance exists on the tortfeasor's automobile is for the carrier on the adverse vehicle to merely deny coverage. There is nothing in the language which goes to the substance of the disclaimer of coverage by the other company. It would also appear that questions as to whether the adverse vehicle's carrier should actually cover the loss or not cannot now first be resolved in a court of law since the very definition of an uninsured automobile merely requires a denial of coverage by such carrier.

In fact, there are several lower court rulings in New York which tend to support this conclusion. In the cases of MVAIC v. Morera,18 in the Matter of MVAIC (Holley),19 and Kaiser v. MVAIC,20 the New York courts were considering a statute that included under uninsured motorist coverage a right to recover for injuries "from the owner or operator of an insured automobile, the insurer of which has disclaimed liability or denied coverage." The similarity between the statute and the expanded definition of an uninsured automobile in many of the newer policies is obvious. In all three cases cited above, the insurer of the tortfeasor denied coverage, and each involved a motion to stay arbitration until the coverage question was resolved. In each case the motion was denied. In the Morera case,21 the court said that there is no "requirement" that the disclaimer be valid, and that, on the motion to stay arbitration, the "court's duty was limited to determining whether insurer disclaimed liability and did not extend to determining (the) validity of disclaimer." In the Holley matter,22 the court held that the injured party was "required to show that disclaimer had been

21 MVAIC v. Morera, supra n. 18.
22 MVAIC (Holley), supra n. 19.
made but was not required to show that it was "prima facie" valid, as prerequisite to enforcement of claim . . . through arbitration." The Kaiser case\textsuperscript{23} concurs and further states that if the respondent believes that the other carrier was not justified in denying coverage, "then it may proceed against that company pursuant to the subrogation provision of its contract . . ." after the uninsured motorist claim is resolved in arbitration.

Again, however, the highest court in New York recently felt the "disclaimer" requirement in the definition deserved its pronouncement. In the case entitled the Matter of MVAIC (Malone),\textsuperscript{24} the highest court of that state said that where the insured, having a policy with the MVAIC endorsement (uninsured motorist coverage), collided with a vehicle of an alleged tortfeasor, a

. . . unilateral declaration of non-coverage by insurer of alleged tortfeasor did not \textit{ipso facto} and without judicial investigation satisfy the requirement . . . that alleged tortfeasor must have been uninsured, and MVAIC had opportunity . . . to litigate before the court, . . . the question whether alleged tortfeasor's policy was validly cancelled.

In 1966, this question was again before the courts of New York,\textsuperscript{25} and in both instances the Malone case\textsuperscript{20} was affirmed and followed. It appears, therefore, that in New York the validity of the disclaimer by the other carrier can still be examined and judicially determined before the insurance company is forced to arbitrate or pay under its uninsured motorist coverage.

What other courts will do with the expanded contract definition of an uninsured automobile remains to be seen. As previously stated, it would seem that mere proof of denial of coverage by the adverse carrier could allow coverage to an insured under his uninsured motorist provisions. If it should be construed as ambiguous, the ambiguity will be resolved in favor of the insured. Probably it will rest with the drafters of the policy to reword or define such clause in order to fully protect themselves from costly litigation upon capricious denials of coverage by the tortfeasor's insurance carrier.

Somewhat on the subject is the situation of a denial of coverage by the adverse carrier, denied on the grounds that they didn't cover the risk, claiming the acts of their insured was an intentional act. Can there now be a claim against the uninsured motorist carrier by the injured party? The other driver is legally responsible; the insured has

\textsuperscript{23} Kaiser v. MVAIC, \textit{supra} n. 20.

\textsuperscript{24} 16 N.Y.2d 1027, 265 N.Y.S.2d 906 (1965).


\textsuperscript{26} MVAIC (Malone), \textit{supra} n. 24.
a right to recover damages, and the other driver's carrier has denied coverage.

In *McCarthy v. MVAIC,* the New York reviewing court made some sharp distinctions. In that case, the plaintiff was injured when her brother-in-law intentionally collided with her vehicle. Her brother-in-law's carrier denied coverage on the grounds that her injuries were not "caused by accident." She subsequently made a claim under uninsured motorist coverage. The lower court ruled in her favor, and the appellate court reversed. In dealing with the question of the brother-in-law's auto being an uninsured automobile, the court relied on the MVAIC law of New York which defined the term "disclaimer or denial of liability" as a repudiation by the adverse carrier of liability "because of some act or omission of the person or persons liable or alleged to be liable." The court said "this refers to an act or omission by the insured automobile owner in his relationship to his company, constituting a breach of the conditions of the policy." The court went on to state:

A sharp distinction must be made between (a) a finding that the insurance company is not liable under a valid policy because the injuries were not caused by accident and hence were not within the risks covered by the policy and (b) a finding that the company is not liable because the policy was not in force at the time in question or because there had been a breach of a condition of the policy by the insured rendering it unenforceable. (emphasis added).

The court held that in the latter situation, (b), the vehicle was an uninsured vehicle; in the former, (a), if the standard policy covered "all the risks required to be covered," it was not an uninsured automobile. Note the distinction between this reasoning and that by the Massachusetts Court in the Whitney case in which the "risk" of a claim by a guest was excluded from the tortfeasor's policy and yet an uninsured motorist claim was allowed. However, it must be emphasized that the New York court was determining a statutory claim which included a clause regarding a company's denial of coverage and further had a statutory definition of "disclaimer or denial of liability." The case is also distinguishable on the grounds that the loss was not truly "an accident."

**Subsequent Insolvency of Tortfeasor's Carrier**

Another situation is involved when an adverse vehicle is insured at the time of the accident but his insurance carrier subsequently becomes insolvent. And again we have situations involving a contract with the expanded definition including disclaimers by the tortfeasor's carrier and those that involve policies only requiring no insurance "applicable at the time of the accident."

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In the case of State Farm Mutual Auto. Ins. Co. v. Brower, Brower was injured in an accident and sued the tortfeasor who was insured. The tortfeasor's carrier did not defend, made no appearance, and offered no defense to the suit. Later it was determined that the tortfeasor's carrier was hopelessly insolvent and a receiver was appointed who also did not provide a defense. The Virginia statute includes in its definition of an uninsured automobile one on which "there is such insurance but the company writing the same denies coverage thereunder." The Virginia court refused to decide whether a policy in a defunct, hopelessly insolvent company is still a policy as will prevent an auto from being an uninsured automobile. Instead, the court held that there had been an effective denial of coverage by the other carrier by refusing to enter the case against its insured and offering a defense while in their policy they promised to "defend any suit against the insured alleging such injury. . . ."

The North Carolina Supreme Court, in the case of The North River Ins. Co. v. Gibson, followed the State Farm ruling on the basis of the broad statutory definition which included an uninsured motorist as one insured but whose carrier denies coverage. The court held that in this case, even though the subsequently insolvent company actually entered the case and afforded a defense, although their attorneys subsequently withdrew from the case, coverage was "effectively denied" when they withdrew from the defense of their insured. Again, the court relied upon an effective denial by a carrier and did not discuss the question of insurance "applicable at the time of the loss."

Recently, a California appellate court also followed the "effective denial" theory in Katz v. American Motorist Ins. Co., in a case of subsequent insolvency on the part of the adverse carrier. California has an uninsured motorist statute which defines an uninsured automobile in the same language as the expanded policy definition.

However, in Swaringin v. Allstate Ins. Co., a Missouri court was considering a claim against Allstate's uninsured motorist coverage by the insured who was injured in an accident and where the tortfeasor's carrier subsequently became insolvent. Allstate's policy did not include the broad language but merely defined an uninsured automobile as one having no insurance "applicable at the time of the accident." The clause was held unambiguous and, therefore, even though the tortfeasor's car-

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30 244 S.C. 393, 137 S.E.2d 264 (1967).
31 State Farm Mut. v. Brower, supra n. 29.
33 399 S.W.2d 131 (Mo.App. 1966).
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rier subsequently became insolvent, a claim could not be maintained under Allstate's policy of uninsured motorist coverage since the other auto was not uninsured "at the time of the loss." This reasoning has been followed in many cases.34

It appears from the cases on the subject that if the definition of uninsured automobile merely refers to insurance "applicable at the time of the accident," subsequent insolvency would not render the automobile an uninsured automobile. However, the Vanguard35 decision out of New York is ever present in the background as authority upon which other courts might rely to include within the uninsured automobile definition cases involving subsequent insolvency on the part of the tort-feasor's insurance carrier. It seems certain New York will do so, applying their "relating back" theory. This is with respect to cases involving contracts which do not have the expanded definition.

In cases involving the expanded definition which includes "denial of coverage," there is other authority to construe the tortfeasor's automobile uninsured by his carrier's subsequent insolvency if they do not afford him a defense, or withdraw from such defense, such act of omission by his carrier is construed as an effective denial of the coverage they promised by contract.36

Insufficient Coverage

Another clause in the definition of uninsured automobile is that it be an auto with respect to which there is no insurance,

. . . in at least the amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged. . . .

First of all, it is noteworthy that the definition refers only to where the insured automobile is principally garaged; where the accident occurs is not controlling.

Therefore, in view of the fact that thirteen states require minimum limits of 5/10 coverage to comply with the financial responsibility laws


35 Appl. of Vanguard Ins. Co., supra n. 15.

36 Very recently a Pennsylvania reviewing court refused this theory holding that the definition including disclaimer by the tortfeasor's carrier did not apply to a subsequent insolvency situation. The court held that such "denial of coverage" definition clause means a rejection of the policyholder as an insured and a refusal to accord him the protection he contracted for; and does not mean the inability to collect the full amount of the damages from the insurer. Pattani v. Keystone Ins. Co., 209 Pa. Super. 79, 223 A.2d 899 (1966). The case was certified to the state's highest court in February, 1967. Their decision is not yet reported.
of their state\textsuperscript{37} and that thirty-three states require 10/20\textsuperscript{38} and that three states require 15/30,\textsuperscript{39} it is very probable for a resident insured of one state to have an accident with a non-resident tortfeasor of another state who was only required to have liability insurance with limits less than that required in the state where the injured insured's automobile is principally garaged. By definition, therefore, the injured insured would have a claim under his uninsured motorist coverage. However, the question would be the amount of insurance coverage available to the insured under his uninsured motorist coverage.

Only one case can be found on the subject situation,\textsuperscript{40} which is that of \textit{White v. Nationwide Mutual Ins. Co. and Allstate Ins. Co.}.\textsuperscript{41} In Virginia, the Financial Responsibility Act requires a minimum limit of $15,000 per person. The insured, a Virginia resident, under an uninsured motorist policy with Nationwide, was injured in an accident, and the tortfeasor, a Tennessee resident, was insured by Allstate with $10,000 limits per person. When inadequate limits were discovered, Nationwide was notified. Suit was brought against the tortfeasor and a $22,000 judgment was recovered. The insured then sued Allstate and Nationwide, and Allstate paid their policy limits into court. The insured sued Nationwide for $15,000, the uninsured motorist coverage limit. In considering the amount recoverable, the Federal District Court stated that since the tortfeasor did not have limits sufficient to meet Virginia's Financial Responsibility Law, it was an uninsured automobile according to definition.

Nationwide argued, since Allstate covered and paid $10,000, their maximum payment should be $5,000, to bring such recovery up to the difference between what Allstate paid and the limit of Nationwide's policy and the minimum requirements of the Financial Responsibility Law of the state. The insured argued for $12,000 to meet the balance outstanding on the judgment. The Federal Court held that "the full

\textsuperscript{37} Colorado, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon and Rhode Island. Oregon requires 5/20 coverage.

\textsuperscript{38} Alabama, Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, New Mexico, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming. In this group, though not a state, is the District of Columbia.

\textsuperscript{39} Alaska, Maryland and Virginia.

\textsuperscript{40} Although the Rhode Island court was not deciding the amount recoverable under the uninsured motorist coverage when the tortfeasor has insufficient coverage, they nevertheless held that even though the policy contract did not have the specific wording in the definition to include as an uninsured automobile one which had limits less than the state's financial responsibility law requires, a tortfeasor who actually had such insufficient coverage was an uninsured motorist allowing an injured insured to seek additional recovery under his uninsured motorist coverage. \textit{Allstate Ins. Co. v. Fusco}, 223 A.2d 447 (R.I. 1966).

\textsuperscript{41} 245 F.\textsuperscript{Supp.} 1 (W.D. Va. 1965).
limits of Nationwide's policy are available to satisfy the unpaid part of the judgment.” As its authority, the Federal Court cited Bryant v. State Farm Mutual Auto. Ins. Co.,\(^{42}\) in which the Virginia court said:

The limit of recovery of the plaintiff under any or all insurance policies carrying the uninsured motorist provision . . . would be the amount of the insured’s judgment against the uninsured motorist.

As mentioned, this is the only case found on the specific subject question, and it comes out of Virginia, which has an uninsured motorist statute. The White case\(^{43}\) relied upon the Bryant case\(^{44}\) which in turn definitely relied upon Virginia’s statutory scheme to allow an injured passenger to collect under both his driver’s uninsured motorist coverage as well as his own personal uninsured motorist coverage with a different carrier.

It still remains to be seen, in the appropriate case, whether states without statutory schemes as to uninsured motorist cases will still allow full recovery of the limits of the uninsured motorist policy even after the full amount of the tortfeasor’s policy has been exhausted; or whether they will limit such to only allow total recovery to be equivalent to the minimum requirements of the Financial Responsibility Law.

**Hit and Run Coverage**

The final definition of an uninsured automobile is “a hit and run automobile, as defined.” The subject of hit and run coverage, with its lengthy definition, could be a subject for an entire article. However, for the purposes of this article, the following substantive requirements of the definition of a hit and run automobile will only be considered. It is defined to be:

... a land motor vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) There cannot be ascertained the identity of either the operator or owner of such “hit and run automobile.”

Under this coverage physical contact is a requirement upheld by many court rulings which requirement allows protection to the carrier against fraud and, therefore, is not contrary to public policy. However, as will be noted below, some inroads have been made on the strict interpretation of such definition requirement.

Let us first consider that part of the definition which requires that a land motor vehicle cause “bodily injury to an insured arising out of physical contact. . . .” In Bashore v. Allstate Ins. Co.,\(^{45}\) the plaintiff was

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\(^{42}\) 205 Va. 897, 140 S.E.2d 817 (1965).
\(^{43}\) White v. Nationwide & Allstate, supra n. 41.
\(^{44}\) Bryant v. State Farm Mut., supra n. 42.
\(^{45}\) 374 S.W.2d 626 (Mo.App. 1963).

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in an auto which was struck a glancing blow by a hit and run motorist, forced off the road and into a tree. Allstate's counsel advanced the argument that the insured could only recover for those injuries caused by the actual impact with the hit and run auto and not those caused by the impact with the tree. The court dismissed that argument, holding that the insured could recover for all injuries of which the hit and run vehicle was the proximate cause since physical contact was established.

The other part of the hit and run definition which has caused some concern is that the injuries must arise out of "physical contact of such vehicle with the insured or with an automobile which the insured is occupying at the time of the accident." (Emphasis added.)

Earlier cases on the subject gave strict interpretation to that clause denying uninsured motorist coverage when a hit and run vehicle hit another vehicle, pushing that other vehicle into the insured's vehicle on the ground that there was no actual direct contact between the hit and run vehicle and the vehicle in which the insured was riding, as required by definition.

In Bellavia v. MVAIC, Bellavia was walking on a sidewalk past a Chevrolet when a Ford struck the Chevrolet, pushing it onto the sidewalk, striking Bellavia. The Ford kept going, and the name of the driver was not obtained. It was ascertained by the police that the Ford was stolen and was being operated without the knowledge or consent of the owner. The lower court in New York denied the application of Bellavia, holding that the bodily injury "did not arise out of physical contact between the injured insured and the 'hit and run' vehicle itself." Also, in In re Portman's Petition, Portman, a blind person, had been knocked down by an automobile when crossing an intersection. While lying on the ground, she was again injured when another vehicle, allegedly a hit and run automobile, collided with the first vehicle and caused the latter to strike the injured person a second time. Again the New York lower court denied the claim on the ground that there was no actual physical contact with the hit and run vehicle itself which caused the bodily injury.

However, in Inter-Insurance Exchange of the Auto. Club of So. California v. Lopez, Lopez, who had a policy with the Exchange including hit and run coverage with the physical contact requirement, was struck by an automobile that came across the center divider driven by one Mr. Clements. Mr. Clements had been struck previously by a third vehicle which continued on its way, and its identity was unknown. The insurance company denied liability on the grounds that actual physical contact was not had between the insured vehicle and the alleged hit and

48 238 Cal.App.2d 441, 47 Cal. Rptr. 834 (1965).
run vehicle. Judgment was in favor of the insurance company. Lopez appealed.

The District Court of Appeals in California reversed the lower court. California has an Uninsured Motorist Statute which, since 1961, required physical contact under the Hit and Run Provisions. The court held that the requirement of physical contact was "designed to eliminate fictitious and fraudulent claims, not to lessen coverage." The fact that the hit and run auto hit another auto first, pushing it into the insured, the court compared to the common law concept of trespass on the case, an indirect wrong that was actionable, and held that the facts of this case met the physical contact requirements of the policy. What is interesting to note, bearing in mind that California has an Uninsured Motorist statutory scheme, is the court's further statement that:

The physical contact requirement, designed to prevent false claims, should not be extended to defeat recovery in cases where fraud clearly does not exist.

This is an obvious departure from prior case rulings on the contact requirement, but one must remember the court was discussing the purpose and intent of the statute, not a contractual provision.

Shortly after the California case was decided, New York's highest court was confronted with the indirect contact situation, and they were further confronted with the prior lower court decisions of their state as expressed above. In the case of MVAIC v. Eisenberg, the court stated that whether "physical contact" requires actual touching between the hit and run vehicle and the appellant's vehicle is to be determined "not as an abstract proposition, but as an integrated phrase in a statutory scheme." New York also has an Uninsured Motorist Statute. The court went on to say that in "most factual situations, the absence of the required contact will preclude resort to Arbitration." But, the court further stated that "it is equally apparent that the actual contact situation is judicially indistinguishable from the situation in the present case. The vehicle which made actual contact with the appellant's auto in this case was a mere intermediary, and in the circumstances we think it cannot logically serve to insulate the respondent from arbitration."

The New York court, as the California court did, went on to explain the purpose of the Uninsured Motorist statute, stating that it is "readily discerned when we examine the need which gave rise to its enactment." The court continued:

The assertion of a hit-and-run accident is a proposition easy to allege and difficult to disprove. Absent protective legislation, it opens the door to abuses, including fraud and collusion. . . . The problem however virtually disappears with the requirement of physical con-

49 Bellavia v. MVAIC, supra n. 46; In re Portman, supra n. 47.
physical contact almost invariably produces physical evidence of impact, [and] the possibility of a "phantom" hit-and-run driver becomes minimal. Thus the rationale for requiring proof of physical contact becomes apparent, while the requirement of "actual" impact between the hit-and-run vehicle and the insured vehicle recedes.

It appears that the New York case is not as strong as the California case as to the physical contact requirement. Carrying the California case to an extreme conclusion, it would appear that they might eventually allow a claim under hit and run coverage, pursuant to their statute, in a case where the insured is forced off the road without physical contact provided the case could be substantiated by objective witnesses and the element of fraud removed. New York still adheres to the contact requirement, but now has allowed "indirect" contact as opposed to prior rulings strictly holding to "direct impact" between the alleged hit and run auto and the insured or insured vehicle.

It is interesting to note in the Eisenberg case\(^{51}\) that two judges dissented, claiming that "words that have a plain meaning and a commonly understood legal effect ought not to be rationalized to a different meaning because it seems desirable to escape the effect of reading them as they are." They go along with the strict interpretation followed by the Bellavia\(^{52}\) and Portman\(^{53}\) cases. However, there are indications of a trend developing to give a more liberal construction to the contact requirement contained in the "hit and run" provisions.

**Unascertainable Identity**

Let us consider next the requirement of the hit and run definition which states "... that there cannot be ascertained the identity of either the operator or owner of such 'hit and run' automobile." Questions in this regard can arise as to when must the identity be not ascertainable. What if the identity could have been ascertained, yet it wasn't, or what if it was ascertained at the time of the accident, but subsequently such information was lost or forgotten by the insured.

In the case of Mangus v. Doe,\(^{54}\) the insured was rear-ended by another auto after which they got out, examined their vehicles and determined that no physical damage had been done to either car. Neither obtained the name, vehicle license numbers nor any information relating to their identities. Subsequently, the insured discovered that he had suffered a ruptured disc. Remembering that in Virginia an uninsured motorist statute includes "unknown" owner or operators, never-

\(^{51}\) Ibid.

\(^{52}\) Bellavia v. MVAIC, *supra* n. 46.

\(^{53}\) In re Portman, *supra* n. 47.

\(^{54}\) 203 Va. 518, 125 S.E.2d 166 (1962).
theless, the Virginia Supreme Court of Appeals does state the following with some applicable significance. The court said that the statute

... does not say that if an insured fails to exercise due care or diligence to ascertain the identity of an unknown motorist causing him bodily injury ... he cannot maintain an action. ... For us to say that an insured had the duty to exercise due diligence to ascertain the identity of an unknown motorist would be reading into the statute language which does not appear there.

In the case of Shaw v. MVAIC,55 a lower court of New York was considering a claim under the “Hit and Run” section of the New York Insurance Statutes, which allowed claims when the “identity of the motor vehicle and of the operator and owner thereof cannot be ascertained,” provided other statutory requirements were met. In this case, Shaw was a pedestrian when he was hit, and the driver that hit him took Shaw home after the accident and supplied Shaw with a piece of paper on which were written some names and addresses, which were understood to be that of the driver and passenger. Shaw claimed he was dazed and semi-conscious. Later the paper was lost and the information had failed to lead to the identification of the motor vehicle, owner, or operator.

Bearing in mind that this was a statutory procedure under New York's Insurance law, the court stated that the law

... mentioned “hit and run” in their titles, nevertheless, the provisions of these sections indicate a more accurate name of “hit and hide.” In other words, after the hit, there must be a successful hiding of the involved motor vehicle and the owner and operator thereof, whose identity cannot be ascertained after the exercise of all reasonable efforts.

In the Shaw case,56 the application was temporarily denied until a statutorily required Commissioner's “certified abstract of the operating record” of the persons involved was completed. If that still were to bear out the unascertainability of operator, etc., the application was to be granted.

In Petition of Casanova,57 the court allowed a claim under the hit and run provisions, wherein the petitioner was hit by an automobile, and the driver of the automobile went to a police officer and described the incident and then took the petitioner to the hospital for treatment and thereafter disappeared. The patrolman verified the fact of the report, but no corroboration of the alleged report was on record at the police department. The lower court of New York held that the statutory requirement of a report to police authorities within twenty-four hours was met, and the requirement requires no more than a “report,” and failure of the police to make a record does not invalidate the claim.

56 Ibid.
The other question before the court in that matter was whether the driver was a "hit and run" auto when he went with the petitioner to the police to report the incident, since he did not leave the scene of the occurrence. The court stated that the "hit and run" words used in the Insurance statute "did not embrace the wording nor the intent of the penal provisions of the vehicle and Traffic Law." Further, the court went into the legislative purpose section of the Insurance law, and the definition of a "Hit and Run" automobile which contains no further elaboration of the words than "the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained."

Recently, in October, 1966, an appellate division court of New York ruled on the question in Riemenschneider v. MVAIC. In that case, the facts were almost identical to those in the Mangus case. Counsel for MVAIC argued that the definition requirement meant that the identity could not be ascertained "at the time of the accident," not later when injuries developed; that if identity is ascertainable at the time of the accident it was not a "hit and run" automobile and thus not uninsured under the "hit and run" policy provision. The court agreed with the factual contention but not the conclusion, stating there is nothing in the definition which specifies the time as to which, or the circumstances in which identity is to be deemed ascertainable. The court went on to say:

Whatever the connotations of precipitate flight because of guilt and fear the term "hit and run" may bear in colloquial usage, they have notably been permitted no expression in the insurance policy definition or in cognate MVAIC legislation. . . . The emphasis is on inability to identify. The cause of the inability may most frequently be reprehensible flight, but that is not made a sine qua non. To make it one would in our opinion constrict gratuitously the remedial purpose underlying the MVAIC endorsement. . . .

It appears that if all other policy definition requirements as to notification of police, report to company and contact, etc., are met, a tortfeasor who cannot be found would qualify as an uninsured motorist under the hit and run provisions of the policy. Obviously, this could be a windfall to the unscrupulous opportunists. What other courts will do with the clause again remains to be seen. Possibly a policy definition of the clause to mean identity which cannot be ascertained at the time of the accident would be the best and most reliable solution.

Conclusion

In attempting to summarize the case decisions on the subject, the reader must remember the basic considerations initially stated in this

59 MVAIC v. Eisenberg, supra n. 50.

Published by EngagedScholarship@CSU, 1967
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article distinguishing between decisions possibly influenced by a state's statutory scheme and the same situation in states without statutory influence.

In the cases of subsequent insolvency or subsequent disclaimer by the adverse vehicle's carrier, it seems that the answer to the question of whether or not the expanded definition is employed controls. Many policies do not yet include in their definition of an uninsured automobile one on which there was insurance but the insurer thereof denies coverage. In those cases, many courts have merely looked at the phrase "at the time of the accident," and have held that subsequent disclaimer or insolvency does not bring the adverse vehicle within the policy definition of an uninsured automobile. Bear in mind, however, New York's very recent departure in the Vanguard case, holding such disclaimer to "relate back" to the loss.

However, if the policy contains the expanded definition which includes an adverse vehicle whose carrier subsequently denies coverage thereunder as an uninsured automobile, another problem arises: whether or not mere denial is sufficient or must it be a valid denial. New York seems to have resolved this problem, holding that the validity of such disclaimer can still be challenged in the courts by the uninsured motorist coverage insurer. How other courts will decide remains to be seen. It would seem that a strict reading of the words used would merely require proof that the other carrier disclaimed, nothing more. The policy definition as written does not require such disclaimer to be legally valid. As the earlier New York cases held, the uninsured motorist carrier can seek recourse through subrogation.

As to the problem of subsequent insolvency under the expanded definition, a few courts have decided that a failure on the part of the insolvent company to fully defend the insured as promised is tantamount to an "effective denial" of the coverage promised their insured and, therefore, brings him within the definition of an uninsured motorist. Whether other courts will adopt this reasoning remains to be seen. Under the simple definition merely stating there must be no insurance applicable at the time of the loss, some courts still hold a subsequent insolvency case not within the uninsured motorist coverage. However, the Vanguard case, with its theory of relating back, may influence future decisions.

The policy definition including as an uninsured automobile one which has limits of coverage less than required by the state's Financial Responsibility Act where the claimant's vehicle is principally garaged has some interesting sidelights. The place of the accident does not seem

60 Appl. of Vanguard Ins. Co., supra n. 15.

61 Ibid.
to be determinative as to whether a disparity in limits exists. It is the place where the insured automobile is principally garaged that controls. As to the amount of coverage available to the insured under the uninsured motorist coverage, there is only one decision on the subject. It has held that the entire uninsured motorist policy limit is still available after the adverse vehicle's policy has been exhausted; even if that means a greater total recovery to the insured than the uninsured motorist coverage alone would have provided or more than the Financial Responsibility Act of that state requires. This decision was influenced by the Virginia statutory provisions.

The cases on the "hit and run" clauses have all come out of states with statutory schemes conducive to liberal construction. However, in view of the fact that other states have not ruled on the subject, these decisions will be examined by them and possibly adopted. New York and California seem to have done away with the requirement of direct impact between such hit and run vehicle and the insured or the vehicle in which he is riding. Whether other states will still require direct touching between those vehicles, based on strict contractual interpretation, remains to be seen, but it is doubtful. Reading between the lines in the California case, it is conceivable that California might go so far as to allow recovery even if there is no contact if the possible element of fraud is sufficiently dispelled. Further, under these provisions the clause dealing with the requirement that the tortfeasor's identity be unascertainable, the New York courts have held that the words used lack policy or statutory explanation, and, therefore, the time when such motorist's identity cannot be ascertained is immaterial. The contract might be held in other states to be sufficiently ambiguous to allow "hit and hide" coverage, other requirements being met.

In the last analysis, it is obvious there are no hard-fast universal conclusions that can be drawn as to each phase of the definition except as the specific decision rendered affects the coverage in the specific state in which it was rendered. However, when other courts are called upon to decide these same issues, they will certainly look to other states for help; and in that regard only should cognizance be had of what other courts are doing. The similarity between the specific state's statutory scheme and that of the state looked to for guidance should dictate the weight to be given to liberal constructions. Strict adherence to plain and commonly understood meanings is still a basic law of contracts, barring ambiguity, and resulting unfortunate hardship, notwithstanding.