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Uninsured Motorist Coverage

Henry A. Hentemann*

The clamor of sociologists for the protection of the innocent victim,¹ the threat of legislatures to enact compulsory insurance laws,² and the fear of insurance companies that they would be forced to underwrite the undesirable risk all have contributed to the evolution of an insurance coverage geared to protect against the irresponsible uninsured motorist.³

The problem of the uninsured motorist and the uncompensated destruction he often leaves in his wake has long been a matter of public concern. Some states have enacted laws to provide compensation for damages caused by an uninsured motorist by the formation of state-operated⁴ or industry-operated funds.⁵ The rights and procedural rules for presenting claims against these funds are guided by the respective state statutes. When the insurance industry began to write uninsured motorist coverage,⁶ other states enacted laws making it mandatory that all contracting for automobile liability insurance in that state

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² Moser, the Uninsured Motorist Endorsement, 406 Ins. L. J. 719 (Nov. 1956); Denny, Uninsured Motorists and the Virginia Court, 48 Va. L. R. 1177 (1962); Court, Virginia’s Experience with the “Uninsured Motorist,” 3 W. & M. L. R. 237 (1962).

³ This particular insurance is usually called Family Protection Coverage.

⁴ New Jersey (1952), North Dakota (1957), and Maryland (1957) have created Unsatisfied Judgment Funds.

⁵ New York enacted the Motor Vehicle Accident Indemnification Corporation Law in 1958 which created a non-stock corporation. All the companies writing automobile liability insurance in that state were made members and operated the corporation. Virginia established the Uninsured Motorist fund in 1958 and all claims are distributed among the automobile liability carriers in proportion to the number of policies written. See, supra, n. 2.

⁶ The first form of this coverage was introduced in January 1954 and was only payable after the insured reduced his claim against the uninsured to judgment. Some judgments by default were not collectible. In October 1955 carriers in New York offered two forms of coverage. In December 1956 the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau made available an Uninsured Motorist Endorsement to the family automobile policyholder and afforded protection when an occupant of a vehicle and also when a pedestrian. Rice, Uninsured Motorist Ins.; California’s latest answer to the problem of the financially irresponsible motorist, 48 Cal. L. Rev. 516 (1960).
were also to be provided with coverage against the uninsured motorist.\(^7\) The remaining states have no remedial laws pertaining to an unsatisfied claim caused by an uninsured motorist, and the subscription of insurance coverage against such a loss is left to the volition of the individual.

This article is concerned with the insurance contract that provides this unique coverage and the legal problems that surround some of its major provisions. Many of these, however, are not yet fully resolved. This is due to the relatively early stage of its development and to the fact that existing decisions are too few and too fragmentary to permit a statement of controlling rules or principles.\(^8\) Nevertheless, the problems will be posed and the principles of law and the cases will be explored. The article will concern itself with the right of subrogation, the arbitration clause and the applicable statute of limitations.

In view of the contractual nature of the insurance contract and the large number of companies writing this coverage, many policies will have clauses that differ slightly from others; but the general principles are the same.

All compensations available under the uninsured motorist coverage are limited to "bodily injury" sustained and the maximum recovery is the minimum limits required by the financial responsibility laws of the state.\(^9\) By virtue of \textit{lex loci contractus}\(^10\) this will be the minimum limits for the state in which the contract is made. Virginia has also statutorily allowed the recovery of property damage above a $200 deductible.\(^11\) The usual agreement that the insurance company makes with the insured is to pay:

\begin{quote}
All sums which the insured or his legal representative\(^12\) shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily in-
\end{quote}

\(^7\) New Hampshire (1957), Virginia (1958), New York (1958), California (1957), and Louisiana (effective October 1, 1962).

\(^8\) Annot., 79 A. L. R. 2d 1252.

\(^9\) The Uninsured Motorist Coverage did not provide coverage of policy limit on each of two uninsured automobiles which simultaneously struck the insured motorist, but was limited to aggregate payment of policy limit. State Farm Mutual Auto. Ins. Co. v. Drewry, 191 F. Supp. 852 (D. C. Va. 1961). See also, supra, n. 2.


\(^12\) Allstate Insurance Company does not include the words "or his legal representative" in their Crusader Policy.
jury, sickness or disease, including death resulting there-
from, hereinafter called "bodily injury," sustained by the
insured, caused by accident and arising out of the owner-
ship, maintenance or use of such uninsured automobile.\textsuperscript{13}

The import of this insuring clause is that the company agrees to
pay damages to the insured or legal representative for bodily
injury sustained by the insured. The insured is defined within
the same section of the policy as being the named insured and
any relative\textsuperscript{14} or any person while occupying an insured auto-
mobile, and

any person, with respect to damages he is entitled to recover
for care or loss of services because of bodily injury to which
this coverage applies.\textsuperscript{15}

As a condition precedent to recovery under this coverage
by those who fall within the class of insureds is that their bodily
injury be caused by an uninsured automobile. An uninsured
automobile for this purpose is defined to mean:

an automobile 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 with
respect to any person or organization legally responsible for
the use of such automobile.\textsuperscript{16}

The term is also meant to include a trailer of any type and a
"hit-and-run" automobile provided there is compliance with cer-
tain conditions.\textsuperscript{17}

However, when payment is made under this coverage, one
of the first questions for consideration is the right of the insur-
ance company to recover that payment made to the insured for

\textsuperscript{13} Custom-Rite Family Automobile Policy, Aetna Casualty and Surety
Company.

\textsuperscript{14} A relative is defined within the policy to mean a relative of the named
insured who is a resident of the same household.

\textsuperscript{15} Supra, n. 13.

\textsuperscript{16} Ibid.

\textsuperscript{17} There must have been physical contact with the hit-and-run automobile;
the identity of either the operator or the owner of such hit-and-run auto-
mobile cannot be ascertained; the insured or someone on his behalf shall
have reported the accident within 24 hours to a police, peace or judicial
officer or to the commissioner of Motor Vehicles, and shall have filed with
the company within 30 days thereafter a statement under oath that the
insured has a cause of action arising out of such accident for damages
against a person or persons whose identity is unascertainable, and setting
forth the facts in support thereof; and the automobile the insured was
occupying shall be made available for inspection at the company's request.
Supra, n. 13.
damages caused by a tortiously liable third party, the uninsured motorist.

**Subrogation**

The uninsured motorist coverage contains a provision entitled the Trust Agreement which states that in the event of payment to any person under this coverage:

a. The company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment was made.

b. Such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this part.\(^{18}\)

The provision further states that the party shall do what is proper to secure and shall do nothing after loss to prejudice rights of the company and shall cooperate in every way in their efforts to recover from the uninsured motorist.

Upon settlement with the company and in compliance with the above quoted provision, the insured to whom payment has been made signs a trust agreement. Is the nature of this agreement an assignment of a bodily injury claim or is it a legal subrogation agreement? The jurisdiction in which it is entered into will be of importance in determining the legal enforceability of a personal tort assignment.

A right of action for a purely personal tort, in the absence of a statute granting otherwise, is not subject to assignment.\(^{19}\) The common law does not permit assignments of causes of action to recover for personal injuries.\(^{20}\) One reason given for this is that such actions do not survive at common law. Some jurisdictions have logically concluded therefore that personal injury actions are assignable where statutory provision has been made for the survival of such claims.\(^{21}\) Other courts have made

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\(^{18}\) *Supra*, n. 13.

\(^{19}\) Annot., 40 A. L. R. 2d 501.

\(^{20}\) *Id.* at 502.

\(^{21}\) *Id.* at 508, Iowa, Kentucky, Michigan, Mississippi, New Hampshire, South Carolina, Texas, Wisconsin.
a distinction between assignment of the right to recover and the right to the recovery\textsuperscript{22} notwithstanding that the cause of action could not be assigned.

In the case of \textit{Pittsburgh, C., C., & St. L. Ry. Co. v. Volkert et al.},\textsuperscript{23} co-defendant Quatkemeyer made an assignment after judgment to his attorney, Muller, of one half interest in that judgment for legal services rendered and to be rendered in his action against the plaintiffs for personal injuries. Muller then further assigned it to defendant Volkert. The plaintiff contended that this was a partial assignment without consent of the debtor and an unenforceable assignment not recognized at law. The court stated that the question was not whether such an assignment can be recognized and enforced at law, but whether it can be made the basis of a proceeding in equity. Speaking of the assignment itself, the court stated that in equity it amounted to an assignment of the debt and would be enforced in equity, although the debtor had not assented thereto, and the same would apply to the case of an assignment of part of a debt. In each case, a trust would be created in favor of the equitable assignee of the fund and would constitute an equitable lien upon it. The court further stated that some authorities deem such a transfer to create an interest in the fund in the nature of an equitable property; others have denominated it an equitable assignment. But, whatever term is used to describe it, the result reached is to give to the assignee a property right in the thing assigned which is cognizable by and enforceable in a court of equity.

This case allows and renders enforceable in equity an assignment of a part of a recovery after such recovery is obtained but gives no right to the assignee to bring an action at law against the tort-feasor alone.\textsuperscript{24}

The assignment of the right itself and rendering the assignee a party to the action against the tort-feasor has been considered in a malicious prosecution action in the case of \textit{State ex rel. Crow v. Weygandt}\textsuperscript{25} where Mr. Crow sought to be made a party to the case on the ground that he had acquired a financial interest in the cause by an assignment by the original party plaintiff.

\textsuperscript{22} Id. at 512, Arizona, California, Massachusetts, New Jersey, New York, Ohio.
\textsuperscript{23} 58 Ohio St. 362, 50 N. E. 924 (1898).
\textsuperscript{24} See Pennsylvania Co. v. Thatcher, 78 Ohio St. 175, 85 N. E. 55 (1908).
\textsuperscript{25} 170 Ohio St. 81, 162 N. E. 2d 845 (1959).
In that case the Ohio Supreme Court held that the action for malicious prosecution does not survive and such cause of action, therefore, cannot be assigned. In *Goings v. Black*\(^{26}\) the court was confronted with a similar situation but this time involving an assignment of a personal injury action which did survive by virtue of a statute. The assignment was made to a disbarred attorney who attempted to circumvent the disbarment by virtue of the assignment. He contended it was enforceable because of the survivorship provision in the statute claiming that he, therefore, acquired a financial interest and could be a party to the case. The Common Pleas Court stated that the Ohio decisions uphold contingent fees of attorneys in tort litigation not as assignments in law as "parties" but merely as equitable assignments which cannot be enforced in a suit at law at the instance of the assignee alone against the tort-feasor. As to one whose rights to practice law have been terminated, such an assignment is obviously against public policy and unenforceable. This decision was affirmed on appeal.\(^{27}\)

It seems that the Ohio courts tend to disapprove of an assignment of the right of action itself, although the state Supreme Court in *State ex rel. Crow*\(^{28}\) made its ruling on the fact that malicious prosecution did not survive. The logical implication seems to be that if the action did survive, the assignment of the cause of action would be enforceable. Also, both cases dealt with a disbarred attorney who took such an assignment. The question now is: if the Ohio courts were to hold the trust agreement entered into upon settlement of a claim under the uninsured motorist coverage to be an assignment, would they allow the company to be a "party" since the cause of action assigned is one that survives. This has not been determined, but the tendency seems against such a holding. However, by virtue of the decisions that allow an equitable assignment of the recovery, the company should be able to enforce the trust agreement in equity.

The next consideration is the effect the trust agreement will have in a state where any assignment of a personal tort is strictly prohibited. Illinois is such a state. The Illinois Appellate Court was recently called upon to decide that very question with respect to the trust agreement signed upon settlement of an unins-
sured motorist claim. In the case of Remsen v. Midway Liquors Inc. and Employers Mutual Liability Insurance Company, the uninsured tort-feasor was intoxicated. Settlement was made with the insurance company under the uninsured motorist coverage, and a release and trust agreement was signed. Under the Dram Shop laws of Illinois the injured party was allowed to bring an action against the taverns that served the intoxicated driver. Such an action was initiated in this case. The insurance company joins in the action as an intervener by virtue of the trust agreement and claims a right to recover the amount they paid from any recovery the insured might get. The contention was made by the insured that the trust agreement was in its nature an assignment of a personal injury tort which is prohibited in the State of Illinois. The court in this case, however, ruled otherwise and held the agreement to be a legal subrogation. The reasoning followed by the court was that the word assignment has a comprehensive meaning, and in its most general sense, is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of an estate or right therein. Subrogation, however, is founded on principles of justice and equity, and its operation is governed by principles of equity. It rests on the principle that substantial justice should be attained regardless of form; that is, its basis is the doing of complete, essential and perfect justice between the parties without regard to form.

As a general rule, any person, who, pursuant to a legal obligation to do so, has paid, even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter, persons standing in the place of the wrongdoer, or others who are primarily responsible for the wrong or default.

The Illinois court also pointed out that in the case of New York Casualty Company v. Sinclair Refining Company it was stated that the doctrines of subrogation and a constructive trust are analogous. The creditor is regarded as holding his claim against the principal debtor and his securities, therefore, in trust for the subrogee.

30 83 C. J. S. 616.
An interesting analogy lies in the nature of assignments of personal tort and fraud claims. Both of these are prohibited in law and equity by some states as being contrary to public policy. However, in Shawmut Bank of Boston v. Johnson\(^{32}\) a claim was made by the insured under a policy of forgery insurance. The company paid thereunder and in consideration of the payment the insured executed and delivered a loan receipt for the amount paid. The receipt provided that the loan was repayable only to the extent of any net recovery that the insured might obtain. The court concluded that the instrument in question was not an assignment of the fraud claim.

In the Remsen Case\(^ {33}\) the court also went on to state that the doctrine of subrogation has been steadily expanding; it is a favorite of the law and has been nurtured and encouraged. It is broad enough as now applied to include every instance in which one person not acting as a mere volunteer or intruder pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.

In Kirouac v. Healey\(^ {34}\) a New Hampshire court, although not deciding the issue of subrogation, discussed the uninsured motorist policy and stated that it is not a contract to indemnify the third party uninsured motorist against liability since the contract is not for his benefit. The uninsured motorist's liability will be unaffected by any payment made by the insurer, who will then be subrogated to the insured's rights against the tort-feasor.

**Arbitration**

Probably the most debated clause in the uninsured motorist coverage and the phase that has received the most litigation is the arbitration clause. A standard clause is as follows:

> If any person making claim hereunder and the Company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the Insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand of either, the matter or matters upon which such person and the Company do not agree shall be settled by arbitration.\(^ {35}\)


\(^{33}\) Supra, n. 29.

\(^{34}\) 181 A. 2d 634 (N. H. Sup. Ct. 1962).

\(^{35}\) Supra, n. 13.
The cases, however, that consider the enforceability of the arbitration clause are usually precipitated by violations or non-compliance with two other provisions applicable to this coverage. One is an exclusion which states that this coverage does not apply if:

Any person entitled to payment under this coverage shall, without written consent of the Company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor.36

The other is a condition that states that no action shall be against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the policy.

The exclusion and condition are related to this topic, for compliance therewith leaves no alternative but to arbitrate, and non-compliance with the exclusion or the arbitration clause would seem to render the coverage void because of the condition.

The legal questions that now arise are many. Is this agreement a bargain or contract to relinquish one's rights to resort to the courts? Is the question of liability a proper subject to be determined by an arbitration committee? Is it against public policy and unenforceable because it is a stipulation depriving the courts of jurisdiction as to future controversies? Does it deprive the insured of his right to have his disputes resolved by due process of law? Is it an illegal limitation on the enforcement of the right of action that the insured has? Further, does the insistence upon the use of arbitration have the effect of denying the insured any payment and, therefore, relieve him of any further duty to comply with the terms of the policy?

The court decisions on this clause are varied and numerous. Some have declared it to be valid, irrevocable and enforceable and others have declared it void, unconstitutional and against public policy. The court decisions, however, are usually in direct relationship to the statutory authority, or lack thereof, sanctioning arbitration agreements.

Probably the most often quoted negative approach to the subject for states that have no statutes on arbitration is the Oklahoma case of Boughton v. Farmers Insurance Exchange.37 The plaintiff in that case did not submit to arbitration a claim

36 Ibid.
under the uninsured motorist's coverage but sued the motorist without the consent of the company. The plaintiff obtained a judgment and then sued on the policy. The company contended that no action should be taken against the insurer except upon compliance with all policy terms as a condition precedent which the plaintiff failed to perform. The court pointed out that Oklahoma had no arbitration statute and common law governed. The court held that the arbitration clause was contrary to public policy and unenforceable because it was a stipulation depriving the courts of jurisdiction as to future controversies, and that the clause which stated that no action could be brought against the uninsured without the consent of the company was void under a statute which nullified agreements restricting parties from enforcing contractual rights by the usual legal proceedings and ordinary tribunals. In answer to the defendant's contention that the policy was voided because there was not compliance with all the terms of the policy, the court stated that the essential part of the contract for which consideration was paid was insurance protecting against uninsured motorists, not a method for determining liability. Those clauses were held to be void and unenforceable.

In the case of Childs v. Allstate Insurance Company the Supreme Court of South Carolina stated that the arbitration clause of the uninsured motorist coverage was unenforceable under the decisions of that state. The defendant cited many New York cases, but the South Carolina court distinguished them on the grounds that New York upheld the agreement under its Civil Practice Act of which South Carolina had no counterpart. Such an agreement is upheld in South Carolina when it provides for arbitration of the amount of loss but not when it undertakes to require arbitration of the question of liability. Matthews v. Allstate Insurance Company in a Virginia court stated that a statute of that state specifically nullified the effectiveness of the arbitration provision of the uninsured motorist policy.

These are a few examples of how states without statutory authority might consider and treat the arbitration clause of the uninsured motorist provision. However, the majority of states have general arbitration statutes and litigation on the subject. The laws vary to the degree that some would seem not to allow

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arbitration of future controversies\textsuperscript{40} while others would; \textsuperscript{41} some consider the agreement irrevocable\textsuperscript{42} and others revocable until submitted to the arbitrators.\textsuperscript{43} Just exactly how these states would consider the arbitration clause of the uninsured motorist coverage cannot be categorically stated, but it would seem reasonable to assume that if statutory sanctions were given to agreements to arbitrate future controversies, they would also uphold the policy provision.

In \textit{Kirouac v. Healey}\textsuperscript{44} the New Hampshire Supreme Court considered by way of dictum whether the insured who obtained a judgment against the uninsured with the consent of the company could then sue the company for the judgment obtained. The court considered that the arbitration provisions of the policy were a voluntary waiver of the plaintiff's right to a jury trial against the insurer, that arbitration agreements are made valid in that jurisdiction, that it was a voluntary agreement, and that the plaintiff should be bound by the agreement to arbitrate even after judgment was obtained with the consent of the company. The judgment would merely establish the fact that he was legally entitled to recover from the uninsured.

Chief Judge Conway of the New York Court of Appeals stated, in an opinion\textsuperscript{45} relating to the general arbitration statute of that state, that before the adoption of that law in 1920

A party might disregard his agreement to arbitrate all disputes under a contract, for such agreements were held to be attempts to 'oust a court of law or equity jurisdiction,' and there was no effective means to enforce them. It was only through acts of legislature that these difficulties were removed. The legislature has provided a means of enforcing that which was previously unenforceable. (The parties) must use those means or none at all.

In the \textit{Matter of Spectrum Fabrics Corporation}\textsuperscript{46} the New York court said the fact is that an agreement to arbitrate, as


\textsuperscript{42} Ibid.

\textsuperscript{43} McLaughlin, \textit{supra}, n. 40, Del., Md.

\textsuperscript{44} \textit{Ibid.}

\textsuperscript{45} McLaughlin, \textit{supra}, n. 40, Del., Md.


authorized by statute, is a contractual method for settling disputes in which the parties create their own forums, pick their own judges, waive all but limited rights of review or appeal, dispense with the rules of evidence, and leave the issues to be determined in accordance with the sense of justice and equity that they believe reposes in the breasts and minds of their self-chosen judges. This case has been quoted in cases considering the arbitration clause in the uninsured motorist coverage.47

New York, by virtue of the Civil Practice Act of that state, has recognized and enforced the arbitration clause of the uninsured motorist policy. This state has been a forerunner in this field of insurance and has the majority of the cases on the subject. Of all the disputes that may arise under the uninsured motorist coverage, which are to be considered proper subjects for arbitration? This question has resulted in various decisions.

There have been cases that held the scope of the arbitration clause did not extend to questions of coverage or whether the automobile causing the damage was one that qualified as "uninsured" within the meaning of the policy.48 These were held to be questions that should be determined in a court of law before proceeding further. The case most referred to under this theory is the Application of Phoenix Assurance Company49 which stated that the arbitration clause under the uninsured motorist coverage was limited only to the issue of negligence and the resulting question of damages.

The courts that follow this line of cases predicate their arguments on a strict interpretation of the wording in the agreement. They hold that the phraseology of the policy is such that the fact that the damages arose from an "uninsured" motorist is a condition precedent and should be litigated or proven before the arbitration of his legal right to recover from such uninsured motorist is begun. However, their view is determined by an interpretation of the words used in the provision which has also been subjected to another interpretation.

In other cases the courts have given a broad scope to the clause and have considered the question of whether the automobile is insured or uninsured to be a proper matter for consideration in the arbitration proceeding.

48 Supra, n. 8.
In the *Application of Travelers Indemnity Company*\(^5^0\) it was held that the ambiguity should be resolved against the insurer which prepared it and that the arbitration clause encompassed a dispute as to whether the automobile was insured or uninsured under the terms of the contract. Later in *Application of Zurich Insurance Company*\(^5^1\) the court gave greater scope to the arbitration clause of the uninsured motorist coverage by stating that the provision was not limited to the issue of negligence and resulting question of damages, but may extend to other questions of law and fact pertaining to the eligibility of the insured to recover.

Both views co-exist in New York, and the only anticipation of a ruling seems to depend upon which appellate division is to determine the case. However, there are two recent cases\(^5^2\) decided in the lower courts in the past several months which have held the clause to have the narrower scope of only determining negligence and damages.

**Statute of Limitations**

Another problem presented by the uninsured motorist coverage is the effect that various statutes of limitations might have. Is the provision to be governed by the tort statute of limitation that would be effective in an action against the uninsured motorist, or is it to be governed by the statute of limitations applicable to an action on a written contract?

The policy states that the company agrees to pay:

All sums which the insured or his legal representative shall be legally entitled to recover as damages.\(^5^3\)

The answer seems to lie in the interpretation and efficacy a court will give to the phrase "legally entitled to recover."

One accepted interpretation of the phrase is that the company can set up any liability defense that the uninsured motorist could have against the insured. The question is whether this is to be limited to a liability defense based on the merits or will it extend to personal defenses such as the statute of limitations?

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\(^5^0\) 26 Misc. 2d 513, 205 N. Y. S. 2d 741 (1960).


\(^5^3\) *Supra*, n. 13.
What is the nature of any action taken to collect under this coverage—is it tort or contract?

In the case of Andrianos v. Community Traction Company\(^\text{54}\) the plaintiff, a fare paying passenger on the defendant’s bus, sustained bodily injury when, through the negligence of the operator-employee, the bus was driven into a pillar of a viaduct. The action was brought after the two year statute of limitations applicable to bodily injury claims had run. A demurrer was sustained. The plaintiff then brought the action on contract under the theory of breach of implied warranty which had a six year statute of limitations that had not yet run. The court stated that the statute which provides that an action for bodily injury shall be within two years governs all actions the real purpose of which is to recover damages for injury to the person and losses incident thereto. It makes no difference whether such action is for a breach of contract or strictly in tort.

There are many cases such as this, especially arising out of the doctor-patient relationship where the patient brings an action for injuries after the statute has run and bases his claim on implied contract. All of these have been held to “sound in tort,” and the statute of limitations applicable to the specific tort is held governing. However, these cases can be distinguished from an action brought on this insuring contract. In the cases just referred to, there exists a double liability exposure in both tort and contract on the same liable party. The only relation the insurance provision has to tort is that the insured must sustain injuries caused by an uninsured tort-feasor before he has a right to collect under the contract with the company.

The Andrianos case was distinguished in R & H Cartage Company v. Fought\(^\text{55}\) wherein the plaintiff was subrogated to a debt paid on behalf of Mid-America Highway Express Inc. The defendant had a lease agreement with Mid-America and agreed therein to pay for losses Mid-America sustained by defendant’s negligence in hauling for Mid-America. A&P Tea Company, a consignee of Mid-America, sued Mid-America for loss sustained by defendant’s delay in delivery. The plaintiff paid the loss for Mid-America and then sued the defendants after the two year statute of limitations for recovery of damages to personal property. The Ohio Appellate Court held that the action is brought

\(^{54}\) 155 Ohio St. 47, 97 N. E. 2d 549 (1951).

\(^{55}\) 111 Ohio App. 230, 171 N. E. 2d 549 (1951).
for damages for breach of a contract of indemnity, the cause of which would not arise until the refusal of the defendants to comply on demand under the terms of its contract with Mid-America.

The analogy of the *R & H Cartage Company* case to an uninsured motorist coverage seems shockingly close by virtue of the fact that therein exists a written contract to pay for tort losses, and the court held that the contract statute of limitations controlled, which did not go into effect until a demand was made on the contract. However, the distinguishing factor is again the fact that the defendant had both a tort and contract liability exposure.

A further point of consideration is that disputes as to whether the insured is legally entitled to damages and the amount of such are to be resolved in arbitration. The next question, therefore, is whether such personal defenses are available to the company in arbitration.

The *Remsen* case in Illinois indicated that liability defenses are available to the company when it dismissed the plaintiff’s contention that the uninsured motorist coverage, medical payments and disability income coverage were all of a kind. The court said they were not since uninsured motorist coverage was only collectible if the insured were legally entitled to collect from the tort-feasor. All the New York cases agree that negligence defenses were available and were considered properly arbitrable issues. However, as was pointed out above, there are a few jurisdictions in that state that follow the holding of the *Zurich* case and give such broad scope to the arbitration clause that it would be conceivable for the statute of limitations to be allowed as a defense to the company or as grounds for a stay of arbitration. The unpredictable question is whether the court will follow the broad or narrow viewpoint.

Another consideration is the right of subrogation that the company has against the uninsured motorist upon settlement of his claim with the insured. If the insured brought his action after the statute of limitations had lapsed on his claim against the uninsured, the company, being subrogated only to the rights the insured had, would be deprived of its right to collect from the uninsured motorist in subrogation.

56 *Supra*, n. 29.
57 *Supra*, n. 51.
In the Application of Ceccarelli\textsuperscript{58} a lower court of New York had to decide the question of which statute of limitations was applicable. The petitioner had previously made a claim against Travelers Insurance Company under their uninsured motorist coverage but did not make a demand for arbitration until the tort statute of limitation had lapsed. The court ruling was in behalf of an application filed to compel the company to arbitrate. The company contended that since no demand for arbitration was made until after the tort statute had lapsed, the motion to compel must be denied. The court, however, stated that the petitioner's claim against the respondents is based not upon tort but upon the insurance contract, although a tortious act of a third party gives rise to the rights under the contract. Since the claim is made on contract, the tort statute of limitations did not apply.

In Application of Travelers Indemnity Company\textsuperscript{59} the petitioner seeks a stay of arbitration proceedings on the ground of estoppel for failing to comply with an alleged condition precedent in the uninsured motorist contract. The company contends that since the respondent did not institute an action against the uninsured within the statutory time limit, he failed to protect the company's rights as a possible subrogee under the trust agreement contained in the policy, and that the defense of the statute of limitations which the uninsured had was available to the company. A claim was made against the company within the time period set for tort actions, but the demand for arbitration was not made until eight months after that statute had lapsed. As to the applicable statute of limitations, the court stated that the company's contention that they had become the insurers of the uninsured motorist is but a conclusion without support. The phrase "legally entitled to recover as damages" does not mean legal liability for damages as determined by a court of law in an action brought by the insured against the uninsured motorist. The contract between the company and the insured specified the manner of making such determination; namely, by agreement or, if that failed, by arbitration. The court on this point also cited the Phoenix\textsuperscript{60} case and stated that only matters

\textsuperscript{58} 204 N. Y. S. 2d 550 (N. Y. Sup. Ct. 1960).
\textsuperscript{60} \textit{Supra}, n. 49.
of negligence, contributory negligence and damages could be used by the company since these were all matters of substantive law and legal defenses of the uninsured and that there was no contract provision that the company succeeded to the uninsured motorist's procedural defenses such as the statute of limitations.

As to company's contention that their subrogation rights were defeated by the insured's failure to demand arbitration on time and his failure to institute an action against the uninsured to protect such interests, the court stated that it was based on a faulty premise that the company's obligation was no greater than that of the uninsured motorist. The court stated that the obligations of the company and of the uninsured are not co-extensive. While the limits of the uninsured's obligation are fixed by law, the extent of the insurance company's obligation is fixed by contract. The company's obligations are inclusive of the uninsured's legal liability, but they extend by contract beyond that area. The company is required under the agreement to make a determination of respondent's claim by negotiation. Absent a settlement, the company is obliged by contract to submit to a determination by arbitration.

The court also found that there was no obligation in the contract requiring the insured to institute an action against the uninsured to protect their possible subrogation rights and that the company had no such rights under the trust agreement until the company was obliged to pay the insured. Another element the court made a point of was the fact that the insured notified the company of the claim before the tort statute had lapsed permitting the company to make payment and protect its rights of subrogation by whatever action necessary.

Both of the New York cases cited above are lower court decisions, and both seem to narrowly construe the defenses available to the company. An interesting factor that exists in each case is that the company was notified of an uninsured motorist claim before the tort statute of limitations had lapsed. The fact that the company had time to protect their subrogation interest was specifically noted and persuasive in the court's decision. How they would have ruled if the first notification of such claim had been made to the company after the statute had lapsed is difficult to anticipate.

Another element which is given much consideration is the arbitration clause existing in each policy and which is recog-
nized and enforced in New York. As was pointed out above, however, not all states recognize such clauses. In such a situation it is obvious how the tort statute would have to apply since the action must be brought against the uninsured to establish the right to collect under the coverage.

Virginia makes the uninsured motorist endorsement a mandatory feature of every liability policy issued in that state.\textsuperscript{61} The statute which makes this the law nullifies the arbitration clause and also empowers the insured to sue John Doe in the event the tortfeasor is unknown. It is required that before the insured is entitled to recover under the endorsement, if the tortfeasor is unknown, a written report should be made to the Bureau of Motor Vehicles within five days after the accident unless it can be shown that the insured was reasonably unable to do so. In \textit{Doe v. Brown}\textsuperscript{62} the plaintiff failed to make such notice to the state within the five day period and further failed to show that he was reasonably unable to do so. The insurance company, having statutory authority to represent John Doe in this situation, contended that the time requirement was in effect a statute of limitations contained within the contract, which had lapsed. The company demurred to the action. The Virginia court stated that this is not an action arising \textit{ex contractu} to recover against the insurance company on its endorsement. The insurance company is not a named party defendant and judgment cannot be entered against it in this action. This was considered an action \textit{ex delicto} since the cause of action arises out of a tort, and the only issues presented are the establishment of legal liability on the unknown uninsured motorist, John Doe, and the fixing of damages if any.

In consideration of the cases existing on the subject, it seems that the statute of limitations on a claim under the uninsured motorist coverage would depend upon the efficacy the state gives to the arbitration clause of the policy. In view of the stand the New York courts have taken and the rationale behind their decision, it would seem that a state that upholds the arbitration clause might tend to consider the contract statute of limitations as applicable. However, this cannot be categorically stated in view of the early stage of legal development and the fact that

\textsuperscript{61} \textit{Supra}, n. 11. \\
\textsuperscript{62} 203 Va. 508, 125 S. E. 2d 159 (1962).
there still exists a school of thought expressed in the *Zurich*\textsuperscript{63} case that the arbitration clause is to be given broad scope.

There is another point worthy of consideration under this section. It is generally accepted that the statute of limitations is a personal defense and part of procedural law. Further, it generally eliminates the remedy and not the right. However, the exception to this is in actions that did not exist at common law but which have been created by statute. When the statute of limitations passes as to these actions, not only the remedy but the right itself terminates. This is true of such actions as wrongful death and survivorship. The question then arises as to what effect these statutes of limitations will have upon a claim for such under the uninsured motorist coverage. It seems reasonable to state that under whatever view the courts take as to the scope of the arbitration clause, these claims would be precluded after the statute of limitations applicable thereto had lapsed. The *Travelers*\textsuperscript{64} case cited above, granting a narrow view to arbitration, stated that only non-negligence, contributory negligence and damages were arbitrable and could be used by the company since they were all matters of substantive law and legal defenses of the uninsured. The statute of limitations as to statute created actions has substantive force and is an absolute defense of the uninsured. In these actions the statute of limitations becomes a matter of substantive and not merely procedural law and is likely to be a defense available to the company.

**Conclusion**

It is obvious from what has been said that no conclusive or categorical statement can readily be made as to how a court will decide a particular dispute under this coverage. Some of the approaches the courts have taken have been set forth. The coverage is in a relative early stage of its development, but the more litigation it is exposed to, the clearer the questionable areas may become, allowing more forceful and reliable rules to be established.

At the present, however, in spite of the scarcity of cases, there seems to be a movement toward a strict interpretation of the arbitration clause, granting a narrow scope to its field of operation. As for the other phases, the best that can be done is to watch and wait.

\textsuperscript{63} *Supra*, n. 51.

\textsuperscript{64} *Supra*, n. 59.