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COMMENTS

INSURANCE—UNINSURED MOTORIST ENDORSEMENT: JUDICIAL INTERPRETATION

Since the time the automobile began to revolutionize the American scene, legislators, insurance companies, law enforcement agencies and private citizens have been concerned with the problems generated by the uninsured motorist. One problem which caused particular concern was the financially irresponsible motorist—the driver who injured his innocent victim and was impervious to civil punishment, because he was uninsured and satisfaction proof.

The current, and indeed it appears, best solution to this problem is to be found in the uninsured motorist endorsement to the standard automobile insurance policy, by which the insurance industry faced, and has apparently successfully stemmed the clamor in the legislative halls across the country for an answer to this problem. This comment will explain the insurance agreement, how it works and trace the few existing decisions on the points raised.

The standard uninsured motorist endorsement consists of an insuring agreement, exclusions, limits of liability, provisions for other insurance, arbitration, a trust agreement and applicable sections of the conditions to the policy. The insuring agreement is:

to pay all sums which the insured . . . shall be legally entitled to recover as damages from the operator of an uninsured automobile because of bodily injury . . . caused by accident . . . provided determination as to whether insured . . . is legally entitled to recover such damages . . . shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration.¹

The endorsement is ineffective when the insured, without the written consent of the company, makes any settlement with or prosecutes to judgment any action against any person who may be legally liable.² The limit of liability in most policies conforms to the limit of liability of the

¹ The clause is taken from the United Services Automobile Association's Family Automobile Policy, Part IV, "Protection Against Uninsured Motorists," *Coverage J—UNINSURED MOTORISTS*, Form No. 401-A-1; NW (5-1-58 Rev. 1-1-60) Rev. 5-61-307M. USAA is a reciprocal insurance association with home offices located at USAA Building, 4119 Broadway, San Antonio 15, Texas. The policy will be hereinafter cited as USAA policy.

² USAA Policy, Part IV, *Coverage J*, Exclusions (b).

financial responsibility laws where the coverage is written,³ but some of the more recent policies have higher limits and the extent of liability conforms to the amounts stated in the policy.⁴

Perhaps the most widely debated and discussed provision in the whole uninsured motorist endorsement is the arbitration section. By its terms, should a claimant and/or the company disagree on either the question of tortfeasor's liability or the amount of damages, then on written demand of either party, the disputed matters are to be settled by arbitration in accord with the rules of the American Arbitration Association, and judgment on the award may be entered in any court of competent jurisdiction.⁵

In some jurisdictions however, arbitration agreements are contrary to the local law. Thus in Arkansas,⁶ Florida,⁷ Illinois,⁸ Kentucky,⁹ Oklahoma,¹⁰ and Utah¹¹ it is held that agreements to arbitrate future disputes are void and violate public policy. As a result it would appear that in these jurisdictions, the insured would have the option of accepting the award or disregarding the arbitration clause and suing the insurer.

Suppose an accident happens. When the loss occurs it seems a bit unrealistic to maintain that the happy relation of insurer and insured remains the same as prior to the loss, because their relationship after the accident is tantamount to that of the insurer dealing with a victim claiming under a bodily injury provision.¹² Indeed for the insured to recover under the endorsement, he must convince the company that: "(1) he is legally entitled to recover damages (2) from the owner or operator of an uninsured automobile (3) because of bodily injury (4) caused by accident, and (5) arising out of the ownership, maintenance or use of such uninsured automobile."¹³

³ Cheek, ABA SECTION OF INSURANCE, NEGLIGENCE & COMPENSATION LAW, *Recovery Procedure Under the Uninsured Motorist Coverage of Family Liability Policy*, 281 (1960).

⁴ USAA Policy, Part IV, *Coverage J, LIMITS OF LIABILITY* (a).

⁵ USAA Policy, Part IV, *Coverage J, ARBITRATION*.

⁶ *Miller v. American Ins. Co.*, 124 F. S. 160 (W.D. Ark. 1954); *Papan v. Resolute Ins. Co.*, 219 Ark. 907, 245 S.W. 2d 565 (1952).

⁷ *Flaherty v. Metal Products Corp.*, 83 So. 2d 9 (Fla. 1955).

⁸ *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923).

⁹ *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944); *Ison v. Wright*, 21 Ky. L. Rep. 1362, 55 S.W. 202 (1900).

¹⁰ *Wilson v. Gregg*, 255 P. 2d 517 (Okla. 1952).

¹¹ *Latter v. Holsum Bread Co.*, 108 Utah 364, 160 P. 2d 421 (1945).

¹² *Miller*, *The New "Uninsured Motorist" Endorsement to Family Automobile Policies—The 1960 Look*, 24 INS. COUNSEL J. 134 (1957).

¹³ *Id.* at 136.

The victim, finding the tortfeasor to be uninsured and satisfaction proof, seeks a claim under the endorsement, but the company in good faith resists insured's claim as invalid on grounds of insured's liability or damages. At this point either party could invoke the arbitration provisions except in those jurisdictions where such agreements are void.¹⁴ But in jurisdictions where contracts to arbitrate future disputes are legal, either party may invoke this provision as a condition precedent to recovery. If the adverse party fails to appear the complainant can get an award and sue the other, using the award and defendant's refusal to appear at the arbitration proceeding as evidence in the suit. If the defendant tries to make the arbitration provision a bar to the plaintiff's suit, it is void.¹⁵

In those jurisdictions where contracts to arbitrate future disputes are void it has been suggested that the remedy, if the insurance company will consent, is to sue the uninsured if known. If unknown then "John Doe" and the clerk of the court should be served with a motion for judgment and the company notified of the suit as if it were a party defendant.¹⁶ In explaining the purpose of notifying the company, Mr. Cheek states:

If the company had the right under the liability feature of the policy to appear for and on behalf of its insured in case of litigation, then the company required the notice to be given for the purpose of enabling it to appear in the litigation and to assist by the employment of counsel.¹⁷

Suppose the insurance company will not consent to a suit by the insured against the tortfeasor. Ostensibly, if the insured proceeds, he violates the policy.¹⁸ As the cases discussed below will show, however, the insurer's failure to consent would estop it from pleading the breach as a defense, especially where the company suffers no harm as a result of the suit. As Mr. Cheek describes it: "the test should be whether the insured's suit, brought without the consent of the company, resulted in a 'material prejudice' to the company."¹⁹

The insured in his suit against the tortfeasor must establish the tortfeasor's liability and the amount of damages. A judgment for the insured does not bind the company; however, it may be used as evidence in the insured's suit against the insurer. If the insured must proceed against the company, his proof must consist of the contract, evidence the accident occurred, evidence the tortfeasor was uninsured and the sum of his damages. The judgment would, it seems, be satisfactory proof that the acci-

¹⁴ Arkansas, Florida, Illinois, Kentucky, Oklahoma, and Utah. Cases cited notes 6-11 *supra*.

¹⁵ Merchants & Mfr. Ins. v. Burns, 205 Okla. 31, 234 P. 2d 409 (1951).

¹⁶ Cheek, *supra* n. 3.

¹⁷ *Id.* at 288.

¹⁸ USAA Policy, Part IV, Coverage J, EXCLUSIONS (b).

¹⁹ Cheek, *supra* n. 3 at 289.

dent occurred, and would be *prima facie* evidence on the question of damages.²⁰

It is probably safe to assume that the great majority of cases involving an uninsured motorist are settled in an amicable fashion. Yet the dearth of cases on this matter in no way requires such a conclusion because the insurance is relatively new and the court calendars are comparatively crowded. In most cases however, it would seem that where a claim is made, the insurer, for obvious reasons, would naturally desire to prevent the insured's claim from reaching a jury, whereas the insured might greatly prefer a plaintiff-sympathetic jury to the cold rationality of an arbitration panel. The four cases discussed below are apparently the only decisions to date in which the courts have judicially interpreted the arbitration provisions of the uninsured motorist endorsement. In each the possibilities of these notions are at least dimly discernible and in all the cases, plaintiff-insureds have successfully forsaken the arbitration provisions and juries have decided the insurer's liability.

The oldest of these cases is *Boughton v. Farmer's Insurance Exchange*.²¹ Here, plaintiff Boughton was injured in a collision with an allegedly uninsured motorist. Plaintiff filed suit against the tortfeasor, notified the company and offered to let it either prosecute or defend the action, both of which it declined to do. The insurer rightfully demanded arbitration but the plaintiff refused contending she had a right to sue to determine the legal liability of the tortfeasor. Plaintiff was successful in suit against the tortfeasor and in this action seeks to collect from the insurer. The defendant moved to dismiss because it was not bound by the judgment against the tortfeasor and should be permitted to re-litigate the issues of liability and damages. Defendant also contended there was no arbitration as the policy required and that plaintiff had violated the "no action without consent" provision in the policy and that it was, therefore, discharged. The trial court dismissed; plaintiff appealed and the Oklahoma Supreme Court reversed. The court reiterated that under the holding of *Wilson v. Gregg*,²² a contract to arbitrate future disputes is void and contravenes public policy because it deprives insured of a judicial examination of the issues involved. It stated further that since the "no action without consent of the company" clause would restrict insured's legal rights, it was void; and that the

judgment against the uninsured motorist determined that plaintiff was entitled to recover . . . and established the amount. . . . Exchange cannot now say . . . that it is entitled to re-litigate these issues when it agreed to pay that which has already been determined. We therefore conclude that the question of damages

²⁰ *Ibid.*

²¹ 354 P. 2d 1085 (Okla. 1960).

²² 255 P. 2d 517 (Okla. 1952).

and legal liability of the uninsured motorist may not be re-litigated in the present action. . . .²³

Having surrendered its opportunity to defend or at least, appear in plaintiff's action, the Oklahoma court appears to have applied the doctrine of *res judicata* to plaintiff's claim on both the question of liability and damages.

Levy v. American Automobile Ins. Co.,²⁴ decided one year later in Illinois, bears marked resemblance to the *Boughton* case. In both jurisdictions, contracts to arbitrate future disputes are void.²⁵ In the *Boughton* case, either party could invoke the arbitration provision, but in the *Levy* case, only the insured had the option to invoke the clause. *Levy* was driving his car and was struck by a car owned by Smith, but driven by Perkins. When letters sent by plaintiff's attorney to the tortfeasors requesting them to have their insurance companies contact him went unanswered, plaintiff filed suit. Perkins and Smith told plaintiff's attorney they were uninsured and notice was then sent to defendant, insurer, that plaintiff would seek payment under the uninsured motorist provision. Defendant's adjuster asked for, but was denied arbitration by plaintiff, and then claimed plaintiff needed defendant's consent before prosecuting the action to judgment and that permission would be denied without arbitration. Plaintiff then got a default judgment against Perkins and Smith, which included damages for loss of use and repairs to the car. Plaintiff, in the instant litigation, seeks recovery from defendant under the uninsured motorist endorsement. The insurance company's defenses were the same as in the *Boughton* case; that is, violation of the arbitration provision, and violation of the "no action without the company's consent" section. The trial court found for plaintiff and defendant appealed. The Illinois Appellate Court discarded the first defense, reminding defendant of the rule of *Cocalis v. Nazlides*,²⁶ and that the option for arbitration was in insured, not the insurer. It also held that defendant could not wrongfully refuse plaintiff permission to sue without violating an implied condition in the policy, citing *Corbin*²⁷ with approval. Though the rationales differ, the result is, for practical purposes, the same as in the *Boughton* case.

²³ 354 P. 2d 1085, 1090-91.

²⁴ 31 Ill. App. 2d 157, 175 N.E. 2d 607 (1961).

²⁵ *Wilson v. Gregg*, 255 P. 2d 517 (Okla. 1952); *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923).

²⁶ *Cocalis v. Nazlides*, *supra* n. 25.

²⁷ 3A CORBIN, CONTRACTS, § 767: "ELIMINATION OF A CONDITION BY UNJUSTIFIED PREVENTION OF ITS FULFILLMENT One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised."

The court went on, however, and reversed the trial court because of insufficient evidence as to the tortfeasor's non-insurance. Thus the court refused to apply a *res judicata* principle on these facts. At the trial of Perkins and Smith, plaintiff's attorney testified as to their non-insurance, as declarations against financial interest, an exception to the hearsay rule,²⁸ but failed to show that they were unavailable, a necessary prerequisite for it apply in Illinois.²⁹ It appears further that plaintiff made a substantial error in the Smith-Perkins suit by including in his motion for judgment, loss of use and repairs to his car which is obviously not "bodily injury" as the endorsement requires.³⁰

The decision is further complicated by the dissent of Burke, P. J. who held that the uninsured motorist endorsement did not even apply because plaintiffs had clearly violated the "no action without consent" section of the policy. He stated further that it was no violation of public policy that this section and the arbitration provisions present a dilemma with no apparent solution to the insured.³¹ But it is very difficult to see how the insurer can be compelled to permit suit or be sued since in Illinois insured cannot enforce the arbitration provision.

The third decision involving these points was *Childs v. Allstate Ins. Co.*,³² which arose in South Carolina. Plaintiff's insurance company, decided that plaintiff Childs was at fault in a collision with Cunningham and repaired Cunningham's car. Childs notified the company and sued Cunningham for personal injuries received in the collision, recovering a judgment for \$1,500. Defendant, insurer, had not consented to Childs' suit against Cunningham and interposed plaintiff's failure to arbitrate (the policy provided either party could demand arbitration), and failure to obtain insured's consent, as defenses to plaintiff's action. The trial court rendered judgment for plaintiff and insurer appealed. The South Carolina Supreme Court, affirming a judgment for plaintiff, held the arbitration agreement unenforceable as an attempt to arbitrate the question of legal liability, and that plaintiff, after being denied relief without legal basis, could maintain an action at law to recover the damages to which it was entitled under the policy.

It seems that in the absence of any discovery or showing of mistake in plaintiff's action against the tortfeasor, the South Carolina court applied the doctrine of *res judicata* as was applied in the *Boughton* case. The *Childs* case does not discuss whether there was conflicting evidence as to

²⁸ 5 WIGMORE, EVIDENCE § 1460 (3d ed. 1940).

²⁹ *German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N.E. 1075 (1900).

³⁰ USAA Policy, Part IV, *Coverage J*, Uninsured Motorist.

³¹ *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 167, 175 N.E. 2d 607, 612 (1961) (dissenting opinion).

³² 117 S.E. 2d 867 (So. Car. 1961).

tortfeasor's non-insurance but presumably the insurance company would have raised that as a defense in the instant case.

The remaining decision is *Kirouac v. Healey*,³³ decided in New Hampshire in 1962. In this jurisdiction contracts to arbitrate future disputes are valid by statute.³⁴ According to the policy, either party could demand arbitration but it was the sole method by which liability could be established. Plaintiff was injured in a collision with an uninsured motorist and after notice to his insurance company, sued the tortfeasor for damages. The insurance company appeared specially and moved for dismissal on the grounds that on such a claim plaintiff's insurance policy provided for arbitration only. The trial court granted the motion and plaintiff appealed. The New Hampshire Supreme Court held that the insurance company had no standing to interfere with plaintiff's exercise of his right to recover damages against defendant in a jury trial. Noting that the policy did not apply if plaintiff proceeded to judgment without the company's consent, the court pointed up the fact that New Hampshire's statutes³⁵ preserve insured's right to trial by jury; but did not decide the question whether the policy limitation was invalid. Neither did the court decide whether the insurer would be bound by the finding in the suit against the uninsured motorist.

It is still too early to determine what the weight of authority will be in interpreting the uninsured motorist endorsement. It is highly probable that in those jurisdictions where contracts to arbitrate future disputes are void, the line in the *Boughton* and *Levy* cases may be followed: that plaintiff is not bound by violating the arbitration provision in the policy and can sue the tortfeasor without the consent of the insurer and that in the absence of substantial error either raised by the insurer or discovered by the court, the court will apply the principle or *res judicata* both as to the question of legal liability and the amount of damages.

Similarly, in the *Childs* case, the implication in that decision is that the insured need not be bound by the arbitration provision, need not have the company's permission to sue his tortfeasor and in the absence of substantial error, the award against the tortfeasor will settle the questions of the company's liability and damages. It may be significant that in the *Childs* case the court reached this decision without any reference to the *Boughton* case which was the only similar case decided before it. This may be a manifestation of the modern tendency to strictly construe the written contract against the party composing it.

As to those jurisdictions where contracts to settle future disputes by

³³ 181 A. 2d 634 (N.H. 1962).

³⁴ N.H.R.S.A. ch. 542, §§ 1-10 (1955).

³⁵ N.H.R.S.A. ch. 268, § 8 (Supp. 1961).