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UNINSURED MOTORISTS COVERAGE IN INDIANA: A REVIEW AND PROPOSAL FOR CHANGE

INTRODUCTION

Motor vehicle accidents pose one of the most formidable threats to the health and economic security of the American people.¹ The majority of motorists in the United States shift at least a portion of this risk through the acquisition of automobile liability insurance.² There are, however, individuals who neither purchase insurance nor possess sufficient funds to compensate innocent victims for personal injuries sustained as a result of the negligent operation of a motor vehicle.³

In Indiana, approximately one out of every twenty licensed drivers is involved in a motor vehicle accident annually.⁴ When that accident takes place, the chances are one in ten that the driver is struck by, or is himself, an uninsured motorist or a hit-and-run driver.⁵ A conservative projection for 1979 indicates that financially

1. In 1977 motor vehicle accidents were the sixth leading cause of death in the United States, accounting for 47,671 fatalities. It is estimated that the annual direct economic loss resulting from motor vehicle accidents is \$43 billion. NATIONAL HIGHWAY TRAFFIC SAFETY COMMISSION, HIGHWAY SAFETY, 1977: A REPORT OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION 3 (1978).

2. It is estimated that nationwide approximately eighty percent of all motorists possess some form of automobile liability insurance. UNITED STATES DEPARTMENT OF TRANSPORTATION AUTOMOBILE INSURANCE AND COMPENSATION STUDY, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 207 (1970).

3. Estimates of the number of uninsured motorists vary from state to state. For example, in Maryland, New York, and North Carolina, states with compulsory insurance laws, less than ten percent of all motorists are not insured. However, at the extreme, one-third of all vehicles in Alabama, Arkansas, Georgia, and Mississippi are uninsured. In the remaining states the percentage of uninsured motorists is between fifteen and twenty-five percent. BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, (UNITED STATES DEPARTMENT OF TRANSPORTATION STUDY), REPORT OF THE DIVISION OF INDUSTRY ANALYSIS 28-29 (1970).

4. According to statistics maintained by the Indiana Bureau of Motor Vehicles, there were 4,276,266 licensed drivers in Indiana in 1977 and 213,739 reported accidents involving physical damage in excess of \$200. Letter from David R. Nelson, Project Coordinator, Indiana Bureau of Motor Vehicles, to writer (September 26, 1978).

5. The exact number of uninsured motorists in Indiana is impossible to determine from the statistical data maintained by the Bureau of Motor Vehicles. However, based upon the study of the Department of Transportation, note 3 *supra*, a conservative estimate of ten percent would not be unreasonable. Indeed, a rate of fif-

irresponsible motorists in Indiana will in some manner be involved in over 20,000 accidents, resulting in some 120 deaths and 6,500 injuries.⁶

A portion of the great loss occasioned by uninsured motorists is absorbed each year by automobile insurance companies who must meet the provisions and requirements of the Indiana Uninsured Motorists Act.⁷ The Indiana statute requires every insurer authorized to underwrite automobile liability insurance in the state to offer uninsured motorist⁸ coverage. This coverage is issued as a part of the insured's automobile policy and permits the insured, when an innocent victim of an accident caused by an uninsured motorist, to seek compensation from his own company for personal injuries. Unless this coverage is rejected in writing by the insured, it becomes part of every automobile insurance policy issued in Indiana.⁹

The Indiana legislature, like the legislative bodies of thirty-five

teen to twenty percent may be more accurate. See UNITED STATES DEPARTMENT OF TRANSPORTATION AUTOMOBILE INSURANCE AND COMPENSATION STUDY, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 204-05 (1970).

6. These estimates were obtained by dividing the total number of accidents, deaths, and injuries occurring in Indiana in 1977 by ten.

7. The Indiana Uninsured Motorists Act states:

No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death as set forth in Acts 1947, chapter 159, sec. 14 [9-2-1-15], as amended heretofore and hereafter, under policy provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Provided, That the named insured shall have the right to reject such coverage (in writing) and Provided further, That unless the named insured thereafter requests such coverage, in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer.

IND. CODE § 27-7-5-1 (1976).

8. Hereinafter cited as UM.

9. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

other states,¹⁰ enacted a very general statute.¹¹ The language of the act is not explicit and it contains no definitions. There are, however, three limitations which the statute places on coverage available from the insurance carriers. First, the insured must be "legally entitled" to recover from the owner or operator of the uninsured vehicle involved in the accident.¹² Second, the UM coverage extends only to damages resulting from bodily injury, sickness, disease, or death;¹³ the coverage does not pay for property damage caused by the negligence of the uninsured motorist.¹⁴ Finally, the coverage need only be offered in limits prescribed by the Indiana Safety-Responsibility Act.¹⁵ This means that in most instances¹⁶ the insured is protected for losses up to \$15,000 per person and \$30,000 per occurrence.

Taking advantage of the very general statutory language, insurance policy draftsmen have developed a number of provisions that restrict, exclude, or limit UM coverage, in order to reduce the possibility of fraudulent claims and the insurer's exposure to liability risks. Courts have traditionally looked with disfavor upon these attempts to narrow the scope of UM protection. As a result, many limitations have been judicially voided on the basis that they place an unfair burden on the insured or that they conflict with the remedial nature of the UM statutes.¹⁷ In spite of the years of con-

10. See A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 129-30 (1969) [hereinafter cited as WIDISS]. For a complete list of citations to the UM statutes of all fifty states, see Comment, 11 CREIGHTON L. REV. 222, 222-23 n.4 (1977).

11. See note 7 *supra*.

12. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

13. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

14. Only nine states require UM coverage to be extended to include losses for both bodily injury and property damage. See DEL. CODE tit. 18, § 3902 (1974); GA. CODE ANN. § 56-407.1(a) (Supp. 1978); N.M. STAT. ANN. § 64-24-105 (1972); N.C. GEN. STAT. § 20-279.21(b)(3) (1978); S.C. CODE § 46-750.33 (Supp. 1975); TENN. CODE ANN. § 56-1148 (Supp. 1978); TEX. INS. CODE ANN. art. 5.06-1 (Vernon Supp. 1978); VA. CODE § 38.1-381(b) (Supp. 1978); W. VA. CODE § 33-6-31(b) (1975).

15. IND. CODE § 9-2-1-1 *et seq.* (1976). The Indiana Safety-Responsibility Act establishes a mechanism for proving financial responsibility in the event of a motor vehicle accident. Failure to prove the ability to respond in damages for liability, through either personal financial resources or an automobile liability insurance policy, can result in suspension or revocation of the driver's license.

16. The Indiana Safety-Responsibility Act, IND. CODE § 9-2-1-15 (1976), prescribes minimum limits of \$15,000 per person and \$30,000 per accident. As a result, most insurance policies will provide benefits only in these amounts unless otherwise specifically requested by the insured.

17. The courts of many states, including Indiana, have been consistently handicapped in their quest to interpret the legislative intent of the UM statutes.

troversy and the flood of litigation that various restrictive clauses have spawned, state legislatures have for the most part taken no steps to modify or clarify the statutes.¹⁸ At the same time, the state insurance departments, statutorily charged with the responsibility of approving insurance policy forms and coverages, have demonstrated a pronounced reluctance to undertake any reform.¹⁹

The situation in Indiana is particularly bleak. The Indiana legislature has not addressed itself to the UM statute since 1969.²⁰ Further, while the Indiana statute has been judicially interpreted on many occasions, no case has ever reached the Indiana Supreme Court.²¹ Perhaps most disturbing is the fact that the Indiana Department of Insurance has taken no action, despite its authority to do

This is largely due to the paucity of information and documentation revealing the history and purpose of such statutes. As a result, courts have been compelled to resort to their own perception of statutory purpose and have reached their decisions accordingly. A good example of such judicial pronouncements is contained in *Bocek v. Inter-Insurance Exchange*, ___ Ind. App. ___, 369 N.E.2d 1093 (1977): "[I]t must be remembered that the purpose behind uninsured motorist coverage and the statutes which require the same is to afford the same protection to a person injured by the uninsured motorist as he would have enjoyed if the offending motorist had himself carried liability insurance." *Id.* at 1097.

18. There are, of course, exceptions to this general statement. The UM statutes of California, CAL. INS. CODE § 11580.2 (West Supp. 1978), and Georgia, GA. CODE ANN. § 56-407.1 (Supp. 1978), are good examples of statutes that have been continually scrutinized by their respective legislatures. The California act, adopted in 1961, has undergone no fewer than eleven amendments in order to change or clarify its already explicit and detailed language. Similarly, the Georgia statute has been amended nine times in its fifteen year history.

19. Only the Wyoming Department of Insurance has promulgated a comprehensive series of regulations governing UM coverages circulated in that state. WYOMING INSURANCE DEPARTMENT RULES AND REGULATIONS, REGULATION GOVERNING UNINSURED MOTORISTS ENDORSEMENTS, Ch. XXIII (1975). See Smith, *The Wyoming Uninsured Motorist Act: A Regulatory Reconciliation of Mandated Coverages with the Standard Uninsured Motorist Endorsement*, 11 LAND AND WATER L. REV. 213 (1976).

20. In 1969 the Indiana Uninsured Motorists Act was amended by adding provisions regarding "insurers insolvency protection" and "subrogation rights" of the insurer. No further action has since taken place.

21. The following is a complete list of all cases interpreting uninsured motorists coverage in Indiana: *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir. 1978) ("good faith" requirement in UM settlements); *Miller v. Hartford Accident & Indemnity Co.*, 506 F.2d 11 (7th Cir. 1974) (intra-policy stacking of UM coverages); *Trinity Universal Ins. Co. v. Capps*, 506 F.2d 16 (7th Cir. 1974) (intra-policy stacking of UM coverages); *Dunn v. Meridian Mutual Ins. Co.*, Civil No. 71 H 329 (N.D. Ind. November 16, 1972) (intra-policy stacking of UM coverages); *Vantine v. Aetna Casualty & Surety Co.*, 335 F. Supp. 1296 (N.D. Ind. 1971) (owned but uninsured clause); *Simpson v. State Farm Mutual Automobile Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970) (medical payments set-off clause and excess-escape clause); *Rozina v. United*

so.²² This combination of factors results in there being no real definitive statement of policy on UM coverage in Indiana. Meanwhile, insurance policies which contain UM exclusions and limitations that have otherwise been judicially voided continue to be sold and circulated within the state. This situation fosters confusion and controversy between insurance companies and their policyholders.

This note will explain the operative effects of six major policy restrictions most often employed by insurers to limit their liability exposure under the UM coverage. Judicial treatment of these limitations and exclusions, with a special emphasis on the Indiana decisions, will also be scrutinized. It will be seen that while limitations on "owned but uninsured"²³ vehicles and "other insurance"²⁴ have in most instances been judicially voided, these clauses indeed serve

States Fidelity & Guaranty Co., Civil No. 69 H 257 (N.D. Ind. September 15, 1970) (intra-policy stacking of UM coverages); Capps v. Klebs, ___ Ind. App. ___, 382 N.E.2d 947 (1978) (subrogation clause); United Farm Bureau Mutual Ins. Co. v. Runnels, ___ Ind. App. ___, 382 N.E.2d 1015 (1978) (pro-rata clause); United Farm Bureau Mutual Ins. Co. v. Wolfe, ___ Ind. App. ___, 382 N.E.2d 1018 (1978) (consent to sue clause); Bocek v. Inter-Insurance Exchange, ___ Ind. App. ___, 369 N.E.2d 1093 (1977) (arbitration clause and rejection of coverage); Allied Fidelity Ins. Co. v. Lamb, ___ Ind. App. ___, 361 N.E.2d 174 (1977) (physical contact requirement); United Farm Bureau Mutual Ins. Co. v. Hanley, ___ Ind. App. ___, 360 N.E.2d 247 (1977) (household exclusion); Vernon Fire & Casualty Co. v. American Underwriters, Inc., ___ Ind. App. ___, 356 N.E.2d 693 (1976) (persons insured); Taylor v. American Underwriters, Inc., ___ Ind. App. ___, 352 N.E.2d 86 (1976) (hit-and-run coverage); Vernon Fire & Casualty Co. v. Matney, ___ Ind. App. ___, 351 N.E.2d 60 (1976) (intervention by insurer); Leist v. Auto-Owners Ins. Co., 160 Ind. App. 322, 311 N.E.2d 828 (1974) (workmen's compensation set-off clause); Jeffries v. Stewart, 159 Ind. App. 701, 309 N.E.2d 448 (1974) (intra-policy stacking of UM coverages); State Farm Mutual Automobile Ins. Co. v. Robertson, 156 Ind. App. 149, 295 N.E.2d 626 (1973) (persons insured); Blankenbaker v. Great Central Ins. Co., 151 Ind. App. 693, 281 N.E.2d 496 (1972) (physical contact requirement); American States Ins. Co. v. Williams, 151 Ind. App. 99, 278 N.E.2d 295 (1972) (subrogation clause); Cannon v. American Underwriters, Inc., 150 Ind. App. 21, 275 N.E.2d 567 (1971) (persons insured); Ely v. State Farm Mutual Automobile Ins. Co., 148 Ind. App. 586, 268 N.E.2d 316 (1971) (physical contact requirement); Patton v. Safeco Ins. Co., 148 Ind. App. 548, 267 N.E.2d 859 (1971) (excess-escape clause); Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1970) (arbitration clause and consent to sue clause); Buehrer v. Indiana Ins. Co., 146 Ind. App. 438, 256 N.E.2d 414 (1970) (physical contact requirement); Lewis v. American Family Ins. Group, 555 S.W.2d 579 (Ky. 1977) (persons insured).

22. The Indiana Administrative Procedures Act, IND. CODE §§ 4-22-2-1—11 (1976), as well as the Indiana Insurance Law, IND. CODE § 27-1-1-1 *et seq.* (1976), empower the Indiana Department of Insurance to supervise and regulate all insurance companies operating within the state and to promulgate rules and regulations for the protection and benefit of the policy-holders of the state.

23. See notes 72 through 94 *infra* and accompanying text.

24. See notes 95 through 127 *infra* and accompanying text.

legitimate purposes and should be enforced. On the other hand, restrictions on the meaning of "insured"²⁵ and on the recovery of medical payments²⁶ and workmen's compensation²⁷ benefits lack merit and have been properly invalidated by the courts. Still other provisions, specifically the physical contact²⁸ and notice²⁹ requirements of the hit-and-run coverage, should be modified to better serve the interests of both the insured and the insurance companies. Finally, in an appendix following the text, this note will set out proposed regulations designed for adoption by the Indiana Department of Insurance.

LIMITATION OF LIABILITY PROVISIONS

The Standard Form Uninsured Motorist Endorsement³⁰ contains several limitations designed to reduce or eliminate entirely the insurer's liability exposure. The insurance company may insulate

25. See notes 36 through 71 *infra* and accompanying text.

26. See notes 128 through 149 *infra* and accompanying text.

27. See notes 150 through 164 *infra* and accompanying text.

28. See notes 167 through 199 *infra* and accompanying text.

29. See notes 200 through 215 *infra* and accompanying text. It must be noted at the outset that the hit-and-run coverage provision is not always a statutorily mandated protection afforded victims of uninsured motorists. The statutes of twenty-five states have provisions for either "unknown" or "hit-and-run" motorists. See CAL. INS. CODE § 11580.2 (West Supp. 1978); DEL. CODE tit. 18, § 3902 (1974); GA. CODE ANN. § 56-407.1 (Supp. 1978); ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd Supp. 1978); IOWA CODE § 516A.1 (Supp. 1978-79); ME. REV. STAT. tit. 24A, § 2902 (Supp. 1978-79); MASS. GEN. LAWS ANN. ch. 175, § 113L (West 1977); MINN. STAT. § 65B.49(4) (Supp. 1979); MISS. CODE ANN. § 83-11-101-103 (Supp. 1978); NEB. REV. STAT. § 60-509.01 (1974); N.H. REV. STAT. ANN. § 268:15-a (1977); N.J. STAT. ANN. § 17:28-1.1 (Supp. 1978-79); N.M. STAT. ANN. § 64-24-105 (1972); N.Y. INS. LAW §§ 617, 618 (McKinney 1966); OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 1978-79); ORE. REV. STAT. §§ 743:786-792 (1977-78); R.I. GEN. LAWS § 27-7.2.1 (Supp. 1977); S.C. CODE § 46-750.31-34 (Supp. 1975); S.D. COMPILED LAWS ANN. § 58-11-9 (1967); TENN. CODE ANN. § 56-1148 (Supp. 1978); UTAH CODE ANN. § 41-12-21.1 (1953); VT. STAT. ANN. tit. 23, § 941 (Supp. 1978); VA. CODE § 38.1-381 (Supp. 1978); WASH. REV. CODE § 48.22.030 (Supp. 1977); W. VA. CODE § 33-6-31 (1975). Of these twenty-five statutes, only about one-third define the meaning of "unknown" or "hit-and-run" motorist. In the vast majority of states, then, hit-and-run coverage is defined solely by the terms of the insurance policy contract. Likewise, the coverage in most instances is one that is extended voluntarily by the insurer. Because this coverage is subject to several limitations which have been the subject of much judicial scrutiny and revision, treatment of this policy provision is afforded in this note.

30. The Standard Form UM Endorsement is a complete policy developed by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. Originally drafted in 1956, it has undergone several revisions before reaching its present form. Because the Standard Form has been widely accepted and used by the insurance industry, it will be referred to repeatedly in this note in order to demonstrate the scope and form of the typical UM endorsement.

itself from certain risks by narrowly defining the persons insured by the policy³¹ or by excluding certain vehicles based upon ownership or insurance status.³² Risk may be further reduced through the use of "other insurance" clauses³³ and set-off provisions for benefits derived from medical payments coverage³⁴ of the automobile policy or from workmen's compensation laws.³⁵ These five limitations on UM coverage are discussed below.

Limitations on Persons Insured

Frequently UM endorsements limit the scope of the insurer's risk by narrowly defining the persons insured under the policy. The Standard Form UM Endorsement sets forth a broad definition of "insured"³⁶ and, as a result, has not been the target of judicial scrutiny. Despite the wide use of the Standard Form, however, some insurers have chosen to tailor their own definition of "insured" in order to confer coverage upon fewer people.³⁷ These specially designed provisions have been the objects of much litigation.

Insurers effect reduction of the meaning of "insured" by excluding certain persons based upon family status, age, or the use of the vehicle involved. As a result, some policies do not cover children or other relatives of the named insured and spouse,³⁸ or persons

31. See notes 36 through 71 *infra* and accompanying text.

32. See notes 72 through 94 *infra* and accompanying text.

33. See notes 95 through 127 *infra* and accompanying text.

34. See notes 128 through 149 *infra* and accompanying text.

35. See notes 150 through 164 *infra* and accompanying text.

36. The present Standard Form UM Endorsement sets out three groups of persons who are insured under the terms of the policy. Specifically, the endorsement provides:

Each of the following is an insured under this insurance to the extent set forth below:

- (a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;
- (b) any person while occupying any insured highway vehicle, and
- (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

1966 STANDARD FORM, PART II: PERSONS INSURED. For text of complete Standard Form see WIDISS, *supra*, note 10 at App. A, 1 (1969).

37. See, e.g., *Roach v. Central National Ins. Co.*, 60 Mich. App. 40, 230 N.W.2d 297 (1975); *Chakalos v. Phoenix Ins. Co.*, 110 N.H. 321, 267 A.2d 573 (1970); *Hartford Accident & Indemnity Co. v. Dairyland Ins. Co.*, 274 Ore. 145, 545 P.2d 113 (1976); *Murray v. Western Pacific Ins. Co.*, 2 Wash. App. 985, 472 P.2d 611 (1970).

38. By way of illustration, consider this actual policy provision: "Persons Insured: The following are insured under the uninsured motorist coverage: The named

under the age of twenty-five not named in the policy,³⁹ or the insured while occupying another vehicle.⁴⁰ As a general rule, courts in many jurisdictions have rejected these limitations by employing primarily three rationales.⁴¹

Some courts have rendered the exclusionary clause inapplicable by finding that an ambiguity exists in the policy terms.⁴² In one case,⁴³ the automobile liability section of the policy contained a definition of "insured" that was broader than the definition of "insured" in the policy's UM endorsement. The court noted that the policy was subject to differing constructions and, applying a fun-

insured and lawful spouse of such named insured if, and only if, such spouse is living with the named insured at the time of the accident." This provision was the source of controversy in *Vernon Fire & Casualty Co. v. American Underwriters, Inc.*, ___ Ind. App. ___, 356 N.E.2d 693 (1976), notes 65 and 67 *infra*.

39. A common form of this exclusion reads: "The coverages afforded by the policy do not apply while the insured automobile is being driven by any person under the age of twenty-five unless such person is named in the policy." The validity of this provision was litigated in *Hartford Accident & Indemnity Co. v. Dairyland Ins. Co.*, 274 Ore. 145, 545 P.2d 113 (1976).

40. These limitations may take form in any number of ways. Coverage may be excluded for persons using the insured automobile with the permission of the insured. See *Roach v. Central National Ins. Co.*, 60 Mich. App. 40, 230 N.W.2d 297 (1975). Coverage may also preclude recovery to an insured while a guest passenger in a non-owned vehicle. See *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971). Finally, as in *Chakalos v. Phoenix Ins. Co.*, 110 N.H. 321, 267 A.2d 573 (1970), the policy may exclude coverage for an insured while occupying or using a vehicle other than a private passenger automobile.

41. See, e.g., *Federated Mutual Implement & Hardware Ins. Co. v. Gupton*, 241 F. Supp. 509 (E.D.S.C. 1965); *Lopez v. State Farm Fire & Casualty Ins. Co.*, 250 Cal. App. 2d 210, 58 Cal. Rptr. 243 (1967); *Hartford Accident & Indemnity Co. v. Booker*, 140 Ga. App. 3, 230 S.E.2d 70 (1976); *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (Mo. App. 1963); *Murray v. Western Pacific Ins. Co.*, 2 Wash. App. 985, 472 P.2d 611 (1970).

42. In *Murray v. Western Pacific Ins. Co.*, 2 Wash. App. 985, 472 P.2d 611 (1970), the court held:

At the outset of this analysis we must remember the rule of construction that 'the language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense.' (cite omitted).

While we would agree that the youthful driver endorsement could be read as defendant contends, we believe that it could also be read to mean that coverage under the policy would be suspended only if the automobile is being driven by a driver under the age of twenty-five who is not a member of the family of the named insured.

Id. at 614.

43. *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (Mo. App. 1963).

damental rule of contract law," resolved the conflict in favor of the insured and against the insurer who had drafted the policy provisions.⁴⁵

Such policy provisions have also been voided by emphasizing the intent of the parties at the time they entered into the insurance contract. By demonstrating that the accident in issue took place in a manner within the contemplation of the parties at the time the insurer accepted the risk, an injured party has been able to overcome restrictive provisions of the policy and be deemed an insured.⁴⁶ This second rationale was effectively used to overcome a policy restriction in *Hartford Accident & Indemnity Co. v. Booker*.⁴⁷ In that case, a garbage collector was struck and injured by an uninsured motorist while standing more than thirty feet away from the insured vehicle. The court held that the injured worker was an insured within the meaning of the policy because the parties contemplated that the use of the insured garbage truck entailed loading, unloading, and workers walking down the road ahead of the vehicle.⁴⁸

The third rationale used by courts to circumvent restrictive policy provisions holds that the provisions conflict with public policy as embodied in the applicable UM statute.⁴⁹ These courts reason that the purpose of the UM statutes would be eroded if insurers were permitted to dilute the scope of coverage by imposing restrictive provisions.⁵⁰ Since the majority of statutes permit the insured to re-

44. *Verba fortius accipiuntur contra proferentem*. Words are to be taken most strongly against him who uses them. See *Tinn v. Hoffman & Co.*, 27 Law. T.R. [N.S.] 271 (1873).

45. 374 S.W.2d 626, 629 (Mo. App. 1963).

46. See, e.g., *Federated Mutual Implement & Hardware Ins. Co. v. Gupton*, 241 F. Supp. 509 (E.D.S.C. 1965).

47. 140 Ga. App. 3, 230 S.E.2d 70 (1976).

48. *Id.* at 73.

49. *Lopez v. State Farm Fire & Casualty Ins. Co.*, 250 Cal. App. 2d 210, 58 Cal. Rptr. 243 (1967); *Kaufman v. Economy Ins. Co.*, 52 Ill. App. 3d 940, 368 N.E.2d 271 (1977); *Cadillac Mutual Ins. Co. v. Bell*, 50 Mich. App. 144, 212 N.W.2d 816 (1973); *Chakalos v. Phoenix Ins. Co.*, 110 N.H. 321, 267 A.2d 573 (1970); *Hartford Accident & Indemnity Co. v. Dairyland Ins. Co.*, 274 Ore. 145, 545 P.2d 113 (1976).

50. The language of the court in *Hartford Accident & Indemnity Co. v. Dairyland Ins. Co.*, 274 Ore. 145, 545 P.2d 113 (1976), typifies judicial sentiment:

It is our conclusion that the legislature did not intend that the uninsured motorist coverage should be subject to qualification. . . . The language purports to specifically exclude the insured from uninsured motorist coverage by a provision that relates primarily to the liability coverage of the policy. The restriction is inserted to exclude responsibility for loss caused by a high risk class of drivers of the insured vehicle. The risk has

ject UM coverage,⁵¹ insurance companies have responded that acceptance of a policy with restrictions constitutes a partial rejection of the coverage.⁵² In other words, by accepting the limiting policy form, the insured not only agrees to the limitations contained therein, but impliedly rejects coverage for those persons subject to the limitations. This argument is tenuous at best; a person purchasing insurance cannot reject a coverage that was never offered to him. One court has flatly rejected this form of argument, holding that "such a piecemeal whittling away of liability is void as against public policy."⁵³

Underlying these three rationales seems to be a judicial policy of extending coverage to those persons for whom the insurance purchaser would have sought coverage had he been in the position to specify coverage.⁵⁴ At the same time, however, the decisions of other courts would justify an insurer's belief that such limitations on persons insured may be upheld if they are stated unambiguously and if

little relation to the risk which is covered by uninsured motorist insurance because such coverage appertains to the risk created by the uninsured motorist. As a result, any such limitation or exclusion from uninsured motorist coverage would defeat on an arbitrary basis the legislative aim of providing protection to those injured by the negligence of an uninsured motorist.

Id. at 115.

51. Only the statutes of eleven states mandate coverage and permit no option on the part of the insured to reject coverage. *See* CONN. GEN. STAT. ANN. § 38-175(c) (1977); ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd Supp. 1978); ME. REV. STAT. tit. 24A, § 2902 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 175, § 113L (West 1977); N.H. REV. STAT. ANN. § 268:15-a (1977); N.Y. INS. LAW §§ 617, 618 (McKinney 1966); ORE. REV. STAT. §§ 743:786-792 (1977-78); S.C. CODE § 46-750.31-34 (Supp. 1975); VT. STAT. ANN. tit. 23, § 941 (Supp. 1978); VA. CODE § 38.1-381 (Supp. 1978); W. VA. CODE § 33-6-31 (1975).

52. *See, e.g.,* California Casualty & Indemnity Exchange v. Steven, 5 Cal. App. 3d 304, 85 Cal. Rptr. 82 (1970); Southeast Title and Ins. Co. v. Thompson, 231 So. 2d 201 (Fla. 1970).

53. California Casualty & Indemnity Exchange v. Steven, 5 Cal. App. 3d 304, 85 Cal. Rptr. 82 (1970).

54. WIDISS, *supra*, note 10, at § 213 (1969). There are probably two main reasons why the average person seeking to purchase insurance is not in the position to specify coverage. First, most insurance policies are pre-printed form policies which provide little or no option for customization to particular needs. In the majority of cases, only the amounts of the liability limits are within the control of the consumer. The person seeking insurance must either take the policy as offered or engage in extensive comparison shopping. If the consumer does choose the latter option, he is confronted with a second problem. Policy language can be confusing to a non-expert in insurance and very often the purchaser only thinks he has obtained the coverage he wants. Thus, an insured may first become aware of his actual policy coverages only after a claim has been filed—after the damage has occurred and it is too late to do anything about it.

the insurance consumer has been fully apprised of the coverage he is receiving. Indeed, some courts have recognized the parties' freedom to contract for such limitations if both parties are fully aware of the policy terms.⁵⁵ In these cases, the perceived purpose of the UM is balanced with the insured's right to purchase affordable coverage.⁵⁶ Similarly, agreements to limit the scope of coverage may be permitted so long as terms are used consistently throughout the policy.⁵⁷ These decisions, then, focus on the rights of the parties to contract freely so long as the insured has knowledge of the limitations and the policy language is clear.

The Indiana courts have twice been confronted with cases involving policy endorsements containing limitations on the persons insured.⁵⁸ In both instances the courts chose not to reject them on the basis of some contract doctrine but rather found them to be in derogation of the Indiana UM act.⁵⁹ In *Cannon v. American Underwriters, Inc.*,⁶⁰ the policy contained an endorsement that covered the insured only while occupying a vehicle owned by him. This policy restriction effectively barred recovery by the insured while driving or riding in another person's vehicle.⁶¹ The plaintiff sustained bodily

55. *Southeast Title and Ins. Co. v. Thompson*, 231 So. 2d 201 (Fla. 1970); *Green v. Great American Ins. Co.*, 516 S.W.2d 739 (Tex. Civ. App. 1974).

56. In *Green v. Great American Ins. Co.*, 516 S.W.2d 739 (Tex. Civ. App. 1974), the court stated:

The plaintiff in this case was offered, and accepted, a contract furnishing her uninsured motorist coverage except when her son was driving the automobile. Why should that be contrary to public policy? If plaintiff's contention is allowed to become law in Texas, insured motorists with sons or daughters with bad driving records will be unable to secure uninsured motorist coverage in any form except from the assigned pool at a much greater cost. Public policy dictates the allowance of partial rejection of such coverage in order to allow insureds in that situation to secure insurance they can afford

Id. at 740.

57. In *Farmers Ins. Co. v. Miller*, 87 Wash. 2d 70, 549 P.2d 9 (1976), the insured sought to have the definitions of "automobile" and "insured" interpreted by the court. In finding that the terms were consistently applied throughout the insurance policy, the court held that it could not "rule out of the contract language which the parties thereto have put into it, nor [could it] revise the contract under the theory of construing it, nor [could it] impose obligations which never before existed." *Id.* at 11.

58. *Vernon Fire & Casualty Co. v. American Underwriters, Inc.*, ___ Ind. App. ___, 356 N.E.2d 693 (1976); *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567 (1971).

59. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

60. 150 Ind. App. 21, 275 N.E.2d 567 (1971).

61. The policy issued by American Underwriters contained the following UM exclusion: "This policy does not apply under the uninsured motorist coverage: unless

injury while a guest passenger in an uninsured automobile. The insurer denied coverage under the UM provision, citing the policy exclusion.⁶² On appeal from the trial court decision in favor of the insurer, the court held that the coverage as offered afforded protection to only a fraction of the persons entitled to recover under the statute: "[C]overage applicable to only a small portion of those insured persons legally entitled to the same under the statute is a subversion of the intent of the legislature, such intent being to afford coverage to all insured persons who legally substantiate their claims."⁶³ The court concluded that the policy exclusion was void as a matter of law and would be given no effect.⁶⁴

Similarly, in *Vernon Fire & Casualty Ins. Co. v. American Underwriters, Inc.*,⁶⁵ the policy issued by American Underwriters contained an exclusion which denied recovery to anyone not a named insured or spouse of the named insured.⁶⁶ Although the definition of "insured" in the UM endorsement differed from the definition of "insured" in the liability portion of the policy, the court chose not to void the exclusion on the basis of inconsistency or ambiguity. Instead, the court concluded that the limitation was in derogation of the UM act and held that the redefinition of "insured" for purposes of such coverage was an attempt to narrow the protection mandated by the statute and was therefore void.⁶⁷

In reaching these decisions, the Indiana courts have intruded on both legislative and executive powers. The Indiana Uninsured Motorists Act suggests that for purposes of coverage, "insured" is to be defined by the terms of the policy issued by the insurer.⁶⁸ Likewise, once the policies are drafted, the provisions contained therein are subject to the approval of the Commissioner of Insurance.⁶⁹ Since the policies in both *Vernon* and *Cannon* had been approved by the Department of Insurance, the scope of judicial

the insured, at the time of the accident, was operating or occupying an insured automobile." *Id.* at 567.

62. See note 61 *supra*.

63. 150 Ind. App. 21, 26, 275 N.E.2d 567, 569 (1971).

64. *Id.* at 29, 275 N.E.2d at 571.

65. ___ Ind. App. ___, 356 N.E.2d 693 (1976).

66. The exclusion that was the subject of controversy read: "The following are insured under the uninsured motorist coverage: the named insured and lawful spouse of such named insured if, and only if, such spouse is living with the named insured at the time of the accident."

67. ___ Ind. App. ___, 356 N.E.2d 693, 696 (1976).

68. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

69. *Id.*

review should have been confined to a determination of whether the terms complied with the rules and principles of contract law. Instead, the courts first assumed a quasi-legislative role by grafting judicial definitions onto the statute; then they assumed a quasi-administrative role by disapproving of and voiding the policy provisions.

While the Indiana courts may be criticized for an intrusion into the legislative and executive prerogative, the conclusions reached by the courts should not similarly be criticized. Clearly, such limitations on the persons insured should be rejected because they serve no legitimate purpose. First, such policy exclusions add unnecessary confusion to the meaning of protection afforded and can only mislead the unwary insured into believing he has received the coverage sought. Second, while such limitations are designed to reduce the insurer's risk, they serve no valid business interest; the insurer is free to simply raise the policy premiums commensurate with its increased exposure. The broad language of the Standard Form⁷⁰ is certainly preferable, and all other forms containing less coverage with respect to the persons insured should be rejected. The problems posed by insurers who issue policy forms with restrictions on the definition of insured would be alleviated by requiring policy language at least comparable with that of the Standard Form.⁷¹

Limitations on "Owned but Uninsured" Vehicles

A policy limitation that enjoys wide use by insurers in UM endorsements is one that bars recovery to an insured while driving or riding in any owned vehicle that is not insured.⁷² The validity of

70. See note 36 *supra* and accompanying text.

71. See Proposed Regulation No. 1 in Appendix, *infra*, page 339.

72. The Standard Form UM Endorsement provisions states:

This insurance does not apply under Part IV: (b) to bodily injury to an insured while occupying a highway vehicle (other than an insured highway vehicle) owned by the named insured, any designated insured or any relative resident in the same household as the named insured, or through being struck by such a vehicle

1966 STANDARD FORM, PART I: EXCLUSIONS. For text of the complete Standard Form see WIDISS, note 10 *supra*, at App. A, 1 (1969). To better understand the application of this policy provision, consider the following hypothetical case. John Doe owns two motor vehicles, a 1978 Mercury and a 1969 Ford pick-up truck. Because of the values of the two vehicles, John fully insures the Mercury, including UM coverage, but purchases no insurance at all on the pick-up truck. While driving to work in his truck, John is struck and injured by an uninsured motorist. Application of the "owned but uninsured" clause in the UM endorsement covering John's Mercury precludes recovery of UM benefits under that policy.

such provisions has been the subject of extensive litigation. The courts of seventeen states have nullified the "owned but uninsured" clause,⁷³ for the most part basing their decisions on some form of public policy argument.

Most of the decisions have examined the underlying objective of the UM statutes and have concluded that the legislative purpose was to provide the injured party with the same coverage as he would have been entitled to had the uninsured tortfeasor complied with the financial responsibility act of the state.⁷⁴ As a result, the limitation is looked upon merely as an attempt to dilute the scope of protection afforded by the UM statutes.⁷⁵ One court in particular invalidated the exception for owned but uninsured vehicles by emphasizing the harsh impact that UM accidents have on the public.⁷⁶

The courts of other jurisdictions have insisted that UM coverage is aimed at the protection of the person and not the vehicle, and that the intent of the legislature was not to limit coverage to any insured by specifying the particular vehicle being occupied at

73. *State Farm Mutual Automobile Ins. Co. v. Reaves*, 292 Ala. 218, 292 So. 2d 95 (1974); *Mullis v. State Farm Mutual Automobiles Ins. Co.*, 252 So. 2d 229 (Fla. 1971); *Gulf American Fire & Casualty Co. v. McNeal*, 115 Ga. App. 286, 154 S.E.2d 411 (1967); *Doxtater v. State Farm Mutual Automobile Ins. Co.*, 8 Ill. App. 3d 547, 290 N.E.2d 284 (1972); *State Farm Mutual Automobile Ins. Co. v. Robertson*, 156 Ind. App. 149, 295 N.E.2d 626 (1973); *Forrester v. State Farm Mutual Automobile Ins. Co.*, 213 Kan. 442, 517 P.2d 173 (1973); *Elledge v. Warren*, 263 So. 2d 912 (La. App. 1972); *Nygaard v. State Farm Mutual Automobile Ins. Co.*, 301 Minn. 10, 221 N.W.2d 151 (1974); *Lowery v. State Farm Mutual Automobile Ins. Co.*, 285 So. 2d 767 (Miss. 1973); *State Farm Mutual Automobile Ins. Co. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Beck v. Ohio Casualty & Indemnity Co.*, 135 N.J. Super. 1, 342 A.2d 547 (1975); *Chavez v. State Farm Mutual Automobile Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975); *Banks v. State Farm Mutual Automobile Ins. Co.*, 216 Pa. Super. 162, 264 A.2d 197 (1970); *Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890 (1973); *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967); *Touchette v. Northwestern Mutual Ins. Co.*, 80 Wash. 2d 327, 494 P.2d 479 (1972); *Bell v. State Farm Mutual Automobile Ins. Co.*, ___ W. Va. ___, 207 S.E.2d 147 (1974).

74. *See, e.g., Touchette v. Northwestern Mutual Ins. Co.*, 80 Wash. 2d 327, 494 P.2d 479 (1972).

75. *Thomas v. Nelson*, 295 So. 2d 847 (La. App. 1974).

76. In *Mullis v. State Farm Mutual Automobile Ins. Co.*, 252 So. 2d 229 (Fla. 1971), the court declared:

Bodily injury to a member of the public due to a motor vehicle accident, whether produced by the negligence of an automobile liability insured or by an uninsured motorist has the same financial loss impact on the injured member of the public . . . [T]he injury is just as acute and damaging to the member of the public whether he was injured as a pedestrian or while riding in a public conveyance or in an 'uninsured automobile.'

Id. at 233.

the time of the accident.⁷⁷ The purpose of the UM law is to recompense innocent persons who are damaged through the wrongful act of uninsured motorists. The coverage, it is argued, is not actually liability insurance, but more closely resembles "limited accident" insurance; that is, it insures against losses occasioned by a limited group of tortfeasors.⁷⁸ In *Elledge v. Warren*,⁷⁹ the focus of the court's attention centered on the premiums charged by the insurer for UM coverage. The court reasoned that because the premium charged for UM benefits was a flat rate, the coverage was intended by the insurer to protect the insured at all times regardless of the circumstances or the degree of risk of exposure to an uninsured motorist accident.⁸⁰

While the jurisdictions invalidating the "owned but uninsured" exclusion have relied heavily on the public's right to be protected, those courts upholding the provision have stressed the construction of the policy and the business interests of the insurance companies.⁸¹ For example, the exclusion has been upheld on the basis that it was

77. *Nygaard v. State Farm Mutual Automobile Ins. Co.*, 301 Minn. 10, 221 N.W.2d 151 (1974); *Chavez v. State Farm Mutual Automobile Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975).

78. See *Forrester v. State Farm Mutual Automobile Ins. Co.*, 213 Kan. 442, 517 P.2d 173, 178 (1974); *Hein v. Nationwide Ins. Co.*, 106 N.H. 378, 213 A.2d 197 (1965).

79. 263 So. 2d 912 (La. App. 1972).

80. In *Elledge*, the court stated:

The nature of the premium charged for this protection gives insight into the coverage afforded. The rate is a flat one and coverage is available to all persons at the same rate. The rate is unrelated to risks. By terms of the policy, the policy holder and members of his family are covered . . . while guest passengers of an uninsured motorist who injures them.

This points to the fact that the intent of the coverage is to protect an insured at all times. Once this definable scope of risks has been enlarged and extended to cover cases, at a flat rate, when the insured is a guest passenger of the uninsured motorist, it follows that the intent of the coverage is to protect the insured at all times against the generalized risk of damage at the hands of the uninsured motorists and not to limit coverage to certain situations or to a certain degree of risk of exposure to the uninsured motorists.

Id. at 917-18.

81. Only the courts of eight states have upheld the use of the "owned but uninsured" clause. *Chambers v. Owens*, 22 Ariz. App. 175, 525 P.2d 306 (1974); *Holcomb v. Farmers Ins. Exchange*, 254 Ark. 514, 495 S.W.2d 155 (1973); *Nunley v. Turner*, 57 Mich. App. 473, 226 N.W.2d 528 (1975); *Barton v. American Family Ins. Co.*, 485 S.W.2d 628 (Mo. App. 1972); *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968); *Cox v. United States Fire Ins. Co.*, 41 Ohio Misc. 128, 324 N.E.2d 304 (1974); *Hill v. Nationwide Ins. Co.*, ____ Tenn. ____, 535 S.W.2d 327 (1976); *Stagg v. Travelers Ins. Co.*, 486 S.W.2d 399 (Tex. App. 1972).

within the reasonable expectations of the parties.⁸² In most instances a policyholder freely chooses not to insure all the vehicles owned by him, if for no other reason than to save money. Although he might expect the UM coverage of one insured vehicle to extend to all other vehicles owned by him, such an expectation has been held to be unreasonable.⁸³ Likewise, it has been held that a specific unambiguous policy provision in an endorsement controls the general provisions of the policy and on that basis the "owned but uninsured" clause has been enforced.⁸⁴

Another argument that has found favor in some jurisdictions goes to the business interests of the insurers. To nullify the "owned but uninsured" clause would be to require the insurance company to extend coverage free of charge.⁸⁵ Insurance premiums are adduced by an actuarial allocation of risks. By invalidating this policy exclusion the owner of four vehicles could protect four licensed drivers simultaneously against financial loss caused by uninsured motorists by merely insuring one vehicle and paying one premium.⁸⁶ Ascription to such a rule forces the insurance companies to become "gratuitous guarantors."⁸⁷ The insurer has at stake valid business interests and has a right to manage its risks and collect a premium for the coverage extended.⁸⁸

Judicial treatment of the use of the "owned but uninsured" clause in Indiana has lacked discussion of the business interests of the insurance companies. Instead, the courts have examined the exclusion only in light of the Indiana UM statute. In *Vantine v. Aetna Casualty & Surety Co.*,⁸⁹ the plaintiff's decedent was killed in a highway accident when the decedent's owned but uninsured motorcycle⁹⁰ collided with an uninsured third party. Relying upon the ex-

82. *Owens v. Allied Mutual Ins. Co.*, 15 Ariz. App. 181, 487 P.2d 402 (1971).

83. *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238, 240 (1968).

84. *Barton v. American Family Ins. Co.*, 485 S.W.2d 628 (Mo. App. 1972).

85. *Nunley v. Turner*, 57 Mich. App. 473, 226 N.W.2d 528 (1975).

86. *Holcomb v. Farmers Ins. Co.*, 254 Ark. 514, 495 S.W.2d 155 (1973).

87. *Chambers v. Owens*, 22 Ariz. App. 175, 525 P.2d 306, 309 (1974).

88. *Hill v. Nationwide Ins. Co.*, ___ Tenn. ___, 535 S.W.2d 327 (1976); *Stagg v. Travelers Ins. Co.*, 486 S.W.2d 399 (Tex. App. 1972).

89. 335 F. Supp. 1296 (N.D. Ind. 1971).

90. The involvement of an uninsured motorcycle has, in some cases, provided courts with a means of easily resolving the controversy. Instead of coming to grips with the validity of the "owned but uninsured" clause, they have simply ruled that a motorcycle is not an automobile and therefore not subject to the exclusion for "owned but uninsured automobiles." See, e.g., *Northland Ins. Co. v. West*, 294 Minn. 368, 201 N.W.2d 133 (1972); *Insurance Co. of North America v. Godwin*, 46 App. Div. 2d 154,

clusion in its policy, the insurer denied recovery of UM benefits. The federal district court, however, rejected the exclusion, holding that it was in violation of the UM act and contrary to public policy. The court reasoned that the statute mandates coverage for the protection of insured persons and the requirement must be observed regardless of the proprietary or insurance interest of the insured person at the time of the accident.⁹¹

Likewise, in *State Farm Mutual Automobile Ins. Co. v. Robertson*,⁹² the Indiana Court of Appeals concluded that the "owned but uninsured" clause was invalid. The facts of the case closely resemble those of *Vantine*. The plaintiff's decedent was killed while operating an owned but uninsured motorcycle. When State Farm invoked the policy exclusion and denied coverage, the insured filed suit. In affirming the decision of the trial court to void the provision, the court relied on the reasoning of the district court in *Vantine*:

A contrary rule would violate clear public policy, serve no legitimate business interest, and conflict with better reasoned law. Defendant's argument, as one court observed, would create the anomalous situation of precluding coverage where the insured happens to be using an owned, non-insured vehicle, while permitting recovery if the insured were injured riding a declared vehicle, or on horseback, or on his front porch⁹³

It is clear that the decisions interpreting Indiana law are aligned with those courts that have rejected the "owned but uninsured" clause.

Despite the cogent reasoning of these decisions and the impressive roster of cases from other jurisdictions supporting this position, use of the exclusion should be permitted. When the provision is voided, insurance companies become unreasonably exposed to risks not contemplated when the policy was issued. Moreover, the increased exposure is not commensurate with the amount of premium collected. This is an undue infringement on the insurer's valid business interests and completely fails to consider the companies' right to protect themselves from those individuals who

361 N.Y.S.2d 461 (1974). The trend in most courts, including Indiana, has been to forego this simplistic analysis and address the substantive issue of validity.

91. 335 F. Supp. 1296, 1298 (N.D. Ind. 1971).

92. 156 Ind. App. 149, 295 N.E.2d 626 (1973).

93. *Id.* at 629, *quoting* *Vantine v. Aetna Casualty & Surety Co.*, 335 F. Supp. 1296 (N.D. Ind. 1971).

would reap the benefits of coverage without first paying for it. In addition, there is a countervailing public policy consideration that the courts have overlooked. By permitting the insured to recover UM benefits by merely insuring one of several owned vehicles, the courts are affording the protection of a law to persons who are themselves not in compliance with that law. It is for these reasons that insurers must be permitted to use and enforce the "owned but uninsured" clause.⁹⁴

Limitations on Other Insurance

The "other insurance" clause of the Standard Form UM Endorsement has been the subject of extensive litigation. This policy provision is composed of two separate paragraphs: the "excess-escape" clause⁹⁵ and the "pro-rata" clause.⁹⁶ These policy limitations are applicable in those instances when a person, injured through the negligence of an uninsured motorist, is an "insured" within the meaning of more than one policy of insurance.⁹⁷ The "excess-escape"

94. See Proposed Regulation No. 2 in Appendix, *infra*, page 339.

95. The "excess-escape" clause reads as follows:

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any similar insurance available to such insured and applicable to such automobile as primary coverage, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limits of such other insurance policy.

1966 STANDARD FORM, PART VI: ADDITIONAL CONDITIONS (E. Other Insurance). For text of complete Standard Form, see WIDISS, note 10 *supra*, at App. A, 1 (1969).

96. The "pro-rata" clause provides that:

Except as provided in the foregoing paragraph [referring to the excess-escape clause], if the insured has other insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of the liability of this insurance and such other insurance.

1966 STANDARD FORM, PART VI: ADDITIONAL CONDITIONS (E. Other Insurance). For text of complete Standard Form see WIDISS, note 10 *supra*, at App. A, 1 (1969).

97. It is not at all uncommon for a person to have UM coverage available to him under several different policies of insurance at any one given time. By way of illustration, consider the following hypothetical situation. Joe Roe owns a 1975 Ford and the policy of insurance covering the vehicle contains the standard UM endorsement. Joe Roe also owns a 1973 Chevrolet, and this vehicle too is insured and its policy includes the UM endorsement. While a guest passenger in a vehicle owned and driven by John Doe, they are struck by an uninsured motorist and Joe is seriously injured.

clause effectively eliminates the insurer's liability if the insured is injured while occupying a non-owned automobile by declaring the coverage to be in excess of the coverage afforded by the host's policy, but only up to the limits of liability of the primary policy.⁹⁸ The "pro-rata" clause, on the other hand, applies in any case other than where the insured is occupying a non-owned vehicle. Under such coverage, the loss is pro-rated among the various insurers, the maximum recovery not to exceed the limit of liability of the policy affording the greater coverage.⁹⁹

As a general rule, both the "excess-escape" clause and the "pro-rata" clause have met with much judicial opposition. In the decisions voiding these provisions, courts have resorted to the use of several rationales. Some jurisdictions, for example, have applied the doctrines of contract law and ruled that payment for each policy coverage necessitates recovery under each policy.¹⁰⁰ That is, once the insurer has collected an additional premium for the UM endorsement, it would be unconscionable to permit the insurer to partake of

By definition, Joe is not only an "insured" under each of the policies covering his own vehicles but he is also an "insured" under the policy covering his host's vehicle. Thus, there are three applicable policies covering Joe's injuries. Assuming that each policy provides UM coverage in the amount of \$15,000, Joe *may* have available to him a total of \$45,000 for compensatory purposes.

98. Continuing the hypothetical from note 97 *supra*, assume that Joe's injuries total \$25,000. Because Joe was a passenger in John's car at the time of the accident with the uninsured motorist, the insurance policy covering John's car is the "primary" policy. This means that Joe will receive the full \$15,000 UM benefit from the policy insuring John's auto. The "excess-escape" clause in both of the policies covering Joe's own cars, however, precludes any recovery from them because Joe's policies provide only "excess" coverage. Thus Joe will recover only a total of \$15,000 even though his injuries totalled \$25,000.

99. In the event that Joe Roe, note 98 *supra*, is injured by an uninsured motorist while operating one of his two owned and insured vehicles, the "pro-rata" clause in each of his two policies would become operative. Thus, even though Joe's injuries total \$25,000, the maximum he would collect is the higher limit of liability of the two policies. Assuming, then, that each policy has UM limits of \$15,000, the most that Joe would collect under each policy is \$7,500 (each policy contributing one-half of the total limit of \$15,000). Again, Joe would recover only a total of \$15,000 of his \$25,000 loss.

100. *Kraft v. Allstate Ins. Co.*, 6 Ariz. App. 276, 431 P.2d 917 (1967); *Walton v. State Farm Mutual Automobile Ins. Co.*, 55 Hawaii 326, 518 P.2d 1399 (1974); *Harleysville Mutual Casualty Ins. Co. v. Blumling*, 429 Pa. 389, 241 A.2d 112 (1968). The position adopted by these courts is that the only limitation on the amount of recovery is the total combined limits of all applicable policies, but in no event to exceed the actual damages incurred by the injured party. Double recovery, therefore, is not permitted.

a windfall by avoiding liability through the application of an exclusionary clause.¹⁰¹

A number of jurisdictions have employed statutory arguments and have voided these exclusions on the basis that they are repugnant to the UM statutes.¹⁰² The premise underlying this rationale is that the statutes are enacted to protect innocent victims from the uninsured motorist and to pay "all sums" which the victims are legally entitled to recover.¹⁰³ These courts argue that it is entirely undesirable to permit the insurer to escape its statutory obligation by reducing or eliminating coverage when the injured party has not been fully compensated for all his damages.¹⁰⁴ Still other decisions reflect the use of what may be termed the "plain meaning" rationale. The courts employing this reasoning stress the statutory requirement that "each policy" of insurance provide UM coverage to the minimum limits of the applicable financial responsibility law irrespective of the existence of other insurance.¹⁰⁵ As a result, the "other insurance" clause is only enforced by the majority of courts to prevent double recovery by the injured party.¹⁰⁶

Those jurisdictions that have upheld the validity of the "other insurance" clause have generally done so on the basis of statutory interpretation.¹⁰⁷ Employing a strict reading of the language of the

101. *Curran v. Firemans Fund Ins. Co.*, 393 F. Supp. 712 (D. Alaska 1975); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973).

102. *State Farm Mutual Automobile Ins. Co. v. Jones*, 133 Ga. App. 920, 213 S.E.2d 73 (1975); *Clayton v. Alliance Mutual Casualty Co.*, 212 Kan. 640, 512 P.2d 507 (1973); *Ramsour v. Grange Ins. Ass'n*, 541 P.2d 35 (Wyo. 1975).

103. See, e.g., *Safeco Ins. Co. v. Jones*, 286 Ala. 606, 243 So. 2d 736 (1970). In that decision the court noted that the Alabama act:

[S]ets a *minimum* amount of recovery, but it does not place a limit on the total amount of recovery so long as that amount does not exceed the amount of actual loss; that where the loss exceeds the limits of one policy, the insured may proceed under other available policies

Id. at 742 (emphasis supplied).

104. See, e.g., *Protective Fire & Casualty Ins. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

105. *Kentucky Farm Bureau Mutual Ins. Co. v. Vanover*, 506 S.W.2d 517 (Ky. App. 1974); *Harthcock v. State Farm Mutual Automobile Ins. Co.*, 248 So. 2d 456 (Miss. 1971).

106. *McFarland v. Motor Club of America Ins. Co.*, 120 N.J. Super. 554, 295 A.2d 375 (1972). See also *Goodman v. Continental Casualty Co.*, 347 A.2d 662 (Del. Super. 1975); *Kaufman v. Economy Ins. Co.*, 52 Ill. App. 3d 940, 368 N.E.2d 371 (1977).

107. *Morelock v. Millers Mutual Ins. Assoc.*, 49 Ill. 2d 234, 274 N.E.2d 1 (1971); *Werner v. Travelers Indemnity Co.*, 55 Mich. App. 390, 222 N.W.2d 254 (1974); *State Auto Mutual Ins. Co. v. Cummings*, ____ Tenn. ____, 519 S.W.2d 773 (1975).

UM statutes, these courts reason that the acts are designed to provide the insured with no greater coverage than he would have had if the collision had taken place with a person insured only to the minimum amount required by the particular financial responsibility law.¹⁰⁸ The Colorado Supreme Court has persuasively argued that had the legislature intended complete indemnification it would not have granted the insured the option of totally rejecting UM coverage.¹⁰⁹ Since the insured is given the opportunity to purchase either the minimum insurance coverage mandated by law, additional coverage, or no coverage at all, there can be no basis for invalidating the "other insurance" limitations.¹¹⁰

The decisions interpreting Indiana law have concluded that the "other insurance" provision conflicts with the Indiana UM statute and have voided both the "excess-escape" clause and the "pro-rata" clause. In *Simpson v. State Farm Mutual Automobile Ins. Co.*,¹¹¹ the plaintiff was injured while a guest passenger in a non-owned vehicle. The insurer of the host vehicle paid the maximum UM benefit available under its policy but that was insufficient to pay for all of Simpson's injuries. A claim was filed with State Farm, the insurer of two vehicles owned by the Simpsons, but coverage was denied based upon the "excess-escape" clause of the State Farm policy.¹¹² Thereafter, suit was filed and the district court held that the exclusion was void as a matter of law. The court concluded that the Indiana UM statute sets only the minimum and not the maximum limits of recovery.¹¹³ In addition, the court noted that the statute requires each policy to include UM protection and, since a premium had been paid for each applicable policy endorsement, the insured was entitled to benefits from all available policies.¹¹⁴

108. *Transportation Ins. Co. v. Wade*, 106 Ariz. 269, 475 P.2d 253 (1970); *Lemrick v. Grinnel Mutual Reinsurance Co.*, ___ Iowa ___, 263 N.W.2d 714 (1978); *Maryland Casualty Co. v. Howe*, 106 N.H. 422, 213 A.2d 420 (1965). It should be emphasized that because in most instances the language of the various UM statutes is almost identical the determination of whether the statute sets a "minimum" or "maximum" limit on recovery by the insured depends largely on the approach of the court interpreting the act.

109. See *Alliance Mutual Casualty Co. v. Duerson*, 184 Colo. 117, 518 P.2d 1177 (1974).

110. *Id.* at 1180.

111. 318 F. Supp. 1152 (S.D. Ind. 1970).

112. The clause invoked by the insurer in the *Simpson* case was the same as that of the Standard Form UM Endorsement set out in note 95 *supra*.

113. 318 F. Supp. 1152, 1156 (S.D. Ind. 1970).

114. *Id.* at 1156.

The "excess-escape" clause was afforded the same treatment by the Indiana Court of Appeals in *Patton v. Safeco Ins. Co.*¹¹⁵ In that case, the Pattons were passengers in a non-owned automobile when it was struck by an uninsured motorist. Recovery was had from the host's UM policy but the amount received was far less than their actual damages. A claim was filed against Safeco, the insurer of the Pattons' owned vehicle, for UM benefits. Safeco contended that recovery was barred by the "excess-escape" clause in their policy.¹¹⁶ In finding that the exclusion was invalid, the court held:

If the legislature had intended to limit the recovery of persons injured by an uninsured motorist to the limits of one policy . . . the act would be directed at the injured parties and not at each policy of insurance.

. . . .

[T]herefore, an insured shall not be limited to the uninsured motorist provision of the one policy . . .¹¹⁷

It thus appears that at the present time insurers in Indiana are not going to be permitted to enforce the "excess-escape" clause when the injured party has not been fully compensated.

The validity of the "pro-rata" clause in Indiana, however, is in some ways unsettled. In *United Farm Bureau Mutual Ins. Co. v. Runnels*,¹¹⁸ the plaintiff was struck and injured by an uninsured motorist while operating his own insured automobile. Runnels sustained damages in excess of the UM limits of one of his automobile policies. As a result, he also sought benefits under a second UM policy issued to him by Farm Bureau. Farm Bureau denied full recovery under both policies on the basis of the "pro-rata" clauses contained in both policies.¹¹⁹ In finding the "pro-rata" clauses invalid, the court held that they had the effect of reducing the insurer's liability on any one policy to less than the minimum amount mandated by the UM act and therefore were in derogation of the UM statute.¹²⁰

115. 148 Ind. App. 548, 267 N.E.2d 859 (1971).

116. The clause in the UM policy issued by Safeco was the same as that of the Standard Form UM Endorsement set out in note 95 *supra*.

117. 148 Ind. App. 548, 555, 267 N.E.2d 859, 864 (1971).

118. ___ Ind. App. ___, ___, 382 N.E.2d 1015 (1978).

119. The "pro-rata" clause involved in *Runnels* was the same as that of the Standard Form UM Endorsement set out in note 96 *supra*.

120. ___ Ind. App. ___, ___, 382 N.E.2d 1015, 1017 (1978). It must be noted that the court continues to recognize that an insurer *might* avoid the result of having to

The arguments advanced by these Indiana decisions and the courts of other states that have invalidated the "other insurance" clause are specious in nature. There is nothing unconscionable about charging a premium for UM coverage and then limiting the coverage when, in fact, the premium charged is based upon the very existence of the policy limitations. The limited coverage received is a valid *quid pro quo* for the relatively small premium paid. Moreover, little recognition has been given to the fact that UM statutes are intended to fill a void left by the financially irresponsible driver. The language employed by the legislature does not mandate that UM coverage overflow the insurance vacuum created by the uninsured motorist. The act requires only that an amount equal to the financial responsibility act be offered,¹²¹ and even that amount may be rejected by the insured.¹²² Indeed, the Indiana Court of Appeals in *Capps v. Klebs*¹²³ declared that: "The purpose of the uninsured motorist statute is to require a *minimum* amount of insurance be available to an injured insured which would place him in substantially the same position he would have occupied had the offending party complied with the *minimum requirements* of the financial responsibility act."¹²⁴ Although this statement might be said to reflect what the court perceives to be the purpose of the Indiana UM act, it is abundantly clear that the courts in Indiana do not look upon the act as mandating only the "minimum requirements" of coverage. Instead, they have required insurers to provide benefits far in excess of those that the injured party would have received had the tortfeasor been insured to the minimum limits.¹²⁵ Finally, the question of

pay UM benefits under both policies if instead a single policy is issued covering several vehicles. *Id.* at 1018. This is in line with the dicta contained in *Jeffries v. Stewart*, 159 Ind. App. 701, 309 N.E.2d 448 (1974), where it was noted that a single policy containing an unambiguously stated "separability clause" would preclude the "stacking" of the limits of more than one policy. Indeed, there have been four federal cases interpreting Indiana law that have recognized the distinction between issuing multiple policies and a single policy with multiple vehicles insured thereunder. See *Miller v. Hartford Accident & Indemnity Co.*, 506 F.2d 11 (7th Cir. 1974); *Trinity Universal Ins. Co. v. Capps*, 506 F.2d 16 (7th Cir. 1974); *Dunn v. Meridian Mutual Ins. Co.*, Civil No. 71 H 329 (N.D. Ind. November 16, 1972); *Rozina v. United States Fidelity & Guaranty Co.*, Civil No. 69 H 257 (N.D. Ind. September 15, 1970).

121. IND. CODE § 27-7-5-1 (1976), note 7 *supra*.

122. *Id.*

123. ____ Ind. App. ____, 382 N.E.2d 947 (1978).

124. *Id.* at 951 (emphasis supplied). See also *Bocek v. Inter-Insurance Exchange*, ____ Ind. App. ____, 369 N.E.2d 1093, 1097 (1977), note 17 *supra*.

125. See *Simpson v. State Farm Mutual Automobile Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970); *United Farm Bureau Mutual Ins. Co. v. Runnels*, ____ Ind. App. ____, 382 N.E.2d 1015 (1978); *United Farm Bureau Mutual Ins. Co. v. Wolfe*, ____ Ind. App. ____.

public policy is largely a fabrication of the courts. Construing the insurance contract accurately and giving it the effects its language unambiguously commands "is not *ipso facto* a breach of the public policy merely because it disappoints the innocent victim of an uninsured motorist."¹²⁶ It would seem, then, that the "other insurance" provision is valid and the insurer should be permitted to use and enforce it. The proposed regulation appropriately adopts this position.¹²⁷

The Medical Payments Set-Off Clause

Many insurance policies providing indemnification for injuries sustained as a result of an accident with an uninsured motorist contain a medical payments set-off or reduction clause.¹²⁸ The clause in essence declares that any amount recoverable under the UM endorsement shall be reduced by all amounts payable under the medical payments benefit of the same policy.¹²⁹

There has been relatively little litigation concerning this set-off provision. Those courts that have recognized the validity of this clause have justified their position on the parties' freedom to contract,¹³⁰ reasoning that policies expressly setting forth set-off provi-

_____, 382 N.E.2d 1018 (1978); *Patton v. Safeco Ins. Co.*, 148 Ind. App. 548, 267 N.E.2d 859 (1971).

126. *Putnam v. New Amsterdam Ins. Co.*, 48 Ill. 2d 71, 269 N.E.2d 97, 104-05 (1970).

127. See Proposed Regulation No. 3 in Appendix, *infra*, page 340.

128. The Standard Form UM Endorsement contains the following provision: The company shall not be obligated to pay under this insurance that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured highway vehicle which represents expenses for medical services paid or payable under the medical payments coverage of the policy.

1966 STANDARD FORM, PART III: LIMITS OF LIABILITY. For text of complete Standard Form, see WIDISS, note 10 *supra*, at App. A, 1 (1969).

129. By way of illustration, John Doe, while operating his own insured automobile, is struck and injured by an uninsured motorist. John's insurance provides medical payment coverage of \$5,000 and UM coverage of \$15,000. John's total damages are \$20,000. Under the medical payments set-off clause of the UM endorsement, John's insurer may pay \$5,000 under the medical payment coverage and then deduct that sum from the \$15,000 payable under the UM provision. As a result, John will collect a total of \$15,000 (\$5,000 from the medical payment coverage and \$10,000 from the UM benefits) as opposed to the full \$20,000 he incurred in damages.

130. *Boehler v. Insurance Co. of North America*, 290 F. Supp. 867 (E.D. Ark. 1968). However, see *Bacchus v. Farmers Ins. Group*, 106 Ariz. 280, 475 P.2d 264 (1970), which, while recognizing the insurer's contractual right to limit the policy, nevertheless held that the medical payments set-off clause was in derogation of the Arizona UM statute.

sions should be construed as written and not subject to judicial revision.¹³¹

However, the developing judicial trend is to permit enforcement of the medical payments set-off clause only in cases in which it acts to prevent the injured party from recovering twice.¹³² Two arguments are commonly used to void this provision. First, it is contended that such reductions dilute the purpose of the UM statutes.¹³³ That is, any attempt to reduce the benefits below the statutory minimum erodes the intent of the enactment.¹³⁴ Second, the medical payments coverage and the UM coverage are two entirely separate policy provisions that require payment of individual premiums. Each is a separate insuring agreement and as such the insured is entitled to recovery under both sections.¹³⁵ At least one court has employed a combination of these two arguments and held that the fact that the motorist protects himself by purchasing separate medical insurance does not alter the mandatory UM coverage imposed by the statute. A policy provision that the insured considers to be additional coverage and for which a separate premium has been tendered cannot be transferred into a reduction of the mandatory UM coverage.¹³⁶

Indiana courts have not spoken to the validity of the medical payments set-off clause. However, two federal district courts interpreting Indiana law have rendered decisions on the issue. In both instances the provision was invalidated. In *Wittig v. United Services Automobile Ass'n*,¹³⁷ the threshold question before the court was

131. In *Morgan v. State Farm Mutual Automobile Ins. Co.*, 195 So. 2d 648, 649 (La. App. 1967), the court held that "insurers have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, and in such event unambiguous provisions limiting liability must be given effect."

132. See *L'Manian v. American Mutual Ins. Co.*, 4 Conn. Cir. 524, 236 A.2d 349 (1967); *Glidden v. Farmers Auto Ins. Ass'n*, 57 Ill. 2d 330, 312 N.E.2d 247 (1974); *Silas v. Allstate Ins. Co.*, 129 N.J. Super. 99, 322 A.2d 464 (1974).

133. *Pleitgen v. Farmers Ins. Exchange*, 296 Minn. 191, 207 N.W.2d 535 (1973); *Talbot v. State Farm Mutual Automobile Ins. Co.*, 291 So. 2d 699 (Miss. 1974); *Shearer v. Motorists Mutual Ins. Co.*, 53 Ohio St. 2d 1, 371 N.E.2d 210 (1978); *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

134. *Keyes v. Beneficial Ins. Co.*, 39 Mich. App. 450, 197 N.W.2d 907 (1972); *Webb v. State Farm Mutual Automobile Ins. Co.*, 479 S.W.2d 148 (Mo. App. 1972).

135. *Alabama Farm Bureau Mutual Casualty Ins. Co. v. Humphrey*, 54 Ala. App. 343, 308 So. 2d 255 (1975); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973).

136. *Koneval v. Grange Mutual Casualty Co.*, 48 Ohio App. 2d 77, 355 N.E.2d 529 (1976).

137. 300 F. Supp. 679 (N.D. Ind. 1969).

whether the plaintiff had satisfied the requisite jurisdictional amount in controversy of \$10,000.¹³⁸ The plaintiff had been injured by an uninsured motorist while riding her bicycle. The insurer contended that under the policy of insurance the maximum recoverable amount was the \$10,000 UM benefit and as such the jurisdictional amount could never be satisfied.¹³⁹ After reviewing the insurance policy, the court concluded that it had jurisdiction because it was possible that the plaintiff could recover from both the UM provision and the medical payments portion of the policy.¹⁴⁰ The construction and language of the applicable policy provisions, it was held, did not impose a reduction of the UM benefits but was only applicable to prevent double recovery by the plaintiff.¹⁴¹

Although the *Wittig* decision was the first step taken in Indiana to strike down the medical payments set-off clause, it is of little precedential value because it relied solely on the language and construction of a particular policy. However, in *Simpson v. State Farm Mutual Automobile Ins. Co.*,¹⁴² the court significantly expanded its basis for decision and found such set-off clauses in derogation of the Indiana UM statute. The court concluded that the Indiana act sets no maximum limit of recovery, and that since separate premiums had been paid for the UM and medical payments benefits, the medical payments could not be deducted from the UM coverage.¹⁴³

A review of the cases in which the "other insurance" clause was invalidated¹⁴⁴ reveals that the arguments advanced by the

138. 28 U.S.C. § 1332 (1976), provides in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and is between—

(1) citizens of different states;

139. In 1969 the Indiana Safety-Responsibility Act, IND. CODE § 9-2-1-15 (1976), mandated a minimum liability limit of \$10,000 per person. In *Wittig*, the policy in issue provided UM benefits only in the minimum amount. In 1971, the Indiana legislature amended the Safety-Responsibility Act and increased the minimum limit to \$15,000 per person.

140. In *Wittig*, the plaintiff could conceivably have recovered a total of \$12,000—\$2,000 from the applicable medical payments coverage and \$10,000 from the UM benefits—and therefore have met the minimum jurisdictional requirement for amount in controversy.

141. *Wittig v. United Services Auto Ass'n*, 300 F. Supp. 679, 681 (N.D. Ind. 1969).

142. 318 F. Supp. 1152 (S.D. Ind. 1970).

143. *Id.* at 1156.

144. See notes 95-106, 111-27 *supra* and accompanying text.

courts to reject that clause are identical to those reasons posited by the courts to void the medical payments set-off provision. However, while it was concluded that the "other insurance" clause should be enforced,¹⁴⁵ the medical payments set-off clause should nevertheless be voided. Accepting the premise that the UM statute is aimed at providing only the minimum limits imposed by the Safety-Responsibility Act,¹⁴⁶ it must be stressed that there remains one fundamental justification for permitting recovery of both UM benefits and medical payments benefits. The medical payments benefit is a first-party coverage,¹⁴⁷ and as such it is payable to the insured without regard to fault or the insurance status of the tortfeasor. Not only is a separate premium paid for the medical payments coverage, but it is a totally separate and different insuring agreement. Moreover, in the event of an accident with an insured vehicle, the injured party may obtain indemnification from his own medical payments coverage as well as from the negligent tortfeasor's insurance company. Since most medical payments provisions do not include subrogation or set-off clauses, not permitting the injured party to receive both the medical payments and UM benefits would render him less recovery than if the tortfeasor had been insured to the minimum limits of the financial responsibility act.¹⁴⁸ The medical payments set-off clause should therefore not be enforced.¹⁴⁹

The Workmen's Compensation Set-Off Clause

The workmen's compensation set-off clause¹⁵⁰ closely resembles the set-off clause for medical payments. The clause provides that any amount payable under the UM coverage of the automobile

145. See Proposed Regulation No. 3 in Appendix, *infra*, page 340.

146. See notes 121-25 *supra* and accompanying text.

147. A first-party coverage is one that inures directly to the benefit of the insured for damages sustained by him. This is in contrast to third-party coverage which compensates other persons for damages sustained as the result of the liability of the insured person.

148. WIDISS, note 10 *supra*, at § 2.65 (Supp. 1978).

149. See Proposed Regulation No. 4 in Appendix, *infra*, page 340.

150. The workmen's compensation set-off provision under the Standard Form UM Endorsement states that:

Any amount payable under the terms of this insurance because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by . . . (2) the amount paid and the present value of all amounts payable under workmen's compensation law, disability benefits law or any similar law.

1966 STANDARD FORM, PART III: LIMITS OF LIABILITY. For text of complete Standard Form see WIDISS, note 10 *supra*, at App. A, 1 (1969).

policy shall be reduced by any sum payable under the state workmen's compensation law.¹⁵¹ Only a few jurisdictions have upheld the provision. Some cases indicate that courts have been persuaded by contract arguments and have enforced the clause on the ground that its meaning is clear and unambiguous.¹⁵² Other courts have ignored the contract arguments and asserted that the UM statutes require only minimum coverage; so long as that amount is recovered, regardless of the source, the legislative purpose has been satisfied.¹⁵³

Approximately twenty states have invalidated the workmen's compensation set-off clause.¹⁵⁴ The rationales employed by these courts are essentially the same as those invoked to set aside other limiting provisions of the UM endorsement. Some cases stress that the intent of the legislation is complete indemnification.¹⁵⁵ In those cases where the total damage exceeds the UM benefits, deduction of workmen's compensation benefits does not provide full indemnification and the purpose of the UM statute is circumvented. A closely

151. To illustrate the operation of the workmen's compensation set-off clause, consider the following hypothetical. Joe Coe, a city fireman, is injured while responding to a fire alarm when the fire truck he is operating is struck by an uninsured motorist. Joe is, by definition under a policy insuring his own personal automobile, an "insured" for purposes of UM benefits. Because Joe was injured while in the course of his employment, he is also eligible for workmen's compensation benefits. Joe sustains injuries in the amount of \$17,000. Joe files a claim for maximum benefits under his UM policy of \$15,000. The workmen's compensation carrier, in the interim, pays total benefits of \$14,500. The UM insurer, by virtue of the workmen's compensation set-off clause, is entitled to deduct the \$14,500 sum from its \$15,000 limit of liability under the UM policy. The total UM benefit would be \$500. This of course means that Joe still has outstanding damages of \$2,000 for which he has received no compensation.

152. See *Niekamp v. Allstate Ins. Co.*, 52 Ill. App. 2d 364, 202 N.E.2d 126 (1964); *Durant v. MVAIC*, 15 N.Y.2d 408, 260 N.Y.S.2d 1, 207 N.E.2d 600 (1965).

153. *Ullman v. Wolverine Ins. Co.*, 48 Ill. 2d 1, 269 N.E.2d 295 (1970).

154. *Preferred Risk Mutual Ins. Co. v. Holmes*, 287 Ala. 251, 251 So. 2d 213 (1971); *Travelers Ins. Co. v. National Farmers Union Property & Casualty Ins. Co.*, 252 Ark. 624, 480 S.W.2d 585 (1972); *Nationwide Mutual Ins. Co. v. Hillyer*, 32 Colo. App. 163, 509 P.2d 810 (1973); *Standard Accident Ins. Co. v. Gavin*, 184 So. 2d 229 (Fla. App. 1966); *Leist v. Auto-Owners Ins. Co.*, 160 Ind. App. 322, 311 N.E.2d 828 (1974); *Gagnard v. Thibodeaux*, 336 So. 2d 1069 (La. App. 1976); *Detroit Automobile Inter-Ins. Exchange v. Ayvazian*, 62 Mich. App. 94, 233 N.W.2d 200 (1975); *Brunmeier v. Farmers Ins. Exchange*, 296 Minn. 328, 208 N.W.2d 860 (1973); *Steinhaefel v. Reliance Ins. Co.*, 495 S.W.2d 463 (Mo. App. 1973); *Sullivan v. Doe*, 159 Mont. 50, 495 P.2d 193 (1972); *Sweeney v. Hartford Accident & Indemnity Co.*, 136 N.J. Super. 591, 347 A.2d 380 (1975); *Bartlett v. Nationwide Mutual Ins. Co.*, 33 Ohio St. 2d 50, 294 N.E.2d 665 (1973); *Rhodes v. Automobile Ignition Co.*, 218 Pa. Super. 281, 275 A.2d 846 (1971); *Aldroft v. Fidelity Casualty Co.*, 106 R.I. 311, 259 A.2d 408 (1969); *Ferguson v. State Farm Mutual Ins. Co.*, 261 S.C. 96, 198 S.E.2d 522 (1973); *Hamaker v. American States Ins. Co. of Texas*, 493 S.W.2d 893 (Tex. App. 1973).

155. *Sullivan v. Doe*, 159 Mont. 50, 495 P.2d 193 (1972).

related argument employed by courts in other jurisdictions is that the deductions are methods of reducing the statutory minimum coverage of the UM act.¹⁵⁶ One court adopted the position that the UM statute contains no language authorizing such a deduction and any attempt to do so is therefore invalid.¹⁵⁷ The Arkansas Supreme Court applied a novel argument and voided the set-off provision on the basis that it discriminates against those persons who work and are protected under the workmen's compensation law.¹⁵⁸

The Indiana Court of Appeals joined those states which do not enforce the workmen's compensation set-off clause when it decided *Leist v. Auto-Owners Ins. Co.*¹⁵⁹ In that case, the plaintiff, in his capacity as town marshal, was operating a town automobile when he was struck and seriously injured by an uninsured motorist. Leist recovered over \$11,000 from the workmen's compensation carrier and then sought recovery from the UM insurer to pay for the balance of his damages. When Leist sought arbitration following denial of his UM claim,¹⁶⁰ the insurer obtained an injunction preventing the arbitration procedure. On appeal, the decision of the lower court was reversed and the injunction dissolved. The court held that the set-off provision violated the UM statute, stating that if the legislature had intended to permit UM insurers to limit their liability it would have done so specifically in the act.¹⁶¹

While the *Leist* decision focused on legislative intent to invalidate the workmen's compensation set-off clause, the rationale relied upon by most courts to invalidate the medical payment set-off clause would appear to be not only applicable but more persuasive.¹⁶² Like the benefits available under the medical payment coverage of

156. *Gagnard v. Thibodeaux*, 336 So. 2d 1069 (La. App. 1976); *Steinhaefel v. Reliance Ins. Co.*, 495 S.W.2d 463 (Mo. App. 1973).

157. *Aldroft v. Fidelity Casualty Co.*, 106 R.I. 311, 259 A.2d 408 (1969).

158. *Travelers Ins. Co. v. National Farmers Union Property & Casualty Ins. Co.*, 252 Ark. 624, 480 S.W.2d 585 (1972).

159. 160 Ind. App. 322, 311 N.E.2d 828 (1974).

160. The majority of automobile insurance policies contains a provision entitling either or both the insured and the insurer to seek arbitration of a dispute arising between the parties as to the applicability of the coverage or the amount payable thereunder. The demand for arbitration must be in writing and it is to be conducted under the rules of the American Arbitration Association. In addition, the arbitration clause provides that each party agrees to be bound by the award made by the arbitrator and such award is enforceable in a court having jurisdiction over such matters.

161. *Leist v. Auto-Owners Ins. Co.*, 160 Ind. App. 322, 311 N.E.2d 828 (1974).

162. See notes 146-49 *supra* and accompanying text.

the automobile policy, workmen's compensation is a first party coverage¹⁶³ payable to any worker who sustains injury while in the course of his employment duties. Workmen's compensation benefits are a separate and independent source of indemnification, wholly unrelated to an automobile policy or any benefits payable thereunder. There is simply no sound reason to preclude recovery from one source merely because the insured is fortunate enough to have coverage under an independent insurance policy for which a separate premium has been paid. As a result, a regulation should be adopted proscribing reduction of benefits obtained from workmen's compensation insurance.¹⁶⁴

HIT-AND-RUN COVERAGE

The uninsured motorist endorsement, in addition to providing coverage against bodily injury inflicted by an uninsured motorist, affords protection against hit-and-run drivers.¹⁶⁵ This coverage is designed to cover those automobile accidents involving a party who flees the scene and whose identity is not known. The hit-and-run coverage, however, is often predicated on the fulfillment of certain policy conditions.¹⁶⁶ These conditions, particularly the "physical con-

163. See note 147 *supra*.

164. See Proposed Regulation No. 5 in Appendix, *infra*, page 340.

165. The Standard Form UM Endorsement provides that an "uninsured vehicle" also means a "hit-and-run vehicle." 1966 STANDARD FORM, PART V: ADDITIONAL DEFINITIONS (Uninsured Vehicle). For text of complete form, see WIDISS, note 10 *supra*, at App. A, 1 (1969).

166. The Standard Form coverage reads:

'[H]it and run vehicle' means a highway vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with the vehicle which the insured is occupying at the time of the accident, provided:

- (a) there cannot be ascertained the identity of either the operator or owner of such highway vehicle;
- (b) 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 within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth facts in support thereof; and
- (c) at the company's request, the insured or his legal representative makes available for inspection the vehicle which the insured was occupying at the time of the accident.

1966 STANDARD FORM, PART V: ADDITIONAL DEFINITIONS. For text of complete form, see WIDISS, note 10 *supra*, at App. A, 1 (1969).

tact" requirement and the "24 hour" and "30 day" notice provisions, strictly limit this coverage and as a result have been the subject of extensive controversy and litigation.

The Physical Contact Requirement

The physical contact clause requires that there be some contact between the insured and uninsured vehicles. The purpose of this requirement is to reduce the possibility of fraudulent claims.¹⁶⁷ The provision's value in foreclosing claims arising from accidents involving an insured and a fictitious "phantom" driver has been recognized by the courts.¹⁶⁸ The statement of one court accurately outlines the problem:

To open the door for all claims against unknown and unidentified drivers, where no physical contact had occurred between the vehicle of the unknown party and the claimant would open the door for all types of fraud. . . . Appellee argues, it is as likely as not that if there is no contact between the vehicles, the negligent tortfeasor is fully insured but unaware that he caused the accident. If there is physical contact and the driver leaves the scene, one of the more likely reasons for his flight is because he does not have insurance. The points may or may not be true or appropriate, but the physical contact requirement in the policy removes the need for such speculation.¹⁶⁹

The validity of the physical contact requirement has been challenged on a number of occasions. The argument most often advanced by injured parties is that the limitation contradicts the underlying purpose of the UM statutes. However, because the hit-and-run provision of the policy is actually a liberalization of most UM enactments,¹⁷⁰ several courts have held that insurers are free to

167. The "hit-and-run" coverage is highly susceptible to abuse. For example, an insured who negligently loses control of his vehicle and collides with a tree might later claim that a hit-and-run motorist forced him off the road.

168. *Huelsman v. National Emblem Ins. Co.*, 551 S.W.2d 579 (Ky. App. 1977); *United States Fidelity & Guaranty Co. v. Fruchtman*, ___ Minn. ___, 263 N.W.2d 66 (1978).

169. *Huelsman v. National Emblem Ins. Co.* 551 S.W.2d 579, 582 (Ky. App. 1977).

170. See note 29 *supra*. In speaking to this matter, the Indiana Court of Appeals in *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 275 N.E.2d 567, 570 (1971), held:

Actually coverage is extended rather than curtailed and more persons are covered than the statute requires. In addition to protecting persons legal-

impose contractual limitations such as the physical contact requirement.¹⁷¹ As a result, the physical contact limitation has generally been recognized as valid and enforceable as long as it is expressed in clear and unambiguous language.¹⁷² Moreover, because the hit-and-run clause is not generally required by statute, courts have expressed a reluctance in some instances to rewrite the insurance contract to bind the insurer to a risk which it did not contemplate or for which it was not paid a premium.¹⁷³

Underlying the physical contact requirement is the compelling interest in preventing fraudulent claims. Certainly the requirement constitutes a reasonable limitation when it is employed to deter fraud. However, on the basis of the physical contact requirement, insurers have argued that the term should be interpreted to bar recovery in all cases where there has not been an "actual" touching of the insured and uninsured vehicles. Given the sometimes harsh results that can come about as a result of such a rigid standard, many courts have responded by adopting a flexible definition of "physical contact."

Indirect Physical Contact

The primary means adopted by the courts to expand the definition of physical contact is to include those incidents in which collisions result from indirect contact with the runaway vehicle. For the most part, courts have shown little reluctance to extend hit-and-run coverage in those cases involving intermediate vehicles.¹⁷⁴ Courts

ly entitled to recover damages because of bodily injury by provably uninsured automobiles, the coverage afforded . . . also [gives] protection to persons injured by drivers of hit and run automobiles . . .

171. See *Balestrieri v. Hartford Accident & Indemnity Co.*, 112 Ariz. 160, 540 P.2d 126 (1975); *Ward v. Consolidated Underwriters*, 295 Ark. 696, 535 S.W.2d 830 (1976); *Rosnick v. Aetna Casualty & Surety Co.*, 172 Conn. 416, 374 A.2d 1076 (1977); *Basilla v. Aetna Ins. Corp.*, 38 Mich. App. 260, 195 N.W.2d 893 (1972); *Ward v. Allstate Ins. Co.*, 514 S.W.2d 576 (Mo. 1974).

172. *Grace v. State Farm Mutual Automobile Ins. Co.*, 197 Neb. 118, 246 N.W.2d 874 (1976); *Travelers Ins. Co. v. Reddick*, 37 Ohio St. 2d 119, 308 N.E.2d 454 (1974); *Phelps v. Twin City Fire Ins. Co.*, 476 S.W.2d 419 (Tex. App. 1972).

173. *Amidzich v. Charter Oak Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969).

174. The most common hit-and-run accident involving intermediate vehicles is the "chain reaction" type collision. In these circumstances, a hit-and-run vehicle generally rearends the vehicle immediately ahead of it and that vehicle in turn rearends the vehicle ahead of it, and so on. After setting the chain reaction in motion, the hit-and-run driver flees the scene. Although the fleeing motorist made direct contact with only one of the vehicles, indirect contact was made with all of the vehicles in the chain.

have consistently applied the rules of proximate causation in determining that recovery is proper in cases where the hit-and-run motorist set the accident in motion.¹⁷⁶ The Louisiana Court of Appeals best articulated the applicable test:

[T]he injury-causing impact must have a complete, proximate, direct and timely relationship with the first impact between the hit-and-run vehicle and the intermediate vehicle. In effect, the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence.¹⁷⁶

It must be noted that this test does not totally obviate the "actual" physical contact requirement. Rather, it merely abrogates the requirement that the "actual" contact take place between the uninsured motorist and the claimant vehicle. The indirect contact rule still requires that the uninsured motorist make actual contact with some other vehicle proximately involved in the accident.

Strict adherence to this test, however, would totally preclude recovery in those cases involving physical contact with objects other than intermediate vehicles. As a result, some jurisdictions have refused to apply the test strictly and have determined that a stone propelled by a hit-and-run vehicle which struck and killed the occupant of another vehicle met the physical contact requirement necessary for recovery.¹⁷⁷ Another court has held that there was sufficient evidence to permit the case to go to the jury where the occupants of an unidentified vehicle tossed a sack of refuse onto the highway causing the claimant to leave the road and flip his automobile.¹⁷⁸

The Indiana Court of Appeals has twice been confronted with cases seeking to expand the term "physical contact" to include in-

175. *State Farm Mutual Automobile Ins. Co. v. Spinola*, 374 F.2d 873 (5th Cir. 1967) (applying Florida law); *State Farm Mutual Automobile Ins. Co. v. Carlson*, 130 Ga. App. 27, 202 S.E.2d 213 (1973); *Ray v. Demaggio*, 313 So. 2d 251 (La. App. 1975); *Shamrock Casualty Co. v. Mack*, 61 Misc. 2d 240, 305 N.Y.S.2d 525 (1969); *Latham v. Mountain States Mutual Casualty Co.*, 482 S.W.2d 655 (Tex. App. 1972).

176. *Springer v. GEICO*, 311 So. 2d 36, 39-40 (La. App. 1975).

177. *Barfield v. Insurance Co. of North America*, 59 Tenn. App. 631, 443 S.W.2d 482 (1969). *See also* *Smith v. Great American Ins. Co.*, 35 App. Div. 2d 233, 315 N.Y.S.2d 388 (1970), *rev'd*, 29 N.Y.2d 116, 324 N.Y.S.2d 15 (1971).

178. *Craig v. State Farm Mutual Automobile Ins. Co.*, 257 Ark. 751, 519 S.W.2d 741 (1975). Other courts, given the same factual circumstances, have refused to extend the indirect contact doctrine. *See, e.g., Gardner v. Aetna Casualty & Surety Co.*, 114 Ariz. 123, 559 P.2d 679 (1977); *Aetna Casualty & Surety Co. v. Head*, 240 So. 2d 280 (Miss. 1970).

direct contact. Initially, the court in *Blankenbaker v. Great Central Ins. Co.*,¹⁷⁹ adopted a very strict policy and totally rejected the indirect contact doctrine. However, in *Allied Fidelity Ins. Co. v. Lamb*,¹⁸⁰ the court granted recovery, recognizing that indirect contact is sufficient in certain circumstances. In *Blankenbaker*¹⁸¹ the claimants' vehicle struck a tire and rim assembly in the middle of the highway and the occupants were seriously injured when the van veered off the road and rolled over. There was no evidence establishing how the assembly happened to be on the road. No other vehicle was involved in the accident nor was any other vehicle in the vicinity of the scene when the accident took place. The occupants filed a claim with the insurer seeking UM benefits. Following denial of the claim, the insurer sought a declaratory judgment of the policy terms.¹⁸²

The court of appeals, in affirming the decision of the trial court that the claimants were not entitled to recovery, held that the occurrence of some type of physical contact between the hit-and-run vehicle and the insured vehicle was necessary to enforcement of hit-and-run claims. The court determined as a matter of law that the tire and rim assembly was not a hit-and-run "vehicle" and recovery was properly denied. By way of dicta, however, the court added that it totally rejected the indirect contact doctrine as an attempt to rewrite the contract between the parties.¹⁸³

The rigid position adopted in *Blankenbaker* was relaxed by the court in *Allied Fidelity Ins. Co. v. Lamb*.¹⁸⁴ In that case, the plaintiff's decedent was killed when an unidentified motor vehicle propelled a stone through the windshield of the claimant automobile. In reversing the decision of the trial court to deny relief, the court of appeals held that the term "physical contact" in the hit-and-run provision of the UM endorsement occurs when an unidentified vehicle strikes an object and causes it to strike the insured vehicle. Although the object clearly need not be another vehicle, the court

179. 151 Ind. App. 693, 281 N.E.2d 496 (1972).

180. ____ Ind. App. ____, 361 N.E.2d 174 (1977).

181. 151 Ind. App. 693, 281 N.E.2d 496 (1972).

182. The declaratory judgment procedure is appropriate for the determination of contractual rights of the insured and insurer alike. For a discussion of the use of declaratory judgments to determine rights under a contract of insurance, see COUCH ON INSURANCE 2d §§ 74:115-74:153 (1968).

183. *Blankenbaker v. Great Central Ins. Co.*, 151 Ind. App. 693, 281 N.E.2d 496, 501 (1972).

184. ____ Ind. App. ____, 361 N.E.2d 174 (1977).

confined recovery to those instances when a "substantial physical nexus" is established between the unidentified vehicle and the intermediate object.¹⁸⁵

Clearly, recovery of UM benefits should be granted in those cases where the claimant can demonstrate that his injuries were the direct and proximate result of a hit-and-run driver. In every case involving indirect contact with the hit-and-run motorist there will be some physical evidence of impact with either the intermediate vehicle or some object. The only remaining issue, then, is the question of proximate causation. As in any tort action, the parties should be entitled to have the trier of fact weigh the evidence presented and determine whether the injuries sustained were the direct result of the negligence of the defendant. Moreover, the primary justification for the physical contact requirement, fraud prevention, is of less importance because there will be evidence supporting the occurrence of the accident. In the case of the intermediate vehicle, the claimant will have the advantage of the testimony of the driver of the vehicle struck directly by the hit-and-run motorist. In the case of impact with an object other than a vehicle there will inevitably be some evidence of physical damage to the exterior of the vehicle.

Constructive Contact

A much more difficult case arises when the claimant, in his effort to avoid collision with either the hit-and-run driver, an intermediate vehicle, or some other intermediate object, takes evasive action which results in bodily injury to the claimant. In such an instance, although the hit-and-run driver made no direct or indirect contact with the claimant, the argument will often be made that there was a "constructive contact" warranting recovery under the UM endorsement.¹⁸⁶ Courts confronted with this theory have demonstrated a pronounced reluctance to accept it. In such cases, the trend of the courts is to strictly construe the contact requirement, thereby barring recovery.¹⁸⁷ As a result of this strict construction, a bus passenger injured when the bus stopped suddenly to

185. *Id.* at 177.

186. *Ferega v. State Farm Mutual Automobile Ins. Co.*, 58 Ill. 2d 109, 317 N.E.2d 550 (1974); *Buckeye Union Ins. Co. v. Cooperman*, 33 Ohio App. 2d 152, 293 N.E.2d 293 (1972).

187. *Ward v. Consolidated Underwriters*, 295 Ark. 696, 535 S.W.2d 830 (1976); *Osephchook v. Gateway Ins. Co.*, 298 So. 2d 169 (Fla. App. 1974); *Basilla v. Aetna Ins. Group*, 38 Mich. App. 260, 195 N.W.2d 893 (1972); *Grace v. State Farm Mutual Automobile Ins. Co.*, 197 Neb. 118, 246 N.W.2d 874 (1976).

avoid striking a car that swerved into its path was denied recovery despite there being a busload of passengers that could corroborate the claimant's story.¹⁸⁸ Similarly, one court held that a claim was properly denied where the driver and passengers of an automobile were injured severely when they were forced off a narrow road by a freight truck driving down the middle of the road at a high rate of speed.¹⁸⁹

The only reported case in Indiana on "constructive contact" is *Ely v. State Farm Mutual Automobile Ins. Co.*¹⁹⁰ In that case, the plaintiff was a guest passenger in a vehicle owned and operated by a friend. As the automobile approached a railroad trestle the driver noticed a truck stopped in the middle of the road. As the driver applied his brakes, the automobile skidded on the muddy pavement and struck a wall, seriously injuring the plaintiff. Following denial of Ely's claim for UM benefits, he filed suit against State Farm. The court of appeals affirmed the trial court's judgment for the insurer, holding that there can be no recovery where there is neither direct nor indirect contact.¹⁹¹ Moreover, the court inexplicably noted that recovery would still be barred even though the claimant could sufficiently demonstrate that the hit-and-run vehicle was the proximate cause of the accident.¹⁹²

Given the past approach of the Indiana cases, it is indeed ironic that in interpreting the physical contact requirement the court of appeals should reach so strict a conclusion. It would appear that the public policy arguments so forcefully advanced in the past would be even more appropriate in the contact cases. Where there is sufficient evidence that the sequence of events which caused the injury

188. *Collins v. New Orleans Public Service Co.*, 234 So. 2d 270 (La. App. 1970).

189. *Amidich v. Charter Oak Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969).

190. 148 Ind. App. 586, 268 N.E.2d 316 (1971).

191. *Id.* at 320.

192.

The appellants alternatively argue that where there is a showing of proximate causation the element of fraud is eliminated and recovery under the policy should be granted notwithstanding the lack of actual physical contact. . . . It is true that for a person injured in an automobile accident to recover from the tortfeasor who caused the accident, physical contact is not required. This is a matter of common law negligence. In this case, however, the insured is attempting to recover from an insurer based upon the provisions of a policy of insurance. The law of contract as opposed to the law of negligence, is controlling here.

Id. at 322.

was initially set in motion by an unknown hit-and-run driver, overriding public policy would seem to require recovery. The physical contact requirement, with its underlying purpose of deterring fraudulent claims, loses its integrity when there are disinterested witnesses available to document the precise cause of the accident.

Invalidating the Physical Contact Requirement

Courts in many states now permit recovery of UM benefits in the absence of physical contact, direct or indirect, with the hit-and-run vehicle. For the most part, this course of action has been taken to avoid the harsh and inequitable results that have occurred because of strict compliance with the policy provisions. Two rationales are generally used to reach these decisions.

Some courts have urged that the purpose of the UM statutes is to put the injured party in the same position he would have enjoyed had the tortfeasor been insured.¹⁹³ Thus, so long as the hit-and-run driver is the proximate cause of the accident, recovery should be allowed. Other courts have rejected the physical contact requirement by holding that this limitation does not adequately protect those individuals who are injured as a result of the actions of hit-and-run motorists.¹⁹⁴ The hit-and-run coverage should not be considered in isolation, but rather in context with the totality and purpose of the UM act.¹⁹⁵

Courts in other jurisdictions have stated that there is no need to require physical contact as a condition to recovery because the trier of fact can determine whether the claim is in fact fraudulent. If the injured party can sustain the burden of proving that an accident did occur as the direct result of an encounter with a hit-and-run motorist, he should be entitled to recovery regardless of the actuality of contact.¹⁹⁶ As one court stated: "Fear of fraudulent claims cannot justify the judicial deprivation of the plaintiff's right to bring an independent action in tort because the genuineness of the claim can

193. *Biggs v. State Farm Mutual Automobile Ins. Co.*, 569 P.2d 430 (Okla. 1977); *Abramowicz v. State Farm Mutual Automobile Ins. Co.*, 369 A.2d 691 (Del. Super. 1977).

194. *Farmers Ins. Exchange v. McDermitt*, 34 Colo. App. 305, 527 P.2d 918 (1974); *Solle v. Stuyvesant Ins. Co.*, 116 N.H. 595, 364 A.2d 883 (1976).

195. *Maurer v. Grange Ins. Ass'n, Inc.*, 18 Wash. App. 2d 197, 567 P.2d 253 (1977).

196. *Montoya v. Dairyland Ins. Co.*, 394 F. Supp. 1337 (D.N.M. 1975); *Brown v. Progressive Mutual Ins. Co.*, 249 So. 2d 429 (Fla. 1971); *State Farm Fire & Casualty Ins. Co. v. Lambert*, 291 Ala. 645, 285 So. 2d 917 (1973).

adequately be tested by the mechanisms of the adversary process."¹⁹⁷ In addition, to require physical contact as a precondition to recovery of UM benefits under the hit-and-run coverage is to concede that an innocent victim of a hit-and-run motorist is much better off to intentionally make physical contact rather than avoid the collision and sustain injury by rolling over or striking a tree.¹⁹⁸ It would seem that a general reconsideration of the propriety of the physical contact requirement is warranted. This is not to suggest that the floodgates to hit-and-run claims should be opened. The insurance companies must be assured that there is adequate protection from fraudulent claims. However, it seems that the adversary system could provide the necessary safeguards. The claimant should have the burden of proof of showing that the injuries sustained were the direct and proximate result of the negligence of a hit-and-run driver and the insurer should have the right to raise fraud and collusion as a defense to any claim.¹⁹⁹

The Twenty-four Hour Report Requirement

Most uninsured motorist endorsements contain a provision requiring that hit-and-run accidents be reported to the police or some other official within twenty-four hours after the occurrence of the accident.²⁰⁰ This requirement clearly serves a valid purpose. Prompt reporting better enables police and other interested parties to determine if and in what manner an accident occurred. The sooner an accident is reported the more quickly interviews may be conducted with witnesses and the scene investigated for post-accident evidence.²⁰¹

Although there are few reported cases involving the twenty-four hour report requirement, it appears that compliance should be viewed as essential to recovery. Failure to comply with the provision may result in total defeat of the right to UM benefits.²⁰² Some

197. *Demello v. First Ins. Co. of Hawaii, Ltd.*, 55 Hawaii 519, 523 P.2d 304, 308 (1974). *See also Webb v. United Services Auto Ass'n*, 227 Pa. Super. 508, 323 A.2d 737 (1974).

198. P. PRETZEL, UNINSURED MOTORISTS § 34.3A (1972).

199. *See Proposed Regulation No. 6 in Appendix, infra*, page 340.

200. For the text of the Standard Form setting forth the 24 hour notice requirement, *see* note 166 *supra*.

201. *California State Auto Ass'n v. Blanford*, 4 Cal. App. 3d 187, 84 Cal. Rptr. 333 (1970).

202. *Barfield v. Insurance Co. of North America*, 59 Tenn. App. 631, 443 S.W.2d 482 (1969).

courts have recognized the report requirement as a valid condition precedent to recovery.²⁰³

In the event that an insured fails to comply with the report requirement, the claim is not always automatically lost.²⁰⁴ Before the insurer will be permitted to deny the claim, there must be evidence that the insurer has been prejudiced by the insured's failure to report the accident within twenty-four hours after the accident. The late report nevertheless does give rise to a rebuttable presumption that there has been some prejudice to the insurance company.²⁰⁵ This means that the insured seeking recovery bears the burden of demonstrating that the insurer was not in any way prejudiced.²⁰⁶

Although the reporting requirement has a valid purpose, in some instances the provision and the attendant burdens associated with failure to comply with it can be particularly unreasonable. It is conceivable that a motorist could become involved with a hit-and-run driver on a deserted secondary road and not be found until after the exhaustion of the twenty-four hour period. Under such circumstances, strict adherence to the reporting requirement would result in loss of the insured's right of recovery under the policy. At best, the insured would be subjected to a difficult burden of persuasion to show that the insurer had not been prejudiced. The better approach would be to relax the twenty-four hour requirement by permitting compliance as soon as practicable under the circumstances.²⁰⁷ By expanding the requirement in this manner, inequitable and harsh results may be avoided. As a result, the insured's burden of showing that the insurer was not prejudiced by the late report would not be imposed until after a showing that the report was not made as soon as practicable after the occurrence of the accident. The rights of the insurance company will not be seriously jeopardized and the insured will be given a fair opportunity to pursue his claim.²⁰⁸

The Thirty Day Notification to Insurer Requirement

In addition to the physical contact requirement and the time limitation imposed on reporting the hit-and-run accident, the Stan-

203. *McKay v. Highlands Ins. Co.*, 287 So. 2d 393 (Fla. App. 1974); *State Farm County Mutual Ins. Co. v. Landers*, 520 S.W.2d 604 (Tex. App. 1974).

204. *Allstate Ins. Co. v. Korschin*, 350 So. 2d 1081 (Fla. App. 1977).

205. *Barnes v. Travelers Ins. Co.*, 342 So. 2d 1065 (Fla. App. 1977).

206. *Torres v. Protective National Ins. Co.*, 358 So. 2d 109 (Fla. App. 1978).

207. *Bolton v. Doe*, 266 S.C. 344, 223 S.E.2d 187 (1976).

208. See Proposed Regulation No. 7 in Appendix, *infra*, page 340.

dard UM Endorsement requires the insured to file with the insurer a statement under oath within thirty days from the time of the accident that he has a legitimate cause of action against the hit-and-run motorist.²⁰⁹ As a general rule, failure to do so will relieve the company of liability.²¹⁰ However, as with the twenty-four hour report requirement, the insurer must have been prejudiced before the failure to comply can be used to bar the claim.²¹¹ Likewise, prejudice will be presumed in the event of late notice, and the claimant has the burden of demonstrating that the company was not prejudiced.²¹²

Because claimants fail too often to read carefully their insurance policies to ascertain what affirmative steps must be taken to preserve their claim, some courts have found means of providing the insured with some latitude in meeting this requirement. One court held that since the insurer had notice of the accident about one month after its occurrence, it had waived its rights to strict compliance of the oath provision.²¹³ In another case, the court held the insurer waived its rights to a statement under oath when it failed to make a response to a letter sent to it by the claimant's attorney within the thirty day period.²¹⁴

While the oath requirement may be of some value in deterring possible fraudulent claims, it should not be used as a means of denying a claim merely because the insured was not aware of the requirement. This is particularly true in those cases where the accident is reported in a timely manner to the insurance company and

209. The 30 day notification clause is set out in note 166 *supra*.

210. *Latham v. Mountain States Ins. Co.*, 482 S.W.2d 655, 657 (Tex. App. 1972).

211. *Hanover Ins. Co. v. Carroll*, 241 Cal. App. 2d 558, 50 Cal. Rptr. 704 (1966).

212. *Laster v. United States Fidelity & Guaranty Co.*, 293 So. 2d 83 (Fla. App. 1974).

213. In *McMahon v. Coronet Ins. Co.*, 6 Ill. App. 3d 704, 286 N.E.2d 631 (1972), the court held:

As a technical matter, it is true that plaintiffs did not comply with the strict letter of the policy provisions by filing the sworn statement within 30 days. . . . This provision was placed in the policy for the benefit of Coronet. Therefore, it was within the power of Coronet to waive its right to receive such formal statement. In this case, the conduct of Coronet created in the plaintiffs a reasonable belief that it was not necessary for them strictly to comply with the letter of this condition in the policy. Recital of the above facts and of the steps taken by Coronet shows that never . . . did Coronet ever bring this provision to the attention of the plaintiffs or require or request their compliance.

Id. at 634.

214. *Hamill v. Nationwide Mutual Ins. Co.*, ____ Tenn. App. ____, 499 S.W.2d 892 (1972).

the company, fully aware that the insured is ignorant of the requirement, purposely permits the thirty day period to lapse in order to avoid its liability. The oath requirement, therefore, should be retained, but the insurer should have the burden of securing the statement. In this manner, fraudulent claims may yet be deterred, but the insured will not be punished for his ignorance of the policy provisions.²¹⁵

CONCLUSION

Statutory uninsured motorist coverage has been enacted in all fifty states in an effort to fill the void left by the motorist who has not purchased automobile liability insurance. The history of these remedial statutes, however, has been marked by an ongoing struggle. On the one hand, insurance companies have narrowly interpreted the meaning of the statutes and have consequently circulated policy endorsements containing contractual restrictions on UM coverage. Conversely, when called upon to interpret the uninsured motorist statutes, courts have generally construed the acts broadly so as to afford as much protection as possible to the insured.

In the center of this controversy between the policy limitations of the insurance companies and the judicial expansion of the statutes, are the policyholders. Just as the insureds are the beneficiaries of the protection of the UM statutes, they have in some ways become victimized by the statutes. The plethora of judicial decrees examining both the statutes and the various policy limitations has been of little practical benefit in remedying the controversy. Even though a given policy restriction may have been judicially voided, the insured may find that his UM endorsement still contains the restriction. While the weight of legal authority may be on the side of the insured, as a practical matter all the policyholder knows is that his policy plainly excludes coverage. In most instances, the insured will be neither an attorney nor an expert in insurance coverages. Nevertheless, the insured should be entitled to rely on what his insurance contract says without having to incur the additional time and expense to learn that his insurance company is selling policies containing invalid provisions. Action by the courts has clearly not alleviated the confusion.

The insurance companies, similarly, have not benefitted from the judicial decisions. In many instances the judicial system has ignored the rights of the insurer to control his risks and to limit the

215. See Proposed Regulation No. 8 in Appendix, *infra*, page 340-41.

scope of coverage commensurate with the premiums collected. Instead, the courts have generally infringed upon the business rights of the insurer by rationalizing and justifying their decisions on "public policy" grounds.

All of this is not to imply, however, that the work of the judiciary has been for naught. The courts have provided a sound forum for setting forth arguments, theories, and guidelines for uninsured motorist coverage. Nor is the judiciary to be chastised greatly for its efforts. The courts alone have taken the initiative, if not by choice then by necessity, to explain and interpret the UM statutes and the policy coverages they require.

The time has long since arrived for the state departments of insurance to engage in much of the work heretofore taken up by the courts. Not only are the insurance departments statutorily charged with the responsibility to regulate the insurance industry and to protect the policyholders, but they are also in the position to analyze and investigate the problems of UM coverage on a much broader scale than the courts. The problems of the uninsured motorist and the UM coverage itself require a delicate balancing of the interests of both the insurer and the policyholder. The regulations proposed in this note are reflective of an attempt to balance these competing interests. The first step, unsure as it may be, must be taken toward reform of the uninsured motorist protection.

Donald Paul Seberger

APPENDIX

PROPOSED REGULATIONS GOVERNING UNINSURED MOTORIST
ENDORSEMENTS

Section One. AUTHORITY. These rules and regulations governing the policy provisions used in various uninsured motorist endorsements circulated within the State of Indiana are promulgated by authority of and pursuant to the Indiana Administrative Procedure Act, IND. CODE § 4-22-2-1 *et seq.* (1976), and the Indiana Insurance Law, IND. CODE § 27-1-1-1 *et seq.* (1976).

Section Two. PURPOSE. The purpose of these rules and regulations is to assure that uninsured motorist endorsements circulated within the State of Indiana are drafted and enforced in such a manner as to enhance, strengthen, and clarify the protection afforded by the Indiana Uninsured Motorists Act, IND. CODE § 27-7-5-1 (1976). Further, their purpose is to prevent the circulation of uninsured motorist policy forms in Indiana which contain ambiguous, misleading, or inconsistent language or which deceptively affect the risk purported to be assumed in the insurance contract.

Section Three. PROPOSED REGULATIONS.

Proposed Regulation No. 1.

All uninsured motorist (UM) coverage circulated within the State of Indiana shall delete all language which excludes from the definition of "insured," (1) any person named in the policy, (2) any spouse or relative of the named insured while residing in the same household, (3) any occupant of an automobile insured in the policy of insurance, or (4) any person using an insured automobile with the permission of the insured.

All UM coverage circulated within the State of Indiana shall delete all language which excludes from the definition of "insured" any person named in the policy of insurance or the spouse or relative of the named insured while residing in the same household, while occupying or driving a non-owned motor vehicle.

Proposed Regulation No. 2.

All UM coverage circulated within the State of Indiana which contains a policy exclusion for "owned but uninsured" motor vehicles shall be valid and enforceable.

Proposed Regulation No. 3.

All UM coverage circulated within the State of Indiana which contains either or both (1) an "excess-escape" clause and, (2) a "pro-rata" clause, clearly and unambiguously stated, shall be valid and enforceable.

Proposed Regulation No. 4.

All UM coverage circulated within the State of Indiana shall delete all language which reduces the benefits payable thereunder by the amount paid or payable under the medical payments coverage of the automobile insurance policy where the actual damages incurred exceed the policy limits of the applicable UM coverage.

Proposed Regulation No. 5.

All UM coverage circulated within the State of Indiana shall delete all language which reduces the benefits payable thereunder by the amount paid or payable under workmen's compensation legislation where the actual damages incurred exceed the policy limits of the applicable UM coverage.

Proposed Regulation No. 6.

All UM coverage circulated within the State of Indiana shall delete all language which restricts hit-and-run coverage to those cases which result from *actual* physical contact with the hit-and-run vehicle.

Proposed Regulation No. 7.

All language contained in UM coverage circulated within the State of Indiana which requires the insured to report a hit-and-run accident to the police, local magistrate, or the Department of Motor Vehicles within twenty-four hours after the occurrence of the accident shall be amended to read "within twenty-four hours after the occurrence of the accident or as soon thereafter as practicable under the circumstances."

Proposed Regulation No. 8.

All language contained in UM coverage circulated within the State of Indiana which requires the insured to file with the insurer within 30 days after the accident a statement under oath shall be amended to read "and at the re-

quest of the insurer shall file a statement under oath within 30 days after the request for the same is made."

Section Four. ENFORCEMENT. Upon due notice and opportunity to be heard, an insurer engaged in the business of automobile liability insurance which causes to be circulated any UM coverage within the State of Indiana that fails to comply with these rules and regulations, shall be subject to the power of the Commissioner of Insurance to withhold, withdraw, or revoke such insurer's license to engage in the business of automobile liability insurance in the State of Indiana.

