Uninsured Motorist Coverage: Are Conflicts Inherent in Every Provision?

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UNINSURED MOTORIST COVERAGE: ARE CONFLICTS INHERENT IN EVERY PROVISION?

I. INTRODUCTION

Insurance coverage designed to protect an insured driver who is injured through the fault of an uninsured or unknown driver is now available throughout the United States.\(^1\) A number of states have enacted legislation making uninsured motorist coverage compulsory.\(^2\) Following this general trend, Montana has recently enacted a statute which provides that all automobile bodily injury liability insurance policies which are either issued or delivered in Montana must include provisions for uninsured motorist coverage.\(^3\) However, the statute provides that the insured may reject such coverage.\(^4\) Since the language of the Montana statute appears to be mandatory,\(^5\) it is likely that uninsured motorist coverage will be read into non-complying policies by the courts unless the insurer can prove that the insured had specifically rejected such coverage.\(^6\) Query, whether or not insurers can force rejection of the uninsured motorist coverage by the inclusion of a rejection provision in the policy itself or by requiring a signed rejection of coverage as a condition precedent to the purchase of liability coverage.

California’s compulsory uninsured motorist statute provides that any rejection of uninsured motorist coverage must be made by supplemental agreement.\(^7\) This requirement of a supplemental agreement guarantees that any rejection of uninsured motorist coverage will be at the option of the insured and every automobile liability policy issued in California will include uninsured motorist coverage in the period between the time the policy is issued and the time the supplemental rejection agreement is received by the company. Although Montana’s mandatory uninsured motorist statute does not expressly require a supplemental agreement,

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\(^1\)Couch, Insurance § 45:619 (2d ed. 1964).
\(^2\)There appears to be a trend to make this coverage compulsory throughout the nation. California, New York, Illinois, and Oregon are among the 14 other states which have made this type of coverage mandatory. For a reprint of the various statutes see Donaldson, Uninsured Motorist Coverage, 34 Insurance Counsel Journal 57, 79 (1967).
\(^3\)Revised Codes of Montana, 1947, § 40-4403 (hereinafter Revised Codes of Montana are cited R.C.M.), provides: ‘‘No automobile liability . . . policy . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided therein . . . 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. . . .’’ Section 2 of ch. 31, Montana Laws, 1967, reads: ‘‘this act is effective January 1, 1968.’’
\(^4\)Id.
\(^5\)R.C.M., 1947, § 40-4403, supra, note 3 provides that ‘‘No automobile liability . . . policy . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided [insuring bodily injury caused by uninsured motorists] . . . .’’ (Emphasis added.)
the statute does give the option of rejection solely to the insured. R.C.M. Section 40-4403 reads: "... provided, that the named insured shall have the right to reject such coverage." Therefore, any provision in the policy itself which states that the insured rejects uninsured motorist coverage seems to be prohibited by implication. Otherwise, the right of the insured to reject such coverage would be illusory. By the same reasoning, the requirement of a signed rejection by the prospective insured as a condition to being able to purchase automobile liability insurance would, in effect, take away any right of the insured to reject uninsured motorist coverage.8

Since practically every insured Montana driver will be provided uninsured motorist coverage by his insurance carrier beginning January 1, 1968, the legal problems connected with its specialized contract provisions are likely to increase.9 Already many cases have added a gloss to the various provisions of uninsured motorist coverage. However, it should be noted that the case law with respect to insurance of this kind has not yet shown a sufficiently clear trend in many areas to justify statements of well-settled principles or rules. This comment will point out some of the major problems likely to occur as a result of the policy provisions and will suggest possible solutions to some of these problems.

II. HISTORY

The constant increase in traffic accidents in this nation and in Montana has served to intensify the serious social problems of the uncompensated traffic victims. The necessity of protecting innocent victims from negligent, uninsured and financially irresponsible motorists was reflected in early financial responsibility legislation.10 Under Montana's present Financial Responsibility Law, a motorist is not required to prove his ability to pay damages for personal injuries or property damage he may cause in an automobile accident until after he has had one accident.11 After the first accident, the motorist must prove financial responsibility by posting a bond or by proving that he carries liability insurance.12 Under this law, the penalty for failure to prove financial responsibility is the revocation of the driver's license until such liability insurance is purchased or until financial responsibility is proved by posting a bond.13 Therefore, the first traffic victim of any given defendant has no assurance of collecting a

8See supra note 3. R.C.M., 1947, §§ 40-3714, 40-3715, allows the Insurance Commission to approve endorsement forms and require the Commissioner to disapprove any form filed which is in violation of or does not comply with the code.

9Section 2 of ch. 31, Laws of Montana, 1967, reads: "this act is effective January 1, 1968." Uninsured motorist coverage has been generally available on a voluntary basis in Montana since approximately 1956.

10No influx of cases have occurred to date, however, the insurance industry has predicted an increase in its "trade" journals. For a good bibliography see Note, Uninsured Motorist Coverage—A Survey, 1962 WASH. U.L.Q. 134 at note 4.


14R.C.M., 1947, §§ 53-422.
judgment. Also the law fails to protect against those who continue to drive without a license. There is little comfort in knowing that a negligent uninsured or financially irresponsible motorist will merely lose his driving privilege while his victims suffer uncompensated losses. For these reasons Montana adopted mandatory uninsured motorist coverage to supplement the existing financial responsibility laws.14

The general uninsured motorist coverage in use in Montana is patterned after provisions drafted by the National Bureau of Casualty Underwriters.16 The insuring provision of this endorsement agrees:

To pay all the sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . sustained by the maintenance or use of such uninsured automobile; provided . . . determination as to whether the insured . . . is legally entitled to recover such damages, and if so, the amount thereof, shall be made by agreement between the insured and the company or, if they fail to agree, by arbitration.17

Usually all recovery under the uninsured motorist coverage is limited to bodily injury; property damage coverage is not included.18 In view of the diversity of the insurance industry and the large number of companies now writing uninsured motorist coverage, many policy provisions may be slightly different from Bureau policy provisions or from the endorsement set out in the appendix to this comment. However, the basic purpose of uninsured motorist coverage is uniform regardless of the wording of the policy provisions. That purpose is to provide protection for the automobile insurance policy-holder against the risk of inadequate compensation for injuries or death caused by the negligence of financially irresponsible drivers, and to place an injured policy holder in the same position he would have been if the tort-feasor had carried minimum limits of liability insurance.19

III. ARBITRATION CLAUSES

As outlined in the typical uninsured motorist provision, when the insured has been injured in an automobile accident and discovers that the

14See supra note 2.
15For a complete history of the Uninsured Motorist Endorsement see: Plummer, The Uncompensated Automobile Accident Victim, 24 INS. COUNSEL J. 78, 83 (1957); George, Insuring Injuries Caused by Uninsured Motorists, 1956 INS. L. J. 715.
16The endorsement is Part IV of the Standard Provisions For Automobile Combination Policies, Family Automobile Form, First Revision, May 1, 1958; prepared by the National Bureau of Casualty Underwriters, 125 Maiden Lane, New York, 38, New York.
17Id. See also the endorsement form set out in the appendix to this comment under "Insuring Agreement #1." This form was provided by Safeco Insurance Company of America, Seattle, Washington, endorsement form T-1861 5/67. (Reprinted by permission).
adverse party has no liability insurance, the insured must notify his insur-er. The insurer then begins an investigation of the accident and if the adverse party was "uninsured" according to policy provisions, the insurer attempts to settle with the insured the questions of liability and damages. If the insurer and the insured do not reach agreement as to the questions of liability or damages, both parties are given the option of requesting arbitration. Either party may initiate arbitration by sending the other written notice of "Demand for Arbitration", and by filing two copies of the notice with the American Arbitration Association. Also, the typical policy provides that any judgment obtained against the adverse party without permission of the insurer will not be conclusive against the insurer. In fact, submitting to arbitration after failure to agree is a condition precedent to the insurer's liability. The policy provides that no action can be taken against the insurance company unless all policy conditions are fully complied with. According to the arbitration clause, the insured and the insurer agree to be bound by any award made by the arbitrators.

A significant question arises when the arbitration clause is challenged as a bargain or contract to relinquish one's right to resort to the courts. At common law an agreement to arbitrate a future dispute was regarded as an attempt by private parties to oust the jurisdiction of the courts and held void. This common law doctrine is followed in many

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20 The notice requirement is usually part of the insuring agreement found in the principal insuring contract.
21 In Application of Zurich Insurance Company, 14 App. Div. 2d 669, 219 N.Y.S. 2d 748 (1961), the court gave greater scope to the arbitration clause by recognizing the clause may extend to questions of law and fact other than negligence and the question of damages. For instance, law and facts which may affect the eligibility of the insured to recover. See also Application of American National Fire Insurance Co., 15 Misc. 2d 692, 182 N.Y.S. 2d 899 (Sup. Ct. 1958).
22 See appendix "A", "Insuring Agreement" number 1.
23 See appendix "A", "Insuring Agreement" number 1 and "condition" number 8.
24 See supra note 21.
25 See appendix "A", "Condition" number 8.
26 See appendix "A", "Condition" number 14.
27 See supra note 25.
28 The common law rule is stated as follows:
It is settled at common law that a general agreement in or to a contract to submit to final determination by arbitrators rights and liabilities of the parties with respect to any disputes that may thereafter arise under the contract is voidable at will by either party at any time before a valid award is made, and will not be enforced by the courts, because of the rule that private persons cannot by a contract to arbitrate, oust the jurisdiction of the legally constituted courts. 78 ALR 2d 1292 (1961).

At least 23 jurisdictions have changed the common law rule by statute, however, such a rule is recognized or codified in Illinois, Oklahoma, South Carolina, Missouri, and Montana. See 1962 WASH. LAW QUARTERLY 142 for a compilation of statutes which have changed the common law rule. See also, Hume, Uninsured Motorist Coverage, 12 FEDERATION OF INS. COUNSEL Q. 7 (1962) where it is stated that some 23 jurisdictions find arbitration agreements valid and enforceable.
jurisdictions when interpreting the arbitration clause in uninsured motorist coverage. The decision of Boughton v. Farmers Insurance Exchange is the leading case holding that an arbitration provision in uninsured motorist coverage is void. In Boughton, the insured sent the insurer copies of the complaint against an uninsured motorist and was advised that the insurer would not pay the insured even if the insured was successful in his suit against the uninsured motorist. The insured promptly obtained a judgment against the uninsured tort-feasor and then sued the insurers under the uninsured motorist coverage. The court held for the insured primarily on the ground that all stipulations to arbitrate future controversies are not enforceable because such stipulations deprive the court of jurisdiction and are contrary to public policy. The court observed that "the primary and essential part of the contract was insurance coverage, not the procedure for determining liability." The court also found that the so-called "no action clause" (policy provision providing no action can lie against the insurer unless there has been full compliance with the terms of the policy) was void. The court reasoned:

In as much as the insured agreed to pay all sums insured shall be legally entitled to recover from an uninsured motorist and the "no action" provision could restrict insured from enforcing these rights, we hold such provision to be void.

Finally, the court held that the judgment which the insured obtained against the uninsured tort-feasor was conclusive against the insurer on the issues of liability and damages, since the company had been given notice of the action.

The Boughton decision is especially significant in Montana because its holding was cited for support in the leading Montana case of Dominici v. State Farm Mutual Automobile Insurance Co. The facts of Dominici were quite similar to those in Boughton. The insurer defended on the ground that its insured had instituted an action against the uninsured tort-feasor without written consent of the insurer as required by the "no judgment clause." The insured contended that the "no judg-

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31 See supra note 29.
33 354 P.2d at 1089.
34 Id.
35 Id.
36 354 P.2d at 1090.

New York damage claimant did not release his insurer from liability under family protection clause by proceeding against uninsured motorist without insurer's consent after insurer had repudiated liability, since repudiation constitutes breach of contract.

The so-called "no judgment clause" which the Montana Supreme Court referred to in the Dominici decision was actually a policy exclusion whereby the uninsured coverage would not apply:

(a) to bodily injury to an insured ... with respect to which such insured, his legal representative or any person entitled to payment under this coverage (if he or they) shall without written consent of the company make any

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ment clause,” which the insurer claimed was an express condition to recovery, was void. The Montana Supreme Court held for the insured and recommended the following rule: 39

In the case at bar, the condition of the company’s promise to pay is the ascertainment of the legal liability of the third party. The company can prevent this determination by the simple device of refusing to grant the insured its written consent to prosecute the action to judgment. There was an implied promise on the part of the Insurance Company that it would not unreasonably or arbitrarily withhold its written consent. . . . Under these circumstances, the action of the company in arbitrarily withholding its written consent constitutes a violation of the implied provisions of the policy and consequently the exclusion clause is not a bar to this action.

In reference to the issue of whether the arbitration clause contained in the policy was valid the court stated:40

... a contract requiring all differences or controversies arising between the parties as to arbitration will not be allowed to interfere with, or bar the litigation of such controversies when brought into court . . . R.C.M. 1947, Section 13-806, makes void contract provisions restricting access to the courts.

The opposite result was reached in Georgia,41 where the insured obtained judgment against the uninsured tort-feasor without the insurer’s consent. The insured then sued the insurer under his uninsured motorist coverage. The court of appeals reversed a trial verdict for the insured and held that the insured forfeited his right to recover because the insured violated a policy provision which required consent of the insurer to sue the uninsured motorist.42

The question still exists in Montana as to the proper course of action for an insurance company when its insured sues the uninsured tort-feasor after an insurer decides to deny coverage. This problem is most likely to arise when the insurer claims its insured was contributorily negligent in an accident with an uninsured motorist. Assuming the insured brings a direct suit against the uninsured motorist as permitted by the Dominici rule,43 the judgment he obtains against the uninsured motorist may be conclusive against the insurer if proper notice of the suit is given.

390 P.2d at 807.

The clause in Dominici is slightly different from the appendix endorsement provision (a) under "Exclusions."


390 P.2d at 809. See also supra note 30.

137 S.E.2d 551 (Ga. 1964).

Cf. Childs v. Allstate Ins. Co. 237 S.C. 455, 117 S.E.2d 867 (1961), where the South Carolina court held a "no judgment clause" invalid but recognized the validity of the arbitration clause to determine the amount of damages. See also Wright v. Fidelity and Casualty Co., 155 S.E.2d 102 (N.C. 1967) where the North Carolina Court held an action against the uninsured motorist by the insured was not an implied condition precedent to recovery.

See text at note 39 supra.
to the insurer. Unless the insurer is allowed to intervene in the lawsuit between its insured and the uninsured tort-feasor, there is a possibility that the uninsured tort-feasor may not be able or willing to adequately defend himself in the lawsuit.\textsuperscript{44} Thus the insurer would be held liable in an action which, if properly defended, may have resulted in a verdict for the uninsured motorist. In answer to this problem, the Montana court, in \textit{Dominici}, suggested intervention by the insurer. The court noted:  \textsuperscript{45}
\begin{quote}
We must admit that this, or any other, insurance carrier is thrown upon the horns of a dilemma by this interpretation (holding “no judgment clause” void) of this type of insurance contract. However, the harshness may be ameliorated through the use of intervention \ldots, or possibly a plaintiff’s use of joinder.
\end{quote}

Intervention or joinder would give the insurance company an opportunity to take some action in a case which would determine whether there were facts which would make the insurance company liable on uninsured motorist coverage.\textsuperscript{46}

When intervention is allowed to an insurer, additional complications ensue. If the insurance carrier attempts to prove contributory negligence against its own insured, a serious problem is raised as to the admissibility of any evidence obtained by the insurance company in confidence from its insured. Usually the uninsured motorist coverage has a provision which requires the assistance and cooperation of the insured.\textsuperscript{47} Assuming that the insured has cooperated with the insurer by revealing the facts of the accident, should the statements and evidence thus obtained be admissible in the lawsuit in which the insurer has intervened and is trying to prove its own insured was contributorily negligent? Probably the insured would have a sound argument on ethical grounds for the exclusion of such evidence. Another problem arises when an insurance carrier attempts to extend a defense to the uninsured driver in a suit by the insured against the uninsured motorist. A conflict of interests may occur when the uninsured motorist does not want the insurance company’s assistance in his defense. If the uninsured motorist does give permission to the insurer to defend him against the insured, the insurer may find itself on both sides of the lawsuit; a situation which California has held to be against public policy.\textsuperscript{48}

Whenever a claim is made for benefits under uninsured motorist coverage, the insurance company could possibly be involved in disputes with their own policy holders and conflicts of interest may arise. One of

\textsuperscript{45}390 P.2d at 810.
\textsuperscript{46}State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343, 349 (Mo. App. 1963): Allowed intervention by the insurer even when the insured argued the insurer had no “interest” in the lawsuit.
\textsuperscript{47}See appendix endorsement clause number 4 under “Conditions,” which requires assistance and cooperation.
the advantages of arbitration under the uninsured motorist coverage is avoidance of such potential conflicts. Many states have enacted legislation which permits enforcement of contractual agreements to arbitrate future disputes. Legislation recognizing the validity of the arbitration clause in uninsured motorist coverage might eliminate many of the conflicts which arise under this special type of insurance. Until such legislation is enacted in Montana, the insured should always scrutinize any evidence used by the insurer who has intervened in the lawsuit between the insured and the uninsured tort-feasor to determine whether or not objections as outlined above can be made to its admission. On the other hand, the insurance carrier should always consider intervention whenever an insured files a direct lawsuit against an uninsured motorist. Otherwise, the insurer may find that any judgment obtained by the insured against the uninsured motorist will be conclusive against the insurer, even though the insurer did not have its day in court.

IV. STATUTE OF LIMITATIONS

In Montana the statute of limitations for a cause of action based upon tort is three years. The statute of limitations for a cause of action based upon a written contract is eight years. Thus it becomes important to determine whether the underlying nature of an action to collect under uninsured motorist coverage is contract or tort. This question as to the nature of the action remains unanswered in Montana.

The obvious relationship that uninsured motorist coverage has to a tort action is the requirement that the insured must sustain injuries caused by an uninsured tort-feasor before the insured can claim under the contract with the insurer. The typical uninsured motorist provision states:

. . . the company agrees . . . to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages . . . because of bodily injury . . .

Whether or not the court interprets the insured’s right as essentially one

Nevertheless, there are conflict problems existing in arbitration. For instance, where the insuring company obtains the cooperation of the uninsured motorist to establish a defense in arbitration. It would then be improper for the defense attorney to obtain any admissions from the uninsured driver and attempt to use them against the uninsured driver at a later date in subrogation against the uninsured motorist.

See supra note 29.

See supra notes 32, 37. See also appendix endorsement clause number 1 under “Insuring Agreements” for a clause which most companies have added since the Boughton decision:

“No judgment against any person . . . alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability . . . or of the amount of damage to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.”

Whether such a provision will stand the test of judicial scrutiny is yet to be determined.

R.C.M., 1947, § 93-2607.

See Appendix “A” Endorsement, “Insuring Agreements” number 1.
in contract or tort seems to lie in the interpretation by the court of the phrase "legally entitled to recover."

In a lower New York decision, an insured sued the insurer on a policy providing uninsured motorist benefits. The insurer argued that since the accident occurred on March 14, 1956, and no demand was made for arbitration until May 28, 1959, the insured's claim was barred by the three-year statute of limitations applicable to tort. The court held that the insured's claim was not based upon a tort, but upon the insurance contract, although a tortious act of a third party gave rise to the rights under the contract.

The primary argument for applying the tort statute of limitation is based upon the concept that the insured must establish the liability of the uninsured motorist before he can recover. When the insured permits the tort statute of limitations to run on his action against the uninsured motorist, the insured is no longer legally entitled to recover from the uninsured tort-feasor. The insurer's right of subrogation would then be effectively destroyed.

A recent South Carolina decision held that recovery under uninsured motorist coverage is subject to the condition that the insured establish legal liability on the part of the uninsured tort-feasor. After the tort-feasor's liability is established through a judgment, a direct action can be brought by the insured to recover from the insurer on his uninsured motorist coverage. Therefore, under the South Carolina rule, if the insured fails to establish liability of the uninsured motorist before the tort statute of limitations runs, he loses his cause of action against the insurance company.

Counsel for the insured may be well advised not to let the three year tort statute of limitations run against the uninsured motorist tort-feasor until this question is finally resolved in Montana. Counsel for the insurer should also encourage the filing of an action by the insured against the uninsured tort-feasor within the three year tort statute of limitation period if settlement is not made with the insured before that time. Otherwise, either the insured will lose his right against the insurance company, if the court holds the tort statute of limitations controls; or, the insurer will lose any right to subrogation against the uninsured tort-feasor, if the court applies the contract statute of limitations.


See Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962), where the Virginia court held that an action by an insurer for uninsured motorist benefits was ex delicto since the cause of action arises out of tort and thus a five day statutory notice requirement which was a type of statute of limitations would apply to a suit by the insured against his insurer for uninsured motorist benefits.

Subrogation is discussed in length under the title; Trust Agreement, infra.
V. SUBROGATION THROUGH THE TRUST AGREEMENT

If the insurer pays a claim to its insured under the uninsured motorist coverage, the insurer may attempt to recoup the amount he has paid to the insured, from the uninsured motorist tort-feasor. In California, when the insurer pays an uninsured motorist claim, the insurer is subrogated to the rights of the insured for the amount of its payment to the insured. However, in absence of a statute such as California’s, subrogation to an insured’s personal injury claim would represent a violation of the common law doctrine that personal tort claims are not assignable. To avoid the common law prohibition, the drafters of the uninsured motorist policy provisions have devised a trust agreement which accomplishes the same result as subrogation. Under the trust agreement the insured agrees that:

In the event of payment to any person under this endorsement . . . the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person . . . legally responsible for the bodily injury because of which such payment is made . . . such person shall hold in trust for the benefit of the company all rights of recovery . . . (Emphasis added)

The contract also provides that the insured will bring an action against the uninsured tort-feasor upon the request of the insurer. New York has held that the trust agreement provision, supra, is valid as a subrogation clause. The New York court analogized the position of the insured to a constructive trustee for the insurer. Montana has not judicially determined validity of the trust agreement.

If the Montana court finds the trust agreement valid, a very practical problem could arise where the insurer pays his insured up to the policy limits for uninsured motorist coverage. For example if the insurer pays its insured $10,000, and the insured then recovers a judgment against a partially solvent uninsured tort-feasor for $50,000, assuming the uninsured motorist has $6,000 in collectible assets, how should the $6,000 be distributed?

Although research reveals no case support, a possible argument for the insured might be that the assets of the uninsured motorist should be pro-rated between the insurer and the insured in proportion to their individual claims. For instance, using the figures above, the insured and insurer would share in the collectible assets of the uninsured tort-feasor according to the ratio of 5 to 1. From th $6,000 in collectible assets, the

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*CAL. INS. CODE § 11580.2(o) (West 1955).
*Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928); 3 A.M. JUR., Assignments § 30 (1936); Morgen Lesser, Some Legal Aspects of the New York, Uninsured Motorists Coverage, 28 N.Y.B. BULL. 132 (1956).
*Id.
*See appendix endorsement clause number 9 under “Conditions” for the usual trust agreement.
*Id.
insured would receive $5,000 of the collectible assets and the insurer would receive $1,000.

In contrast to this approach, the insurer would seek to recover the full amount available. The insurer's primary argument appears to be that the insured has contractually agreed to allow the insurer a priority to the uninsured motorist's collectible assets to the extent of any payment made to the insured. Furthermore, to allow the insured to assert priority over the insurer would be allowing a trustee (the insured) the benefits which belong to the beneficiary of the trust (the insurer). This argument is supported in the Illinois case of Remsen v. Midway Liquors Inc. There, the uninsured tort-feasor who collided with the insured was intoxicated. The insurer paid the insured the policy limits of the uninsured motorist coverage. The uninsured motorist coverage contained a provision like the trust agreement discussed above. The insured then brought an action under the Dram Shop laws of Illinois against the tavern keeper that served the intoxicated driver. The insurer intervened in the action and claimed a right arising from the trust agreement, to recover any amount the insured might receive from the tavern keeper. The insured contended the trust agreement was in the nature of an assignment of a personal injury claim and for this reason was prohibited by statute in the State of Illinois. The Illinois Court rejected this argument and held the trust agreement to be a legal subrogation entitling the insurer to any amount recovered by the insured until the amount that the insurer had paid to the insured plus attorney fees, was recovered.

The typical trust agreement requires the insured to sue the uninsured motorist at the request and expense of the insurer. Also, it specifically provides:

CONDITIONS

... in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorney's fees incurred by it in connection therewith. ... 

No action shall lie against the company unless ... the insured ... has fully complied with all the terms of this endorsement.

VI. CONCLUSION

The relatively new uninsured motorist coverage raises problems which result in part from the ambiguity of some of its policy provisions and in part from the unique type of coverage it provides. The insured and his own insurance carrier are apt to be on the opposite sides of a law suit
if the insurance carrier attempts to prove its insured was guilty of contributory negligence. However, if the insured wins judgment against the uninsured motorist, they are supposed to be allied against the uninsured motorist to recover any collectible assets and finally as one writer aptly observed:71

Their alliance, however, may be jeopardized by the insured's natural feelings of hostility towards his recent adversary, the insurance company, and is likely to be shortlived since a judgment against the uninsured motorist may set them quarreling over distribution of the proceeds.

With all its ambiguities, uninsured motorist coverage should help supply the grave need for protection against the financially irresponsible driver. The enactment of the mandatory uninsured motorist statute72 by the Montana legislature reflects the interest of lawmaking bodies for the extreme problems created by the uncompensated traffic victim. Furthermore, additional types of insurance coverage are now becoming available in a few states on an experimental basis. These provide benefits to drivers injured in automobile accidents whether or not the insured driver is at fault.73 Under this experimental coverage, all auto accident victims would be guaranteed payment for their medical expenses up to $5,000 per person, irrespective of fault.74 In addition, all accident victims could elect disability benefits up to $7,500 in no-fault benefits.75 With more than 85 million insured vehicles now congesting United States highways, causing some 14 million accidents and 2 million injuries each year, the public will see many changes in automobile insurance coverage in the next decade.76

EARL J. HANSON

71Rice III, Uninsured Motorist Insurance: California’s Latest Answer To the Problem of the Financially Irresponsible Motorist, 48 CAL. L. REV. 516, 531 (1960).
72See supra note 3.
73Guaranteed Benefits, 44 J. AMER. INS. 2 (1968). Guaranteed Benefits Plan supra at 5, tells of a plan to provide compensation to victims regardless of fault. Some of the benefits include:
1. Medical Payments
2. Basic Disability payments
3. Loss of services payments
4. Supplemental Disability payment
5. Medical Impairment Payment
6. Survivor’s Loss Payment
   (Overall limit of $21,500 per person.)
74Id.
75Id.
76Guaranteed Benefits, supra note 73.
APPENDIX (A)

DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED AUTOMOBILES
(Herein referred to as Uninsured Motorists)

In consideration of the payment of the premium for this endorsement and subject to all of the terms of this endorsement and the applicable terms of the policy, the company agrees with the named insured as follows:

INSURING AGREEMENTS

1. Damages for Bodily Injury Caused by Uninsured Automobiles

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided, for the purposes of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damage to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

2. Definitions

(a) "insured" means:

(1) the named insured as stated in the policy and, while residents of the same household, the spouse of any such named insured and relatives of either; and

(2) any other person while occupying an "insured automobile"; and

(3) any person, with respect to damages he is entitled to recover because of bodily injury to which this endorsement applies sustained by an insured under (1) or (2) above.

The insurance applies separately with respect to each insured, but the application of the insurance to more than one insured shall not operate to increase the limits of the company's liability.

(b) "insured automobile" means an automobile:

(1) described in the declarations of the policy as an insured automobile to which the bodily injury liability coverage of the policy applies; and

(2) while temporarily used as a substitute for an insured automobile as described in subparagraph (1) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction; and

(3) while being operated by a named insured or by his spouse if a resident of the same household;

but the term "insured automobile" shall not include:

(i) an automobile while used as a public or livery conveyance; or

(ii) an automobile while being used without the permission of the owner; or

(iii) under subparagraphs (2) and (3) above, an automobile owned by the named insured; or

(iv) under subparagraphs (2) and (3) above, an automobile furnished for the regular use of the named insured.

(c) "uninsured automobile" means:

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

(2) a hit-and-run automobile as defined:

but the term "uninsured automobile" shall not include:

(i) an insured automobile; or

(ii) an automobile which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law; or
(iii) an automobile which is owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing; or

(iv) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

(d) "hit-and-run automobile" means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identity of either the operator or owner of such "hit-and-run automobile"; (2) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured 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 the facts in support thereof; and (3) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

(e) Occupying. The word "occupying" means in or upon or entering into or alighting from.

(f) State. The word "state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

3. Policy Period, Territory

This endorsement applies only to accidents which occur on and after the effective date hereof, during the policy period and within the United States of America, its territories or possessions, or Canada.

EXCLUSIONS

This endorsement does not apply:

(a) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this endorsement shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor;

(b) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by a named insured or any relative resident in the same household, or through being struck by such an automobile;

(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.

CONDITIONS

1. Policy Provisions. None of the Insuring Agreements, Exclusions or Conditions of the policy shall apply to the insurance afforded by this endorsement except the Conditions "Notice,' "Notice of Accident,' "Changes,' "Assignment,' "Cancellation' and "Declarations.'"

2. Premium. If during the policy period the number of insured automobiles owned by the named insured or spouse changes, such named insured shall notify the company during the policy period of any change and the premium shall be adjusted in accordance with the manuals in use by the company. If the earned premium thus computed exceeds the advance premium paid, such named insured shall pay the excess to the company; if less, the company shall return to such named insured the unearned portion paid by such insured.

3. Proof of Claim; Medical Reports. As soon as practicable, the insured or other person making claim shall give to the company written proof of claim, under oath if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the determination of the amount payable hereunder. The insured and every other person making claim hereunder shall submit to examinations under oath by any person named by the company and subscribe the same, as often as may reasonably be required. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim. The insured person shall submit to physical examinations by physicians selected by the company when and as often as the company may reasonably require and he, or in the event of his incapacity his legal representative, or in the event of his death his legal representative or the person or persons entitled to sue therefor, shall upon each request from the company execute authorization to enable the company to obtain medical reports and copies of records.

https://scholarship.law.umt.edu/mlr/vol29/iss2/3
4. **Assistance and Cooperation of the Insured.** After notice of claim under this endorsement, the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant.

5. **Notice of Legal Action.** If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

6. **Limits of Liability.**
   
   (a) The limit of the company's liability under this endorsement shall be the limit of bodily injury liability required by the motor vehicle financial responsibility law of the state of residence, as shown on the declarations;
   
   (b) any amount payable under the terms of this endorsement because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by
   
   (1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Bodily Injury Liability Coverage of the policy, and
   
   (2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.
   
   (c) any payment made under this endorsement to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under the Bodily Injury Liability Coverage of the policy, and
   
   (d) the company shall not be obligated to pay under this coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy.

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

   Except as provided in the foregoing paragraph, if the insured has other similar 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 liability of this insurance and such other insurance.

8. **Arbitration.** If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this endorsement, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement.

9. **Trust Agreement.** In the event of payment to any person under this endorsement:
   
   (a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;
   
   (b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this endorsement;
   
   (c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;
   
   (d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or
appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith:

(e) such person shall execute and deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the company established by this provision.

10. **Payment of Loss by the Company.** Any amount due hereunder is payable (a) to the insured, or (b) if the insured be a minor to his parent or guardian, or (c) if the insured be deceased to his surviving spouse, otherwise (d) to a person authorized by law to receive such payment or to person legally entitled to recover the damages which the payment represents; provided the company may at its option pay any amount due hereunder in accordance with division (d) hereof.

11. **Action Against the Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured or his legal representative has fully complied with all the terms of this endorsement.