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Glenn E. Smith

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The Wyoming Uninsured Motorist Act requires automobile insurers authorized to do business in Wyoming to offer a policy endorsement which allows insureds to recover damages for bodily injuries caused by negligent uninsured or hit-and-run drivers. In writing this coverage, insurers typically add a variety of restrictions, exclusions, and conditions. The use of such devices is the subject of a recently promulgated administrative regulation of the State Insurance Department. The author explains the operative effect of the standard restrictive provisions found in uninsured motorist endorsements, examines judicial reaction to them, and details Wyoming's recent effort to reform the practices of the insurance industry in this area.

## THE WYOMING UNINSURED MOTORIST ACT: A REGULATORY RECONCILIATION OF MANDATED COVERAGES WITH THE STANDARD UNINSURED MOTORIST ENDORSEMENT

*Glenn E. Smith\**

**R**OUGHLY one out of every fifteen licensed Wyoming drivers will be involved in an automobile accident this year,<sup>1</sup> and when that accident occurs, the chances are approximately one in four that the driver will be struck by, or will himself be, an uninsured motorist or a hit-and-run driver.<sup>2</sup> Projections in 1975 indicate that the financially irresponsi-

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\*Deputy Insurance Commissioner, State of Wyoming; B.A., J.D., University of Wyoming.

1. According to statistics maintained by the Motor Vehicle Division of the Department of Revenue, there were approximately 244,000 licensed Wyoming drivers at year end 1974, and 14,814 reported accidents involving either bodily injury or property damage in excess of \$250. WYOMING TRAFFIC ACCIDENT FACTS, REPORT OF THE HIGHWAY SAFETY BRANCH TO THE WYOMING HIGHWAY DEPARTMENT 11 (1970).
2. The exact percentage of uninsured motorists in Wyoming is impossible to determine by the statistical data kept by the Motor Vehicle Division of the

ble motorist in Wyoming will somehow be involved in over 3700 accidents, resulting in some fifty deaths, 1350 injuries, and a combined economic loss of over eleven million dollars.<sup>3</sup>

Part of this tremendous economic loss caused by automobile owners who carry no liability insurance has been absorbed in Wyoming by automobile insurance carriers who must now conform to the provisions of the Wyoming Uninsured Motorist Act.<sup>4</sup> Enacted in 1969 and modeled after

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Department of Revenue and the Wyoming Highway Department. According to data furnished to the author, 10,727 Wyoming drivers were requested to furnish proof of financial responsibility in 1974, and out of that number 8,784 SR-21 forms were received from insurance companies, leading one to believe that approximately 82% of Wyoming's drivers are insured. This computation, however, is distorted on the one hand by the observation that uninsured drivers are perhaps more likely to cause accidents than insured drivers, and on the other by the fact that many insurance companies send in SR-21 forms when they are not required to do so (when property damage does not exceed \$250, for example). This is corroborated by the fact that in the month of November, 1974, the number of SR-21 forms received by the Motor Vehicle Division exceeded the number of drivers involved in accidents. Hence, the conclusion that 82% of Wyoming's drivers are insured is probably an optimistic one. Letter from D. D. Cameron to George Beckman, Sept. 30, 1975, on file in the Wyoming Insurance Department. The estimation that 25% of Wyoming's drivers are uninsured is consistent with the percentage of uninsured drivers in neighboring states. A Department of Transportation study indicates that nationwide approximately 20% of all motorists are uninsured. In the states with compulsory insurance laws, such as Massachusetts, New York, and North Carolina, more than ninety percent of all vehicles are insured. In seventeen other states, the proportion of vehicles insured ranges from eighty to ninety percent. At the other end of the scale, fourteen states have less than seventy-five percent of their vehicles insured. At the extreme, one-third of all such vehicles in Alabama, Arkansas, Georgia, and Nevada do not have liability coverage. INSURANCE ACCESSIBILITY FOR THE HARD-TO-PLACE DRIVER, REPORT OF THE DIVISION OF INDUSTRY ANALYSIS, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION (U.S. Dept. Trans. Auto. Ins. & Comp. Study) 28 (1970).

3. WYOMING TRAFFIC ACCIDENT FACTS, *supra* note 1, at 3. These estimations were arrived at by dividing the total deaths, accidents, injuries, and economic loss in the year 1974 by one-fourth.
4. WYO. STAT. § 31-315.1 (Supp. 1975).

No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any natural 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 section 31-278 (j), Wyoming Statutes 1957, Compiled 1967, as amended from time to time, under provisions approved by the insurance commissioner, for the protection of persons insured thereunder or 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, however, that the named insured shall have the right to reject such coverages; and provided further that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

similar legislation in forty-six other states,<sup>5</sup> the Wyoming Act requires every insurer who is authorized to sell automobile liability insurance in the state to offer a coverage which, as part of the insured's own policy, permits an innocent victim of an accident caused by an uninsured motorist or a hit-and-run driver to make claim against his own insurance company for damages to which his injuries may entitle him. The purpose of the Act is to put any insured party who is injured by an uninsured motorist in the same position as he would have been had the uninsured party carried the limits of liability as prescribed by Wyoming's Safety Responsibility Act.<sup>6</sup> Unless rejected by the insured in writing, it automatically becomes a part of every policy of automobile insurance issued in Wyoming.

There are at least three self-contained limitations which the Uninsured Motorist Act places on the type of coverage a policyholder is able to obtain from his insurance carrier. First of all, the insured must prove that his injuries were caused by the negligence of an uninsured motorist or hit-and-run driver, and if the insured contributes to his injuries by his own negligence, the principles of comparative negligence become fully applicable.<sup>7</sup> Secondly, uninsured motorist coverage applies to damages occasioned by bodily injury only—it will not pay for property damage caused by the negligence of an uninsured motorist. Finally, the coverage need only be offered in limits prescribed by the state Safety Responsibility Act, which means in most instances that the insured is covered for losses up to \$10,000 per person and \$20,000 per occurrence.<sup>8</sup>

Aside from these legislative limitations on uninsured motorist coverages, policy draftsmen have grafted a number of restrictive provisions, exclusions, and conditions of coverage onto the standard uninsured motorist endorsement,<sup>9</sup> the

5. For statutory citations to the forty-six states which have enacted uninsured motorist statutes, see Graham, *Recent Interpretations of the Uninsured Motorist Endorsement*, 4 THE FORUM 160 n.1 (1969).

6. WYO. STAT. §§ 31-277 to -315 (1957).

7. WYO. STAT. § 1-7.2(a) (Supp. 1975).

8. WYO. STAT. § 31-278(j) (1957).

9. The standard uninsured motorist endorsement was formulated by the insurance industry in 1956 and was revised in 1963. Although a few companies

purpose of which is to reduce the possibility of fraudulent claims, the uncertainties that insurers face in offering the coverage, and, quite obviously, the insurer's liability itself. In so doing, however, the legislative objective of protecting the policyholder and members of his family against the risk of being negligently injured by a financially irresponsible motorist has been partially defeated.<sup>10</sup> The insured may find, for example, that although he has purchased two different policies of liability insurance from different insurers, both of which contain uninsured motorist coverage and for which separate premiums were paid, he will be permitted to collect on only one policy, even though his damages exceed the combined limits of both.<sup>11</sup> He may find that his insurer is entitled to deduct from his uninsured motorist benefits all sums paid by the insurer under another section of the policy (medical payments, for instance), sums paid by a disability carrier, or benefits collected from Workmen's Compensation.<sup>12</sup> He may find that where his policy pays in full for bodily injury damages caused when he was struck by a hit-and-run motorist, it pays nothing if there was a fortuitous lack of physical contact between the two vehicles.<sup>13</sup> He may likewise find that coverage is forfeited if he fails to report the accident within twenty-four hours or if he fails to provide his insurer with a statement of oath, whether requested or not, as provided in his insurance policy.<sup>14</sup> He may find that he is precluded from initiating a lawsuit against his insurer to recover uninsured motorist benefits because of a mandatory arbitration clause, from which there is no right of appeal.<sup>15</sup> And he may find that if he obtains a judgment from the uninsured motorist in a court of law without first obtaining his insurer's consent to sue, that judgment will not

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still append the endorsement to their policies in the form of supplemental coverage, it is now contained in the body of most policies as part of the insurance package. For a reprint of the standard uninsured motorist endorsement, see KEETON, *INSURANCE LAW*, app. H at 664 (1971).

10. KEETON, *supra* note 9, § 8.6(e) at 580.

11. See text accompanying notes 21 through 35 *infra*.

12. See text accompanying notes 36 through 41 *infra*.

13. See text accompanying notes 42 through 47 *infra*.

14. See text accompanying notes 67 through 73 *infra*.

15. See text accompanying notes 74 through 85 *infra*.

be binding on the insurer, even though the insurer was given notice of the suit and an opportunity to intervene.<sup>16</sup>

With a suspicious eye cast toward any uninsured motorist policy provision which limits the liability of the insurer or places an onerous burden on the insured, the restrictive provisions mentioned above have been judicially voided in many states on the basis that they unlawfully restrict the minimum coverages required by state uninsured motorist laws.<sup>17</sup> In spite of obvious judicial disfavor with the standard uninsured motorist endorsement and the extraordinary amount of litigation it has spawned, the endorsement has yet to be significantly modified by the insurance industry.<sup>18</sup> Even state insurance departments, statutorily charged with the responsibility of approving policy forms, have shown a strange reluctance to undertake meaningful reform.<sup>19</sup> With the objective of harmonizing uninsured motorist coverages with the judicial interpretations they have received throughout the United States, the Wyoming State Insurance Department has recently promulgated an administrative regulation which perhaps goes farther toward providing needed reform in this particular area than actions taken in any other state.<sup>20</sup>

16. See text accompanying notes 86 through 94 *infra*.

17. SCHERMER, AUTOMOBILE LIABILITY INSURANCE §§ 17.01 to 26.07 (1974).

18. *Supra* note 9. Although many of the restrictive policy provisions employed in the standard uninsured motorist endorsement have been declared void by a majority of courts which have passed on such issues, the endorsement itself has remained unchanged since 1963. See SCHERMER, *supra* note 17, § 17.02 at 17-5.

19. A glance at any insurance company's uninsured motorist endorsement under "State Exceptions" reveals that a sporadic number of state insurance departments have invalidated or required some change in select policy provisions. None, however, appear to have approached the problem on a comprehensive basis.

20. Regulation Governing Uninsured Motorist Endorsements, ch. XXIII, Wyoming Insurance Department Rules and Regulations (1975).

Section 1. Authority. These rules and regulations governing the policy provisions employed in various uninsured motorist endorsements circulated within the State of Wyoming supplement Section 26.1-316(b) of the Wyoming Insurance Code. They are promulgated by authority of and pursuant to the Wyoming Administrative Procedures Act (Chapter 108, Session Laws of Wyoming, 1965) and to Sections 26.1-26 and 26.1-41 of the Wyoming Insurance Code.

Section 2. Purpose. The purpose of these rules is to assure that uninsured motorist coverages issued and circulated within the State of Wyoming do not conflict with or otherwise unlawfully restrict the minimum coverages required by the Wyoming Uninsured Motorists Act. Wyo. Stat. Section 31-315.1 (Supp. 1975). Further, their purpose is to prevent the circulation of uninsured motorist policy forms in Wyoming which contain ambiguous, misleading, or inconsistent language or which deceptively affect the risk purported to be assumed in the general coverage of the contract.

The purpose of this article will be to explain the operative effects of these restrictive policy provisions and their purpose, to examine some of the cases which have passed on the validity of such provisions, and to detail the changes now required in the standard uninsured motorist endorsement by the regulation.

### I. LIMITATION OF LIABILITY PROVISIONS

The standard uninsured motorist endorsement overflows with policy provisions which have no other purpose but to limit the liability of the insurer. Four of these provisions will be discussed below.

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Section 3. Applicability. These rules shall apply to any casualty insurer who circulates automobile liability insurance in the State of Wyoming.

Section 4. "Other" insurance clauses. In all instances where the insured holds more than one policy of uninsured motorists insurance or is entitled to recover under more than one policy of uninsured motorists insurance, for which separate premiums have been paid, the extent of his coverage will be the combined coverages under all policies, and actual damages sustained by the insured will be recoverable to the full extent of the combined limits of all such policies. Such recovery, however, will not exceed the minimum requirements for coverage under Section 31-278(j) Wyo. Stat. (Supp. 1975), as to all other policies except the primary policy. The primary policy shall be construed to mean that policy which provides the coverage for the insured automobile involved in the accident.

Section 5. Reduction of uninsured motorists coverage by sums paid under automobile medical coverage, bodily injury coverage, and Workmen's Compensation.

- a. In no instance shall the benefits payable under uninsured motorists coverage be reduced on account of payments made under any other section of the policy, including, but not limited to, sums paid under automobile medical coverage and bodily injury liability coverage, where actual damages exceed the policy limits of the uninsured motorists coverage. Only when total proven or undisputed damages incurred by the insured do not exceed the policy limits of the uninsured motorists coverage may payments made under other provisions of the policy be used to reduce uninsured motorist benefits.
- b. In no instance shall the benefits payable under uninsured motorists coverage be reduced by amounts paid under Workmen's Compensation legislation.

Section 6. Hit and run coverage.

- a. In no instance shall uninsured motorist endorsements which provide coverage against bodily injury inflicted by a hit and run motorist restrict such coverage to injuries which result from actual physical contact with the hit and run vehicle.
- b. Any language which requires the insured to report a hit-and-run accident to a police officer or the Department of Motor Vehicles within 24 hours after the occurrence of the accident shall be amended to read "within 24 hours after the occurrence of the accident or as soon thereafter as is practicable under the circumstances."
- c. Any language which requires the insured to file with the insurer a statement of oath within 30 days after the accident shall have been reported shall be amended to read "and at the request of the insurer

## A. "Other" Insurance Clauses

Quite often a person who has suffered injuries as a result of an accident involving an uninsured motorist may discover that he has been defined as an "insured party" under more than one policy of uninsured motorist insurance. The most usual example of when this might occur is when a person owning an automobile is injured while riding as a guest passenger in a nonowned automobile. If this happens, the injured person will be insured under the owned automobile coverages of his own policy<sup>21</sup> in addition to the coverage he has under his host's policy,<sup>22</sup> assuming that both host and passenger have purchased uninsured motorist protection. The insured may also have more than one policy available to him for recovery if he has purchased different insurance

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shall have filed a statement of oath within 30 days after the request for same is made."

Section 7. Defining an uninsured automobile.

- a. All uninsured motorist coverages must delete from policy forms circulated within the State of Wyoming any language which excludes from the definition of an uninsured automobile any motor vehicle owned by a state or local governmental agency and any federal vehicle where its use is unauthorized.
- b. Any uninsured motorists coverage circulated within the State of Wyoming which excludes from the definition of an uninsured automobile any land motor vehicle or trailer while located for use as a residence or premises shall be amended to read "This exclusion shall not apply to mobile recreational vehicles while being used for normal or ordinary purposes."

Section 8. Consent to sue clause. In no instance shall any uninsured motorists coverage circulated within the State of Wyoming contain any policy language which forbids the insured to prosecute an action against an uninsured motorist without the written consent of the insurer. The insurer, however, shall be entitled to a copy of the complaint and summons forthwith in the event the insured decides to initiate a lawsuit.

Section 9. Mandatory arbitration clause. In no instance shall any uninsured motorists coverage circulated within the State of Wyoming contain an [sic] mandatory arbitration clause by which the insured is required to arbitrate an insurance claim in the event of disagreement with his insurer, nor shall any such clause require that the results of arbitration are binding on the parties without the right of appeal unless the parties themselves agree to be so bound by a separate agreement.

Section 10. Benefits in excess of actual damages not to be inferred. Notwithstanding any other section of this regulation, no payments will be required under uninsured motorists coverage which would result in duplicate payment for the same elements of loss or payment in excess of damages sustained.

21. KEETON, *supra* note 9. Under the standard uninsured motorist endorsement, an "insured party" is defined to include "the named insured and any relative."
22. KEETON, *supra* note 9. The standard uninsured motorist endorsement also defines an "insured party" as including "any person while occupying an insured automobile."



policies for multiple-owned automobiles, and he is injured while driving an owned vehicle, while riding in a nonowned vehicle, or while crossing the street.<sup>23</sup> Under any of these examples, should the injured party find himself insured, say, under three separate policies, each of which carries the minimum limits of \$10,000 for bodily injury or death per person, he may have a total of \$30,000 available to him for compensatory purposes.<sup>24</sup>

Because of the additional exposure that this creates for the insurer, most companies have attempted to prevent the "stacking" of separate uninsured motorist policies by incorporating provisions in the policy that limit the insured's recovery to an amount that represents the single highest limit of liability coverage under any one coverage. This has been accomplished by two uniformly used policy provisions, commonly known as the "excess escape" clause<sup>25</sup> and the "pro rata" clause.<sup>26</sup> Under the excess escape provision the insurer effectively eliminates its liability if the insured incurs an injury while occupying a nonowned automobile by declaring its insurance excess over the host's policy of insurance, but only up to the limits of the primary policy. Thus, if an

23. As long as the insured suffers bodily injury at the hands of an uninsured motorist and he is not driving or riding in an owned, uninsured vehicle, he is covered under the standard uninsured motorist endorsement, regardless of how he is injured. See text accompanying notes 48 through 53 *infra*.

24. A believable hypothetical could be constructed under which the insured has more than three policies available to him for recovery. If he is a passenger in a nonowned vehicle, and the driver has three separate policies of insurance and he has three of his own, his potential recovery for provable damages could be \$60,000. See *State Farm Mut. Auto. Ins. Co. v. Christenson*, 494 P.2d 552 (Nev. 1972), in which the plaintiff was allowed to recover \$50,000 on five policies of uninsured motorist insurance.

25. KEETON, *supra* note 9. 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 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 limits of liability of such other insurance.

26. KEETON, *supra* note 9. The pro rata clause reads:  
Except as provided in the foregoing paragraph [referring to the excess escape clause], 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.

insured is injured by an uninsured motorist while riding with his neighbor to work, and he incurs \$20,000 in injuries, he may recover a maximum of \$10,000 in benefits under his host's policy, while he is precluded by the excess escape clause from recovering anything under his own. The pro rata clause, on the other hand, applies in any situation where there are multiple coverages available to the insured other than where he is a passenger in a nonowned vehicle. Under such coverages, the loss is then prorated among the different insurers to a maximum of \$10,000. If the insured, for instance, has purchased two policies of insurance from different companies and is struck by an uninsured motorist while crossing the street, each insurer is obligated to pay a maximum of \$5000, even though the actual loss may greatly exceed \$10,000.

Whether these "other" insurance clauses conflict with state uninsured motorist statutes is a frequently litigated question in insurance law.<sup>27</sup> In most decisions the issue seems to be whether the insurer is required by such statutes to offer the prescribed limits of liability to the insured in *each* of the issued policies.<sup>28</sup> What appears now to be a solid majority view is well-expressed in the Alabama decision of *Safeco Insurance Co. v. Jones*.<sup>29</sup> Interpreting a statute almost identical to the one passed by the Wyoming Legislature, and after exhaustively surveying the law in other jurisdictions, the court concludes:

We hold that our statute sets a minimum amount for recovery, but it does not place a limit on the

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27. For a listing of the case law see Annot., 28 A.L.R.3d 551 (1969). Approximately thirty-five jurisdictions now have some case law on the validity of other insurance clauses. As of 1972, an analysis of the case law by the court in *Blakeslee v. Farm Bureau Mut. Ins. Co.*, 388 Mich. 464, 201 N.W.2d 786, 789-90 (1972), led the court to conclude:

Though a matter of first impression with this court, several other jurisdictions have considered the problem [of other insurance clauses] in interpreting similar uninsured motorist statutes. The cases are divided. There are 19 states plus one Federal case applying state law which disallow such limitations as contrary to the statute. There are 8 states with a contrary doctrine but only 3 of them are directly on point—in 3 there is no uninsured motorist statute involved, in two the statute itself allows prorating. This leaves a heavy preponderance in favor of disallowing such limitations.

Since *Blakeslee* was decided, at least seven more states have joined the ranks of the majority, with one or two others siding with the minority. For a comprehensive listing of case law, see SCHERMER, *supra* note 9, at § 24.02.

28. SCHERMER, *supra* note 17, § 24.02.

29. 286 Ala. 606, 243 So.2d 736 (1970).

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; and that where the premiums have been paid for uninsured motorist coverage, we cannot permit an insurer to avoid its statutorily imposed liability by its insertion into the policy of a liability limiting clause which restricts the insured from receiving that coverage for which the premium has been paid.<sup>30</sup>

An older, minority position holds that there is no conflict between other insurance clauses and uninsured motorist statutes, on the basis that uninsured motorist laws are intended to protect an insured only to the extent that he would have been protected had the uninsured motorist carried the minimum limits required by the state's financial responsibility law.<sup>31</sup> For many courts, however, this argument has not been an impressive one. The case of *Van Tassel v. Horace Mann Insurance Co.*,<sup>32</sup> for example, holds that the insured is not receiving what has been paid for if his recovery is restricted to the applicable limits of only one policy:

It seems to us that, in spite of the attempt by the insurer to limit its liability to one policy or to the amount recoverable under one policy, the fact that the legislature required an uninsured-motorist-provision in all policies, added to the fact that a premium has been collected in each of the policies involved, should result in the policyholder's receiving what he paid for on each policy, up to the full amount of his damages. *It is true that such holding results in permissible recovery exceeding what he would have received if the uninsured motorist had been insured for the minimum amount required under our Safety Responsibility Act. But if the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who*

30. *Id.* at 742.

31. *Transportation Ins. Co. v. Wade*, 106 Ariz. 269, 475 P.2d 253 (1970); *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 269 N.E.2d 97 (1971); *Burcham v. Farmers Ins. Exch.*, 255 Iowa 69, 121 N.W.2d 500 (1963); *Maryland Cas. Co. v. Howe*, 106 N.H. 422, 213 A.2d 420 (1965); *Keeble v. Allstate Ins. Co.*, 342 F. Supp. 963 (E.D. Tenn. 1971); *State Farm Mut. Auto. Ins. Co. v. Bafus*, 77 Wash. 2d 720, 466 P.2d 159 (1970).

32. 207 N.W.2d 348, 351-52 (Minn. 1973).

*has paid a premium should get all he paid for rather than that the insurer should escape liability for that which it collected a premium. (emphasis added).*

Under the very recently decided case of *Ramsour v. Grange Insurance Co.*,<sup>33</sup> Wyoming has joined the growing roster of states which have voided the use of "other" insurance clauses in uninsured motorist endorsements. In *Ramsour*, the plaintiff was injured by an uninsured motorist while driving a rented vehicle, and she sought to recover for extensive injuries under her own policy of insurance as well as the policy purchased by the rental agency. Reversing a district court summary judgment in favor of the insurer, Justice Raper, speaking for a unanimous court, held that Wyoming's Uninsured Motorist Act requires the "stacking" of separate uninsured motorist policies where the insured's actual damages exceed the limits under any one policy. Basing the decision primarily on the language the legislature used in adopting the Wyoming Act, the court states:

The statute states that every policy of insurance that is issued shall be in the amount of the statutory minimum. It does not say that if there is more than one policy covering the insured, that the maximum to be paid would be the minimum limit of one policy. We cannot stretch, extend, enlarge nor amend what the legislature has clearly said.<sup>34</sup>

Taking cognizance of the case authority, both in Wyoming and in other jurisdictions which have interpreted statutes identical to the Wyoming Act, whereby other insurance clauses have almost uniformly been voided as conflicting with the mandatory provisions of state uninsured motorist statutes, the Wyoming Insurance Department, pursuant to regulation, has withdrawn its approval of all policies of uninsured motorist insurance circulated within the state which contain any liability-limiting provisions, the purpose of which is to limit the insurer's liability to the maximum benefits available under one primary policy of insurance, without regard to the number of policies available to the insured for recovery and without regard to actual damages sustained. Under

33. 541 P.2d 35 (Wyo. 1975).

34. *Id.* at 37-38.

the regulation recently promulgated by the Department of Insurance, the extent of the insured's recovery in all instances where the insured is entitled to recover under more than one policy of insurance, for which separate premiums have been paid, will be the combined coverages under all such policies not to exceed actual damages incurred.<sup>35</sup>

*B. Reduction of Uninsured Motorist Benefits for Payment Made Under Automobile Medical Coverage*

Section 5(a) of the Insurance Department regulations governing uninsured motorist endorsements provides:

In no instance shall the benefits payable under uninsured motorists coverage be reduced on account of payments under any other section of the policy, including, but not limited to, sums paid under automobile medical coverage and bodily injury liability coverage where actual damages exceed the policy limits of the uninsured motorists coverage. Only when total proven or undisputed damages incurred by the insured do not exceed the policy limits of the uninsured motorists coverage may payments made under other provisions of the policy be used to reduce uninsured motorist benefits.

This provision was made necessary by another liability-limiting clause uniformly used in uninsured motorist endorsements which allows the insurer to reduce the payment an insurer is obligated to make under the uninsured motorist section of the policy by an amount already paid under the medical payment provision in a different section of the policy.<sup>36</sup> The purpose of the clause is to avoid a double liability on the part of the insurer where the insured, for example, collects his actual damages of \$2000 under the medical payment provision of the policy, and then turns around

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35. *Supra* note 20.

36. KEETON, *supra* note 9. Under the standard uninsured motorist endorsement the medical payment reduction clause states that "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 Part II."

and tries to collect the same damages again under his uninsured motorist coverage.<sup>37</sup>

Where its purpose is to prevent a double recovery of damages by the insured this particular provision serves a sound and fundamental purpose. Clearly, the insured should not be permitted to recover twice for the same damages. This provision, however, is used for the less salutary purpose of reducing an insured's recovery of actual damages when such damages are in excess of the policy limits. That is to say, where the insured evidences actual damages of \$12,000, under this clause the insurer can pay the insured the normal maximum of \$2000 under the medical payment provision, and then deduct that sum from the \$10,000 minimum coverage under the uninsured motorist section of the policy, so that the insured receives a total of \$10,000 in damages (\$8,000 in uninsured motorist benefits, \$2000 in medical pay benefits), as opposed to the \$12,000 he would ordinarily be entitled to. When used in this fashion, the rationale that a medical payment reduction clause is needed to avoid a double liability on the part of the insurer no longer applies. This is made clear in *Melson v. Illinois National Insurance Co.*,<sup>38</sup> in which the court held that where actual damages exceed the limits of liability, the insured should be able to collect under both the medical payment and uninsured motorist provisions:

The defendant has admitted that the plaintiff's damages are in excess of \$12,000.00 . . . . Since the plaintiff has been compensated for \$2,000.00 of medical expenses he still has remaining a minimum of \$10,000.00 in damages which have not been paid as medical expenses and are not payable as such since he has already exhausted his medical payment coverage. Therefore, regardless if the remaining \$10,000.00 of his admitted damages is regarded as medical expenses, lost wages, damages for pain, suffering or for permanent disability, it

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37. *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 310, 480 P.2d 739 (1971); *Wittig v. United Serv. Auto. Ass'n*, 300 F. Supp. 679 (N.D. Ind. 1969); *Hutchinson v. Hartford Accident & Indem. Co.*, 312 N.Y.S.2d 789 (1970).

38. *Melson v. Illinois Nat'l Ins. Co.*, 1 Ill. App. 3d 1025, 274 N.E.2d 664, 666 (1971).

is clear that double payment will not occur if the limit of uninsured motorists coverage is paid.

It follows that double payment can exist, and that therefore the deduction provision applies, only if the total amount of proven or undisputed damages does not exceed the total of uninsured motorists coverage and medical expense coverage.

Again, there is some split of authority on the question of conflict between the mandatory provisions of state uninsured motorist laws and the medical pay reduction clause, with the majority view again favoring the position that such clauses are inoperative.<sup>39</sup> As one case notes, if the plaintiff were able to contract for medical expense coverage in the sum of \$10,000 and had suffered medical expenses in excess of this amount, the effect of the medical payment reduction clause would be to completely eliminate the uninsured motorist clause.<sup>40</sup> As yet another court has remarked, "A result which concludes that as medical bills go up, uninsured motorist coverage goes down, clearly seems incongruous to the intent of the Legislature and should not be tolerated."<sup>41</sup>

### *C. Reduction of Uninsured Motorist Coverage for Payment Made Under Workmen's Compensation Legislation*

In addition to preventing an insurer from deducting sums paid under the medical payment provision of the policy from uninsured motorist benefits, the regulations of the Wyoming Insurance Department have also voided a similar policy provision which allows the insurer to deduct any amounts the insured may receive under Workmen's Compensation legislation from the insured's uninsured motorist recovery.<sup>42</sup> Although much of the case law has invalidated policy provisions to this effect on grounds that they reduce

39. For an analysis of the case law see Annot., 24 A.L.R.3d 1353 (1969). See also SCHERMER, *supra* note 17, § 20.04; Plevin, *Set-Off in Uninsured Motorist Coverage*, 20 CLEV. ST. L. REV. 10 (1971).

40. *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133, 139 (1968).

41. *Keyes v. Beneficial Ins. Co.*, 39 Mich. App. 450, 197 N.W.2d 907, 910 (1972).

42. KEETON, *supra* note 9. The Workmen's Compensation reduction clause under the standard uninsured motorist endorsement reads "Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by (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."

benefits below the minimum required by uninsured motorist statutes,<sup>43</sup> there is another compelling reason in Wyoming for looking unsympathetically upon a Workmen's Compensation reduction clause.

Under this state's Workmen's Compensation Act,<sup>44</sup> the State Treasurer is partially subrogated to any recovery obtained in a third party liability action (which includes an uninsured motorist carrier), whether as a result of judgment, compromise, settlement, or release.<sup>45</sup> Where the insured collects damages from an insurance carrier after receiving a Workmen's Compensation award, the insured must return a portion of his insurance proceeds back to the State Treasurer. Under the Wyoming Act, he is allowed to deduct a reasonable cost of recovery and to retain one-half of the remainder. Of the balance remaining, up to one-half shall be paid to the State Treasurer as a reimbursement for amounts previously paid out of the Workmen's Compensation fund.<sup>46</sup> This means that if the insured is injured by an uninsured motorist in a job-related accident and incurs bodily injury damages to the extent of \$10,000, not only can the insurer deduct the insured's Workmen's Compensation benefits from the \$10,000 it is obligated to pay under the policy, but the State Treasurer is partially subrogated to the amount remaining after the reduction is made, leaving the insured with a recovery diminished to a point below actual damages sustained. Thus, in the example above, if Workmen's Compensation benefits paid for \$5,000 of the insured's \$10,000 loss, and the insurer is entitled to deduct that sum from the \$10,000 it is legally obligated to pay, leaving \$5,000 in uninsured motorist benefits, the State Treasurer is subrogated to part of the \$5,000 paid by the insurer. The effect of the subrogation rights of the Workmen's Compensation fund, coupled with the reduction clause in the insured's uninsured motorist policy, is to leave the insured totally uncompensated

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43. *Fidelity & Cas. Co. v. McMahon*, 487 S.W.2d 371 (Tex. Civ. App. 1972); *Aldroft v. Fidelity & Cas. Co.*, 106 R.I. 311, 259 A.2d 408 (1969); *Bartlett v. Nationwide Mut. Ins. Co.*, 294 N.E.2d 665 (Ohio 1972); *State Farm Ins. Co. v. Cahoon*, 287 Ala. 462, 252 So. 2d 619 (1971); *Sullivan v. John Doe*, 495 P.2d 193 (Mont. 1972).

44. WYO. STAT. §§ 27-310 to -388 (Supp. 1975).

45. WYO. STAT. § 27-313(a) (Supp. 1975).

46. WYO. STAT. § 27-313(a)(i) (Supp. 1975).



for a significant portion of his loss. By voiding the Workmen's Compensation reduction clause, the insured's uninsured motorist recovery is left unimpaired after the insured reimburses the Workmen's Compensation fund in the proper amount.

Note should be taken of some apparent friction between Section 5(b) and Section 10 of the Insurance Department regulation. Section 10 states that no payments will be required under any uninsured motorist coverage which would result in duplicate payment for the same elements of loss or payment in excess of actual damages sustained, while Section 5(b) allows the insured to recover damages under his uninsured motorist policy undiminished by whatever award he receives from the Workmen's Compensation fund. These two sections could be construed in such a manner so that the insured could collect from his insurer only that sum which represents the balance between his actual damages and Workmen's Compensation benefits.<sup>47</sup>

*D. Exclusion for Accidents Occurring While Using a Motor Vehicle Owned by the Named Insured But Not Expressly Covered Under the Policy*

A policy provision which enjoys frequent use in uninsured motorist coverages is one which excludes coverage for injuries suffered by a named insured while occupying an automobile owned by the insured or a member of his family but not specifically listed in the policy.<sup>48</sup> Under this exclusion, if the insured is driving or riding in any automobile owned by him or a member of the household which is not named in the policy, or if he is struck by such an automobile, coverage will be denied.

The general purpose of an exclusion of this nature is to prevent a family that owns two motor vehicles from paying

47. It is not made clear under the regulation whether Section 10 is meant to apply only to benefits collectible under a policy of uninsured motorist insurance or whether its application was intended to extend to collateral benefits.

48. KEETON, *supra* note 9. Under the standard uninsured motorist endorsement, this provision states "This policy does not apply under Part IV: (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile."

insurance premiums on only one and collecting benefits for injuries sustained while operating the other.<sup>49</sup> Notwithstanding this rationale, a majority of recent decisions have held such exclusions invalid on the grounds that they are repugnant to state uninsured motorist statutes.<sup>50</sup> In *Nygaard v. State Farm Automobile Ins. Co.*,<sup>51</sup> the court observed:

Although two lines of authority have developed, by now perhaps a majority of courts which have dealt with the issue have held that the exclusion of coverage of an insured while occupying an owned vehicle other than the insured vehicle is invalid. While few of these decisions have relied on specific legislative history in holding the exclusion of coverage invalid, they have generally agreed in finding the exclusion offensive to the public policy of protection embodied in the uninsured-motorist statutes. According to these opinions, a policy excluding uninsured-motorist coverage for the insured occupying another owned vehicle is invalid because "it is not the intent of the statute to limit coverage to an insured by specifying his location or the particular vehicle he is occupying at the time of injury." (citations omitted).

Recent decisions emphasize that uninsured motorist protection should follow the insured wherever he goes, regardless of his mode of transportation, as long as the injury is caused by a motorist who is uninsured. Thus, in *Elledge v. Warren*,<sup>52</sup> the court held:

There is no requirement in the statute that the insured have any relation, at the time of the accident, with any vehicle he owns and that is insured with the insurer. The uninsured motorists protection covers the insured and the family members while riding in uninsured vehicles, while riding in

49. *Rushing v. Allstate Ins. Co.*, 216 So. 2d 875 (La. App. 1968). SCHERMER, *supra* note 17, § 21.02.

50. *Boettner v. State Farm Mut. Auto. Ins. Co.*, 388 Mich. 482, 201 N.W.2d 975 (1972); *Elledge v. Warren*, 263 So. 2d 912 (La. App. 1972); *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Hogan v. Home Ins. Co.*, 194 S.E.2d 890 (S.C. 1973); *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash. 2d 327, 494 P.2d 479 (1972); *Vantine v. Aetna Cas. & Sur. Co.*, 355 F. Supp. 1296 (N.D. Ind. 1971).

51. 221 N.W.2d 151, 156 (Minn. 1974).

52. *Elledge v. Warren*, *supra* note 50, at 918.

commercial vehicles, while pedestrians, or while rocking on the front porch.

Similarly, the case of *Chavez v. State Farm Mutual Automobile Insurance Co.*<sup>53</sup> holds that:

[T]he only limitations on protection are those specifically set out in the statute itself, i.e., that the insured be legally entitled to recover damages and that the negligent driver be uninsured.

The exclusion clause here is invalid because it is not the intent of the statute to limit coverage for an insured to a particular location or a particular vehicle.

In spite of the cogent reasoning in this impressive array of cases, the regulations of the Insurance Department have not altered the uninsured motorist policy exclusion for injuries sustained by a named insured while occupying a vehicle owned by the insured but not specifically covered in the policy. By voiding this exclusion, the insurer becomes unreasonably exposed to a risk not contemplated by either party when the policy was issued. If the insured, for example, purchases a policy of insurance for one vehicle, while leaving two other vehicles and a motorcycle uninsured, and in the rather exaggerated circumstance where all four vehicles were being driven the same day by different members of the family, the insurer would be exposed to four different risks, even though only one policy of insurance was sold and only one premium collected. Under these circumstances, the risk exposure is not commensurate with the premium received. The insurer, accordingly, should be entitled to limit its uninsured motorist coverage to only those vehicles which are separately insured and for which separate premiums have been paid.

## II. HIT AND RUN COVERAGE

### A. *Physical Contact Requirement*

In addition to providing coverage against the risk of bodily injury negligently inflicted by an uninsured motorist,

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53. 533 P.2d 100, 102-03 (N.M. 1975).

the standard uninsured motorist endorsement also provides protection against hit-and-run motorists whose identity cannot be subsequently ascertained.<sup>54</sup> As to the hit-and-run protection, however, the vast majority of policies restrict coverage to damages which result from actual "physical contact" with the hit-and-run vehicle.<sup>55</sup>

The purpose of requiring a physical contact between the insured's vehicle and the hit-and-run vehicle as a condition precedent to coverage under the standard uninsured motorist endorsement is to ensure that the accident did occur as the claimant may say it did.<sup>56</sup> Through a requirement of physical contact, the insurer is able to reduce the type of fraudulent claims that may occur, for instance, where the insured falls asleep while driving on a two-lane highway, runs into an embankment, and then tries to collect for bodily injury under his uninsured motorist endorsement by reporting the incident to his insurer the next day as an accident caused by a drunken driver who negligently ran him off the road.

In spite of the understandable attempts on the part of insurers to reduce the possibility of fraud in cases involving a hit-and-run vehicle, the injustices inherent in requiring physical contact as a condition of recovery are obvious. By insisting on some type of contact, the insurer can prevent a recovery under circumstances where, for example, a bus

54. KEETON, *supra* note 9. Under the standard uninsured motorist endorsement, an uninsured automobile is defined to include a hit-and-run automobile.

55. KEETON, *supra* note 9. The hit-and-run provision under the standard uninsured motorist endorsement reads as follows:

"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: (a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile"; (b) the insured or someone on his behalf shall have reported the accident to the police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have 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 (c) 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.

56. *Brown v. Progressive Mut. Ins. Co.*, 249 So. 2d 429 (Fla. 1971). SCHERMER, *supra* note 17, § 23.02.

passenger is injured when his bus suddenly stops to avoid hitting a car that swerves in front of it, even though an entire busload of passengers can corroborate the insured's claim,<sup>57</sup> or where a freight truck driving down the middle of a narrow road at a high rate of speed runs a passenger car into the ditch, causing the driver and his passengers to overturn.<sup>58</sup> These are the type of factual situations, both of which resulted in a dismissal of the insured's claim, that have inspired several commentators to conclude that an innocent victim of a hit-and-run vehicle is much better off under his policy of insurance to intentionally make physical contact, where he has that choice, with the guilty party.<sup>59</sup> One such author has stated:

It is indeed unfortunate that an otherwise deserving insured who was injured in an effort to avoid a more serious accident may be denied recovery under the physical contact clause; but until some better clause can be devised, it appears preferable for the insured to collide rather than avoid where he himself may be injured by avoiding.<sup>60</sup>

As may be expected, the validity of the physical contact requirement has been litigated often in recent years. In spite of several early decisions which held that such a requirement constitutes a contractually permissible attempt to prevent fraud on the insurer,<sup>61</sup> most of the recent decisions have concluded that the mere lack of physical contact should not prove fatal to an otherwise legitimate claim, as long as the insured

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57. *Collins v. New Orleans Pub. Serv. Inc.*, 234 So. 2d 270 (La. App. 1970).

58. *Amidzich v. Twin City Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969).

59. Notman, *Uninsured Motorist Coverage: A Current Analysis*, 55 ILL. B. J. 142, 147 (1966).

An alert, athletic pedestrian who barely manages to avoid contact with such a car by leaping through a plate glass display window receives the unkindest cuts of all for his efforts, but cannot qualify. Snubbed, too, is the driver who miraculously manages to steer his car off the highway and thus avoid a collision with an oncoming vehicle traveling in the wrong lane, but in so doing effects a rather abrupt stop against an unyielding bridge abutment. Seemingly, then, this requirement once again illustrates vividly the bitter truth of that time-worn pronouncement that "close ones only count in horseshoes."

60. PRETZEL, *UNINSURED MOTORISTS* § 24.3A at 57-58 (1972).

61. *Inter-Insurance Exch. v. Lopez*, 238 Cal. App. 441, 47 Cal. Rptr. 834 (1965); *Lawrence v. Beneficial Fire & Cas. Ins. Co.*, 8 Ariz. App. 155, 444 P.2d 446 (1968); *Prosk v. Allstate Ins. Co.*, 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967).

can sustain his burden of proof by showing that he in fact was injured by a hit-and-run driver.<sup>62</sup> This is well-expressed in the leading decision of *Brown v. Progressive Mutual Insurance Co.*:<sup>63</sup>

The only reason for [the physical contact requirement] . . . is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury, or the judge if demand for jury trial is not made. If the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact. If twenty witnesses will swear they saw the accident happen, their testimony should not be deemed worthless, as it would be under the decision here for review.

Other decisions have held that the physical contact requirement is fundamentally incongruous with the purpose and intent of state uninsured motorist laws, on the basis that the legislature could not have intended to protect one class of motorists who establish contact while totally ignoring those who do not.<sup>64</sup> In *Webb v. United Services Automobile Ass'n*,<sup>65</sup> the court voided the requirement of physical contact on grounds of public policy by holding that:

If the legislature intended to "provide protection to innocent victims of irresponsible drivers" it could not also intend that the motorist faced with the decision whether to collide with another vehicle or to avoid it should choose to collide or else lose his protection. (citations omitted).

The regulations of the Wyoming Insurance Department are in accord with the position that the physical contact requirement constitutes an impermissible restriction upon the broad coverage required under state uninsured motorist

62. *Brown v. Progressive Mut. Ins. Co.*, *supra* note 56; *Webb v. United Serv. Auto. Ass'n*, 227 P. Super. 508, 323 A.2d 737 (1974); *Hartford Accident & Indem. Co. v. Novak*, 83 Wash. 2d 576, 520 P.2d 1368 (1974); *DeMello v. Fire Ins. Co.*, 523 P.2d 304 (Hawaii 1974); *Farmers Ins. Exch. v. McDermott*, 527 P.2d 918 (Colo. App. 1974).

63. *Brown v. Progressive Mut. Ins. Co.*, *supra* note 56.

64. *See* cases cited, *supra* note 62.

65. *Webb v. United Serv. Auto. Ass'n*, *supra* note 62.

laws.<sup>66</sup> The automatic exclusion of all claimants injured by hit-and-run drivers on the basis that their injuries were not a result of physical contact is unnecessary and unwarranted, as long as the claimant can prove to the satisfaction of a jury that there was indeed another car involved. While this task is certainly easier when there is contact, it should not be made impossible simply because there was not.

### *B. Time Within Which Accident Must Be Reported*

Most uninsured motorist endorsements contain a provision which requires hit-and-run accidents to be reported to the police within twenty-four hours after the accident occurs.<sup>67</sup> If the accident goes unreported, or is reported after twenty-four hours have elapsed, coverage under the policy may be forfeited.<sup>68</sup>

Wyoming law requires all accidents involving bodily injury to be reported to the proper authorities.<sup>69</sup> In some instances, however, a twenty-four hour policy limitation for reporting a hit-and-run accident can be an unreasonably short one. In a rural state such as Wyoming, with approximately four people per square mile, it is not at all inconceivable that an insured could be killed or injured by a hit-and-run motorist on a remote secondary road, with no one discovering the accident until the following day. Under these circumstances, the insured may lose his right of recovery under the policy because it was not possible for the accident to be reported within the specified time. In recognition of this fact, the uninsured motorist regulations of the Department of Insurance now require all hit-and-run accidents to be reported to the proper authorities within twenty-four hours, *or as soon thereafter as is practicable under the circumstances.*<sup>70</sup>

66. *Supra* note 20, § 6(a).

67. *Supra* note 55.

68. An insured may recover if he was interviewed by police officers at the scene of the accident, *Long Island Ins. Co. v. Spaulding*, 252 So. 2d 849 (Fla. App. 1971), and absence of observable property damage and lack of apparent physical injury will excuse the reporting requirement. *Mangus v. Doe*, 203 Va. 518, 125 S.E.2d 166 (1962).

69. WYO. STAT. § 31-288 (Supp. 1975).

70. *Supra* note 20, § 6(b).

*C. Statement of Oath*

In addition to the physical contact requirement and the time limitation imposed on the reporting of hit-and-run accidents, the standard uninsured motorist endorsement also requires the insured to file with the insurer a statement under oath that the insured has a legitimate cause of action arising out of a hit-and-run accident.<sup>71</sup> Most policies require this statement to be submitted within thirty days from the time the accident occurs.

Because prospective claimants all too often fail to read their insurance policies to ascertain the affirmative steps which must be followed to successfully prosecute a claim, some jurisdictions have voided statement of oath provisions in uninsured motorist policies on grounds that they impose an unreasonable requirement on claimants, and hence are violative of public policy.<sup>72</sup> The Wyoming regulations, however, recognizing that fraudulent claimants will not be quite so inclined to pursue illegitimate claims if they have to perjure themselves to do so, have not voided the statement of oath provision altogether. Rather, they shift the burden of securing the statement onto the insurer, so that now the insured's unfamiliarity with his own policy of insurance can no longer be used as a policy defense after a claim has been made.<sup>73</sup>

## III. ARBITRATION AND CONSENT TO SUE

*A. Mandatory Arbitration Clause*

Under the standard uninsured motorist endorsement, the insurer can compel the arbitration of a disputed claim between the insurer and the policyholder.<sup>74</sup> The arbitration

71. *Supra* note 55.

72. *Nationwide Mut. Ins. Co. v. Sours*, 205 Va. 602, 139 S.E.2d 51 (1964); *Latham v. Mountain States Mut. Cas. Co.*, 482 S.W.2d 655 (Tex. Civ. App. 1972).

73. *Supra* note 20, § 6(c).

74. KEETON, *supra* note 9. The standard uninsured motorist endorsement arbitration clause reads as follows:

If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this Part, then, upon written demand



result then becomes binding, with no right of appeal. Although for obvious reasons most insurance companies dislike risking a jury determination on the questions of liability and damages, and arbitration is often cited as a means of providing a quick and inexpensive forum for the settlement of claims,<sup>75</sup> the real purpose of the mandatory arbitration clause is to protect the insurer against multiple lawsuits, in which the interests of the insurer may be adversely affected through the doctrine of collateral estoppel.<sup>76</sup> For this reason, a provision for compulsory arbitration is frequently coupled with a provision prohibiting suit or settlement by the insurer with the negligent motorist, leaving arbitration with the insurer as the only means by which the insured can enforce his rights under his uninsured motorist coverage.<sup>77</sup>

The mandatory arbitration clause has been termed the most controversial provision in the entire uninsured motorist endorsement,<sup>78</sup> and, ironically, it has been its own prolific source of litigation.<sup>79</sup> A substantial number of states have prohibitory arbitration statutes and common law decisions which invalidate agreements to arbitrate future disputes as a matter of public policy.<sup>80</sup> Additionally, several uninsured motorist statutes specifically prohibit mandatory arbitration, and some state insurance departments have voided such provisions under their authority to disapprove policy forms.<sup>81</sup> The regulations adopted by the Wyoming Insurance Department follow a similar pattern, although they do not prohibit arbitration if both parties are willing to pursue that mechan-

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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 Part.

75. SCHERMER, *supra* note 17, § 26.01; KEETON, *supra* note 9, § 7.3(c).

76. Annot., 24 A.L.R.3d 1325, 1328 (1969).

77. *Infra* note 86.

78. KEETON, *supra* note 9, § 7.3(c).

79. Annot., 24 A.L.R.3d 1325 (1969).

80. One author concludes that in thirty-one states the standard arbitration clause "does not satisfy the statutory requirements for an agreement or contract to arbitrate a future dispute." Widiss, *Perspectives On Uninsured Motorist Coverages*, 62 Nw. U.L. Rev. 497, 531 (1967).

81. SCHERMER, *supra* note 17, § 26.02.

ism as a means of resolving their dispute. Section 9 of the regulation provides:

In no instance shall any uninsured motorists coverage circulated within the State of Wyoming contain an [*sic*] mandatory arbitration clause by which the insured is required to arbitrate an insurance claim in the event of disagreement with his insurer, nor shall any such clause require that the results of arbitration are binding on the parties without the right of appeal unless the parties themselves agree to be so bound by a separate agreement.

Although both are prohibited by regulation, the distinction should nonetheless be drawn between mandatory and binding arbitration. Binding arbitration is conspicuously unconstitutional under Article 5, Section 28 of the Wyoming Constitution, which states that "Appeals from decisions of compulsory boards of arbitration shall be allowed to the supreme court of the state, and the manner of taking such appeals shall be prescribed by law." Mandatory arbitration, on the other hand, is generally viewed with hostility, not on constitutional grounds, but on convincing grounds of public policy. Reasons frequently given for voiding arbitration clauses include the arguments that (1) they infringe on the right of a claimant to have free access to the courts;<sup>82</sup> (2) such provisions, contained in an intricate, complicated, and adhesive contract of insurance, are not properly bargained for by the insured, who is in no position to dictate the terms of such a policy;<sup>83</sup> (3) to enforce such a provision against the injured party would be to permit the insurer to enforce its rights as to arbitration by court proceedings while denying an equal opportunity to the insured party;<sup>84</sup> and (4) uninsured motorist coverages provide that the insured "shall be legally entitled to recover," implying that the amount plaintiff may recover should be determined by the processes of law.<sup>85</sup>

Strangely enough, the mandatory arbitration clause appears in no other section of a standard automobile policy.

82. *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085 (Okla. 1960).

83. *Barnhart v. Civil Serv. Emp. Ins. Co.*, 16 Utah 2d 233, 393 P.2d 873 (1965).

84. *Id.*

85. *Id.*

That it was incorporated into the uninsured motorist endorsement alone can only be viewed as another attempt by policy draftsmen to limit the method, and perhaps the amount, of recovery by a policyholder who is injured by an uninsured motorist.

### *B. Consent to Sue Clause*

As mentioned above, insurers are reluctant to put themselves in a position where they are bound by the results of an action brought by an insured against an uninsured motorist who is either irresponsible enough to permit the entry of a default judgment against him or financially unable to provide an adequate defense. Consequently, to prevent the insured from determining the issues of liability and damages in this manner, a consent to sue clause has been devised,<sup>86</sup> the purpose of which is to preclude coverage under the uninsured motorist endorsement if the insured prosecutes an action to judgment against the uninsured motorist without the written consent of the insurer.

The position taken by the regulations of the Insurance Department is that where mandatory arbitration is unenforceable, the consent to sue clause itself becomes unenforceable.<sup>87</sup> If the insurer is no longer able to bar a claimant's access to the courts by invoking its option to arbitrate the question of liability, the insurer should not be able to accomplish the same result by being permitted to arbitrarily withhold its consent to sue. This is in accord with the holding of *Dominici v. State Farm Mutual Automobile Insurance Co.*,<sup>88</sup> where the court, in speaking of the consent to sue clause as a "no judgment" clause, concludes:

[A]s we read this contract we note that the question of this type of arbitration is inexorably tied to the

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86. KEETON, *supra* note 9. Under the standard uninsured motorist endorsement, the consent to sue provision states:

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 damages 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.

87. SCHERMER, *supra* note 17, § 26.02.

88. 143 Mont. 406, 390 P.2d 806, 809 (1964).

“no judgment” clause. They complement one another to the point one cannot exist without the other. Where such arbitration is allowed and countenanced there is nothing unreasonable about the latter mentioned clause . . . . But where contracts to arbitrate future controversies are not enforceable a “no judgment” clause, as exists before us, necessarily becomes unreasonable and itself must fall . . . .

By voiding the consent to sue clause, the Department regulations do not deprive the insurer of its right to be notified of an action commenced against an uninsured motorist by the insured.<sup>89</sup> Notwithstanding the validity of the consent to sue clause itself, upon which there is a familiar split of authority,<sup>90</sup> the cases appear to be uniform in holding that if the insurer is in fact notified of an action between the insured and the uninsured motorist, and does not choose to intervene after being notified, it cannot later be heard to contest the judgment on the basis that the policy required the written consent of the insurer for such a judgment to be obtained before it is considered binding on the insured. As one case stated, it would place the insured in “an absurd position legally” to say that a judgment is not binding on the insurer because, although notified of the action, the insurer did not give written authorization to the insured to pursue the judgment.<sup>91</sup>

Mention should be made that, in spite of case authority to the contrary,<sup>92</sup> the Department regulations leave intact a corollary clause found in most uninsured motorist coverages which prevents a settlement between the insured and the uninsured motorist from becoming binding on the insurer

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89. *Supra* note 20. Section 8 of the regulation provides that the insurer shall be entitled to a copy of the complaint and summons forthwith in the event the insured decides to initiate a lawsuit.

90. Annot., 25 A.L.R.3d 1275 (1969).

91. Clayton v. Alliance Mut. Cas. Co., 212 Kan. 640, 512 P.2d 507, 514 (1973).

92. Hawaiian Ins. & Guar. Co., 538 P.2d 865 (Wash. App. 1975); Michigan Mut. Liab. Co. v. Karsten, 13 Mich. App. 46, 163 N.W.2d 670 (1968); Guthrie v. State Farm Mut. Auto. Ins. Co., 279 F. Supp. 837 (D.C. Va. 1968); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Clem, 49 Ala. App. 457, 273 So. 2d 218 (1973).

against its will.<sup>93</sup> The different treatment accorded this "consent to settle" clause is apparently justified on the premise that an indifferent or irresponsible uninsured motorist can unduly prejudice the rights of the insurer by admitting liability and obtaining a written release to protect his driving privileges.<sup>94</sup> If the insured was allowed to bind his insurer by obtaining a settlement with the uninsured motorist without consent, the insurer would have little protection in doubtful cases of liability.

#### IV. CONCLUSION

With the stated objective of assuring that uninsured motorist coverages issued and circulated within the State of Wyoming "do not conflict with or otherwise unlawfully restrict the minimum coverages required by the Uninsured Motorist Act" and to "prevent the circulation of uninsured motorist policy forms in Wyoming which contain ambiguous, misleading, or inconsistent language, or which deceptively affect the risk purported to be assumed in the general coverage of the contract"<sup>95</sup> the Wyoming Insurance Department has promulgated an administrative regulation which goes a long way toward reconciling the type of coverage contemplated by state uninsured motorist statutes with the standard uninsured motorist endorsement currently used by the insurance industry. By prohibiting the use of "other" insurance clauses, medical payment reduction clauses, Workmen's Compensation reduction clauses, the physical contact requirement, compulsory arbitration clauses, and consent to sue clauses, the regulation hopefully brings the uninsured motorist endorsement in Wyoming closer to the legislative objective of protecting the insured and members of his family against the risk of being negligently injured by a financially

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93. KEETON, *supra* note 9. This exclusion provides as follows:

This policy does not apply under Part IV (b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor.

94. SCHERMER, *supra* note 17, § 25.01. Under the Wyoming Safety Responsibility Act, an uninsured motorist who procures a written release from the other party involved in the accident is able to reinstate his driving privileges. WYO. STAT. § 31-291 (1957).

95. *Supra* note 20, § 2.

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irresponsible motorist. No less important, the regulation simplifies uninsured motorist coverages by making policy provisions which have troubled the courts for years a bit easier for the policyholder to understand.