INSURANCE: DIRECT ACTION AGAINST INSURER UNDER UNINSURED MOTORIST ENDORSEMENT APPROVED

IN *Wright v. Fidelity & Casualty Company*,[1] the North Carolina Supreme Court held that a motorist could sue his insurer under the "uninsured motorist" provision of his insurance policy without first obtaining a judgment against the tortfeasor. Plaintiff-Wright's wife, covered by his policy with Fidelity, was critically injured when the car in which she was a passenger was struck from behind by the uninsured driver of a borrowed, uninsured automobile. After her death some eighteen months later, Wright filed suit against Fidelity, his own insurance company, and Liberty Mutual, the insurer of the automobile in which the deceased had been riding. Recovery was claimed in both instances under the uninsured motorist clauses of the two policies, and the cases were consolidated for trial. Fidelity demurred on the ground that the complaint failed to state a cause of action, as plaintiff had not shown, by judgment secured against the alleged tortfeasors, that he was legally entitled to payment under the policy.[2] Liberty demurred on the same ground, adding that there had been no adjudication that the alleged tortfeasors were "uninsured," and that the policy owner had never contracted for uninsured motorist coverage.[3] Both demurrers were sustained by the superior court and Wright appealed. The North Carolina Supreme Court held that the policy with Fidelity, although similar in many respects to the typical uninsured motorist provision,[4] was unambiguous in its allowance of a direct action against the insurer without prior judgment against an alleged tortfeasor,[5] an option not provided in most uninsured motorist endorsements. Furthermore, since the North Carolina Uninsured Motorist Statute made such coverage mandatory where not rejected by the insured, the burden was on the insurer to show rejection.[6]

During the past ten years, statutes have been enacted in over

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[1] 270 N.C. 577, 155 S.E.2d 100 (1967).

[2] *See id.* at 580, 155 S.E.2d at 103.

[3] *Id.*

[4] *See* Standard Family Combination Auto. Policy, CCH AUTO. L. REP. (INS.) ¶¶ 2270-2329 (1967).

[5] 270 N.C. at 583, 155 S.E.2d at 105.

[6] *See id.* at 588, 155 S.E.2d at 108.

thirty states requiring that insurance companies make available uninsured motorist coverage.[7] Approximately one-half of these statutes provide simply that such protection shall be afforded the insured and generally detail only the requisite minimum coverage.[8] Six of these general enactments provide for subrogation of the insurer to the rights of the insured if the latter collects from the company under the policy.[9] Seven states, including North Carolina, have adopted a structure which adds hit-and-run drivers to the category of "uninsured motorists," but provides no special procedure for recovery against the company in case the tortfeasor is unknown.[10] A third form of "uninsured motorist" statute, appearing in four states,[11] contains a procedure for suing a fictitious "John Doe" to determine recovery under the endorsement when the insured has been the victim of an accident involving an unknown motorist. Variations on these three basic forms have been enacted by other states. California, for example, explicitly requires the insured to file suit against the uninsured motorist, or conclude an agreement with the insurer as to the amount due under the policy, or formally institute arbitration proceedings before suing the insurer on the policy.[12] Massa-

[7] See notes 8-11 *infra* and accompanying text. *See generally* Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283, 288-89 (1960); Comment, *Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145 (1961); Annot., 79 A.L.R.2d 1252 (1961).

[8] ALA. CODE tit. 36, § 74 (62a) (Supp. 1965); ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1967); ARK. STAT. ANN. §§ 66-4003 to -006 (1966); COLO. REV. STAT. ANN. § 72-12-19 (Supp. 1965); FLA. STAT. ANN. § 627.0851 (Supp. 1966); HAWAII REV. LAWS § 181-447 (Supp. 1965); IND. ANN. STAT. § 39-4310 (1965); KY. REV. STAT. § 304.682 (Supp. 1966); LA. REV. STAT. § 22:1406 (D) (Supp. 1966); ME. REV. STAT. ANN. tit. 24, § 502 (22) (Me. Legis. Serv. ch. 93, 1967); MONT. REV. CODES ANN. § 40-4403 (Supp. 1967); N.C. GEN. STAT. § 20-279.21 (b) (3) (Supp. 1965); OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1966); ORE. REV. STAT. § 736.317 (1965); TEX. INS. CODE ANN. art. 5.06-1 (Tex. Sess. L. Serv. ch. 202, 1967); WIS. STAT. ANN. § 204.30 (5) (a) (Supp. 1967).

[9] ARK. STAT. ANN. § 66-4006 (1966); FLA. STAT. ANN. § 627.0851 (4) (Supp. 1966); KY. REV. STAT. § 304.682 (4) (Supp. 1966); LA. REV. STAT. § 22:1406 (D) (4) (Supp. 1966); N.C. GEN. STAT. § 20-279.21 (b) (3) (Supp. 1965); TEX. INS. CODE ANN. art. 5.06-1 (Tex. Sess. L. Serv. ch. 202, 1967).

[10] ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd 1965); IOWA CODE ANN. (Iowa L. Serv. 2, House File 561, 1967); MINN. STAT. ANN. § 170.59 (1) (Minn. Sess. L. Serv. ch. 837, 1967); N.H. REV. STAT. ANN. §§ 268:15, 412:2-a (Supp. 1965); N.C. GEN. STAT. § 20.279.21 (b) (3) (Supp. 1965); R.I. GEN. LAWS ANN. § 27-7-2.1 (Supp. 1966); UTAH CODE ANN. § 41-12-21.1 (Supp. 1967).

[11] GA. CODE ANN. § 56-407.1 (d) (Supp. 1966); S.C. CODE ANN. § 46-750.35 (Supp. 1966); VA. CODE ANN. § 38.1-381 (e) (Supp. 1966); W. VA. CODE ANN. § 33-6-31 (e) (iii) (Supp. 1967).

[12] CAL. INS. CODE § 11580.2 (h) (West Supp. 1966).

chusetts requires that determination of the amount which the insured is "legally entitled to recover" be made by settlement or arbitration between the insured and the insurer.[13] Uninsured motorist endorsements in automobile insurance policies are, in general, as uniform as the statutes.[14] The Standard Family Combination Automobile Policy, in a typical provision, protects against a defined uninsured motorist or vehicle, establishes agreement or arbitration as a means of settlement, and states that no prior suit adjudicated without the written consent of the company shall be binding on it.[15] This pattern was employed in the instant case by Liberty, while Fidelity's policy, in addition to the usual definition of terms, simply provided for recovery by suit against the insurer if the insured elected not to arbitrate.

Where the legislature has not afforded protection against uninsured motorists by statute, courts obviously must look to the terms of the policy to determine whether the insured may sue his insurer directly. Prior to *Wright* only one court had considered the issue of direct suit under the provisions of an uninsured motorist endorsement. In *Hill v. Seaboard Fire & Marine Insurance Company*,[16] a Missouri Court of Appeals concluded that an insured may bring direct action against the insurer, absent a provision in the insurance contract to the contrary, under a policy which treated unknown hit-and-run drivers as uninsured motorists in a manner similar to that contemplated by the North Carolina statute. The court reasoned that since insurance companies were knowledgeable in requiring an unsatisfied judgment as a condition precedent to liability, a company's failure to so provide would be construed to allow a direct suit by the insured.[17] On the other hand, where similar actions have been filed in states having *statutes* with "John Doe" provisions, the

[13] MASS. GEN. LAWS ANN. ch. 175, § 111D (1959). *See also* KAN. GEN. STAT. ANN. § 40-1110 (1964) (uninsured motorist coverage merely permissive, rather than mandatory); N.Y. INS. LAW §§ 608-612 (McKinney 1966) (arbitration through New York's Motor Vehicle Accident Indemnification Corporation); Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future,* 8 BUFFALO L. REV. 215 (1959).

[14] *Compare* Standard Family Combination Auto. Policy, CCH AUTO. L. REP. (INS.) ¶¶ 2270-2329 (1967), *with* Allstate Ins. Co. Crusader Policy, CCH AUTO. L. REP. (INS.) ¶¶ 2670-2730 (1967), *and* State Farm Mut. Auto. Ins. Co. Policy, CCH AUTO. L. REP. (INS.) ¶¶ 3280-3283, 3299-3308 (1967).

[15] Standard Family Combination Auto. Policy, CCH AUTO. L. REP. (INS.) ¶¶ 2270-2329 (1967).

[16] 374 S.W.2d 606 (Mo. Ct. App. 1963).

[17] *Id.* at 611.

courts have unanimously held that a prior judgment against a tortfeasor is prerequisite to a suit against the insurer.[18] These courts have concluded that the legislative scheme requiring recovery of a judgment against an unknown tortfeasor indicates an intent that insurance companies should not be subject to direct suit on uninsured motorist endorsements. Had the legislature not been opposed to direct action, they reason, it would not have gone to such efforts to insure prior action when the real defendant was unknown. By inference, where the tortfeasor is known, prior suit is similarly required.[19] Thus, before *Wright,* no court had held that under an uninsured motorist *statute* without specific provision for suit against an unknown motorist, an insured could sue his own insurer without first gaining judgment on the issues of liability and damages in a suit against the uninsured motorist.

Wright v. Fidelity & Casualty Company afforded the North Carolina Supreme Court an opportunity to interpret an uninsured motorist statute which did not specifically provide for initial suit against the tortfeasor if he were unknown. Freed of the weight of the "John Doe" decisions, the *Wright* court disposed of that part of Liberty's policy which rendered arbitration the sole means of reaching settlement absent agreement with the insured by viewing it as an attempt to oust the courts from jurisdiction, and thus in conflict "with the beneficent purposes of [the] uninsured motorist statute . . . ."[20] Since the statute sought to protect against hit-and-run drivers but failed to provide a procedure for gaining recovery against an unknown tortfeasor, the legislative intent, in the court's view, must have been to allow direct action against the insurer in such a case. In light of the statute's failure to distinguish between a "hit-and-run driver" and an "uninsured motorist," the court reasoned that the recovery procedure by the insured should be the

[18] O'Brien v. Government Employees Ins. Co., 372 F.2d 335 (3d Cir. 1967) (interpreting the Virginia Uninsured Motorist Statute, VA. CODE ANN. §§ 38.1-381 (b) to - (h) (Supp. 1966)); State Farm Mut. Auto. Ins. Co. v. Girtman, 113 Ga. App. 54, 147 S.E.2d 364 (1966); *see* Gulf Am. Fire & Cas. Co. v. McNeal, 115 Ga. App. 286, 292-93, 154 S.E.2d 411, 417 (1967); Smith v. Allstate Ins. Co., 114 Ga. App. 127, 128, 150 S.E.2d 354, 355 (1966); Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 66, 145 S.E.2d 673, 677 (1965); Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 159, 135 S.E.2d 841, 844 (1964); Laird v. Nationwide Ins. Co., 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964).

[19] *See, e.g.,* O'Brien v. Government Employees Ins. Co., 251 F. Supp. 318, 321-22 (E.D. Pa. 1966), *aff'd,* 372 F.2d 335, 339 (3d Cir. 1967) (expressly approving district court rationale).

[20] 270 N.C. at 587, 155 S.E.2d at 107.

same irrespective of the status of the tortfeasor. As the insured is not precluded from bringing direct suit if he is the victim of a hit-and-run driver, he should not be denied such procedure if the tortfeasor is known. Consequently, the insured had the right to sue the insurer without a prior determination of legal liability. Overruling the sustaining of Fidelity's demurrer, the court noted that the policy gave the insured the right to demand arbitration; or, if the insured elected not to arbitrate, the policy provided that "the liability of the company shall be determined only in an action against the company . . . . In any action against the company, the company may require the insured to join [the tortfeasor] . . . as a party defendant."[21] Regarding this provision as "free from ambiguity,"[22] the court concluded that an action against the insurer was permissible without first securing a judgment against the uninsured motorist.

The conclusion of the *Wright* court, that a motorist can bring direct action against his insurer under the North Carolina statute, should reduce unnecessary lawsuits and prompt more pre-trial settlements. Since most policies provide that the insured may not sue the tortfeasor without serving proper notice on the insurer and gaining its written consent, there seems to be little need for two separate suits. Generally, the insurer, in the first suit, will be the real defendant, for if the requisite procedure is followed by the insured, a judgment in his favor on the issues of negligence and damages will be res judicata in a suit against the insurer on the insurance contract.[23] The notice provision has been interpreted to mean that the insurer may take steps necessary to protect its interest "as though it were a party defendant . . . ."[24] Because of a greater likelihood of a default judgment, adequate defense might be especially important when the uninsured motorist is indigent. Direct suit in this instance would thus avoid circuity of action while providing the real parties in interest an opportunity to be heard. Another objection to direct

[21] *Id.* at 582, 155 S.E.2d at 104.

[22] *Id.* at 583, 155 S.E.2d at 105.

[23] *See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964); Rodgers v. Danko, 204 Va. 140, 143, 129 S.E.2d 828, 830 (1963). *See also* Comment, *Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145, 158-60 (1961).

[24] VA. CODE ANN. § 38.1-381 (c) (1) (Supp. 1966); *see* O'Brien v. Government Employees Ins. Co., 251 F. Supp. 318, 320, 322 (E.D. Pa. 1966), *aff'd*, 372 F.2d 335 (3d Cir. 1967); Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 69-70, 145 S.E.2d 673, 678-79 (1965).

action—that juries will tend to find for a plaintiff if they are aware that an insurance company is the real defendant[25]—is becoming less significant with the statutory requirement in many states of compulsory liability insurance. It is not unreasonable to posit that contemporary jurors tacitly assume that the defendant is covered by liability insurance.[26] Assuming that some fear of prejudice exists, insurers may be more prone to reach an equitable settlement prior to trial in order to avoid confrontation with a jury. Thus, *Wright* is a step in the direction of eliminating unnecessary law suits in actions under uninsured motorist provisions and fulfilling the "beneficent purposes" of such statutes; *i.e.*, providing the insured with coverage against loss resulting from the negligence of uninsured motorists.

[25] O'Brien v. Government Employees Ins. Co., 251 F. Supp. 318, 322 (E.D. Pa. 1966), *aff'd*, 372 F.2d 335 (3d Cir. 1967); Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo. Ct. App. 1963) (unpopularity of insurance companies with juries no reason to refuse direct action under uninsured motorist endorsement); Comment, 22 LA. L. REV. 243, 245 (1961).

[26] *See* Comment, 22 LA. L. REV. 243, 245 & n.5 (1961).