# INSURANCE AGAINST LACK OF INSURANCE? A DISSENT FROM THE UNINSURED MOTORIST ENDORSEMENT

JOSEPH LAUFER*

*Recently the insurance industry has sponsored, on a nationwide basis, its own solution to the perennial problem of the uninsured and financially irresponsible motorist. It consists of a policy called the "Uninsured Motorist Endorsement", designed to protect the insured against the risk of injury by uninsured and negligent drivers: The policy is sold on either a compulsory or a more or less automatic basis to holders of automobile liability insurance policies. The author suggests that for at least three major reasons the industry's solution is wanting: (1) the terms of the policy are unduly restrictive, (2) they give rise to innumerable law suits, despite an unusual clause compelling the insured victim to arbitrate disputes with his insurer, and (3) they ignore pedestrian victims who do not own cars nor share a car-owner's household. The most urgent reform needed is to extend protection, as New York has done, to these pedestrian victims. Further, existing inequitable restrictions on recovery should be removed, especially if, as New York's experience seems to indicate, the Endorsement has turned out to be a profitable venture for the industry.*

ABOUT 85 percent of the more than 83 million passenger automobiles presently in use in the United States are covered by liability insurance,[1] most of which is procured voluntarily by motorists desiring to protect themselves against liability from traffic accidents. The arrangement serves two major purposes. It protects the insured motorist against the depletion of personal

* Professor of Law, State University of New York at Buffalo Faculty of Law and Jurisprudence. LL.B. 1940, Duke University; LL.M. 1941, Harvard University.

[1] Total 1968 registration of private and commercial automobiles was over 83 million. U.S. Dep't of Transp., News Release (May 25, 1969). J.C. Bateman, president of the Insurance Information Institute, estimated that 85% of the cars on the road in 1966 were insured. The National Underwriter, Sept. 6, 1968, at 13. In that year registered passenger automobiles totalled 78,315,000. 1967 AUTOMOBILE FACTS AND FIGURES 18. These figures are based on estimates that may not be up-to-date. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 65-67 (1965) [hereinafter cited as KEETON & O'CONNELL].

assets which would result if he were forced to pay the damages he caused his victim. Secondly, compensation to the injured party is assured because insurance company funds discharge the liability and thus recovery by the victim does not hinge on the solvency of the offending motorist. Of course such an arrangement, due to legal and contractual design, does not assure compensation to all traffic accident victims. Under present tort law an injured party has no legal claim to damages against the motorist unless the latter has been at fault and the victim blameless.[2] Although a widely discussed and controversial topic, the question of whether automobile insurance should free itself from the "fault principle" and compensate most, if not all, traffic victims on a "non-fault" basis is beyond the scope of this article.[3]

However, a second, serious limitation inherent in the private (and usually voluntary) insurance arrangement involves the offending motorist who is not covered by a liability policy. What happens if, for one reason or another, the operator of the vehicle turns out to be "uninsured"—a condition often tantamount to financial irresponsibility? In such a case the victim, although he has a valid claim against the offending motorist, may find himself unable to enforce it.[4] This situation of unenforcible liability is an affront to the legal order which requires wrongdoers to indemnify their victims. Furthermore, in light of the hazards to life and limb created by modern traffic, financial irresponsibility of this nature presents a grave social evil,[5] but attempts to cope with it

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[2] Another serious limitation of the present liability insurance—compensation scheme arises from the fact that many policies are written at the inadequate minimum level of $10,000 for injuries suffered by a single claimant and $20,000 for injuries suffered by all claimants arising out of one accident. Thus in 1966, for example, 30% of all New York Motorists, 32% of those in Massachusetts, and 52% of those in North Carolina, carried only the minimum coverage required by law. Hashmi, *Compulsory Automobile Insurance*, 1967-1968 Ball State University Lecture Series 5.

[3] The most thorough modern study of the "fault" versus "non-fault" controversy in auto liability insurance is KEETON & O'CONNELL. For a recent analysis of "non-fault" compensation plans, *see* King. *The Insurance Industry and Compensation Plans*, 43 N.Y.U.L. REV. 1137 (1968).

[4] With respect to financial irresponsibility, it has been stated that "[t]he cold fact [is] that where there is no liability insurance, legal rights and liabilities are largely meaningless." C. KULP, CASUALTY INSURANCE 201 (3d ed. 1956). *See also* COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 203-05 (1932).

[5] G. HALLMAN, UNSATISFIED JUDGMENT FUNDS 5-19 (University Microfilms, Inc., Ann Arbor, 1965).

have remained, at least in the United States, a subject of continuing controversy. The American insurance industry, by designing a special kind of accident policy which protects the holder against the risk of being hit by a negligent, uninsured driver, has sponsored a new solution: insurance against another's failure to insure.

Over the past decade, legislation dealing with this novel policy has been enacted in state after state,[6] plainly bespeaking the existence of a concerted, nation-wide industry drive. The policy is called "Family Protection Coverage" or more prosaically, the "Uninsured Motorist Endorsement"[7] and, like liability insurance, is "tort-related," *i.e.*, no insurance is payable to the Endorsement-insured unless he is blameless and the uninsured motorist is at fault in causing the accident. However, unlike liability insurance the Endorsement is a form of "first-party" insurance, the victim receiving compensation from his *own* insurance company. The Endorsement is attached by way of a "package deal" to the conventional automobile liability policy. In a number of jurisdictions, the Endorsement must be bought if a liability policy is obtained. More often it must be, to use the graphic term of the trade, "rolled-on,"[8] *i.e.*, automatically attached to the liability policy unless the customer explicitly rejects it.[9]

Part I of this article sketches the background of this newcomer to the American insurance scene; Part II outlines the principal

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[6] "Despite the fact that compulsory automobile insurance has not caught on through legislation, compulsory uninsured automobile insurance has swept the country perhaps faster than any piece of statutory enactment other than the Uniform Commercial Code," Aksen, *Arbitration of Automobile Accident Cases*, 1 CONN. L. REV. 70, 74 (1968).

[7] The policy in question will hereinafter be referred to as the Endorsement. For a recent summary of Endorsement legislation and statutory citation, see J. CORBLEY, UNINSURED MOTORIST PROTECTION, DEFENSE RESEARCH INSTITUTE MONOGRAPH Appendix A, 38-42 (1968); *see also* American Insurance Association, Chart of Mandatory Uninsured Motorist Provisions (Jan. 1969). A most thoughtful article is Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497 (1967). For bibliographies see J. CORBLEY, *supra* 25-37; G. HALLMAN, *supra* note 5, at viii-xxiv; Seide, *Uninsured Motorist Arbitration*, 19 ARB. J. (n.s.) 45-50 (1964).

[8] The "roll-on" technique was developed when the Endorsement was still optional. Hashmi, *Uninsured Motorist Coverage*, 20 THE ANNALS OF THE SOCIETY OF CHARTERED PROPERTY AND CASUALTY UNDERWRITERS 147, 155 n.16 (1967). It is still used in that fashion, *e.g.*, in New York for the "extraterritorial" Endorsement, which is optional. See note 192 *infra* and accompanying text.

[9] The insured may reject the Endorsement in the 35 jurisdictions in which it is not mandatory; they are listed by J. CORBLEY, *supra* note 7, at 38-42.

terms of the Endorsement; Part III examines selected aspects of its operation as reflected by litigation; and Part IV comments on the grave deficiencies which emerge from this inquiry.

## I. BACKGROUND

To understand the rise of the Endorsement from obscurity to near-universality during the last decade, it must be recalled that the problem of uninsured motorists and attempted solutions date back at least half a century. By 1919, Mr. Ford's mass-produced and inexpensive Model T had been on the market for over a decade[10] and more and more motorists were able to buy automobiles, often second-hand. Most of them did not bother to insure themselves against liability. Some may not have appreciated the hazards of driving and thus may have been willing to "chance it." Others, presumably the majority, were too poor to spend money on insurance premiums. In any event, within a decade the uninsured motorist had become a national problem. Legislative action seemed necessary.

### *Compulsory Insurance*

In 1925, after six years of controversy,[11] Massachusetts became the first among the common law jurisdictions to take the step which, to this day, remains the most rational solution. Beginning in 1927 private motorists were compelled to insure themselves against the risk of tort liability arising from their negligent driving.[12] The impact of this new, mandatory approach may be gauged by the simple fact that almost overnight the percentage of uninsured motorists in Massachusetts was reduced from more than 70 to 1 or 2 percent.[13]

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[10] The Model T was introduced in 1908 and sold for $850.00. *See* K. SWARD, THE LEGEND OF HENRY FORD 24-25 (1948).

[11] Blanchard, *Compulsory Vehicle Liability Insurance in Massachusetts*, 3 LAW & CONTEMP. PROB. 537 (1936).

[12] MASS. GEN. LAWS ANN. ch. 90, §§ 1A to 34A (Supp. 1968).

[13] The Massachusetts Registrar of Motor Vehicles estimated that only 1% of Massachusetts motorists had failed to comply in 1929 with the compulsory insurance law, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 45 (1932).

From the outset the American insurance industry has bitterly opposed compulsory insurance.[14] Among the more serious arguments[15] against such a system were the industry's fear of political meddling with premium rate structures, the fear of reduced profits due to the inability of the insurers to select only the "better risks" among the applicants, and, more generally, the dislike of governmental regulation of private business. Furthermore, it was thought that regulation would eventually lead to government-operated insurance. Whatever the merits of these arguments, the industry's adamant opposition proved decisive and compulsory insurance was confined to Massachusetts for nearly thirty years. Not until 1956 was Massachusetts joined by New York[16] and not until a year later by North Carolina.[17] In contrast, and subject to the "financial responsibility laws" to be noted next, automobile liability insurance in the other 47 jurisdictions has remained substantially the same as it was in the days of the Model T Ford—the motorist's free choice.

*Financial Responsibility Laws*

Beginning in the late twenties the insurance industry, in an attempt to ward off compulsory insurance, came forward with its own solution. Embodied in legislation euphoniously labeled "financial responsibility laws," these provisions were enacted under the industry's sponsorship nearly everywhere in the United States.[18] Since they have been the subject of extensive analysis,[19] only their main features are relevant here. Essentially they were based on the notion of *selective* and *delayed* rather than *universal* and *immediate*

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[14] For a recent critique of the American industry's position toward compulsory insurance, *see* Hashmi, *supra* note 2, *passim*.

[15] These and others are analyzed in detail by Hashmi, *supra* note 2, at 65-90.

[16] Law of April 16, 1956, ch. 655, § 2 (now N.Y. VEH. & TRAF. LAW §§ 310-21 (McKinney 1960), *as amended*, N.Y. VEH. & TRAF. LAW §§ 312-318 (McKinney Supp. 1968)).

[17] N.C. GEN. STAT. §§ 20-309 to 319 (Supp. 1967).

[18] The first of these was enacted in Connecticut in 1925, Law of January 1, 1925, ch. 183, [1925] Conn. Pub. Acts 3956 (repealed 1927).

[19] *See, e.g.*, Braun, *The Financial Responsibility Law*, 3 LAW & CONTEMP. PROB. 505 (1936); Feinsinger, *Administrative Problems of Financial Responsibility Laws*, 3 LAW & CONTEMP. PROB. 531 (1936); Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950); Hume, *Are Our Financial Responsibility Laws Adequate? What Can We Do To Improve Them?*, 19 FED. OF INS. COUNSEL Q. 60 (1968-69).

compulsion to insure against liability. Contemporary versions[20] require every driver who becomes "involved" in a serious traffic accident to surrender his license (and registration plates) unless he produces "security" for the damages he may have to pay to the victims of the accident. If insured, the driver will be able to furnish the required security simply by exhibiting his liability policy. If uninsured, however, the driver must either make the required deposit or give up driving (and registration) until he can show that he was blameless or until he comes to terms with his victim. If, as usual, he is financially irresponsible, the best that the law can do is to force him off the road while his unfortunate victim remains uncompensated. The flaw basic to this entire approach is evident: the "financial responsibility laws," in effect, ignore the first victim of a driver who is both uninsured and financially irresponsible.[21] Since under these statutes no driver is compelled to insure until he has had a serious accident, substantial numbers of financially irresponsible drivers remain on the road and uninsured. In light of this situation it is not surprising that in the early fifties the industry was confronted with renewed demands for more effective measures to deal with this problem.[22] Once again compulsory insurance was proposed.

*The "Nominal Defendant"*

At this critical juncture fifteen years ago, history, or at any rate, American insurance history, repeated itself. The insurance industry once more presented to American legislatures a solution of its own, the Endorsement. As before, the industry's action was motivated by the fear of compulsory insurance legislation. This time, however, it also dreaded another, more recent device—the creation of public funds to indemnify the victims of uninsured motorists.[23] Already well-established legislative schemes in other

[20] New Hampshire was the first state to adopt a modern version, Law of July 14, 1937, ch. 161, [1937] N.H. Laws 293 (repealed 1949).

[21] The comtemporary versions of these laws are described and criticized in Grad, *supra* note 19. The American Insurance Association published in 1967 an intricate "Four Chart Analysis of Financial Responsibility and Related Laws" which groups the complex legislation in all states according to its main features.

[22] Netherton & Nabhan, *The New York Motor Vehicle Financial Security Act of 1956*, 5 AM. U.L. REV. 37 (1956).

[23] For a careful analysis of the "nominal defendant" versions in the United States and Canada, *see* G. HALLMAN, *supra* note 5. Brief summaries of European versions appear in

parts of the world, these funds were capable of ready adaptation to American conditions.

The honors for having pioneered the underlying concept belong jointly to two Australian states, South Australia and Victoria. A 1936 South Australian statute permitted the victim of an unidentified "hit and run" driver to recover from a "nominal defendant."[24] This defendant, appointed by the state treasurer, was held liable if the victim could prove that he would have recovered from the negligent driver had it been possible to identify him.[25] A 1939 Victoria enactment broadened this scheme to include all situations in which an automobile accident victim was unable to recover because the negligent driver turned out to be uninsured and financially irresponsible.[26] Significantly, the South Australia and Victoria schemes supplemented a regime of compulsory liability insurance.[27] In both jurisdictions there were limitations on claims by passengers. Otherwise, recoveries from the nominal defendant were not limited in amount, although the victim was first required to obtain a judgment against the driver and prove that it could not be satisfied.[28] The funds necessary to permit the "nominal defendant" to meet his statutory liabilities were contributed by the insurance companies who in turn passed them on through increased premium rates to automobile owners as a class.[29] The scheme first appeared in North America in 1945 in the province of Manitoba as an "unsatisfied judgment fund."[30] Thereafter, in one form or another, such funds were enacted in most Canadian provinces, in Europe and elsewhere.[31] Inevitably, once the basic notion proved

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Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283, 302-06 (1960).

[24] Castles, *Compulsory Automobile Liability Insurance in Australasia*, 6 AM. J. COMP. L. 257, 264 (1957).

[25] *Id.*

[26] *Id.* at 264, 268.

[27] *Id.* at 261-68; Castles, *Legislative Reform of the Nominal Defendant Provisions of the Motor Car Act*, 7 RES JUDICATAE 153 (1955).

[28] The requirement that the victim first obtain a judgment has lead to the familiar term "unsatisfied judgment fund." Since, typically, uninsured motorists cannot be properly served, or if served, simply default, modern funds relax this requirement, subject to suitable safeguards for the protection of the fund, G. HALLMAN, *supra* note 5, at 107-10.

[29] Castles, *supra* note 24, at 269.

[30] MAN. REV. STAT. ch. 112, §§ 153-60 (1954).

[31] See note 23 *supra*.

acceptable, considerable variations in the scope of coverage, methods of administration, and funding appeared.[32] The scheme is compatible with either compulsory or more or less voluntary liability insurance. Its adoption in the United States would have removed a crucial objection to the "financial responsibility laws": the "nominal defendant" will compensate the *first* victim of an uninsured motorist on the same basis as the second or third.[33]

The American insurers rejected this solution as they had earlier rejected compulsory insurance.[34] In their view the adoption of the "nominal defendant" scheme was nothing short of a prelude to state-run insurance, and again their opposition proved decisive.[35] Yet, if this was a victory for the industry comparable to the battle won against compulsory insurance, it was merely defensive. In the early fifties the industry realized that it had become futile to call again for more effective enforcement of traffic rules and "public

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[32] In Canada, most of the unsatisfied judgment funds are administered (under special arrangements with the provincial governments) by the insurers themselves (many of whom incidentally, are controlled by American companies). G. HALLMAN, *supra* note 5, at 41-49.

[33] E.H.S. Piper, the present counsel of the All Canada Insurance Federation pointed this compensation scheme out to his American colleagues 16 years ago: "It was almost in the nature of a guarantee that the Safety Responsibility Law would be successful in achieving the results everyone desired that the undertaking was given that, if the Safety Responsibility Law were adopted, the insurance business would provide for the few who were unable to enforce judgments rendered in their favor against the negligent motorist by financing and operating the Fund." Piper, *Canadian Unsatisfied Judgment Funds*, 3 FEDERATION OF INS. COUNSEL Q. 25, 33 (1953). Theoretically and, of course, in practice, the number of uninsured motorists and hence the financial burden for the "nominal defendant" will be substantially lower where a motorist's failure to insure is a criminal offense.

[34] For a consideration of the New Jersey experience, for instanee, see Wise, *The Problems of the Financially Irresponsible Motorist and the Uncompensated Accident Victim*, 1957 INS. L.J. 139, 142.

[35] The industry has lost a few battles against "state-run" insurance, however. In the wake of its Canadian neighbor provinee Manitoba, North Dakota established a very modestly conceived "unsatisfied judgment fund" in 1947, N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (1960), *as amended*, N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (Supp. 1967). In 1952, New Jersey enacted similar fund legislation, N.J. STAT. ANN. § 39: 6-61 to 6-91 (1961), *as amended*, N.J. STAT. ANN. §§ 39: 6-62 to 6-87 (Supp. 1968). Maryland followed in 1957, MD. ANN. CODE, art. 66½ §§ 150-179 (1967), *as amended*, MD. ANN. CODE §§ 150-177 (Supp. 1968), and Michigan in 1965, MICH. STAT. ANN. §§ 9.2801-9.2831 (1968), *as amended*, MICH. STAT. ANN. §§ 9.2803-9.2827 (Supp. 1969). For the situation in New York see notes 40 & 63 *infra*.

responsibility laws" and hope for the best.[36] It was at this point that, as a "constructive" alternative, the Endorsement emerged.[37]

## II. THE ENDORSEMENT

### *History*

As early as 1925 an insurance company offered "unsatisfied judgment" insurance.[38] The policy required the insurer to pay an insured after he had reduced his claim against a motorist to judgment and proved that he was unable to collect on it. The innovation made little headway.[39] Between 1952 and 1953, in the midst of the bitter legislative battles over compulsory insurance waged in New York, the industry seemed to become aware of the potentialities of the device[40] and the nationwide significance of the underlying issues. Accordingly in 1956 two major insurance groups[41] joined in promulgating, and from time to time amending, standard conditions for the Endorsement.[42] In so doing the industry followed a procedure established for automobile liability policies which had been standardized in 1936.[43]

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[36] *See, e.g.*, Moser, *The Uninsured Motorist Endorsement*, 1956 INS. L.J. 719, 720.

[37] "Faced again with the threat of compulsory insurance or government take-over, the companies invented . . . [the Endorsement] and hastily presented it as their defense to these threats." Pretzel, *Uninsured Motorist: Uneasy Money—Unless Modified*, 1965 INS. L.J. 711, 712; *see also* Caverly, *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, 1956 INS. L.J. 19, 20; Moser, *supra* note 36, at 719.

[38] George, *Insuring Injuries Caused by Uninsured Motorists*, 1956 INS. L.J. 715; Plummer, *The Uncompensated Automobile Accident Victim*, 1956 INS. L.J. 459, 464.

[39] George, *supra* note 38, at 718.

[40] In 1954 the New York insurance companies were ready to accept a "nominal defendant" scheme for the compensation of those who had voluntarily obtained Endorsement coverage. When the Harriman administration continued the efforts of Governor Dewey to introduce compulsory legislation, the insurers again proposed the "voluntary Endorsement" as the answer to the uninsured motorist problem. *See generally* Netherton & Nabhan, *supra* note 22, at 47-48 & n.36. The insurers offered a wide variety of Endorsements. Several issued "unsatisfied judgment" insurance. New York's mutual insurers offered Endorsements which did not require proof of the uninsured driver's negligence—it was "presumed." Morgenbesser, *Some Legal Aspects of the New York Uninsured Motorists' Coverage*, 1956 INS. L.J. 241, 242; Plummer, *supra* note 38, at 464. Another version, much like a true accident policy, included a death and dismemberment schedule, along with fixed compensation payments, thus eliminating the issue of damages from the bargaining between insurer and insured. George, *supra* note 38, at 718.

[41] The National Bureau of Casualty Underwriters representing the stock companies, and the Mutual Insurance Rating Bureau, representing the mutual companies.

[42] Form A-615, dated December 12, 1956. A revised form was issued on May 1, 1958 (Form A-615 a). The third revision was dated May 1, 1966 (Form UM). The 1956 and 1963 versions are reproduced in J. CORBLEY, *supra* note 7, at 44 & 46.

[43] Herbert, *The General Practitioner and the Basic Automobile Policy*, 1957 INS. L.J. 163.

Before briefly outlining some of the more significant provisions[44] of the Endorsement, a cautionary note is in order. In many instances the industry's form, somewhat like a "uniform act", has been modified in a particular jurisdiction by statute, administrative rule or judicial decision. This process is continuing and some of the more recent modifications are noted later. Of special importance is the fact that several large insurers insist on using their own versions.[45] However, such variations have not prevented the emergence of a common pattern. The following observations apply, unless otherwise indicated, to the most recent standard Endorsement published in 1966.[46]

Broadly speaking the Endorsement[47] protects a victim against the risk of being injured or killed by a negligent uninsured motorist.[48] There is no requirement that the insured first obtain a judgment against the uninsured motorst and that it be returned unsatisfied. The Endorsement considers a victim as an "insured" when he falls within either of two groups: the first consists of the

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[44] Georgia, New Mexico, North Carolina, South Carolina, Virginia and West Virginia also provide protection against property damage. For statutory citations, see J. CORBLEY, *supra* note 7, at 38-41. This additional coverage is beyond the scope of this article.

[45] *E.g.*, Allstate Insurance Company Policy, CCH AUTO. L. REP. (Ins.) ¶ 2670; State Farm Mutual Policy, CCH AUTO L. REP. (Ins.) ¶ 3520. The "independent" companies, which number over 400, feel free to use their own forms since they are not affiliated with the two organizations which drafted the standard Endorsement. The independents claim to write more automobile policies than the companies represented by the two organizations. Widiss, *supra* note 7, at 502 n.16.

[46] See note 7 *supra*. While the 1966 Endorsement uses the inclusive term "highway vehicle," this article will instead use the term "automobile" which is still common in all other versions. For more technical and detailed descriptions, *see* Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME LAW. 5, 7-23 (1967); Widiss, *supra* note 7, at 500-23.

Since the fifties uninsured motorist coverage was also offered as a separate policy. Deschamps, *Coverage for Innocent Victim Pays Off*, 1956 INS. L.J. 722, 724. Although pedestrians can hardly be expected to purchase such a policy in significant numbers, it seems to be available outside of New York. Hashmi, *supra* note 8, at 149, 151, 155.

[47] In actuality, the "Endorsement" is a full-fledged insurance policy sui generis; the term itself means no more than that the policy it embodies is available only as an appendage to the basic automobile liability policy. Although classed as an "appendage," it is in fact a formidable instrument of almost 2400 words, and matches in length and complexity the liability policy to which it is annexed. First the policy defines the risk against which the insured is protected. Then several broad qualifications on the insured's claim against the insurer are established. In addition, six elaborate definitions of key terms are presented with numerous "exclusions" from the preceding coverage. Finally, eleven further "conditions" are set forth in fourteen sections and subsections.

[48] Subsections Endorsement, I. Coverage U-Uninsured Motorists.

individual whom the principal policy (i.e., the automobile liability policy to which the Endorsement is appended) names as insured (the "named insured") and of those family members (spouse and relatives of either) who share his or her household.[49] This group is protected regardless where the accident overtakes the victim, whether as pedestrian, driver, occupant of a car or otherwise. The second group consists of all individuals who at the time of the accident are "occupying the insured automobile."[50] Although the "insured automobile" is primarily the car covered by the "principal policy,"[51] this favored status ends whenever the vehicle is used without the owner's permission.[52]

However, no victim, regardless of the group of insureds to which he belongs, can recover unless the offending car was "an uninsured automobile."[53] A car is considered "uninsured" if at the time of the accident, in respect of the injuries caused by its negligent operator, no bodily injury liability insurance policy is applicable; or where such a policy *is* applicable but the insurer "denies coverage"; or the car is a "hit and run automobile" (of course it may or may not have been insured). An important exclusion from or qualification of this definition is that a car is never an "uninsured automobile" (and hence the policy does not protect) if the negligently operated car is owned either by a self-insurer or by the federal or state governments, their agencies and subsdivisions.[54]

A series of special requirements must be met before an offending car is a "hit and run" vehicle and, as such, an "uninsured automobile."[55] The victim's injuries must have resulted from the car's "physical contact" with his body or with the car in which he was riding; he must be unable to ascertain the offending car's operator or owner; a proper report of the accident must have been made to the authorities within 24 hours; and within 30 days he

[49] *Id.* II. Persons Insured (a).

[50] *Id.* II. Persons Insured (b).

[51] Another car becomes an "insured automobile" while the named insured, or his spouse residing in the same household, drives it unless a resident of that household has it "in regular use." *Id.* V. Additional Definitions, Insured Automobile, (c), Exclusion (iv).

[52] *Id.* V. Additional Definitions, Insured Automobile, (a), (c) and Exclusion (ii).

[53] *Id.* V. Additional Definitions, Uninsured Automobile, (a), (b).

[54] *Id.* V. Additional Definitions, Uninsured Automobile, Exclusions (i), (ii).

[55] *Id.* V. Additional Definitions, Hit-and-Run Vehicle, (b).

must have filed with the insurer a sworn statement of his claim with facts supporting it.

Coverage is denied or reduced in certain circumstances of which only the more frequent will be noted. The claimant will forfeit his claim against the insurer completely if without the latter's written consent he settles with those liable for the injury.[56] If the offending motorist or those liable with him make any payment to the victim, the latter's claim against the insurer is reduced *pro tanto*[57] even if the damages exceed the Endorsement's coverage limits. The same is true of a payment made by the insurer under the principal liability policy on behalf of another insured who is also liable to the victim for the injury suffered, and of all sums paid or payable to the victim under any workmen's compensation law, disability benefits law or any similar law.[58]

Special provisions apply where similar insurance policies exist. Thus if the insured has occupied a car of another who in turn has obtained an Endorsement for that car, he is of course also an "insured" under that Endorsement. Yet the claim payable under the insured's *own* Endorsement is reduced to the amount by which its coverage limits exceed those of the other Endorsement.[59] More generally, the victim's damages are "deemed" not to exceed the higher of the limits contained in *any* of the applicable Endorsements. This means that whenever his *real* damages exceed these "deemed" limits, the existence of several Endorsements will be ignored insofar as the "excess" damages are concerned. In any event, the insurer will be liable only for that proportion which the maximum payable under the insured's Endorsement bears to the total of all amounts optimally recoverable under the several Endorsements. For example, if the victim could claim under three different Endorsements with a maximum of $10,000 each, the liability of each insurer will be reduced to one-third or $3,333.33 regardless of the total amount of actual damages suffered. These limitations on the right to recover are especially significant because coverage under the Endorsement is generally limited to $10,000 for a single claim and $20,000 for multiple claims arising out of the

[56] *Id.* I. Coverage U-Uninsured Motorists, Exclusion, (a).
[57] *Id.* III. Limits of Liability, (b)(1).
[58] *Id.* III. Limits of Liability, (b)(2).
[59] *Id.* VI. Additional Conditions, E. Other Insurance, Subsecs. 1, 2.

same accident.[60] These low amounts are occasionally fixed by state law but they exist for the most part by virtue of the industry's refusal to write higher limits.[61]

Finally, one of the boldest innovations of the Endorsement is the preclusion of a claimant's access to the courts. Whenever the insured and the insurer cannot agree as to whether the insured "is legally entitled to recover . . . damages from the owner or operator" or do not agree as to the "amount . . . owing under this insurance" the matter or matters are to be settled "by arbitration . . . in accordance with the rules of the American Arbitration Association."[62]

## III. JUDICIAL INTERPRETATION

The complex Endorsement policy was drawn up by an anonymous group of draftsmen who apparently defined its terms without the benefit of discussion other than among themselves. On occasion the 1956 standard Endorsement has been revised by its draftsmen or modified by statute or regulation. More often than not, however, the pertinent legislation has given free rein to the draftsmen's work, the classic illustration being the New York Endorsement which in substance reflects the 1956 standard form. Consequently the judicial interpretation of the Endorsement's terms is of special interest. The very concept of an insurance policy against the results of another's failure to insure, as it emerges from this over-simplified outline, suggests puzzling questions about the philosophy, interpretation and practical operation of the novel policy. It has, in fact, already produced an astonishingly large body of case law which is growing daily.[63] Unfortunately, due to this

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[60] According to a chart published in 1968, Alaska, California, North Carolina, Virginia and Washington now have maxima of $15,000 for single claims and $30,000 for all claims arising out of the same accident. Connecticut has a unitary maximum of $20,000. J. CORBLEY, *supra* note 7, at 38-42.

[61] Notman, *supra* note 46, at 17 n.71. The Virginia statute requires insurers to offer higher limits. Aksen, *supra* note 6, at 73, n.10. A large Illinois insurer is said to offer coverage in amounts equal to liability coverage, Pretzel, *supra* note 37, at 713.

[62] Standard Endorsement, I. Coverage U-Uninsured Motorists, Subsecs. I; VI. Additional Conditions, F. Arbitration.

[63] "When compared to all the rest of the language in the usual automobile policy, the . . . [Endorsement] language takes less than one third of the space needed for the total policy. However the . . . [Endorsement] coverage has provided us with more questions in recent years than all of the other provisions combined." Schallert, *Uninsured Motorist Coverage—Bane or Blessing?* 1968 INS. L.J. 917, 918. Most of the case law is based on the

plethora of litigation only a few issues can be selected for examination. These illuminate not only the attitudes displayed by the insurers toward the Endorsement but also the practically unlimited potential for litigation it presents.

*The Arbitration Clause*

Paradoxically the Endorsement's most litigated provisions have been precisely the ones intended to forestall litigation by forcing the claimant to arbitrate, not litigate, his disagreements with the insurer. In the event of a dispute arbitration is required to determine whether "the insured . . . is legally entitled to recover . . . damages" from the offending motorist and, if so, "the amount . . . thereof."[64] The insurers took the "narrow" view of what is arbitrable under this equivocal wording, adopting the position that no more than three issues can be decided by the arbitrator:[65] (1) was the uninsured motorist negligent; (2) was the victim free from contributory negligence; and if so, (3) what are his damages? Insureds, however, took the "broad" view that the terms of the clauses made *all* issues, including particularly the existence of insurance coverage, arbitrable. In any event, the insureds further argued that any lurking ambiguity should be resolved, as elsewhere, against the insurers.[66] At the outset one may speculate why the insurer draftsmen who repeatedly revised the standard Endorsement did not lay the controversy to rest simply by restating their "narrow" view in precise language. Judicial reaction has remained mixed. The "broad" view was apparently adopted in

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New York Motor Vehicle Accident Indemnification Law of 1958, N.Y. INS. LAW §§ 167, 600-26 (McKinney 1966). The statute provides not only for a compulsory Endorsement but extends protection against uninsured motorists to pedestrians ("qualified" claimants) who do not come under the protective umbrella of an Endorsement. These claimants assert their claims against a "nominal defendant," the Motor Vehicle Accident Indemnification Corporation [hereinafter referred to as MVAIC]. On the background of this legislation, *see* Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present, and Future*, 8 BUFFALO L. REV. 215, 226-29 (1959); for the text of the Endorsement, as promulgated by the MVAIC, *see* J. CORBLEY, *supra* note 7, at 51.

[64] Standard Endorsement I. Coverage U-Uninsured Motorists.

[65] Fairgrave & Forney, *Uninsured Motorist Coverage*, 1964 INS. COUNSEL J. 665, 669; Fieting, *Arbitration Under the Uninsured Motorists Coverage*, 1961 INS. COUNSEL J. 629, 630-31; McLaughlin, *Arbitration Under Uninsured Motorists Coverage*, 46 CHI. BAR RECORD 58, 60 (1964).

[66] *See, e.g.*, Rosenbaum v. Am. Sur. Co., 11 N.Y.2d 310, 316, 183 N.E.2d 667, 670, 229 N.Y.S.2d 375, 380 (1962) (dissenting opinion); Travelers Indem. Co. v. Sherwood, 26 Misc.

Massachusetts,[67] Pennsylvania and elsewhere.[68] In contrast New York's trial and intermediate appellate courts disagreed among themselves for years[69] until finally a closely divided Court of Appeals sustained the "narrow" view.[70] This view, under the complex mechanism of the Endorsement, opens a broad spectrum of legal and factual issues to litigation because any issue other than those involving fault or damages must be determined by a court as a preliminary to arbitration.[71]

In New York all these issues must be resolved in favor of the victim as conditions precedent to arbitration; until this is done, the MVAIC or, since 1965, the insurer, will be granted a stay of arbitration. Typically, the New York courts decide the following issues: was the victim "insured";[72] was the offending car "an uninsured automobile";[73] was there a "disclaimer" by the tortfeasor's insurer;[74] was there a "hit-and-run" accident;[75] and did the victim give timely notice to the MVAIC or the insurer.[76] On

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2d 513, 514, 205 N.Y.S.2d 741, 742 (Sup. Ct. 1960), *rev'd on other grounds*, 13 App. Div. 2d 507, 212 N.Y.S.2d 427 (1961).

[67] *See, e.g.*, Employers' Fire Ins. Co. v. Garney, 348 Mass. 627, 205 N.E.2d 8 (1965). *But see* Cohen, *Uninsured Motorists Protection—Coverage U in Massachusetts*, 51 MASS. L.Q. 135, 146-47 (1967).

[68] *See, e.g.*, Fisher v. State Farm Mut. Auto. Ins. Co., 243 Cal. App. 2d 749, 52 Cal. Rptr 721 (1966); McKinney v. Allstate Ins. Co., 6 Ohio App. 2d 136, 216 N.E.2d 887 (1966); Harleysville Mut. Ins. Co. v. Medycki, 431 Pa. 67, 244 A.2d 655 (1968); Nat'l Grange Mut. Ins. Co. v. Kuhn, 428 Pa. 179, 236 A.2d 758 (1968). *But see* Pac. Auto. Ins. Co. v. Lang, ___ Cal. App. 2d ___, 71 Cal. Rptr. 637 (1968); Jordan v. Pac. Auto. Ins. Co., 232 Cal. App. 2d 127, 42 Cal. Rptr. 556 (1965).

[69] For authorities adopting the "broad" view with respect to which issues are arbitrable, *see, e.g.*, MVAIC v. Velez, 14 App. Div. 2d 276, 220 N.Y.S.2d 954 (1961); Zurich Ins. Co. v. Camera, 14 App. Div. 2d 669, 219 N.Y.S.2d 748 (1961); Royal Indem. Co. v. McMahon, 10 App. Div. 2d 926, 200 N.Y.S.2d 950 (1960) (*per curiam*).

[70] For courts adopting the "narrow" view, *see, e.g.*, MVAIC v. Brown, 15 App. Div. 2d 578, 223 N.Y.S.2d 309 (1961); Phoenix Assur. Co. v. Digamus, 9 App. Div. 2d 998, 194 N.Y.S.2d 770 (1959).

[71] Rosenbaum v. Am. Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

[72] McGuiness v. MVAIC, 32 Misc. 2d 949, 225 N.Y.S.2d 361 (Sup. Ct. 1962).

[73] Rosenbaum v. Am. Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

[74] Ryan v. MVAIC, 22 App. Div. 2d 949, 255 N.Y.S.2d 908 (1964); MVAIC v. Brown, 15 App. Div. 2d 578, 223 N.Y.S.2d 309 (1961).

[75] MVAIC v. Downey, 11 N.Y.2d 995, 183 N.E.2d 758, 229 N.Y.S.2d 745 (1962); De Puccio v. MVAIC, 30 App. Div. 2d 1015, 294 N.Y.S.2d 113 (1968).

[76] *See, e.g.*, MVAIC v. Malone, 16 N.Y.2d 1027, 213 N.E.2d 316, 265 N.Y.S.2d 906 (1965); MVAIC v. Goldman, 33 Misc. 2d 703, 227 N.Y.S.2d 882 (Sup. Ct. 1961).

demand of either party the issues are decided by jury trial.[77] The burden of proof throughout is on the claimant, including, in particular, the burden of establishing that the offending car was not insured.[78] Appellate reversals are frequent,[79] especially where such "mixed" issues of fact and law as "reasonable notice" are involved. Lingering uncertainties about the scope of the clause stimulate further litigation. Thus notwithstanding the Court of Appeals' decision in 1962,[80] neither the bar nor the lower courts of New York seems certain as to the division of issues into arbitrable and non-arbitrable ones.[81]

*Disclaimers*

The *insured* motorist who breaches his obligations to his own insurer created a special problem of interpretation under the Endorsement. By failing to report to or to cooperate with his insurer after an accident, the insured motorist gravely jeopardizes the insurer's conduct of the defense against the victim's claim arising from the accident.[82] On the other hand, permitting the insurer to rescind the policy by disclaiming its liability because of

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[77] Rosenbaum v. Am. Sur. Co., 11 N.Y.2d 310, 313, 183 N.E.2d 667, 668, 229 N.Y.S.2d 375, 377 (1962).

[78] Vitrano v. State Farm Mut. Auto. Ins. Co., 198 So. 2d 922 (La. App. 1967); Merchants Mut. Ins. Co. v. Schmid, 56 Misc. 2d 360, 288 N.Y.S.2d 822 (Sup. Ct. 1968); *cf.* Pan Am. Fire & Cas. Ins. Co. v. Loyd, 411 S.W.2d 557 (Tex. App. 1967).

[79] Egloff v. MVAIC, 29 App. Div. 2d 1048, 289 N.Y.S.2d 925 (1968); Haas v. MVAIC, 29 App. Div. 2d 447, 289 N.Y.S.2d 251 (1968); Pagan v. MVAIC, 28 App. Div. 2d 1119, 285 N.Y.S.2d 115 (1967); Lloyd v. MVAIC, 27 App. Div. 2d 396, 279 N.Y.S.2d 593 (1967); MVAIC v. Stein, 23 App. Div. 2d 526, 255 N.Y.S.2d 483 (1965); Allstate Ins. Co. v. Jahrling, 16 App. Div. 2d 501, 229 N.Y.S.2d 707 (1962).

[80] Rosenbaum v. Am. Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

[81] On no fewer than five occasions since 1962 the New York Court of Appeals has found it necessary to clarify its adherence to the narrow view of "arbitrable" issues. *See* Napolitano v. MVAIC, 21 N.Y.2d 281, 234 N.E.2d 438, 287 N.Y.S.2d 393 (1967); Vanguard Ins. Co. v. Polchlopek, 18 N.Y.2d 376, 222 N.E.2d 383, 275 N.Y.S.2d 515 (1966); Carlos v. MVAIC, 17 N.Y.2d 614, 216 N.E.2d 26, 268 N.Y.S.2d 930 (1966); De Luca v. MVAIC, 17 N.Y.2d 76, 215 N.E.2d 482, 268 N.Y.S.2d 289 (1966); MVAIC v. Malone, 16 N.Y.2d 1027, 213 N.E.2d 316, 265 N.Y.S.2d 906 (1965). Similar uncertainty is apparent in other jurisdictions. For the experience in Florida and California, *see* Widiss, *supra* note 7, at 539-40. *Compare* Am. Ins. Co. v. Gernard, ___ Cal. App. 2d ___, 68 Cal. Rptr. 810 (1968) *with* Allstate Ins. Co. v. Orlando, ___ Cal. App. 2d ___, 69 Cal. Rptr. 702 (1968).

[82] A parallel situation arises where the insurer discovers after the accident that the insured has induced the issuance of the policy by fraudulent misrepresentations.

the insured's misconduct leaves the victim much as if the offending policy-holder had been uninsured from the outset. The problem can be resolved by shifting the risk of the policy-holder's misconduct to his insurer. Thus, *vis-a-vis* an accident victim, the insurer may be denied the right to disclaim, a technique used in many "public responsibility law" jurisdictions once a motorist is compelled to obtain a policy.[83] In all other instances, however, the insurers are permitted to disclaim for breach of policy conditions, thus leaving the victim financially stranded. It was readily foreseeable that the victim would oppose any attempt to differentiate between an uninsured driver and a policy-holder whose misconduct provokes a cancellation of his policy. After all, whatever the legal distinctions, it is difficult for common sense to distinguish the two situations.

The draftsmen of the original version of the Endorsement did not define "uninsured automobile" precisely enough to settle the issue. They described as uninsured an automobile to which "no . . . insurance policy [is] applicable at the time of the accident."[84] One question immediately raised was whether this phrase included the disclaimer situation. Predictably, the insurers took a "hard" line approach and argued that an insured has "insurance applicable *at the time of the accident*" even if later disclaimed. In contrast, and again predictably, the insureds took a "soft" line, urging an interpretation consistent with the general purpose of the instrument to alleviate the plight of uncompensated victims. In any event, the insured discovered in the phrase a latent ambiguity that ought to be resolved against the insurer.[85] An early New York trial court opinion dealing with the standard, not the New York, Endorsement accepted the industry's approach,[86] and it secured a wide judicial following in New York.[87] However, on its first encounter with the

[83] *See, e.g.*, N.C. GEN. STAT. § 20-279.21f(1) (Supp. 1965). For the situation under N.Y. VEH. & TRAF. LAW § 345(i)(1) (McKinney 1966) *see* Ward, *supra* note 63, at 219-21 (Ward cites 38 states in which as of August 1958, "required" policies became absolute after loss. *Id.* at 219 n.10).

[84] Standard Endorsement (1956), II, Definitions, (c), Uninsured Automobile, (1).

[85] Vanguard Ins. Co. v. Polchlopek, 18 N.Y.2d 376, 379, 222 N.E.2d 383, 385, 275 N.Y.S.2d 515, 518 (1966).

[86] Berman v. Travelers Indem. Co., 11 Misc. 2d 291, 171 N.Y.S.2d 869 (Sup. Ct. 1958).

[87] *See, e.g.*, Vanguard Ins. Co. v. Polchlopek, 23 App. Div. 2d 625, 274 N.Y.S.2d 492 (1965), *rev'd*, 18 N.Y.2d 376, 222 N.E.2d 383, 275 N.Y.S.2d 515 (1966); Rosen v. United States Fid. & Guar. Co., 23 App. Div. 2d 335, 260 N.Y.S.2d 677 (1965); Allstate Ins. Co. v. Smith, 26 Misc. 2d 859, 207 N.Y.S.2d 645 (Sup. Ct. 1960); Am. Nat'l Fire Ins. Co. v. McCormack, 15 Misc. 2d 692, 182 N.Y.S.2d 899 (Sup. Ct. 1958).

problem eight years later the New York Court of Appeals, in a closely divided opinion, repudiated the lower courts' view and held the disclaimer situation to be embraced by the definition set out above.[88]

In the meantime some legislatures took notice of the problem. Upon requiring the Endorsement to be annexed to all liability policies, nine states specifically prescribed protection in the event of a "denial of coverage."[89] In 1963 part of the industry followed suit by enlarging the standard Endorsement's definition of the "uninsured automobile" to include the case where liability insurance is applicable at the time of the accident but "the company . . . denies coverage thereunder."[90] Even afterwards, however, Endorsements still were being issued with the original restrictive wording.[91]

Despite the liberalized definition of the "uninsured automobile" difficult questions of interpretation remain. Thus if the Endorsement-insurer disagrees with the victim over the presence or absence of a "denial of coverage" by the offending motorist's liability-insurer, should this issue be determined by the arbitrator or, as in New York since 1962,[92] by the court? A further and equally critical question arises. As already noted both the MVAIC statute and, since 1965, the New York Endorsement declare the automobile uninsured where the offending motorist's insurer "disclaims liability or denies coverage." It could be argued even under the "narrow" view of arbitration that in the absence of a qualifying word such as "*validly* disclaims liability or denies coverage" this language meant no more than that in case of a dispute the court is limited to a determination as to whether the insurer had *in fact* disclaimed—an issue that frequently arises.[93]

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[88] Vanguard Ins. Co. v. Polchlopek, 18 N.Y.2d 376, 222 N.E.2d 383, 275 N.Y.S.2d 515 (1966).

[89] For a list of statutes prescribing protection in event of denial of coverage, *see* Widiss, *supra* note 7, at 512-13 n.56.

[90] Standard Endorsement (1963), 11. Definitions, (c)(1).

[91] *See, e.g.*, Bollinger v. Travelers Indem. Co., 433 S.W.2d 55 (Mo. App. 1968).

[92] The question had been left open in Travelers Indem. Co. v. Sherwood, 13 App. Div. 2d 507, 212 N.Y.S.2d 427 (1961).

[93] *See, e.g.*, Rivera v. MVAIC, 22 App. Div. 2d 201, 254 N.Y.S.2d 480 (1964); Lumpkin v. Aetna Cas. & Sur. Co., 21 App. Div. 2d 860, 251 N.Y.S.2d 203 (1964); Di Stefano v. MVAIC, 34 Misc. 2d 68, 228 N.Y.S.2d 404 (Sup. Ct. 1962).

Under that view the Endorsement-insurer would have to arbitrate once a *de facto* disclaimer was judicially found to have occurred. The MVAIC contended, however, that the victim also had to establish in court that the insurer had *validly* disclaimed. Again an occasion for much litigation was presented,[94] with the Court of Appeals eventually sustaining the MVAIC's position.[95]

The result, of course, is that the claimant may face every conceivable kind of substantive and procedural complexity that such determinations may entail. As the innocent bystander he is caught in a struggle between two insurers. As far as he is concerned that struggle typically involves the mutual conduct and relations of three strangers—the offending policy-holder and *his* insurer and the appraisal of the resulting legal situation by the claimant's own Endorsement insurer. The burden of proof with respect to the invalidity of the disclaimer is on the victim[96] and years may elapse before the resulting litigation is terminated by appellate decisions.[97] Commendably, the MVAIC, impressed by the victim's plight, has tried to secure arbitration among insurers to avoid this depressing spectacle. Its efforts, undertaken without statutory basis, have had only partial success; 42 percent of the New York insurers were unwilling to arbitrate disputes with their peers[98] however much they prefer arbitration when they deal with their own policy holders.

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[94] *See, e.g.*, Rivera v. MVAIC, 22 App. Div. 2d 201, 254 N.Y.S.2d 480 (1964); Landow v. MVAIC, 17 App. Div. 2d 976, 234 N.Y.S.2d 807 (1962); MVAIC v. Lucash, 16 App. Div. 2d 975, 230 N.Y.S.2d 262 (1962); MVAIC v. Moskowitz, 237 N.Y.S.2d 497 (Sup. Ct. 1962); Kaiser v. MVAIC, 35 Misc. 2d 636, 231 N.Y.S.2d 178 (Sup. Ct. 1962); MVAIC v. Scott, 28 Misc. 2d 492, 214 N.Y.S.2d 600 (Sup. Ct. 1961).

[95] MVAIC v. Malone, 16 N.Y.2d 1027, 213 N.E.2d 316, 265 N.Y.S.2d 906 (1965). The holding in *Malone* may be followed elsewhere, *but see* St. Paul Mercury Ins. Co. v. Am. Arbitration Ass'n, 425 Pa. 548, 229 A.2d 858 (1967) (even a bad faith disclaimer sufficient).

[96] *See, e.g.*, Vitrano v. State Farm Mut. Auto. Ins. Co., 198 So. 2d 922 (La. App. 1967); Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo. App. 1963); Merchants Mut. Ins. Co. v. Schmid, 56 Misc. 2d 360, 288 N.Y.S.2d 822 (Sup. Ct. 1968); Pan Am. Fire & Cas. Co. v. Loyd, 411 S.W.2d 557 (Tex. Civ. App. 1967).

[97] *See, e.g.*, MVAIC v. Nat'l Grange Mut. Ins. Co., 19 N.Y.2d 115, 224 N.E.2d 619, 278 N.Y.S.2d 367 (1967); Carlos v. MVAIC, 17 N.Y.2d 614, 216 N.E.2d 26, 268 N.Y.S.2d 930, *rev'g* 24 App. Div. 2d 747, 263 N.Y.S.2d 670 (1966); State Farm Mut. Auto. Ins. Co. v. Malik, 30 App. Div. 2d 594, 290 N.Y.S.2d 249 (1968); Landow v. MVAIC, 17 App. Div. 2d 976, 234 N.Y.S.2d 807 (1962).

[98] MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1968, 10 (mimeo). The signers of the agreement represent 85% of the insurance written in New York. *Id.* Evidently,

*The Insurer's Obligation and Other Sources of Compensation*

Often an accident victim will look to compensation from several sources: one or more tortfeasors; a workmen's compensation or disability benefits carrier; insurers under liability, accident or health insurance policies. How to coordinate the several potential sources of recovery and how to allocate, if appropriate, the ultimate burden of the loss to one or the other remains one of the unsettled problems of modern compensation law.[99] Meanwhile the insurers try to solve it in their own way so far as the victims of uninsured motorists are concerned. As already noted,[100] the Endorsement embodies a number of provisions limiting or eliminating the insurer's liability whenever the victim has access to other sources of compensation, especially from "other similar insurance."[101]

In considering the problem in light of the victim's losses, three typical fact situations may be distinguished. The first is the least problematic. The victim's losses are less than the limits placed on the compensation available from each of the several sources. Here

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insurers writing insurance elsewhere are not included. A recent announcement of the leading defense lawyers' association urged its members to suggest to their insurance company clients the settlement of inter-company disputes by voluntary arbitration (under the auspices of the Defense Research Institute, Inc., not the American Arbitration Association); it stated in part: " 'Why must insurance companies fight among themselves over coverage questions? If the same parties who drafted the language in the policies cannot agree as to its meaning, is there not a better method than litigation to dispose of such disputes?' One need only pick up the latest advance sheets to see the basis for the quotation. Courts continue to grind out decisions in intercompany disputes which further tarnish the image of the industry, or produce results that were never within the contemplation of the policy drafters." Defense Research Institute, Inc., *Arbitration Instead of Litigation*, 19 FEDERATION OF INS. COUNSEL Q. 38 (Fall 1968) (announcement).

[99] Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

[100] See note 59 *supra*.

[101] Although a detailed discussion of the merits of the various solutions adopted by the Endorsement is beyond the scope of this article, it should be noted that one approach has been the use of techniques developed first for fire insurance, and later applied to liability insurance, despite the fact that the situation is not really comparable. Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319, 320 (1965). For discussion of this technique used in connection with the Endorsement, see Comment, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CALIF. L. REV. 516, 523-26 (1960); Notman, *supra* note 46, at 16-18; Note, *The Uninsured Motorist Endorsement, Some Problems of Construction*, 42 TUL. L. REV. 352, 368-74 (1968).

the pertinent provisions of the Endorsement operate simply to block "over-" compensation of the victim. To that extent they are, or should be, beyond challenge.[102] Overcompensation is prevented by requiring that the insurer's own obligation be reduced or eliminated to the extent that others indemnify the victim[103] or other insurance is available to him.[104] By the same token this method also shifts, *pro tanto,* the risk created by the uninsured motorist to a source thought by the Endorsement's draftsmen to be more appropriate. This is true, for example, not only for partial payments by a tortfeasor, a joint tortfeasor or their liability insurer,[105] but also for payments made under a workmen's compensation or disability benefits law.[106] Thus the ultimate burden is imposed, unilaterally as it were, on the workmen's compensation or disability benefit insurance carriers as a group. Although the justification for this may not be self-evident;[107] in any event the victim should not be heard to complain that he cannot collect twice for the same injury.

The problem changes, however, in a second type of fact situation. Suppose the victim's loss is more than the $10,000 maximum usually provided for under the Endorsement, and "other insurance" such as workmen's compensation or disability benefits, is paid in the amount of $10,000. In that situation to require as the Endorsement does that the insurer be credited with $10,000 is to permit it to escape all liability for the victim's remaining losses. In defense of this result it may be argued that the Endorsement must be understood as a contractual arrangement to secure the victim a fund of no more than $10,000; it should make no difference to the victim whether this fund is created by payments of

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[102] L'Manian v. Am. Motorists Ins. Co., 4 Conn. Cir. 524, 236 A.2d 349 (Ct. App. 1967); Am. Indem. Co. v. N.Y. Fire & Marine Underwriters, 196 So. 2d 592 (La. App. 1967); *cf.* Gunter v. Lord, 242 La. 943, 140 So. 2d 11 (1962).

[103] See note 59 *supra* and accompanying text.

[104] Standard Endorsement, VI. Additional Conditions, E. Other Insurance.

[105] Standard Endorsement, III. Limits of Liability, (b)(1).

[106] Standard Endorsement, III. Limits of Liability, (b)(2).

[107] The workmen's compensation deduction has been held not authorized by statute. Southeast Title & Ins. Co. v. Austin, 202 So. 2d 179 (Fla. 1967); Mason v. Allstate Ins. Co., 189 So. 2d 907 (Fla. App. 1966); Standard Accident Ins. Co. v. Gavin, 184 So. 2d 229 (Fla. App. 1966); Peterson v. State Farm Mut. Auto. Ins. Co., 238 Ore. 106, 393 P.2d 651 (1964). *Contra,* Niekamp v. Allstate Ins. Co., 52 Ill. App. 2d 364, 202 N.E.2d 126 (1964); Allen v. United States Fidelity & Guar. Co., 188 So. 2d 741 (La. App. 1966); Durant v. MVAIC, 15 N.Y.2d 408, 207 N.E.2d 600, 260 N.Y.S.2d 1 (1965).

the tortfeasor, "other insurance," workmen's compensation, or, if needs be, by payments under the Endorsement itself. The argument against this result is that the insured is thus forced to bear uncompensated losses over and above this $10,000 "fund," contrary to the purpose of the Endorsement. After all, the insurer did promise upon receipt of a special premium to pay, within the $10,000 limit, "all sums which the insured . . . shall be entitled to recover as damages"[108] from the uninsured motorist. Differently stated, the insured victim may claim that the insurer's restrictive view abandons the very concept underlying the Endorsement—that it is meant to be a substitute for the liability policy which the uninsured motorist should have carried. In many situations as long as the victim is not fully compensated a motorist's liability-insurer would have remained liable even if some other source had partially indemnified the claimant.

The views of the ultimate purpose of the Endorsement clash even more sharply in the third type of fact situation which has become fairly frequent. Consider the situation of an "insured" victim who has suffered injuries while riding, not in the car covered by his Endorsement, but as a guest passenger in an automobile covered by another Endorsement. Occupying the host's car with his permission the victim qualifies as an "insured" under the host's Endorsement. In this hypothetical accident several other occupants of the host's car are also injured or killed, the combined damages of all victims far exceeding the maximum of $20,000 payable under the host's Endorsement. As a result that amount is nearly or completely exhausted by the demands of the claimant's fellow victims. The claimant, unable to recover more than a fraction of his loss, at best, under his host's Endorsement, now turns to his "own" Endorsement insurer. The latter will seek to disclaim under a clause providing that its liability "shall apply only as excess insurance over any other similar insurance available to . . . [the] insured and applicable to such vehicle."[109] Since Endorsements usually carry a $10,000 limit for single claims, the excess is almost always nil. In that situation the insurer argues that similar insurance was "available" to the victim *at the time* of the accident.

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[108] See note 48 *supra*.

[109] Standard Endosement VI. Additional Conditions, E. (1).

This is so even if all or most of the funds payable under the host's Endorsement have been exhausted due to the severity of the accident. In the insurer's view the victim would have been in precisely the same condition had the offending motorist carried the required minimum insurance; after all, the Endorsement is not designed to leave the insured better off than the victim of an insured motorist. The insured's argument, on the other hand, is similar to the one advanced in the second type of fact pattern. If the insurer's contention is accepted, he urges, the insurer has collected a premium for a policy which turns out to afford merely "phantom" coverage in a situation in which the victim's need is most compelling. Again the very concept of the Endorsement is at issue: if the Endorsement is no more than a substitute for minimum coverage, the insurer's argument is convincing, for the insured's real quarrel is not with the Endorsement as such but with the low statutory minima for liability insurance. What the insured really seeks is the Endorsement's protection against the inadequacy of the statutory limits. The insurer could claim that the Endorsement was never designed to shield against that risk. The catalog of the several "gaps" in coverage left open by the scheme of automobile insurance never included the loss of protection which is caused by the exhaustion of the notoriously low minimum limits on liability policies.

As is true of almost every basic issue that has arisen under the Endorsement, judicial views concerning clauses limiting recovery in the presence of "other insurance" or other sources tend to be deeply divided.[110] The opinions rarely make any conscious effort to differentiate among the several types of fact situations noted above. Instead they resort to the well-known patterns of judicial interpretation of insurance "contracts." Many courts shrug off the arguments of the insured as inconsistent with the "contractual" arrangements set forth in the Endorsement and are unable to discover any ambiguity in its formulations.[111] Others reach the

[110] For the California judicial view as to clauses limiting recovery in the presence of other "sources," *see* 48 CALIF. L. REV., *supra* note 101, at 523-26.

[111] *See, e.g.*, Travelers Indem. Co. v. Wells, 316 F.2d 770 (4th Cir. 1963); Darrah v. Calif. State Auto. Ass'n, 259 Cal. App. 2d 243, 66 Cal. Rptr. 374 (1968); Globe Indem. Co. v. Baker's Estate, 22 App. Div. 2d 658, 253 N.Y.S.2d 170 (1964); Russell v. Paulson, 18 Utah 2d 157, 417 P.2d 658 (1966); Miller v. Allstate Ins. Co., 66 Wash. 2d 871, 405 P.2d 712 (1965).

contrary result by various methods. Thus one court will read the phrase relating to "other . . . insurance available" as meaning *actually* available and hence considers other insurance as irrelevant when it is consumed by payments to other claimants.[112] Another court, often without extended analysis of the underlying problem or the statutory provisions involved, may strike down the limiting clauses as inconsistent with the general purpose, found in the statutory enactments that sanction the Endorsement, of protecting the victims of uninsured motorists.[113] A final group of decisions has reached the same result by seizing on the presence of such clauses in two or more Endorsements to invalidate all or part of them as being mutually repugnant.[114] To date the issues have been firmly settled in only a few jurisidctions. In light of their importance and their typical recurrence it is easy to predict continued intense litigation involving these issues on all judicial levels.[115]

*Insolvency of the Offending Motorist's Insurer*

The widely held assumption that along with banks insurers are the most closely regulated industry is challenged by the recurrent phenomenon of insolvent liability insurers.[116] It would seem reasonable to assume that due to administrative supervision insurers' involvencies are virtually impossible and that in any event appropriate remedies exist. However, such is not the case. In nearly

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[112] *See, e.g.*, Safeco Ins. Co. v. Robey, 270 F. Supp. 473 (D. Ark. 1967), *aff'd*, 399 F.2d 330 (8th Cir. 1968); Travelers Indem. Co. v. Wells, 209 F. Supp. 784 (W.D. Va.), *rev'd*, 316 F.2d 770 (4th Cir. 1963); Kraft v. Allstate Ins. Co., 6 Ariz. App. 276, 431 P.2d 917 (1967); Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

[113] *See, e.g.*, Tuggle v. Gov't Employees' Ins. Co., 207 So.2d 674 (Fla. 1968); Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967); Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

[114] *See, e.g.*, Safeco Ins. Co. v. Robey, 399 F.2d 330 (8th Cir. 1968); Sparling v. Allstate Ins. Co., ____ Ore. ____, 439 P.2d 616 (1968); Smith v. Pac. Auto. Ins. Co., 40 Ore. 167, 400 P.2d 512 (1965); Harleysville Mut. Cas. Co. v. Blumling, 429 Pa. 389, 241 A.2d 112 (1968).

[115] A judge referred to the clauses as representing an "area of law which is nebulous, unsettled and devoid of uniformity and agreement." Miller v. Allstate Ins. Co., 66 Wash. 2d 871, 873, 405 P.2d 712, 713 (1965).

[116] The Illinois Insurance Department placed five casualty carriers in liquidation in the first eight months of 1965. Pretzel, *supra* note 37, at 713 n.5. Between 1947 and 1967 the same fate befell 29 automobile liability insurers in Pennsylvania. Feldman, *Uninsured Motorist Coverage and Insolvent Insurers—A Case History*, 3 THE FORUM 37, 40, 45 (1967) (A.B.A., Sec. of Ins., Negl. & Compens. Law).

all jurisdictions[117] this risk is borne by the individual insureds, or their tort victims, and in the case of severe accidents the results may often be disastrous. Those insureds from whom a tort judgment is worth collecting may be financially destroyed. If they lack substantial assets, which is usually the case, the accident victim bears the loss. Thus whatever the legal distinctions, the situation created by the insolvency of the offending motorist's liability insurer is much the same as if the motorist had been uninsured at the time of the accident. Until 1967 the nation-wide Endorsement remained silent on this subject. When the insureds tried to bring the insolvency situation under the Endorsement's umbrella by suitable interpretation of the document, the insurers, consistent with their general attitude toward the Endorsement, rejected these attempts.[118]

A New York trial judge upheld the industry position;[119] as he saw it the legislation, having failed to contemplate the insurer's insolvency, could not be rectified by judicial interpretation: "Since . . . [it] creates statutory rights unknown at common law, it must be strictly construed."[120] Other courts seized on the definition of an "uninsured automobile" as contained in the 1963 revision[122] which equated an insurer's "denial of coverage" to the initial lack of insurance; they were willing to construe insolvency as tantamount to such a denial.[123] More recently a growing number of state

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[117] In New York, a "Motor Vehicle Liability Security Fund," maintained by contributions of the New York insurers, guarantees the payment of claims against insolvent insurers. N.Y. INS. LAW § 333 (McKinney 1966).

[118] The arguments for the conflicting positions of insurers and insureds follow a pattern typical of insurance litigation. *See* Note, *Uninsured Motorist Insurance Coverage in the Event of Subsequent Insolvency or Denial of Liability by the Tortfeasor*, 20 ALA. L. REV. 123 (1967).

[119] Uline v. MVAIC, 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961). *But see* Travis v. Gen. Accident Group, 31 App. Div. 2d 20, 294 N.Y.S.2d 874 (1968) (insolvency is both disclaimer and denial of coverage).

[120] Uline v. MVAIC, 28 Misc. 2d 1002, 1005, 213 N.Y.S.2d 871, 975 (Sup. Ct. 1961). The opinion confuses the claim asserted by the plaintiff under the New York Endorsement with that of a "qualified" claimant arising under the statute itself.

[121] Topolewski v. Detroit Auto. Inter-Ins. Exch., 6 Mich. App. 286, 148 N.W.2d 906 (1967); Seabaugh v. Sisk, 413 S.W.2d 602 (Mo. App. 1968); Hardin v. Am. Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Stone v. Liberty Mut. Ins. Co., 55 Tenn. App. 189, 397 S.W.2d 411 (1965).

[122] See note 73 *supra*.

[123] Katz v. Am. Motorist Ins. Co., 244 Cal. App. 2d 886, 53 Cal. Rptr. 669 (1966); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968); McCaffery v. St.

statutes have come to the victim's rescue by expressly providing that the insolvency of the offending motorist's insurer renders his automobile "uninsured,"[124] and in 1967, following a period of widespread adverse publicity over some spectacular insurers' insolvencies and ensuing proposals for federal reforms, the standard Endorsement form was specially amended to cover this situation.[125] Still, this statutory "revamping" has not been universal, and a legislative chart based on industry data and published in 1968 shows 16 jurisdictions which make no specific provision for insolvencies.[126]

*The Statute of Limitations*

The industry draftsmen failed to fix the time in the Endorsement within which the victim must ask for arbitration or else be barred. To be sure, the claimant must give the insurer "as soon as practicable . . . written proof of claim, under oath if required."[127] Assuming that he has given reasonable notice, the question remains as to how long the insured may delay before forcing the insurer to arbitrate.

The insurers insisted, and a few writers agreed,[128] that the statute of limitations applicable to torts should control. The insurers' substantive arguments were the following. First, the insurer's liability is based on the offending motorist's tort. Secondly, the insured by failing to demand arbitration within the time limited for tort claims could frustrate the insurer's right to

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Paul Fire & Marine Ins. Co., 108 N.H. 373, 236 A.2d 490 (1967); Pattani v. Keystone Ins. Co., 426 Pa. 332, 231 A.2d 402 (1967); North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964); State Farm Mut. Auto. Ins. Co. v. Brower, 204 Va. 887, 134 S.E.2d 277 (1964).

[124] For statutory citations to 13 jurisdictions which, in 1967, had provisions rendering an automobile uninsured upon the insolvency of an offending motorist's insurer, *see* Widiss, *supra* note 7, at 512, n.55. For a listing of 32 jurisdictions providing coverage in case of insolvency, as of November 1968, *see* J. CORBLEY, *supra* note 7, at 38-42.

[125] J. CORBLEY, *supra* note 7, at 10, 48.

[126] American Insurance Association, Chart of Mandatory Uninsured Motorist Provisions (Jan. 1969).

[127] Standard Endorsement, VI. Additional Conditions. B. Proof of Claim; Medical Reports.

[128] Kuvin, *The Effect on Uninsured Motorist Proceedings of Statute of Limitations, Survival of Actions Act, Wrongful Death Act, Subrogation Rights*, 1962 INS. COUNSEL J. 127, 130; *Open Forum Discussion*, 1964 INS. COUNSEL J. 608, 615-16; Pretzel, *supra* note 37, at 719. Schallert, *supra* note 63, at 938.

subrogation. If the claimant were to go to arbitration and recover after the tort statute of limitations against the offending motorist has run, the latter could simply plead the statute against the unfortunate insurer subrogee. Thirdly, once the claim against the uninsured motorist is time-barred, he is no longer "legally liable" as the Endorsement requires and consequently the insurer is equally rid of his liability.[129]

Given the "voluntary" background of the Endorsement,[130] however, and the insistence of the insurers elsewhere on its "contractual" terms, it would seem reasonable to treat the claim to arbitration as contractual even though it does arise in the wake of a tort committed by another. As to the asserted frustration of the subrogation claims, it is within the control of the insurer to force a passive claimant to proceed to arbitration. After all, the insurer has been notified of the accident and thus has had the opportunity to safeguard its rights to subrogation if that be considered worthwhile. This, however, is rarely the case. Whatever subrogation may amount to in other contexts, as against uninsured motorists it is a mirage. For example, New York's MVAIC recovered until the end of 1967 2.6 cents for each dollar it paid out.[131] In any event, the argument that the insurer is no longer liable because a tortfeasor able to plead the tort statute of limitations is not "legally liable" to compensate his victim misconceives the basic idea underlying the Endorsement. As might have been expected, the insureds seek to rely on the contractual nature of the insurer's obligation since the statute for contract actions is usually much longer than the tort statute of limitations. Indeed it might have been argued, at least in those jurisdictions which like New York force the Endorsement by statute on all motorists, that the duty to arbitrate is in substance of *statutory* origin and thus the limitation established for statutory obligations should control.

This issue too became embroiled in much litigation.[132] In New

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[129] For a detailed critique, *see* Widiss, *supra* note 7, at 508-11.

[130] See note 9 *supra*.

[131] The total paid to claimants by the MVAIC from January 1, 1959 to December 31, 1967 was $35.5 million; total subrogation recovery was $735,400. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1968, Schedules F & H (mimeo).

[132] The question has been raised why the draftsmen of the Endorsement did not promptly lay the issue to rest by amending the Endorsement to suit their desire for a shorter period. Pretzel, *supra* note 37, at 719.

York alone it took eight years and numerous lower court decisions in favor of the contract statute of limitations[133] before the Court of Appeals in a closely divided opinion opted in favor of the view of the lower courts.[134]

*Claims of a Victim's Survivors*

The catalog of restrictive postures assumed by insurers under the Endorsement is much longer than the foregoing illustrations indicate.[135] One final example deserves notice if only because it almost caricatures the industry's attitude toward the Endorsement. Following the suggestion of a frequent contributor to insurance law journals[136] who was supported by others,[137] some insurers claimed that if the accident killed the victim the Endorsement precluded any claims by his dependents based on the applicable wrongful death act. This argument proceeded from the phrase that the damages are payable "to the insured or his legal representative."[138] This, it was said, solely contemplated claims by the victim and claims which survived to his estate if he died, and which thus could be asserted

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[133] *See, e.g.*, MVAIC v. McDonnell, 23 App. Div. 2d 773, 258 N.Y.S.2d 735 (1965); McNamara v. MVAIC, 42 Misc. 2d 923, 248 N.Y.S.2d 1009 (Sup. Ct. 1964); McGuinness v. MVAIC, 40 Misc. 2d 775, 243 N.Y.S.2d 764 (Sup. Ct. 1963); La Marsh v. Md. Cas. Co., 35 Misc. 2d 641, 231 N.Y.S.2d 121 (Sup. Ct. 1962); *In re* Ceccarelli, 204 N.Y.S.2d 550 (Sup. Ct. 1960).

[134] De Luca v. MVAIC, 17 N.Y.2d 76, 215 N.E.2d 482, 268 N.Y.S.2d 289 (1966); *accord* Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo. App. 1963); Schleif v. Hardware Dealer's Mut. Fire Ins. Co., 218 Tenn. 489, 404 S.W.2d 490 (1966); Horne v. Superior Life Ins. Co., 203 Va. 282, 123 S.E.2d 401 (1962). In Louisiana, the lower courts appear to be in confliet. 42 TUL. L. REV., *supra* note 101, at 356. In California, a special one year statute of limitations enacted in 1959 sanctions the industry's position. CALIF. INS. CODE § 11580.2(b) (1959).

[135] Among the restrictive positions taken by insurers under the Endorsement are the provisions barring an insured's claim if, without the insurer's written consent, he settles with (or, under many Endorsements other than the 1966 Standard Endorsement, prosecutes to judgment his claim against) the uninsured motorist, note 56 *supra*; the requirement of "physical contact" between the victim and the uninsured automobile, note 55 *supra*; the insistence that this contact be "direct"; the exclusion of governmental and self-insured automobiles from the definition of "uninsured automobiles," note 54 *supra*, whether driven within or outside the scope of employment or by a thief, the insistence (under Endorsements other than the 1966 Standard Endorsement) that motorcycles cannot be considered as covered by the term "uninsured automobile."

[136] Kuvin, *supra* note 128, at 131-35; *Open Forum Discussion*, 1964 INS. COUNSEL J. 608, 616.

[137] *E.g.*, Donaldson, *Uninsured Motorist Coverage*, 1967 INS. COUNSEL J. 57, 60.

[138] Standard Endorsement (1966).

by his representative, nothing more; the Endorsement contract did not contemplate as its wording indicates any claims which might be asserted under a wrongful death act by the victim's surviving spouse or next of kin. In other words, what was true at common law before Lord Campbell's Act of 1846 is now claimed to be true under the Endorsement. So far as the Endorsement-insurer is concerned, it is more profitable if the victim is killed outright than if he is merely scratched.[139] At least seven different trial and appellate court opinions considered and rejected this indefensible interpretation.[140]

## IV. A CRITIQUE

Two characteristic but distinct features of the Endorsement have emerged from its terms and the massive body of case law that has accumulated to date: first, the multiplicity of restrictions on recovery, restrictions that are either expressed by the original language or read into the document by narrow insurer-sponsored interpretations; second, the Endorsement's propensity to breed litigation, despite a seemingly broad compulsory arbitration clause. However extensive Endorsement litigation may be, it must be kept in mind that this is a mass instrument issued or renewed annually for some 74 million policy holders[141] upon payment of a premium that varies from a low of $1 in New Hampshire to a high of $8 in California.[142] As is true of other accident litigation only a negligible fraction of claims involving uninsured motorists ever reaches the stage of litigation or even arbitration;[143] the vast majority either is

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[139] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 577-81 (3d ed. 1964).

[140] *See* MFA Mut. Ins. Co. v. Lovins, 248 F. Supp. 108 (E.D. Ark. 1965); Netherlands Ins. Co. v. Moore, 190 So. 2d 191 (Fla. App. 1966); Davis v. United States Fidelity & Guar. Co., 172 So. 2d 485 (Fla. App. 1965); Zeagler v. Commercial Union Ins. Co., 166 So. 2d 616 (Fla. App. 1964), *aff'd*, 172 So. 2d 450 (Fla. 1965); Hall v. Allied Mut. Ins. Co., ___ Iowa ___, 158 N.W.2d 107 (1968); Sterns v. MFA Mut. Ins. Co., 401 S.W.2d 510 (Mo. App. 1966).

[141] The estimated figure is arrived at by deducting some 8 million private cars registered in Michigan, Maryland and North Dakota (the "nominal" defendant jurisdictions) from the total of more than 83 million private passenger cars registered today. See for 1966 state registration and totals, 1967 AUTOMOBILE FACTS & FIGURES 18. For 1968 figures see note 1 *supra*.

[142] Hashmi, *supra* note 8, at 151-52 (1965 figures).

[143] Between 1 1/2% and 4% of all Endorsement claims presented to insurers are reported to reach the stage of an arbitration award. Aksen, *Arbitration Under the Uninsured Motorist Endorsement*, 1965 INS. L.J. 17, 25.

settled informally or abandoned. Plainly the decision to settle or give up is usually reached in the light of the judicial interpretation of the Endorsement. As elsewhere few statistics illuminate the scene of practice. Even so, it is apparent that in all too many instances the victims of uninsured motorists have no protection or at best are inadequately indemnified.[144]

*Limited and Discriminatory Protection*

The array of restrictions whieh thwart claims for recovery could have been justified, in part at least, in 1956 when the first nationwide standard Endorsement appeared. The draftsmen could have argued that from the industry's viewpoint the lack of actuarial and practical experience called for the utmost caution since the premium to be charged had to be moderate to be acceptable to the respective legislatures. Even so the illustrations furnished above show that some of the restrictions went beyond the needs of prudence, to say nothing of justice. Furthermore, many of them persist today after experience financially favorable to the insurers appears to have accumulated.[145] These restrictions, the most prominent of which are the "other insurance" clauses, insurers' disclaimers and insolvencies, frustrate the very purpose for which the Endorsement was said to be designed. Although a few have been abandoned in certain jurisdictions since 1956, largely under the impact of judicial criticism or legislative correction, reform in general has proceeded at a snail's pace.

The most critical flaw, however, is inherent in the very concept of a "private" accident policy protecting a motorist against another motorist's failure to insure. This is the omission of the Endorsement to give any consideration whatsoever to a very substantial proportion of traffic victims—pedestrians. As the uninsured motorist's first victim is overlooked by the "financial responsibility laws", so is the pedestrian victim by the Endorsement unless he can bring himself within its protective reach by qualifying as one of the "named insureds" or as spouses and relatives who share

[144] An estimate of $450 million damages annually caused by uninsured motorists provides an insurance writer with an additional argument for keeping the Endorsement limits low since any rise would lead to increased costs of the Endorsement. Pretzel, *Keeping Up-to-Date on Uninsured Motorist Coverage*, 1968 INS. L.J. 865, 871 n.18.

[145] For a discussion of the MVAIC's experience see note 179 *infra*.

their household. This is a discrimination against a group of our population which, due to rising longevity and the increase in urban street congestion, is bound to grow. It is made up of the aged who live by themselves or in institutions, of those of any age who are too poor to maintain automobiles and of those who do not care to be burdened with them in our traffic-choked cities. Yet pedestrians for evident reasons generally suffer the most severe injuries in traffic accidents.

Presently New York stands as the only Endorsement jurisdiction which has faced up to this problem. There pedestrians enjoy, within narrowly defined limits, protection against uninsured motorists[146] similar to that of other victims. The official records of New York's MVAIC show that in the three years from 1962 to 1964 the percentage of compensated pedestrians represented on the average about 27 percent of the compensated insured victims. During that period payments made to these victims accounted for more than one half of MVAIC's total payments to insured claimants.[147] Even if corresponding nation-wide percentages are lower than the New York figures indicate, the discriminatory failure to protect victims who both physically and economically are most vulnerable to accidents is serious enough in itself to characterize the Endorsement as gravely deficient.[148]

*The Arbitration Clause*

The other characteristic of the Endorsement, its propensity to breed litigation, cannot be fully appreciated without first considering the arbitration clause. The clause was central to the industry's thinking about the Endorsement as indicated by the

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[146] See note 63 *supra*.

[147] From 1962 to 1964 the MVAIC settled with insured victims a total of 7037 claims, claims paid to qualified victims numbered 1906; the MVAIC paid a total of $8,651,183 to insured victims, while the "qualified" received $4,500,102. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 21, 1965, Schedules I & K (mimeo).

[148] Twelve years ago, an advocate of the Endorsement shrugged off the problem of inadequate protection by observing that "given time, the industry will produce an answer to this gap." Moser, *supra* note 36, at 721. According to Lemmon, *Compulsory Insurance—A Toxic Brew*, 1956 INS. L.J. 695, in 1955 only 8 deaths and 93 serious injuries cases would have remained unprotected in New York under a combination of public safety laws and the voluntary Endorsement. With the notable exception of Widiss, *supra* note 7, at 527-48, the arbitration clause has received little critical attention.

circumstances surrounding its adoption in 1956. At that time less than half of the states had abandoned the common law's well-known dislike of arbitration. In a minority of jurisdictions express statutory provisions had to be enacted to uphold even *ordinary* agreements to arbitrate future disputes.[149] These statutory changes occurred against a background of long-established practices in the field of commercial and labor arbitration where the parties involved are more or less equal in economic and bargaining power and in general have found this method of settling disputes more suitable to their needs than litigation.

In contrast the Endorsement was intended to operate in a non-commercial context involving parties of totally disparate economic, social and political power. It included arbitration as one of the terms of a highly technical document drafted by the dominant party. At best, and even when it was still being offered as "the Voluntary Endorsement"[150] it was a classic "take-it-or-leave-it" contract. Today, however, it is frequently imposed by statutory compulsion.[151] This is true in New York and Massachusetts for all motorists; it is also true in at least nine other jurisdictions for motorists whom the local "financial responsibility law" compels, after their first accident, to obtain a liability policy and with it the Endorsement. An intermediate situation exists in 34 other jurisdictions where liability insurance is still sold on a voluntary basis.[152] There the insured is given the right—of which few avail themselves[153]—to reject the Endorsement which is "rolled-on," *i.e.*, automatically appended to the liability policy unless the customer rejects it.

In the face of these crucial differences from traditional forms of arbitration and the fact that in 1956 even voluntary arbitration was far from being universally accepted, the insurance

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[149] *See* Aksen, *supra* note 6, at 78-79; Notman, *supra* note 46, at 18-22; Widiss, *supra* note 7, at 528-32.

[150] See note 40 *supra*.

[151] The Endorsement is mandatory in Connecticut, Illinois, Maine, Massachusetts, New Hampshire, Oregon, South Carolina, Vermont, Virginia and West Virginia. *See* J. CORBLEY, *supra* note 7, at 38-41.

[152] North Carolina occupies an intermediate position since liability insurance is compulsory but the Endorsement may be rejected. *See* J. CORBLEY, *supra* note 7, at 40.

[153] Notman, *supra* note 46, at 7.

industry propelled Endorsement arbitration on the national stage.[154] In order to provide the organization and manpower necessary to carry out the tens of thousands of arbitrations to be expected under the terms of the Endorsement, the industry agreed to make annual contributions to the American Arbitration Association through assessments on insurers proportioned to their premium incomes[155]—to compensate the Association for its services.[156] In addition the Association charged insurers and insureds a fee of $50 for each arbitration. Recently this arrangement was abandoned for unexplained reasons. Instead the Association now collects a $100 fee from the insurer and $50 from the insured for each arbitration.[157] Arbitrators receive no remuneration.[158] In terms of income and caseload these arrangements have profoundly affected the activities of the Association. As statistics indicate its major preoccupation has become the handling of Endorsement arbitration. In 1967 its income from this activity was three times its income from labor arbitration and two and one half times its income from commercial arbitration.[159] Fees from the Endorsement now constitute 55 percent of the Association's income, and in 1966 alone of about 13,000 cases handled 7,400 or almost 58 percent were uninsured motorist arbitrations.[160] Presumably with the spread of the Endorsement this disparity of Endorsement and commercial and labor arbitrations will increase,[161] a major transformation which occurred without any

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[154] As late as 1967, 16 jurisdictions are reported as barring arbitration under the Endorsement. Donaldson, *supra* note 137, at 88. At least nine states specifically forbid arbitration under the Endorsement. *See* J. CORBLEY, *supra* note 7, at 42. One writer concluded in 1967 that in 31 states the arbitration clause does not satisfy the statutory requirements for an agreement or contract to arbitrate a future dispute and that in 17 of the remaining 19 states the clause does not meet the statutory requirement for a voluntary agreement. *See* Widiss, *supra* note 7, at 531, 532.

[155] Aksen, *Arbitration of Uninsured Motorist Endorsement Claims*, 24 OHIO ST. L.J. 589, 597 (1963).

[156] *Id. See also* King, *Arbitration of Automobile Accident Claims*, 14 U. FLA. L. REV. 328, 344-45 (1962).

[157] Aksen, *supra* note 6, at 77.

[158] *Id.*

[159] See the balance sheet of December 31, 1967, in American Arbitration Association, ARBITRATION NEWS No. 3, March 1968.

[160] American Arbitration Association, ARBITRATION NEWS No. 3, 1967, at 1.

[161] Aksen, *supra* note 6; Aksen, *Arbitration of MVAIC Claims, An Analysis of the First Five Years*, 19 ARB. J. 164 (1964); Aksen, *supra* note 155; Aksen, *supra* note 143; Aksen,

official explanation as if the Endorsement were simply another welcome application of the idea of arbitration which needed little discussion, let alone reflection.

Despite the unusual circumstances surrounding Endorsement arbitration, few have questioned the clause on constitutional, statutory or policy grounds.[162] It has been suggested that if the usual approval of the Endorsement's arbitration provisions by a state insurance commissioner be deemed "state action," then, if compulsory, they may run afoul of the seventh amendment of the Federal Constitution.[163] More substantial, perhaps, are doubts based on state constitutional guarantees of a jury trial.[164] There is only one pertinent precedent: enforced arbitration in Pennsylvania for accident cases that do not exceed $2,000.[165] Significantly the Supreme Court of Pennsylvania upheld the enabling statute on the ground that the arbitration award could be set aside by a demand for a jury trial.[166] No such opportunity, however, is provided by the Endorsement; the arbitrator's decision is final.[167] Nor for that matter have plaintiffs so far challenged the validity of the arbitration clause in the courts.[168] This is true even in New York where the MVAIC without explicit statutory authority but with administrative approval included the unusual clause in its Endorsement form.[169]

The bar has joined in the observance of silence. That the insurance counsel did so in this instance despite their general

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*Uninsured Motorist Coverage: A Guide to MVAIC and Arbitration*, 15 ARB. J. (n.s.) 166 (1961).

[162] *But see* Widiss, *supra* note 7, at 528-38; Note, *The Problem of the Financially Irresponsible Motorist—New York's MVAIC*, 65 COLUM. L. REV. 1075, 1082-85 (1965); Note, *Arbitration and Award*, 78 HARV. L. REV. 1250, 1252-53 (1965).

[163] 78 HARV. L. REV. *supra* note 162, at 1252.

[164] *See generally* Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 n.28 (1961).

[165] For a cautious appraisal of Pennsylvania's limited experiment in forced arbitration, *see id.*

[166] *In re* Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1955).

[167] Of about 63,000 cases arbitrated, some 4000 were appealed between February 1958 and December 1967. *Statistical Report and Explanatory Remarks Pertaining to Compulsory Arbitration—First Decade 1958-1967: County of Philadelphia, Compulsory Arbitration Division*, 1968 INS. L.J. 355, 362.

[168] *But see* Kirouac v. Healey, 104 N.H. 157, 181 A.2d 634 (1932).

[169] Its phrasing follows the standard form. *See* J. CORBLEY, *supra* note 7, at 51, 52.

concern with the sanctity of jury trial may not be surprising.[170] However, even the plaintiffs' bar organization has had nothing to say. One might have thought that the right to a civil jury so vigorously and at times stridently espoused by that bar seems worthy of defense even if the recovery is limited to $10,000. Moreover, not only is the jury dispensed with, but a lawyer-arbitrator in contrast to a judge sitting without a jury has the final, unappealable say. Lastly, a precedent is being firmly established whose extension to other accident litigation and higher recovery limits will not be so easily resisted.[171]

Of course compelled arbitration under the Endorsement is usually defended by its advocates on the grounds of speed, informality, low cost and the need for preserving amicable relations between insurer and insured.[172] Yet the narrow interpretation given the clause spawns multiple litigation with the attendant procedural complexities and increased expenses. As a consequence of the application of this clause in practice the parties to the Endorsement often find themselves in conflicting strategic positions. The victim's sole concern of course is to collect on his asserted claim as quickly and as cheaply as possible, an advantage which arbitration was supposed to provide. Nevertheless, the complainants will find arbitration unavailable whenever the insurer can present any of the multiple issues of fact and law noted above to a court.

On the other hand the insurer's position is more complex. Obviously it will always resist what it deems to be an unjustified claim. Although in the routine case arbitration may represent to the insurer a net saving in time, effort and cost, in more unique cases the insurer may well prefer to litigate because of the significance of the outcome for the thousands of other cases under the Endorsement it and other insurers may face in the future. The

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[170] The public relations director of a national organization of insurance counsel, in urging the preservation of the jury trial, fails to mention compulsory arbitration under the Endorsement. He refers, however, with approval to lawyer-staffed pre-trial panels in New York as a device for securing settlements in personal injury and property damage cases involving claims of $10,000 or less but stresses that these panels "will not impose decisions." D. ROSS, TRIAL BY JURY—PRESERVE IT 8 (1965).

[171] One writer, relying heavily on Endorsement experience advocates voluntary arbitration for automobile accident cases without urging "at least not at this time" compulsory arbitration. *See* King, *supra* note 156, at 351.

[172] *See, e.g.*, Aksen, *supra* note 6, at 76-78.

natural consequence is the industry's aversion to the "broad" view of the clause, a view which would sweep all legal issues into the no-man's land of arbitration. While the "narrow view" restricting arbitration to liability and damages is productive of multiple law suits, the insurer may hope that litigation will produce an authoritative, if not favorable interpretation of the law. But even when a routine controversy enters the channel of arbitration, the benefits are not equally shared. Doubtless the speed of arbitration helps everybody. Most likely, however, the primary beneficiaries are the attorneys on both sides and, to an undetermined extent, the insurers. The attorneys are spared the effort and time normally required to prepare the case and try it to a court and jury, and where the insurance counsel passes on these savings to his corporate client, the insurer also benefits.[173] In contrast, the claimant usually will pay the established contingent fee.

One can only speculate as to whether arbitration provides more "just" results.[174] There are some indications that the insurers had hoped that arbitrations would result in more "reasonable" awards than could be obtained from juries.[175] If it is in fact cheaper for the industry to arbitrate than to go before a jury,[176] it is again the insured who is the loser. Perhaps independent fact research

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[173] One writer estimates fees and costs in Endorsement arbitration as half the amounts required for ordinary litigation. Pretzel, *supra* note 144, at 871.

[174] "Arbitration ought to be more successful for the companies than for the claimants, as more weapons are available to them than are available to the claimants" (referring to the claimant's obligation to cooperate, to give a statement and to submit to a physical examination, in contrast to the insurer's investigation, photographs, etc., which are not available to the claimant). Pretzel, *supra* note 37, at 716.

[175] Arbitration figures in Michigan are said to show that 44% of arbitration cases go to a final award as contrasted with 12% of jury cases filed. This is explained by the greater readiness of the insurers to gamble on an arbitrator's award than on a jury verdict and to take greater chances with arbitration because of the low ceiling. Pretzel, *supra* note 37, at 714.

[176] The answer may depend on who acts as arbitrator. Of the arbitrators in 500 cases, 304 were plaintiffs' lawyers and only 57 defense lawyers; the average award by plaintiffs' lawyers was 25% higher than those made by defense lawyers. Pretzel, *supra* note 144, at 871. Since more plaintiffs' lawyers are available to serve as aribtrators, the Ameriean Arbitration Association may have delicate problems of staffing. An insurance counsel observed: "Arbitrating a case before an active plaintiff's [sic] attorney is like trying the case to a jury made up of claimants' attorneys." Hapner, *A Dozen Problems in Arbitration of Uninsured Motorist Claims Under American Arbitration Association Rules*, 1967 INS. COUNSEL J. 92, at 96.

currently underway[177] may provide the answer but for the moment the truth is unknown.

Finally, in the light of the foregoing and of what is to be discussed below it will not do to justify the arbitration clause by pointing to the large number of cases which it keeps away from the courts.[178] The total of arbitrated cases is not a meaningful criterion unless the number of claimants who abandon their actions in the face of procedural roadblocks to arbitration and the number who fail after an actual try to clear them are also known. Again the annual reports of the MVAIC provide us with some clues. Thus it appears for the 1962-1964 period less than 40 percent of the total claims ever lead to any payment.[179] This high attrition rate *after* a case has been docketed with the MVAIC cannot be explained merely by precautionary filings, ineptitude of lawyers or their readiness to pursue indefensible claims. Furthermore, it is not known how many cases are abandoned without being docketed with the MVAIC simply because filing seems futile.

*Excessive Litigation*

The rash of law suits over the terms of the Endorsement is noteworthy; first, because it is insurance litigation of a peculiar kind, and second, because its peculiarities tend to deter claimants from pressing claims. It will not do to dismiss the current volume of litigation as a passing phase, as "growing pains" that are after all characteristic of any novel insurance policy.[180] In that view insurers and insureds are always apt to litigate antagonistic interpretations of standard policy terms until a congeries of appellate opinions will settle the "law" in favor of one or the other. The Endorsement is not to be compared with any of the traditional forms of insurance such as life, fire, accident or liability policies. These represent time-honored devices against universally

[177] *Columbia University Project for Effective Justice*, School of Law, Columbia University. For some preliminary findings, *see* Aksen, *supra* note 6, at 88-91.

[178] For statistics demonstrating the efficacy of arbitration in lessening docket loads, *see, e.g.*, Aksen, *supra* note 6, at 80-82.

[179] During the 1962-64 period, some 17,900 arbitration cases were closed, only 7,037 of which involved any payment. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 21, 1965, Schedule K (mimeo).

[180] *See, e.g.*, Widiss, *supra* note 7, at 501.

recognized risks for which there is a correspondingly broad, social need of protection. With respect to them, litigation over the meaning of a particular provision will in the long run serve the community which must rely on them. In contrast the Endorsement not only defines an eminently marginal risk, but it is also a policy for which there is no precedent in the United States or anywhere else. Moreover, even when more than merely factual issues are involved, appellate determinations in this area do not seem to be peculiarly firm.[181] While the draftsmen as it were have stolen a march on many if not most legislatures in defining on their own the terms of the Endorsement (which after all derives its coercive power from an enabling statute) neither judicial nor legislative deference to these industry-sponsored terms is likely to last. Indeed, as the implications of the Endorsement unfold, judicial and legislative "intervention" against its inequities seems to be increasing; the effect of this development will be to rob the burgeoning body of Endorsement case law of what limited stability it now has and by the same token drain it of lasting legal and social significance. The coming changes of course will add further fuel to the flames of litigation.

These law suits differ from ordinary insurance litigation in another important respect. Because of the unusual interplay between arbitration and the judicial process noted above, many lawyers, especially those appearing for the insured, and often enough the courts themselves, seem baffled by the procedural and jurisdictional difficulties in this relatively unfamiliar area. These difficulties tend to shift the balance further to the disadvantage of the insured who is rarely counselled by specialists. This is particularly true if yet another typical feature of Endorsement litigation is kept in mind: the usual optimal recovery of $10,000,[182] from which a counsel fee of at least a third will be deducted. There is something futile about complex forensic battles at the trial and even more at the appellate levels when the rewards to the

[181] The number of reversals and divided appellate opinions in New York is a striking illustration of the lack of firm precedent.

[182] The maximum for single claims in Louisiana, Mississippi and Oklahoma, as of January 1, 1969, is $5000; in Alaska, California, Virginia and Washington $15,000; and in Connecticut $20,000. American Insurance Association, Chart of Mandatory Uninsured Motorist Provisions (Jan. 1969).

claimant are so drastically limited. In contrast, with time, funds, and, typically, superior experience in a new and specialized field of law on its side, the insurer in all but the most routine cases has little to lose and much to gain by litigation. Although this is true of most insurance litigation, the problem assumes here a unique intensity: the insured must deal with complex facts, face multiple proceedings, deal with multiple parties (his own insurer, the tortfeasor, the latter's insurer, police officials, motor vehicle bureaus, etc.) and multiple instruments (his own and other Endorsements, and if any, the tortfeasor's policy). Only where the victim's losses near or exceed the $10,000 limit will his counsel be ready to press his claim. These instances are the exception since the average recovery is well below $2,000.[183] Difficulties such as these are bound to produce the same effect as the many restrictions embodied in the instrument itself: the assertion of claims is discouraged.

*The Endorsement, a Rewarding Venture for the Industry?*

If, from the insured's vantage point, the foregoing observations cast doubt on the Endorsement's capacity to fulfill adequately its asserted purpose,[184] the picture as seen from the insurers' side is much brighter. In persuading within a decade 46 out of 50 legislatures[185] to induce, if not compel, all or most liability policy holders to purchase the Endorsement, the industry has achieved a brilliant legislative and strategic victory. In these 46 jurisdictions the ghosts of compulsory insurance and of the "nominal defendant", whether in the form of "unsatisfied judgment funds" or otherwise, have been exorcised. To achieve this objective, the industry was evidently prepared to pay a price. Its attitude was recently explained to an academic observer:[186]

> [I]t can be said that the insurance industry is going to make every effort to keep the premium . . . [for the Endorsement] as low

[183] The average cost per claim paid by the MVAIC in 1967 to insured persons was $1856. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1968, Schedule H (mimeo).

[184] "[Endorsement] coverage operates as a guarantee that a policyholder who has taken steps to insure his liability . . . , and who is injured or damaged in an automobile accident, shall be made financially whole." Deschamps, *supra* note 46.

[185] For statutory citations and other details of "Endorsement" legislation for 46 states, *see* J. CORBLEY, *supra* note 7.

[186] Hashmi, *supra* note 8, at 158.

> as possible. [I]t was introduced primarily to provide an answer to unsatisfied judgment funds and compulsory automobile liability insurance and *not to provide profit for the insurance industry.*
>
> The insurance industry does not want to overcharge for . . . [the Endorsement]; *in fact it would be glad to provide* . . . [it] *at a break even* point. (Emphasis added.)[187]

In fact, the Endorsement may turn out to be a profitable venture. Reliable, if incomplete, statistics are available for New York—the state which commands the longest and largest actuarial experience with a mandatory, broadly-based Endorsement. According to its annual reports, total expenditures of the MVAIC during the calendar years 1962, 1963 and 1964 amounted to 19.1 million dollars.[188] During this three-year period, the New York insurers collected, in Endorsement premiums, some 43.5 million dollars.[189] Hence, gross profits for the three year period amount to about 24.4 million dollars. Even if another 30 percent[190] is deducted for commissions, taxes, overhead, etc., a net profit of about 17 million dollars remains. This amount may be contrasted with a total of no more than 12.5 million dollars expended on behalf of Endorsement-insureds[191] during the same period. Thus New York insurers seemed a comfortable distance away from the break-even point during that period. In appraising this result several basic considerations must be entertained. First, the 1962-1964 period is truly representative because by 1962, the existence and procedures

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[187] The viewpoint that the industry should merely break even is not shared by all. An insurance counsel observed: "True enough, U.M. coverage costs and premiums are a small fraction of total costs and premiums, but each coverage should make its own profit. Let's start with this one!" Pretzel, *supra* note 37, at 720.

[188] Total disbursements of the MVAIC for 1962-1964 were $19,168,403.77. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1963, May 22, 1964, May 21, 1965, Schedule B (mimeo).

[189] Automobile registrations for the period 1962-1964 were: 4.8 million in 1962, 4.9 million in 1963, 5.1 million in 1964. Assuming that 2% of the registered cars were uninsured, a total of about 14.5 million paid $3 each during this period. *See* AUTOMOBILE FACTS & FIGURES 1964, 1965, 1966.

[190] The figure used for liability insurance by the industry is actually 29.1%. King, *supra* note 3, at 1145. The sales (commission) costs for the Endorsement are lower than the 20% assigned for liability policies so that the deduction should not exceed 25-26%.

[191] The amounts actually paid out on behalf of Endorsement-insured for 1962-64 are 8.6 million, the balance of 4 million consists of allocated and unallocated (overhead) claims expenses. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1963, May 22, 1964, May 21, 1965, Schedules I & K (mimeo).

of the MVAIC, operative since January 1, 1958, had become familiar to lawyers and public alike. Secondly, more than a third of the *total* of 19.1 million dollars just noted, about 6.6 million, had to be spent on the claims of pedestrian victims (the "qualified" claimants) whom all other Endorsement jurisdictions ignore. Hence, other jurisdictions with $3 (or higher) annual premiums[192] will show correspondingly higher profits. Furthermore, New York insurers derived during that period about 14.5 million dollars in additional premium income from New York motorists who each pay another dollar for a special Endorsement to protect them solely against out-of-state accidents with uninsured motorists, a coverage that is not provided by the New York Endorsement.[193] The amounts expended to compensate insureds for such out-of-state accidents are unknown, but it is not likely that the $1 "extraterritorial" rate is less profitable than the $3 "domestic" rate. Finally, while New York's experience is instructive, it is not fully representative since all New York drivers must be insured and consequently the number of uninsured motorists and their victims should be smaller in New York[194] than in jurisdictions operating under the regime of the "financial responsibility laws." On the other hand, this factor will be substantially offset by the supposed "claim-consciousness" of New Yorkers, by New York's attraction to motoring tourists, including uninsured ones,[195] by its higher costs, standards of living and levels of accident compensation, and by the concentration of "uninsured" accidents in New York City. Thus, far from requiring the industry to operate at the suggested break-even point, the New York Endorsement has been, at least during the 1962-1964 period, a source of comfortable

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[192] In 1965, the premium charged was less than $3 in 7 jurisdictions, $3 in 15 and more than $3 in all other jurisdictions. Hashmi, *supra* note 8 at 151-52.

[193] New York Automobile Accident Indemnification Endorsement, Insuring Agreements, III, Territory.

[194] W.S. Hults, then Commissioner of the New York State Department of Motor Vehicles, estimated in 1965 that there were only 6000 motorists in New York who deliberately evaded the compulsory insurance law. No more recent estimates are available. Letter from Frank Harwayne, Chief Actuary, Insurance Dept., State of New York, to the writer, January 29, 1968.

[195] In 1967, over 22% of all claims paid by the MVAIC arose out of accidents involving uninsured out-of-state drivers. Another 18% involved unidentified hit-and-run drivers who doubtless included a certain number of out-of-state drivers. MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 17, 1968, Schedule J (mimeo).

profits. If this is the case elsewhere, the industry may well be able to relax its restrictive stance at least until the break-even point is reached.[196] Unfortunately, the economic aspects of the Endorsement business have remained obscure, for the industry has not reported its financial experience with the new device. The insurance professor just quoted reports: "Many large insurers, for reasons of their own, do not keep a separate record of . . . [Endorsement payments] or . . . are unwilling to divulge them."[197] However, limited data (for the years 1960-1963) collected by two of the industry's three statistical agencies[198] were "declassified and made available to him only on condition that he would not present them in the form of a table . . . [b]ecause it was feared that without an accompanying explanation the data would be subject to great misinterpretation."[199] Furthermore, because of their "erratic nature", he "agreed not to present [experience on a state-wide basis] at all . . . and therefore an analytical study on [a] statewide basis cannot be undertaken at this time."[200] He notes, however, that one trade group's nation-wide experience was "not particularly good, while the other group's experience has been favorable."[201] Since the release of that information, five years (1964-1968) of claims experience accompanied by the rapid nationwide expansion of the compulsory or semi-compulsory feature of the Endorsement have elapsed. The pertinent nation-wide data, it would appear, are still unpublished and un-analyzed. Such data as are made available use actuarial concepts that do not clarify the issue.[202] The industry defines payments to its insureds, the cost of handling individual

[196] Contrast the comment of a writer, associated with the Industry in Illinois: "At the present rates . . . [the Endorsement] is a real bargain. The full effect of the coverage will be better known in 1968. We do know that if we wait until that time to learn about . . . [it], we will have spent more dollars in payments than the claimants, your insureds, possibly deserved . . . . [They] are just people, and because they are just ordinary folk, they consider an insurance company, even their own carrier, as fair game." Pretzel, *supra* note 37, at 712.

[197] Hashmi, *supra* note 8, at 156-57.

[198] The National Association of Independent Insurers and the National Bureau of Casualty Underwriters, *id.* at 157.

[199] *Id.* at 157 n.18.

[200] *Id.* at 158 n.20.

[201] *Id.* at 157.

[202] The National Association of Independent Insurers has sent the author its statistical data on a state-by-state basis for the years 1962-1967. A number of Insurance Commissioners have also provided data on their state's experience.

claims (including insurance counsel fees) and overhead costs attributable to these claims, as "losses."[203] Its "loss ratio" expresses the percentage of these outlays in terms of the premium paid by the insured: for example, a loss ratio of 45 percent indicates that the insurer paid out 45 cents in connection with claims for each premium dollar collected. Yet, this ratio is not computed on the basis of the amounts an insurer actually *pays out* in a given year, *i.e.*, "paid losses." These "paid losses" are obviously critical figures on the balance sheet of every insurance company. If they were compiled on a state-wide and eventually, nation-wide basis, "paid losses" would tell us what it *actually* costs, under the Endorsement regime, to compensate in a given year the victims of uninsured motorists, clearly information of major public interest. Yet, neither the industry nor their statistical agencies, nor, for that matter, the insurance commissioners, seem concerned with "paid losses."

Instead, the statistics made known are based on the concept of "incurred losses"—the sum of the "paid losses" just discussed and the *estimated* "losses" incurred as a result of Endorsement claims filed against the insurer during a particular report year.[204] These estimated losses are a more or less informed prophecy of what it will cost the insurer to dispose of the claims filed during the year. Whether these "incurred losses" are used to determine an insurer's financial condition at a given time or to plan future premium rates, the accuracy of this prediction cannot be determined without information about "paid losses." However, as just noted, figures on paid losses are not available to the public. This is a serious deficiency because whatever experience may be available to test the credibility of "incurred losses" in the liability field, it cannot be used, without substantial qualification, in the Endorsement Context. Endorsement claims differ significantly from those based on the traditional liability policy both conceptually and technically. As pointed out by the MVAIC's manager:

> Experience has proven that the defense of an MVAIC case differs materially in comparison with the defense of an automobile liability case conducted by an insurance company. The unique defenses available to the Corporation, which are in addition to

[203] King, *supra* note 3, at 1144 n.37, 1145.
[204] *Id.* at 1144.

> liability defenses, are not usually applicable in the defense of a case in behalf of an insurance carrier. These unique defenses mandate that they be interposed in all litigation involving the Corporation.
>
> For example, in a "hit-and-run" case it is a statutory requirement that the accident be reported to the Police within twenty-four hours of the occurrence and there must be actual physical contact of the motor vehicle causing such bodily injury with the claimant or with the motor vehicle which the claimant was occupying at the time.
>
> If these conditions precedent to recovery are not unequivocally proven, the Corporation must demand a separate trial wherein it is the claimant's burden to prove compliance with the statutory requirements.[205]

The difference between liability and Endorsement claims is illustrated by the fact that, over the years, the MVAIC has been able to close without payment at least 60 out of every 100 claims filed against it, a record unmatched in the liability insurance field. If this is true, one should like to know how "incurred losses" under the Endorsement coverage are computed and how they compare with *actual* losses, *i.e.*, "paid losses." Not until these data are known will it be possible to judge the financial aspects of the Endorsement. Even if the severe restrictions presently imposed were essential to avoid heavy losses or much higher premium changes, this would simply suggest that the Endorsement is incapable of doing its job.

## CONCLUSION

The preceding examination of selected aspects of the Endorsement has disclosed grave flaws in this novel device. These may be summarized as follows: (1) The Endorsement completely ignores a large segment of pedestrian victims of uninsured motorists—perhaps as many as one-third of the total—who are unable to bring themselves under the umbrella of the standard automobile liability policy to which the Endorsement is attached. As a group the uninsured pedestrians suffer 40 percent of the total bodily injuries caused by uninsured motorists. (2) The Endorsement as designed "over"-protects the insurers and "under"-protects the insured. Most of the recent improvements in this regard resulted

[205] MVAIC, ANN. REP. OF THE SECRETARY & MANAGER, May 21, 1965, 9 (mimeo).

from legislative and judicial intervention. (3) The Endorsement is generally available only up to present liability insurance minimums, $10,000 for a single claimant and $20,000 for multiple claims arising out of the same accident. Thus compensation fails when it is most urgently needed—whenever injuries are severe. (4) The Endorsement adds a defect of its own. While automobile liability insurance can be purchased in virtually unlimited amounts, insurers generally have refused to write higher limits for higher premiums for the Uninsured Motorist Coverage although in New York, for instance, at least seven years of broad statistical experience for this risk have been available. (5) The compulsory arbitration prescribed by the Endorsement doubtless provides a quick and inexpensive remedy where the controversy is limited to the issues of fault and damages. It remains a matter of conjecture as to whether the unappealable decision of a single lawyer, sitting as an arbitrator, provides more "justice" for either side. In routine cases, the chief beneficiaries of the reduction in effort and time due to arbitration appear to be the attorneys on both sides. (6) The widespread interpretation of the arbitration clause permitting only the questions of negligence, contributory negligence and damages to be arbitrated, has enabled the insurers, in numerous instances, to litigate many legal and factual issues with their own policy-holders before arbitration can be enforced. (7) Confronted with conflicting notions about the Endorsement's purpose and the pertinent statutory provisions, the judiciary, even within a single jurisdiction, appears uncertain about the proper approach toward the novel instrument. The uncertainty is reflected in frequent judicial disagreements, culminating in divided opinions on all appellate levels. (8) The burgeoning case law of the Endorsement seems legally and socially of minor significance compared with the heavy burden it imposes on claimants, courts and the taxpaying public. There is little hope for an ultimate "clarification" of fundamental issues and concepts; what is litigated are not the terms of a standard fire, life or liability policy but of a highly marginal, odd and perhaps ephemeral accident policy. Decades of further litigation, refueled from time to time by the inevitable revision, by insurers, courts, or legislative action, of the Endorsement's terms, lie ahead. (9) Whenever extensive litigation seems likely, the insured's lawyer will hesitate to pursue his client's claim unless it approaches the $10,000 limit. The game is not worth the candle. (10) In contrast, the restrictive and litigious

attitude of the insurers persists in the presence of evidence from New York that the Endorsement has been a source of respectable profits to the insurers.

Despite the present, serious upheaval in the insurance industry, it is too much to expect that the Endorsement will vanish from the American scene. The industry has devoted very substantial legislative, organizational and litigious efforts to its brainchild—efforts that will not be readily abandoned. Thus, realistic hopes for improving the Endorsement lie with our legislatures. Among needed reforms, none is more urgent than elimination of its most mischievous feature, the discriminatory disregard of pedestrians who do not qualify as Endorsement insureds. Even if coverage of pedestrians is broadened, New York's present experience raises serious doubts about the soundness of the basic approach.

There is irony in all this. Although constituting only 1.6 percent of the world's population, Americans own more than half of the automobiles in use today. During the last fifty years, they have transformed what was once a rich man's toy into an item of mass consumption. Throughout this process they have paid and are continuing to pay a heavy price; more than a million and a half Americans have died since 1913 in automobile accidents. With such wealth, know-how, and bitter experience at their command, the American people deserve better protection against uninsured motorists than the inadequate device of "uninsured motorist insurance" affords.