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## REDUCTION AND EXCLUSION CLAUSES IN UNINSURED MOTORIST COVERAGE

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Uninsured motorist coverage in the automobile insurance field has created many knotty legal problems for the courts, usually leading to diverse results in different jurisdictions. The anomalous nature of the coverage, creating conflicting interests and duties on the part of the insurer under different coverages within the same policy, is perhaps responsible for a number of the problems which have arisen. Another fertile source of litigation has been the fact that uninsured motorist coverage, or at least the offer of it, has been made mandatory in all automobile liability policies by statute in nearly all states, giving rise to questions as to whether particular policy provisions are contrary to the public policy as expressed in such statutes.

It is understood that the problems of stacking, or pyramiding, the stated limits of uninsured motorist coverage under different policies, or under one policy providing such coverage on several vehicles, and the effect in that connection of the "other insurance," "excess-escape" and "pro rata" clauses thereon, is being treated elsewhere in this Journal. Consideration will, therefore, be given here to other reduction, exclusion, or limitation clauses in uninsured motorist coverage, and in particular those dealing with the effect of medical payments, workmen's compensation, settlements with an insured motorist, and occupancy of a vehicle owned by the named insured or a relative, but not insured by the policy.

### THE MEDICAL PAYMENTS REDUCTION CLAUSE

One such provision calls for crediting under uninsured motorist cov-

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erage of any payments made under the medical payments provisions of the same policy:

The company shall not be obligated to pay under this coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part II [medical payments coverage].<sup>1</sup>

The construction of this policy language is not open to question. It clearly is intended to reduce any payment otherwise due under uninsured motorist coverage by that due or paid under the medical payments coverage of the same policy. The only question is thus; whether there is anything in the particular uninsured motorist statute, express or implied, to invalidate such a contractual provision.

The states are divided upon this particular question. Thus, *Miller v. Cosmopolitan Mutual Insurance Co.*<sup>2</sup> declares of such policy language that it "unequivocally provided that damages recoverable thereunder were not to include any amount for medical expenses paid or payable under the medical payment provisions of the policy."<sup>3</sup> The court then goes on to state that "[i]n our opinion, this limiting provision violates neither statute nor public policy . . ."<sup>4</sup> A number of other cases have reached the same result, upholding and enforcing this provision.<sup>5</sup> An example wherein the provision was given its utmost effect is presented by *L'Manian v. American Motorists Insurance Co.*,<sup>6</sup> holding that where the insured has recovered under his uninsured motorist coverage an amount including his medical expenses, he cannot

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1. All references to insurance policy provisions within this article are taken from the Texas Standard Family Combination Automobile Policy as prescribed by the Texas Board of Insurance Commissioners.

2. 307 N.Y.S.2d 592 (Sup. Ct. 1970).

3. *Id.* at 593.

4. *Id.* at 593, citing *In re Napolitano*, 287 N.Y.S.2d 393 (1967); *In re Durant*, 260 N.Y.S.2d 1 (1965); *Silinsky v. State-Wide Ins. Co.*, 289 N.Y.S.2d 541 (Sup. Ct. 1968). Similarly, *Boehler v. Insurance Co. of N. America*, 290 F. Supp. 867 (E.D. Ark. 1968) states, "In this Court's estimation the provision in question is a reasonable one and does not offend either the statute or public policy." *Id.* at 870.

5. *Pinkus v. Southern Farm Bur. Cas. Ins. Co.*, 292 F. Supp. 141 (E.D. Ark. 1968); *Fisher v. State Farm Mut. Auto. Ins. Co.*, 52 Cal. Rptr. 721 (Dist. Ct. App. 1966); *Bailes v. Southern Farm Bur. Cas. Ins. Co.*, 252 So. 2d 123 (La. Ct. App. 1971); *Connelly v. Southern Farm Bur. Cas. Co.*, 219 So. 2d 206 (La. Ct. App. 1969); *Morgan v. State Farm Mut. Auto. Ins. Co.*, 195 So. 2d 648 (La. Ct. App. 1967); *Hutchison v. Hartford Acc. & Indem. Co.*, 312 N.Y.S.2d 789 (Sup. Ct. 1970); *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 1970 CCH AUTO L. REP., AUTO. CAS. ¶ 6711 (Tenn. 1970).

6. 236 A.2d 349 (Conn. Cir. Ct. 1967).

again recover those expenses in an action on the medical payments coverage.<sup>7</sup>

On the other hand, the appellate courts of a number of states have held that this limitation or offset is not enforceable. Thus, *Stephens v. Allied Mutual Insurance Co.*<sup>8</sup> concludes its discussion of the problem as follows:

We therefore hold that a provision in an automobile liability policy that an insurer shall not be obligated to pay under uninsured motorist coverage for that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed and required by the law.<sup>9</sup>

A similar basis is given by the other cases reaching this result.<sup>10</sup>

The argument for validity is that the policy provision here is clear and unambiguous and likewise consistent with the statutory policy, since, when it is given effect, the insured is in the same situation he would have been in if the other driver had carried a liability policy with minimum limits. The purpose of uninsured motorist statutes is not frustrated by the provision which only seeks to avoid double recovery and does not reduce the total recovery under the policy below the statutory standard. This is particularly so when the medical payment coverage contains a subrogation provision and allowance of the reduction would put the insured in the same position as if the other motorist had liability coverage to the minimum limits. It cannot be said that there is failure of consideration for the premiums paid if the provision is given effect because it may be presumed that the officials charged with control of premium rates will take such set-off provision into account. There would seem to be no policy consideration behind

7. *Id.* at 352; *accord*, *Northwestern Mut. Ins. Co. v. Rhodes*, 47 Cal. Rptr. 467 (Dist. Ct. App. 1965).

8. 156 N.W.2d 133 (Neb. 1968).

9. *Id.* at 140.

10. *Booth v. Seaboard Fire & Marine Ins. Co.*, 431 F.2d 212 (8th Cir. 1970); *Heiss v. Aetna Cas. & Sur. Co.*, 465 S.W.2d 699 (Ark. 1971); *Bacchus v. Farmers Ins. Group Exch.*, 475 P.2d 264 (Ariz. 1970); *Tuggle v. Government Employees Ins. Co.*, 207 So. 2d 674 (Fla. 1968); *Standard Acc. Ins. Co. v. Gavin*, 196 So. 2d 440 (Fla. 1967); *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970); *Pleitgen v. Farmers Ins. Exch.*, 207 N.W.2d 535 (Minn. 1973); *Kinthead v. Buckeye Union Ins. Co.*, 276 N.E.2d 673 (Ohio Ct. C.P. Franklin Co. 1970); *Peterson v. State Farm Mut. Auto. Ins. Co.*, 393 P.2d 651 (Ore. 1964); *Aldcroft v. Fidelity & Cas. Co.*, 259 A.2d 408 (R.I. 1969); *Lyon v. Hartford Acc. & Indem. Co.*, 480 P.2d 739 (Utah 1971).

uninsured motorist statutes to require double payment of medical expenses.

The main argument for denying validity to the provision is that allowing the offset would have the effect of reducing the statutory minimum of uninsured motorist coverage, allowing insurers contractually to alter the terms of the statute and escape part of the liability the legislature intended for them to provide. Under this view the medical payment coverage of the policy is independent of the uninsured motorist coverage and should be considered just as if it were in a different policy issued by a different issuer.

In Texas, the question was first presented in a diversity case in federal court, *Bogart v. Twin City Fire Insurance Co.*<sup>11</sup> In making an "Erie-educated guess" as to what the Texas law would be, the Court of Appeals for the Fifth Circuit considered Texas cases dealing with other aspects of uninsured motorist coverage<sup>12</sup> and concluded that "the medical payments offset clause is void as contrary to public policy."<sup>13</sup> It noted that the Texas holdings relied upon concerned offsets of insurance provided by other policies whereas "the insurance sought to be offset in this case is found in the same policy," but considered the same reasoning to be applicable.<sup>14</sup>

The first state court case in Texas on the question was *Dhane v. Trinity Universal Insurance Co.*,<sup>15</sup> where the court agreed with *Bogart* but noted that as in *Bogart*, the total damages suffered exceeded the recovery under both coverages, so that there was no problem of double recovery.<sup>16</sup>

#### WORKMEN'S COMPENSATION REDUCTION AND EXCLUSION CLAUSES

Another clause in the uninsured motorist portion of the standard Texas automobile liability policy provides that the amount of recovery thereunder should be reduced by the extent of any workmen's compensation benefits paid because of the bodily injury in question:

11. 473 F.2d 619 (5th Cir. 1973).

12. *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. Sup. 1972); *Fidelity & Cas. Co. v. McMahon*, 487 S.W.2d 371 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.); *Northwestern Mut. Ins. Co. v. Lawson*, 476 S.W.2d 931 (Tex. Civ. App.—Tyler 1972, no writ); *Fidelity & Cas. Co. v. Gatlin*, 470 S.W.2d 925 (Tex. Civ. App.—Dallas 1971, no writ).

13. 473 F.2d 619, 626 (5th Cir. 1973).

14. *Id.* at 626.

15. 497 S.W.2d 323 (Tex. Civ. App.—Waco 1973, writ granted).

16. *Id.* at 329. This case also included stacking of uninsured motorist coverage and is now before the Supreme Court of Texas.

6. *Limits of Liability*

(b) Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this part shall be reduced by

(2) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.

In addition to this reduction clause, there is also an exclusionary clause, providing that the policy does not apply under its uninsured motorist coverage

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

While some of the considerations with respect to the workmen's compensation provisions are the same as with respect to the clause for reduction because of medical payments, there are additional factors involved.

In many jurisdictions, the workmen's compensation law gives the compensation carrier subrogation rights, raising the problem of whether payments under the uninsured motorist coverage would actually benefit the carrier rather than the insured in such a situation if no reduction is allowed. Further, while the limits of medical payments coverage are usually small, workmen's compensation can ordinarily be much larger; thus, the insured may often be fully indemnified by his workmen's compensation benefits, so that any uninsured motorist coverage recovery would permit him to realize a net gain from the accident and to recover more than his actual damages.

The various states are divided as to the validity of workmen's compensation reduction clauses, with the majority approving them. Perhaps the best explication of the majority position is that in *Ullman v. Wolverine Insurance Co.*<sup>17</sup> In holding workmen's compensation benefits paid validly deductible from the amount otherwise payable under uninsured motorist coverage, the Supreme Court of Illinois states:

It would appear that the purpose of the provision in our Insurance Code requiring that every automobile liability policy shall contain

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17. 269 N.E.2d 295 (Ill. 1970).

uninsured motorist vehicle coverage in an amount not less than the limits described in the Financial Responsibility Law . . . was intended to place the policyholder in substantially the same position he would occupy, so far as his being injured or killed is concerned, if the wrongful driver had had the minimum liability insurance required by the Financial Responsibility Act.<sup>18</sup>

The Illinois laws mentioned are virtually identical to those in Texas.<sup>19</sup> The opinion goes on to point out that there is no language in the statute "either prohibiting or authorizing the insurer to deduct workmen's compensation benefits paid or payable to the insured."<sup>20</sup>

*Ullman* then agrees with the holdings that deduction of compensation benefits from a minimum required uninsured motorist coverage is not contrary to public policy and distinguishes contrary cases on the ground that the workmen's compensation statutes in the states concerned did not give full subrogation to the compensation carrier or employer. In such states, "an uninsured motorist provision calling for the deduction in full of workmen's compensation benefits would cause an employee to receive less protection under the policy than he would had the tort-feasor been insured."<sup>21</sup> Where there is full right of subrogation to any recovery from a third party, however, as in Illinois and Texas, when the challenged deduction is permitted, "the employee's position is the same under the uninsured motorist coverage as it would be had the tort-feasor carried the minimum insurance."<sup>22</sup> In neither instance does the employee retain both compensation and identical damages from the tort-feasor and, as stated by the court:

The deduction provision does not cause the employee with uninsured motorist coverage to have less financial protection than he would have had if the tort-feasor had carried insurance in the minimal amount. Were we to hold it is contrary to public policy, it would mean that an injured employee's extent of recovery, under circumstances such as exist here, would hinge on the fortuitous circumstance that the tort-feasor was uninsured and was not otherwise financially responsible. We do not consider that a policy limitation which precludes this result is offensive to public policy.<sup>23</sup>

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18. *Id.* at 297.

19. *See* TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1974).

20. *Ullman v. Wolverine Ins. Co.*, 269 N.E.2d 295, 297 (Ill. 1970).

21. *Id.* at 298.

22. *Id.* at 298.

23. *Id.* at 298; *accord*, *Niekamp v. Allstate Ins. Co.*, 202 N.E.2d 126 (Ill. Ct. App. 1964).

In *Hackman v. American Mutual Liability Insurance Co.*,<sup>24</sup> the pertinent discussion by the Supreme Court of New Hampshire includes the following:

Essentially any dispute over the right of a liability carrier to thus limit its liability lies between the compensation carrier and the liability carrier and does involve the plaintiff. The fact that American carries both coverages here and thus it is in the same position financially as it would be if it insured the tort-feasor does not reduce Hackman's recovery below the amount he would have recovered if injured by an insured operator. The limitation in the endorsement reducing the award by the amount Hackman has received in compensation benefits is valid against him. In the *Ullman* [*Ullman v. Wolverine Ins. Co.*, 244 N.E.2d 827 (Ill. Ct. App. 1969)] case it is pointed out that *Peterson v. State Farm Mutual Automobile Ins. Co.*, 393 P.2d 651 and *Standard Accident Insurance Co. v. Gavin* (Fla. App.), 184 So. 2d 229, relied upon by the plaintiff here involve jurisdictions where the compensation carrier is not entitled to recover all of the compensation benefits paid by it.<sup>25</sup>

In addition to Illinois and New Hampshire, other states which have reached this result include California<sup>26</sup> where the statute expressly authorizes a deduction,<sup>27</sup> Arkansas,<sup>28</sup> Louisiana,<sup>29</sup> Michigan,<sup>30</sup> New York,<sup>31</sup> and New Jersey.<sup>32</sup>

Cases to the contrary in Florida<sup>33</sup> and Oregon<sup>34</sup> can be distinguished, as suggested in *Ullman*, on the ground that the workmen's compensation laws in those states do not give complete subrogation rights to the workmen's compensation carrier. However, there are cases in other states not so distinguishable that nevertheless hold the reduction clause as to workmen's compensation invalid. Thus, in Rhode Island, *Ald-*

24. 261 A.2d 433 (N.H. 1970).

25. *Id.* at 436 (citations omitted).

26. *Waggaman v. Northwestern Security Ins. Co.*, 94 Cal. Rptr. 170 (Dist. Ct. App. 1971); *Safeco Ins. Co. of America v. Houchins*, 90 Cal. Rptr. 414 (Dist. Ct. App. 1970); *Jarrett v. Allstate Ins. Co.*, 26 Cal. Rptr. 231 (Dist. Ct. App. 1962); see *Eliopoulos v. North River Ins. Co.*, 33 Cal. Rptr. 449 (Dist. Ct. App. 1963).

27. CAL. INS. CODE § 11580-2(h)(1) (Deering Supp. 1973).

28. *Edmundson v. Commercial Union Ins. Co.*, 459 S.W.2d 112 (Ark. 1970).

29. *Allen v. United States Fidelity & Guar. Co.*, 188 So. 2d 741 (La. Ct. App. 1966). *But see Williams v. Buckalew*, 246 So. 2d 58 (La. Ct. App. 1970).

30. *Michigan Mut. Liab. Co. v. Mesner*, 139 N.W.2d 913 (Mich. Ct. App. 1966).

31. *Napolitano v. Motor Vehicle Acc. Indem. Corp.*, 287 N.Y.S.2d 393 (1967); *Vartanian v. Motor Vehicle Acc. Indem. Corp.*, 283 N.Y.S.2d 762 (Sup. Ct. 1967); *Danielewicz v. Motor Vehicle Acc. Indem. Corp.*, 271 N.Y.S.2d 735 (Sup. Ct. 1966).

32. *Brooks v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 303 A.2d 884 (N.J. 1973).

33. *Southeast Title & Ins. Co. v. Austin*, 202 So. 2d 179 (Fla. 1967); *Standard Acc. Ins. Co. v. Gavin*, 184 So. 2d 229 (Fla. Dist. Ct. App. 1966).

34. *Peterson v. State Farm Mut. Auto Ins. Co.*, 393 P.2d 651 (Ore. 1964).



*croft v. Fidelity & Casualty Co.*<sup>35</sup> reaches that result on the basis of the legislative intent embodied in the uninsured motorist coverage:

We are persuaded that . . . the legislature intended to give an insured motorist operating on the public ways protection against the economic loss that might result from the negligent operation of uninsured motor vehicles. The protection was to be in an amount of at least \$10,000 for bodily injury or death in the case of one person in any one accident, and the legislature commanded that this protection be made available to every insured to whom a policy is issued for liability insurance unless specifically rejected. Nothing in the statute warrants the issuance of a policy providing for such protection of the insured motorist in any lesser amount or in any alternative amount. The coverage directed in the statute must be given unless the insured rejects it in specific terms.

. . . .

The coverage in the policy delivered to the insured in the instant case is different from that mandated in the statute. It requires the insured, if he desires to accept the policy so issued, to agree that any award of damages or amount paid him under a workmen's compensation or a similar piece of legislation be deducted from any award of damages he may recover from the tortfeasor. Nothing in the statute, in our opinion, confers upon the insurer any authority to require an insured to accept a policy proffered for delivery which contains such a limitation upon the mandated statutory coverage.

. . . .

Because we take this view, we find that the provisions of the policy limiting the liability of the insured as is therein provided are . . . void, and the policy is to be construed as having included within its terms coverage against damage by uninsured motorists up to the extent of the statutory limit, that is, \$10,000 for bodily injury to one person in any one accident.<sup>36</sup>

Alabama,<sup>37</sup> Pennsylvania,<sup>38</sup> and Colorado<sup>39</sup> have taken similar positions. Likewise, the United States Court of Appeals for the Eighth Circuit has concluded that under the law of Nebraska this reduction provision is not enforceable.<sup>40</sup> This result was reached even though the uninsured motorist coverage and the compensation benefits together exceeded the amount of the judgment obtained by the insureds against

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35. 259 A.2d 408 (R.I. 1969).

36. *Id.* at 413-14.

37. *State Farm Mut. Auto. Ins. Co. v. Cahoon*, 252 So. 2d 619 (Ala. 1971); *Preferred Risk Mut. Ins. Co. v. Holmes*, 251 So. 2d 213 (Ala. 1971).

38. *Rhodes v. Automotive Ignition Co.*, 275 A.2d 846 (Pa. Super. Ct. 1971).

39. *Nationwide Mut. Ins. Co. v. Hillyer*, 509 P.2d 810 (Colo. Ct. App. 1973).

40. *Booth v. Seaboard Fire & Marine Ins. Co.*, 431 F.2d 212 (8th Cir. 1970).

the uninsured tort-feasor, the court declaring that “[t]he interpretation of the statute and application of the set-off clause should not turn upon the contingency of the amount of damages and the amount of collateral insurance available.”<sup>41</sup>

In Texas, the question was initially presented in *Fidelity & Casualty Co. v. McMahan*.<sup>42</sup> The majority opinion quoted from *American Liberty Insurance Co. v. Ranzau*<sup>43</sup> and considered it controlling here, stating: “The language and logic of this decision clearly seemed determinative of the question here presented. Workmen’s compensation is certainly ‘other insurance.’”<sup>44</sup> The opinion goes on to state:

Appellant argues that Art. 8307, Sec. 6a, Vernon’s Ann. Civ. St. [giving the compensation carrier subrogation to the rights of the injured employee against others] takes our case out of the *Ranzau* holding. It contends that to extend this holding to our situation would give to McMahan a benefit he would not have had if Strahan had been covered by liability insurance. This argument, of course, has appeal but we think the answer to it is that the one is conferred by legislative act, while the other is a contract provision without such approval.<sup>45</sup>

The dissent by Justice Keith considered that the holding in *Ranzau* by a divided supreme court was not dispositive of the question here and would follow *Ullman* and *Hackman*, regarding the logic of those cases as unanswered by the majority opinion.<sup>46</sup>

In *Bogart*, mentioned above in another connection, the obverse situation was presented, with the workmen’s compensation insurer having intervened in the employee’s action against his uninsured motorist insurance carrier to assert its right of subrogation in any recovery. The federal court considered the Texas law, under Article 8307, Section 6a, Revised Civil Statutes, to provide the right of subrogation only against a third party tort-feasor and not against any uninsured motorist insurance. Because of such interpretation of the statute and because of the clause in the uninsured motorist section of the automobile policy excluding workmen’s compensation carriers from benefits thereunder,

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41. *Id.* at 219.

42. 487 S.W.2d 371 (Tex. Civ. App.—Beaumont 1973, writ ref’d n.r.e.).

43. 481 S.W.2d 793 (Tex. Sup. 1972).

44. *Fidelity & Cas. Co. v. McMahan*, 487 S.W.2d 371, 372 (Tex. Civ. App.—Beaumont 1973, writ ref’d n.r.e.).

45. *Id.* at 372; *accord*, *Hamaker v. American States Ins. Co.*, 493 S.W.2d 893 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref’d n.r.e.).

46. *Id.* at 372-73

the intervenor was denied any recovery.<sup>47</sup> No state appellate court in Texas has yet passed directly upon this aspect of the problem.

#### SETTLEMENTS WITH AN INSURED MOTORIST

Still another situation giving rise to reduction and exclusion problems is presented when the insured is in an accident which involves not only an uninsured motorist, but also another insured motorist, with whom he settles. The uninsured motorist coverage provisions of the standard automobile policy contain an express exclusion that uninsured motorist coverage does not apply:

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

There is also a provision under the heading of "Limits of Liability" which states:

Any amount payable under the terms of this Part because of bodily injury sustained in an accident by a person who is an insured under this Part shall be reduced by (1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury . . . .<sup>48</sup>

Where the claimant has settled with and been paid by or on behalf of an insured motorist involved in the accident and brings suit against his own uninsured motorist coverage carrier on the ground that there was also liability on the part of an uninsured motorist, several defenses

47. *Bogart v. Twin City Fire Ins. Co.*, 473 F.2d 619, 627-28 (5th Cir. 1973).

48. There is a further provision under the heading of "Trust Agreement" as follows: In the event payment to any person under this Part:

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

may be asserted. One contention that may be advanced is that a settlement and release bars any recovery under uninsured motorist coverage by cutting off that carrier's subrogation rights. Another argument is that by reason of the exclusion arising in the event of any settlement without consent of the company, the assured is denied recovery. Finally, the recovery may be denied by reason of credit for the amount received under the reduction clause. The opposing contention is that in the light of the uninsured motorist coverage statutes, these provisions can be valid only with respect to any settlement with or payment by the uninsured motorist.

Here, again, the results have not been consistent in all jurisdictions, but it appears to be the majority view that the pertinent policy provisions include, and validly so, settlements with any insured motorist involved in the accident. Thus, *LaBove v. American Employers Insurance Co.*<sup>49</sup> denied recovery in a case involving a three-vehicle accident. The car which actually collided with the insured was itself covered by insurance but was passing an uninsured motorist whom the claimant contended was guilty of negligence causing the accident. The claimant settled with the driver of the insured automobile that collided with him, without the consent of his own insurer, and then sued such insurer under the uninsured motorist coverage of his policy. The Louisiana court affirmed summary judgment for the insurer, the discussion including the following:

The defendant insurer admits that one purpose of the exclusion is to prevent the insured from making a small settlement with the uninsured motorist, who might then testify admitting liability; or who may have assets which would, because of the settlement, become unavailable to indemnify the insurer for any payment it makes. Nevertheless, the language is not restricted to settlement with the uninsured motorist. It clearly and unequivocally states that a settlement with *any* person who "may be" liable, made without the written consent of the insurer, precludes recovery.

. . . .

As used here, the words "may be legally liable" clearly refer to any person who possibly, perhaps or by chance may be liable and not to any person who has already been held liable by judgment of court. Applying this construction to the present case, it is clear that the settlement with Ardoin was made; and that Ardoin may possibly be liable. Hence, coverage is excluded.<sup>50</sup>

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49. 189 So. 2d 315 (La. Ct. App. 1966).

50. *Id.* at 318 (court's emphasis). The court discussed at length several of the underlying purposes of the exclusion stating that:

Since it was held that the exclusion clause prevented recovery, the court found it unnecessary to pass upon the effect of the reduction clause in the limits of liability provisions.<sup>51</sup> Similar results have been reached in California,<sup>52</sup> Missouri,<sup>53</sup> Alabama,<sup>54</sup> South Carolina,<sup>55</sup> Illinois,<sup>56</sup> New York,<sup>57</sup> and Florida.<sup>58</sup> This position likewise has been supported by most commentators who have touched on the question.<sup>59</sup>

*Michigan Mutual Liability Co. v. Karsten*<sup>60</sup> is perhaps the leading case for the opposing position. It held that settlement with the insured motorist did not in itself preclude any recovery and that the settlement amount should not be subtracted from the maximum coverage to determine liability of the uninsured motorist carrier but rather only from the total amount of damages suffered. The exclusion clause was interpreted to mean that the settlement forbidden was only "one made by the insured with a person legally liable for injuries caused by an accident arising out of the ownership, maintenance or use of the *uninsured* vehicle."<sup>61</sup> This view was supported by the general principle that an insurance policy should be given the construction most favorable to the insured. The court then construed the limits of liability provision

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The purposes of the exclusion also support defendant's view. One obvious purpose is to prevent settlements with parties who perhaps "may be" liable, without first putting the insurer on notice of the proposed settlement. Under the terms of the policy, the amount payable under the uninsured motorists clause is reduced by any sum received from any person who is jointly liable. Hence, the defendant insurer is interested in having notice of any such settlements. Defendant also might possibly want to enter into the negotiations in an effort to make an advantageous settlement of its own coverage. Also, it is obvious that defendant's subrogation rights would probably be lost by such a settlement and, hence, defendant would lose this valuable right.

51. *Id.* at 318. Other Louisiana cases that arrived at a similar result include: *Sylvest v. Employers Liab. Assurance Corp.*, 252 So. 2d 693 (La. Ct. App. 1971); *Conner v. American Employers Ins. Co.*, 189 So. 2d 319 (La. Ct. App. 1966). In *Sylvest*, the parents were held to be precluded from recovery by a settlement with the driver's insurer where a child was killed while riding as a passenger in an insured vehicle that collided with an uninsured motorist.

52. *Portillo v. Farmers Ins. Exch.*, 47 Cal. Rptr. 450 (Dist. Ct. App. 1965); *Mills v. Farmers Ins. Exch.*, 41 Cal. Rptr. 650 (Dist. Ct. App. 1964).

53. *Kisling v. M.F.A. Mut. Ins. Co.*, 399 S.W.2d 245 (Mo. Ct. App. 1966).

54. *Dancy v. State Farm Mut. Auto. Ins. Co.*, 324 F. Supp. 964 (S.D. Ala. 1971).

55. *Senn v. J.S. Weeks & Co.*, 180 S.E.2d 336 (S.C. 1971).

56. *See Remsen v. Midway Liquors, Inc.*, 174 N.E.2d 7 (Ill. Ct. App. 1961).

57. *McGee v. Horvat*, 260 N.Y.S.2d 345 (Sup. Ct. 1965).

58. *McInnis v. State Farm Mut. Auto. Ins. Co.*, 208 So. 2d 481 (Fla. Dist. Ct. App. 1968).

59. *See Beck, Insured versus Insurer versus Uninsured Motorist*, 20 DEFENSE L.J. 1 (1971); Chadwick & Poché, *California's Uninsured Motorist: Scope and Problems*, 13 HASTINGS L.J. 202 (1962); Drummond, *Uninsured Motorist Coverage—A Suggested Approach to Consistency*, 23 ARK. L. REV. 167 (1969).

60. 163 N.W.2d 670 (Mich. Ct. App. 1968).

61. *Id.* at 671-72 (court's emphasis).

so that the settlement amount from the insured motorist may be subtracted only from the total damages arising out of the accident, and not from the coverage limits.<sup>62</sup>

*American Motorists Insurance Co. v. Thompson*<sup>63</sup> reaches a similar result but points out that the Oregon statute, as it existed at the time of the accidents there involved, did not provide for subrogation for uninsured motorist payments.<sup>64</sup> The statute was subsequently amended to do so and the opinion recognizes that in cases arising under the amended statute, the result would be different.<sup>65</sup> *Volkswagen Insurance Co. v. Taylor*<sup>66</sup> contains some language in accord with *Karsten*, but it is at best dictum since the opinion puts stress on the fact that there were two separate collisions, one involving the uninsured motorist and the other an insured motorist, with a time interval between them.<sup>67</sup> The result was further based upon waiver by failure of the uninsured motorist carrier to timely assert its policy defense.<sup>68</sup>

In Texas, this problem was first broached in *Allstate Insurance Co. v. Clarke*.<sup>69</sup> The policy there was issued before the passage of Article 5.06-1(3), Texas Insurance Code, but the court did construe the policy provision and held it to give the insurer the right of subrogation against an insured joint tort-feasor as well as against the uninsured motorist.<sup>70</sup>

The language of the statute in this connection, article 5.06-1(3), is virtually identical to that in the standard policy form as used both before and after the adoption of the statute:

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury, sickness or disease, or death for which such payment is made.

The first Texas case passing upon this question under a policy issued

62. *Id.* at 672-73.

63. 453 P.2d 164 (Ore. 1969).

64. *Id.* at 165-66.

65. *Id.* at 166.

66. 201 So. 2d 624 (Fla. Dist. Ct. App. 1967).

67. *Id.* at 627. Even in such a situation, some of the cases cited in support of the majority rule have held to the contrary.

68. *Id.* at 628.

69. 471 S.W.2d 901 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).

70. *Id.* at 907.

after the effective date of the uninsured motorist statute was *Jobe v. International Service Insurance Co.*<sup>71</sup> The plaintiffs there were pedestrians who were injured when automobiles driven by Goss and Amunson collided, Goss being insured and Amunson uninsured. Claimants sued Goss and Amunson and also their own insurance companies under the uninsured motorist provisions of their policies. Liability was found on the part of both drivers, and Goss' insurer made payment on his behalf:

Jobe recovered \$61,175 judgment against Goss and Amunson, jointly and severally; and Corby recovered \$25,495 judgment against Goss and Amunson, jointly and severally. Goss had \$20,000 liability insurance; Amunson was uninsured. Goss' insurance carrier paid Jobe and Corby \$10,000 each. Nothing has been paid by or on behalf of Amunson.<sup>72</sup>

The opinion goes on to state:

Appellees' policies provide that they would pay appellants damages legally recoverable from an uninsured and that any amount so payable "shall be reduced" by all sums paid on behalf of (i) the owner of the uninsured automobile and (ii) any other person jointly or severally liable together with such owner.

Allstate paid on behalf of Goss who was jointly and severally liable with the uninsured. Thus under the policy appellees had the right to reduce their liability in the amount of the sums paid.

And appellees are entitled to the extent of their payment, under the "Trust Agreement" provision of the policies, to the proceeds of settlement of any person legally responsible, because of which such payment was made. The payment was made on behalf of Goss, and Goss is jointly and severally liable with Amunson.<sup>73</sup>

The court held that the policy terms in question were "specifically authorized and sanctioned by Section 3, Article 5.06-1 of the Insurance Code, V.A.T.S."<sup>74</sup>

*Jobe* was followed by *Grissom v. Southern Farm Bureau Insurance Co.*,<sup>75</sup> which held that the uninsured motorist provision excluding coverage where the insured, without written consent of the insurer, makes settlement with any person or organization who may be legally liable, was clear and applicable to settlement with an insured motorist as well as the uninsured motorist.<sup>76</sup> The court also held that where the provi-

71. 474 S.W.2d 11 (Tex. Civ. App.—Waco 1971, writ ref'd n.r.e.).

72. *Id.* at 13.

73. *Id.* at 13.

74. *Id.* at 13.

75. 476 S.W.2d 448 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.).

76. *Id.* at 450.

sion had been approved by the State Board of Insurance prior to the issuance of policies, it would be enforced as written against insureds who made such a settlement without the written consent of the insurer.<sup>77</sup> The same result was again reached in *Traders & General Insurance Co. v. Reynolds*,<sup>78</sup> which held that the recoupment and credit provisions were not in derogation of the statute and must be enforced according to their terms,<sup>79</sup> and once more in *Jessie v. Security Mutual Casualty Co.*<sup>80</sup> Thus, the Texas position on this situation can now be regarded as well settled.

A refinement of the Texas rule in this connection appears in the recent case of *Dairyland County Mutual Insurance Co. v. Roman*.<sup>81</sup> There the insured, who was asserting liability against his insurer under the uninsured motorist provisions of his policy, executed a release without consideration to a second uninsured motorist involved in the accident. It was held, however, that since the evidence conclusively established that there was no consideration for this release, it was not binding and did not impair the insurer's subrogation rights and thus did not constitute a "settlement" within the meaning of the exclusion and therefore, the uninsured motorist coverage was not lost.<sup>82</sup> Apparently the same would be true in the event of a release without consideration of an insured motorist.

#### OTHER REDUCTION AND EXCLUSION CLAUSES

Another exclusionary clause was presented to a Texas court in *Stagg v. Travelers Insurance Co.*<sup>83</sup> This was a suit on an uninsured motorist endorsement attached to a garage liability policy issued to the father on one owned automobile. While one of the insured's sons was driving another automobile, record title to which was in his brother and which was insured under a different policy, a collision occurred with an uninsured motorist. An exclusionary clause provided that the uninsured motorist coverage did not apply to an injury to an insured while occupying a vehicle (other than an insured highway vehicle) owned by the named insured or any relative, resident in the same household. The clause further provided that this exclusion did not apply to the

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77. *Id.* at 450.

78. 477 S.W.2d 937 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

79. *Id.* at 941.

80. 488 S.W.2d 140 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

81. 498 S.W.2d 154 (Tex. Sup. 1973).

82. *Id.* at 159.

83. 486 S.W.2d 399 (Tex. Civ. App.—Beaumont 1972, no writ).



named insured or his relatives while occupying a vehicle owned by a designated insured or his relatives. Plaintiffs urged that the exclusion was void as an improper restriction on coverage, but the court found it to be valid, stating:

Although there have been no Texas decisions passing on the validity of the exclusion in question, those jurisdictions that have actually passed on the particular provision have held it to be clear and unambiguous with the valid purpose of requiring the named insured to secure additional uninsured motorists coverage for himself and his relatives for any vehicles owned by relative residents of the same household.<sup>84</sup>

Cases from Florida,<sup>85</sup> Louisiana<sup>86</sup> and Minnesota<sup>87</sup> were cited in support of this result.

A provision under "Limits of Liability" in the uninsured motorist coverage which has as yet not received any definitive judicial treatment is that which states:

Any payment made under this Part to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person insured under Coverage A, Bodily Injury Liability.

The occasion for application of this clause would arise when a passenger in an automobile covered by a liability policy providing uninsured motorist coverage is hurt in an accident with an uninsured motorist caused by negligence on the part of both drivers. If the passenger has a cause of action against the driver of the vehicle he was occupying, there would be coverage of such liability by the insurer under the bodily injury liability coverage of the policy. The passenger would also be an insured under the uninsured motorist coverage, as a person occupying an insured vehicle, and if legally entitled to recover from the uninsured motorist, would come under the uninsured motorist coverage of the same policy. The effect of the quoted provision would be that if the insurer makes any payment under the uninsured motorist coverage in connection with the liability of the uninsured motorist, its liability under the bodily injury coverage would be accordingly reduced.

While contained in the uninsured motorist section of the policy, this

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84. *Id.* at 402-03.

85. *United States Fidelity & Guar. Co. v. Webb*, 191 So. 2d 869 (Fla. Dist. Ct. App. 1966).

86. *Spencer v. Traders & Gen. Ins. Co.*, 171 So. 2d 723 (La. Ct. App. 1965).

87. *Smitke v. Travelers Indem. Co.*, 118 N.W.2d 217 (Minn. 1962).

is really a liability coverage limitation. It does not provide for reduction of uninsured motorist coverage recovery, but rather for reduction of liability coverage recovery by reason of payments made under the uninsured motorist coverage. Therefore, it would not conflict with the policy embodied in the uninsured motorist statutes, and liability coverage is not ordinarily mandatory by statute. However, if the policy is one certified under a financial responsibility law, then an analogous argument based upon statutory policy could be made against the validity of the provision.

#### CONCLUSION

From a review of the various situations and decisions above, one clear conclusion is that each limiting clause must be considered on its own merit and that it cannot properly be said that all such clauses are valid nor that all such clauses are invalid. Thus, of the four exclusion or reduction situations above which have been passed upon by the Texas courts, the policy provisions have been held invalid in two instances and valid in two instances. While there may be a family resemblance between all of these problems, still each one has its own special considerations, and authorities dealing with one provision may not be too confidently relied upon in connection with another. Uninsured motorist coverage is an important extension of the insurance protection provided by automobile insurance policies, but has also created many legal problems, not all of which are yet completely resolved.