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# Insurance--Some Suggested Changes in the Standard Policy Provisions Promulgated under the Uninsured Motorist Law

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## INSURANCE—SOME SUGGESTED CHANGES IN THE STANDARD POLICY PROVISIONS PROMULGATED UNDER THE UNINSURED MOTORIST LAW

With the enactment of the uninsured motorist law<sup>1</sup> in 1967, the West Virginia Legislature sought to provide a minimum degree of protection for the victim of the uninsured motorist.<sup>2</sup> The adopted plan requires that motor vehicle liability insurance policies issued in West Virginia contain a provision whereby the insurer is to compensate the insured for damages the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle.<sup>3</sup>

Although the economic cost for the protection rests upon the individual who purchases the policy, the benefits of the protection are extended to include, generally, the members of the named insured's family.<sup>4</sup> To recover from the insurer, an insured need only bring an action against the uninsured motorist to establish legal liability and the extent of damages. No more is required of the insured since the judgment that renders the uninsured motorist liable also renders the insurer liable.<sup>5</sup>

The uninsured motorist law is implemented by requiring the use of the Standard Policy Provisions which are promulgated by the West Virginia Insurance Commissioner.<sup>6</sup> Difficulties that have so far arisen with the Standard Policy Provisions are, at least to

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<sup>1</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume).

<sup>2</sup> See, e.g., *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147 (W. Va. 1974).

<sup>3</sup> No motor vehicle liability insurance policy may be issued "unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . ." W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume).

<sup>4</sup> W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume) provides: As used in this section . . . the term 'insured' shall mean the named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either, while in a motor vehicle or otherwise, and any person, except a bailee for hire, who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies . . .

<sup>5</sup> *Snider v. State Farm Mut. Auto. Ins. Co.*, 360 F. Supp. 929 (S.D.W. Va. 1973).

<sup>6</sup> It is the duty of the West Virginia Commissioner of Insurance to promulgate and require the use of Standard Policy Provisions for the uninsured motorist cover-

some extent, a result of the indemnity principle of insurance.<sup>7</sup> Violation of the indemnity principle can occur where one who meets the statutory requirements of an insured under the provisions of one insurance policy also meets those requirements under the provisions of another policy. If the insured receives equal benefits from each insurer, he has realized a net gain to the extent his actual loss is less than the benefits he receives.<sup>8</sup> If the insured's actual loss, as reflected in a judgment against the uninsured motorist, is in excess of, or equal to, the combined limits of liability of both policies, no net gain can be realized and no violation of the principle can occur.

The protection required by the West Virginia uninsured motorist law, considered in conjunction with the extensive use of the automobile in this society, indicates that there are many instances in which an injured party would have available more than one uninsured motorist provision to cover a loss. Policy provisions such as those once contained in the Standard Policy Provisions<sup>9</sup> and generally referred to as "other insurance" clauses sought, in part, to preclude any violation of the indemnity principle by the insured receiving a net gain.<sup>10</sup> One of the subdivisions of the "other insurance" clause is the "excess-escape" clause.<sup>11</sup> Where loss occurs to

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age. However, the use of the Standard Policy Provisions may be waived by the Commissioner under certain circumstances. W. VA. CODE ANN. § 33-6-31(i) (1975 Replacement Volume). See also W. VA. CODE ANN. § 33-6-10 (Replacement Volume).

<sup>7</sup> Insurance is designed for reimbursement of loss suffered. The indemnity principle requires that the enforcement and interpretation of insurance contracts be consistent with the objective of providing a benefit no greater than the loss suffered. Where insurance benefits are greater than the loss suffered, there is a net gain to the insured, and the principle is violated. R. KEETON, BASIC INSURANCE § 3.1 (1971) [hereinafter cited as KEETON]. The vice of net gain is that it may encourage gambling and the destruction of insured lives and property. *Id.* at §3.1(b).

<sup>8</sup> For example, in West Virginia, the injured party is the named insured in Policy A. He is in a collision with an uninsured motorist while he is operating, with permission, a vehicle owned by another and insured under Policy B. Under Policy A, the injured party is the named insured and will meet the statutory definition of an "insured." He will also meet the statutory definition of an "insured" under Policy B. If the injured party has secured a judgment from the uninsured motorist equalling \$8,000, then, arguably, he is entitled to benefits of \$8,000 under Policy A and \$8,000 under Policy B. See W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume); KEETON, *supra* note 6, § 3.1(c).

<sup>9</sup> Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (April, 1967).

<sup>10</sup> A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 2.59 (1969) [hereinafter cited as WIDISS].

<sup>11</sup> *Id.*

any insured in a vehicle other than a vehicle owned by the named insured,<sup>12</sup> the uninsured motorist coverage of the policy does not apply unless: (1) there is no uninsured motorist coverage applicable to such vehicle, or (2) the loss exhausts the limits of liability of the uninsured motorist coverage that applies to such vehicle, but then only to the extent the limits of liability of the coverage exceed the limits of liability of the coverage that applies to the vehicle involved in the loss.<sup>13</sup> If the insured's judgment is less than the limits of liability of the coverage applicable to the vehicle involved, then the clause is salutary because it precludes net gain by the insured.<sup>14</sup>

The "other insurance" clause also includes what has been termed the "pro-rata" clause.<sup>15</sup> This provision<sup>16</sup> is applicable when an individual owns more than one vehicle. If each of the vehicles is separately insured with accompanying uninsured motorist coverages, the effect of the clause is similar to the "excess-escape" clause. The insured is unable to recover a net gain since the insurer may limit his liability to that portion of the judgment which equals the proportion that the limit of liability of his coverage bears to the sum total limits of liability of all of the coverages available.<sup>17</sup> How-

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<sup>12</sup> To determine those who qualify as an "insured," see note 4 *supra*. The "named insured" means "the person named as such in the declarations of the policy or contract and shall also include such person's spouse if a resident of the same household . . ." W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume).

<sup>13</sup> See Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (April, 1967), *construed in* *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123 (S.D.W. Va. 1972).

<sup>14</sup> The "excess-escape" clause purports to provide coverage where the judgment exceeds the limits of liability of the uninsured motorist coverage that is applicable to the vehicle in which the loss occurred. As a practical matter, it provides no coverage. Insurers uniformly market uninsured motorist coverage in the minimum amount required by law. See note 71 *infra*. As a result, there is no difference in the limits of liability of the uninsured motorist coverages. This is the "escape" feature of the "excess-escape" clause. WIDISS, note 10 *supra* at §2.59.

<sup>15</sup> WIDISS, note 10 *supra* at §2.61.

<sup>16</sup> A standard clause provides:

If the insured has other similar bodily injury insurance available to the accident, the damages for bodily injury shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

*Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123, 1126 (S.D.W. Va. 1972).

<sup>17</sup> If the judgment against the uninsured motorist is \$10,000, and there are

ever, where the insured's damages exceed the highest limit of liability of any of the provisions available, the clause deems the damages to be equal to the highest limit of liability of the available provisions and each insurer is able to reduce its liability under the coverage, since each will contribute on a pro-rata basis.<sup>18</sup> The net effect is that the insured remains uncompensated while the insurers, who uniformly market the coverage with maximum limits of liability set at the statutory minimum amount required,<sup>19</sup> are able to reduce their liability below the amount required by law.<sup>20</sup>

In *Tulley v. State Farm Mutual Automobile Insurance Company*,<sup>21</sup> the "excess-escape" clause was held to be invalid. The plaintiff's judgment against the uninsured motorist equalled \$35,700. At the time the loss occurred, the plaintiff had in force, as the named insured, an automobile liability insurance policy with accompanying uninsured motorist coverage, and was operating a vehicle owned by his brother for which there was applicable insurance that included uninsured motorist coverage. The limit of liability for uninsured motorist coverage for each policy was \$10,000. However, if the "excess-escape" clause contained in the policy issued to the plaintiff as the named insured were given effect, the plaintiff's recovery would be limited to \$10,000 or the limit of liability of the uninsured motorist coverage contained in the policy issued to the vehicle owner. The court found that since

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available two uninsured motorist provisions, each with a limit of liability of \$10,000, the effect of the clause is to set each insurer's liability at \$5,000, for a total recovery of \$10,000.

<sup>18</sup> If the judgment against the uninsured motorist is \$20,000, and there are two uninsured motorist provisions available to the insured with maximum limits of liability of \$10,000 each, \$10,000 is the extent of damages. See note 16 *supra*. Each insurer is liable for \$5,000, which leaves the insured uncompensated for damages for \$10,000. This particular effect of the "pro-rata" clause has been upheld in some jurisdictions. The rationale is that clear and unambiguous language in insurance contracts cannot be disregarded because of the public policy favoring indemnification. See, e.g., *Otto v. Allstate Ins. Co.*, 2 Ill. App. 3d 58, 275 N.E.2d 766 (1972).

<sup>19</sup> See note 71 *infra*.

<sup>20</sup> The limits of liability for the uninsured motorist coverage must be no less than that required to prove financial responsibility under the Safety Responsibility Law. W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume). Proof of financial responsibility means the ability to respond in damages in an amount equal to \$10,000 for bodily injury to any one person in any one accident, \$20,000 for bodily injury to two or more persons in any one accident, subject to the limit for one person, and \$5,000 for property damage caused by injury to or destruction of property of others in any one accident. W. VA. CODE ANN. § 17D-4-2 (1974 Replacement Volume).

<sup>21</sup> 345 F. Supp. 1123 (S.D. W. Va. 1972).

the statute, as the controlling instrument, requires that each policy contain a provision that undertakes "to pay the insured all sums which he shall be legally entitled to recover as damages,"<sup>22</sup> a clause in the insurance contract that attempts to limit the insurer's liability to the amount by which its limits of liability exceed the limits of liability of all other insurance is a qualification that conflicts with the requirements of the statute and is, therefore, void and unenforceable.<sup>23</sup> In addition, the court held that the clause could not be validated by reason of its compliance with the Standard Policy Provisions since the Standard Policy Provisions conflict with the statute upon which they are based.<sup>24</sup>

The *Tulley* decision to hold the "excess-escape" clause void received the approval of the West Virginia Supreme Court of Appeals in *Bell v. State Farm Mutual Automobile Insurance Co.*<sup>25</sup> There the court held that a clause in an insurance policy that, if given effect, limits the recovery of benefits by an insured in a manner that adds to or detracts from the requirements of the uninsured motorist law is void and ineffective. Therefore, an insured may "collect upon as many policies as provide him coverage under the statute up to the limits of both policies or the amount of the judgment, whichever is less."<sup>26</sup>

The same analysis in a slightly different framework was employed by the court in *Bell* to hold invalid a clause in the uninsured motorist provision that purported to exclude coverage to an insured while occupying a vehicle owned by the insured but to which

<sup>22</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume).

<sup>23</sup> 345 F. Supp. at 1128-29. The trend among jurisdictions that have considered the "excess-escape" clause is to refuse to construe the clause in a manner that precludes indemnification up to the limits of liability of the provision. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Murphy*, 226 Ga. App. 710, 177 S.E.2d 257 (1970); *Collins v. Motorist Mut. Ins. Co.*, 36 Mich. App. 424, 194 N.W.2d 148 (1971).

<sup>24</sup> 345 F. Supp. at 1129.

<sup>25</sup> 207 S.E.2d 147 (W. Va. 1974). The factual situation, as it applies to the "excess-escape" clause, is similar to the factual situation in *Tulley*. The injured party had available two separate uninsured motorist provisions. She was the named insured in a policy the defendant had issued to her to insure a vehicle that she owned; she also qualified as an insured under her father's policy since she was a resident relative of the named insured. See W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume). The issue was whether the "excess-escape" clause in her father's policy precluded her from recovery under the policy in satisfaction of a judgment totalling \$20,000. See notes 10 and 11 *supra*.

<sup>26</sup> 207 S.E.2d at 151.

the provision did not apply.<sup>27</sup> Since the uninsured motorist law does not make a distinction between vehicles the insured owns and to which the policy provision applies and vehicles the insured owns but to which the policy provision is inapplicable,<sup>28</sup> but, instead, focuses upon the class to whom the insurer shall provide uninsured motorist coverage,<sup>29</sup> the clause is in conflict with the uninsured motorist law and is void.<sup>30</sup> Arguably, this represents a windfall to the insured. If he owns three automobiles but purchases an insurance policy for only one,<sup>31</sup> then he is provided uninsured motorist coverage for all of the automobiles.<sup>32</sup> However, the windfall is illusory since to take advantage of it necessarily requires foregoing all other insurance on the additional automobiles.

As a result of the *Bell* decision, the Standard Policy Provisions were revised<sup>33</sup> and now reflect a removal of the "other insurance" clauses.<sup>34</sup> However, it was a complete removal and represents, to some degree, an overreaction, since not all of the clause was incon-

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<sup>27</sup> "This clause provides:

This uninsured motorist insurance does not apply:

- (a) To bodily injury to an insured while occupying a motor vehicle (other than an insured motor vehicle) owned by the named insured or if a resident of the same household as the named insured, his spouse or relatives of either, or through being struck by such a motor vehicle."

*Id.* at 149.

<sup>28</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume). The distinction is made, however, with respect to insurance policies issued to the insured providing coverage for bodily injury liability and property damage liability. The coverage that the law requires does not go beyond the motor vehicle for which the policy was issued. W. VA. CODE ANN. § 33-6-31(a) (1975 Replacement Volume). *See also* W. VA. CODE ANN. § 17D-4-12 (1974 Replacement Volume).

<sup>29</sup> For purposes of the uninsured motorist law, the named insured and, if residents of the same household, his spouse and their relatives receive the benefits of the coverage "while in a motor vehicle or otherwise." W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume).

<sup>30</sup> 207 S.E.2d at 149-50; *accord*, Allstate Ins. Co. v. Meeks, 207 Va. 897, 153 S.E.2d 222 (1967) (similar statutory language).

<sup>31</sup> Motor vehicle liability insurance is not mandatory in West Virginia. W. VA. CODE ANN. § 17D-3-4 (1974 Replacement Volume).

<sup>32</sup> *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147, 151 (W. Va. 1974) (Sprouse, J., dissenting).

<sup>33</sup> *See* Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (Revised) (May, 1975).

<sup>34</sup> The "pro-rata" clause has been held invalid by implication. *See* Moomaw v. State Farm Mut. Auto. Ins. Co., 379 F. Supp. 697 (S.D.W. Va. 1974). The passengers in a non-owned vehicle were allowed recovery up to the maximum limits of liability on multiple policies issued to them as the named insureds. *Id.* at 701.

sistent with the uninsured motorist law. The portion of the clause that caused its invalidation in *Bell* was the language that purported to limit the application of the excess insurance to the amount by which the limit of liability for the excess insurance exceeded the limit of the primary insurance.<sup>35</sup> Short of this language, the clause does not operate as a limitation on the uninsured motorist law which would permit an insurer to escape all or a portion of its liability and deny the insured coverage that he is legally entitled to receive.<sup>36</sup>

It is where the judgment against the uninsured motorist exceeds the combined limits of liability of all the available uninsured motorist provisions that the insured may recover the maximum limit of liability of each provision as a result of the *Bell* decision.<sup>37</sup> In many situations, however, the judgment will be less. In that regard, the "other insurance" clause would provide an orderly process for determining the priority of liability among the available uninsured motorist provisions.

In *State Farm Mutual Automobile Insurance Co. v. United States Fidelity and Guaranty Co.*,<sup>38</sup> the "other insurance" clauses were invalidated because of their inconsistency with the uninsured motorist law. Consequently, the court found no basis in the policy provisions or the statute for determining which provision was primary and which was secondary.<sup>39</sup> Since neither provision was primary, the court held that the liability of the insurers under the two policy provisions should be evenly divided.<sup>40</sup> However, equal contribution by each of the available uninsured motorist provisions may not always occur.<sup>41</sup> To the extent it does not, the liability

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<sup>35</sup> 207 S.E.2d at 151.

<sup>36</sup> *State Farm Mut. Auto. Ins. Co. v. United Servs. Auto. Ass'n.*, 211 Va. 133, 176 S.E.2d 327 (1970).

<sup>37</sup> 207 S.E.2d at 151.

<sup>38</sup> 358 F. Supp. 1143 (S.D.W. Va. 1973).

<sup>39</sup> *Id.* at 1146. *But see* *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123, 1125-26 (S.D.W. Va. 1972). The insurance for the vehicle involved in the collision was designated as primary only for determining which policy, and its exclusions applied to the issue to be decided in the case.

<sup>40</sup> 358 F. Supp. at 1147. The factors considered in arriving at this conclusion are not articulated by the court.

<sup>41</sup> *See generally* *Maryland Cas. Co. v. Continental Cas.*, 189 F. Supp. 764 (N.D.W. Va. 1960). The court was concerned with apportionment of liability among three insurers for a claim against the bodily injury and property damage liability coverages of their respective policies in a situation where there was no basis for determining which was the primary insurer. Noting that the purpose of apportion-



among the available uninsured motorist provisions is not predictable and is susceptible to becoming a litigious issue.

The insertion of an "other insurance" clause into the Standard Policy Provisions would provide a predictable and orderly method of distributing liability among the available uninsured motorist provisions, assuming, of course, that the clause would be consistent with the uninsured motorists law.<sup>42</sup> If the application of the clause is made contingent upon the loss occurring in a vehicle not owned by the named insured, then, with regard to the vehicle in which the loss occurs, the "other insurance" clause of that provision would not apply. Consequently, the insurer of the vehicle in which the loss occurs would have the initial liability. This aspect of the clause also precludes the possibility that the "other insurance" clauses in the available policies will be mutually repugnant.

Other exclusionary clauses have been the subject of litigation in West Virginia. In *Tulley v. State Farm Mutual Automobile Insurance Co.*,<sup>43</sup> the court also held void a clause in an uninsured motorist provision that purported to reduce the limit of liability under that provision by an amount equal to that part of the judgment the insured was entitled to recover as expenses under the medical payments coverage of the policy. The clause was held void because such reduction of the limit of liability of the uninsured motorist coverage was not authorized by the uninsured motorist law. The purpose of the clause was to assure compliance with the principle of indemnity.<sup>44</sup> However, where the insured's damages exceeded the limit of liability for the uninsured motorist coverage,

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ment is to reach a just and equitable result, the court's opinion was that all the circumstances should be considered. Those specifically considered by the court included the limits of liability of the various coverages and the question as to the degree of directness of each coverage to the risk that gave rise to the actual loss. *Id.* at 775. See also *Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 209 F. Supp. 83 (N.D.W. Va. 1962).

<sup>42</sup> An orderly method of distributing liability among the available uninsured motorist insurers would undoubtedly increase the economic efficiency of claim administration by reducing the duplicity of investigation and negotiation that would occur where apportionment of liability was the rule. If the "other insurance" clause designates the uninsured motorist provision applicable to the vehicle involved in the collision as primary, then in the frequent case where the insured's damages are less than the limits of liability of the primary provision, only the primary insurer need be involved.

<sup>43</sup> 345 F. Supp. 1123 (S.D.W. Va. 1972).

<sup>44</sup> WIDISS, note 10 *supra* at §2.63.

the clause operated to reduce the liability of the insurer below that which is required by the uninsured motorist law.<sup>45</sup>

An analogous situation exists within the present Standard Policy Provisions.<sup>46</sup> An insurer may reduce its liability to an insured under the bodily injury liability coverage of the policy to the extent the insured receives compensation under the uninsured motorist coverage of the same policy.<sup>47</sup> As with the other clauses previously discussed,<sup>48</sup> questions as to the enforceability of this clause would arise only where the insured's damages exceed the limit of liability of the uninsured motorist coverage.

The factual situation that would give rise to the applicability of the clause can briefly be set out. The named insured is operating the insured vehicle and has one passenger, also an insured, accompanying him. There is a collision with an uninsured motorist, and the passenger recovers a judgment against both the named insured and the uninsured motorist as joint tortfeasors. The bodily injury liability coverage protects the named insured and provides compensation to the injured passenger. The uninsured motorist coverage provides compensation to the passenger since the passenger is also an insured<sup>49</sup> and has established that he is legally entitled to recover from the uninsured motorist. Assuming that the judgment equals \$20,000, and that the bodily injury liability coverage and the uninsured motorist coverage are both at the statutory minimum of \$10,000 for any one person,<sup>50</sup> then the clause operates to

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<sup>45</sup> *Id.* If the insured's damages total \$11,000 and a payment of \$1,000 is made to the insured under the medical payments coverage of the policy, then the clause allows the insurer to reduce its liability under the uninsured motorist coverage to \$9,000, which precludes full indemnification in this situation.

<sup>46</sup> Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (Revised) (May, 1975).

<sup>47</sup> *Id.* at B-10. The clause provides:

5. *Limits of Liability.*

. . . .

(c) If claim is made hereunder and claim is also made against any person who is an insured under the Bodily Injury Liability or Property Damage Liability coverages of the policy because of bodily injury or property damage sustained in an accident by a person who is an insured hereunder, any payment made hereunder to or for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person who is an insured under the Bodily Injury Liability or Property Damage Liability coverages.

<sup>48</sup> See text accompanying notes 9-27 *supra*.

<sup>49</sup> W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume).

<sup>50</sup> W. VA. CODE ANN. § 17D-4-12(b)(2) (1974 Replacement Volume).

limit the passenger's recovery under the policy to \$10,000. This occurs even though the passenger would have been fully compensated had both of the joint tortfeasors been insured.

The clause does not on its face restrict the uninsured motorist coverage since it is the bodily injury liability coverage that is reduced. Indirectly, however, the uninsured motorist coverage is reduced. To the extent it precludes indemnification to the insured up to the maximum limits of liability of both coverages, the clause conflicts with the statutory purpose of providing a minimum degree of protection against loss caused by the uninsured motorist since the insured will not be in the same position had the uninsured motorists had in effect a motor vehicle liability insurance policy with the minimum limits required by law.<sup>51</sup>

Closely related is the question of whether it is appropriate under the uninsured motorist law for an insurer to be able to reduce its liability to an insured to the extent the insured is compensated by a separate insurer whose liability arose under a separate policy issued to a joint tortfeasor.<sup>52</sup> For example, the insured is a pedestrian and receives injury as a result of the negligent operation of two vehicles. A judgment against both follows. If one of the joint tortfeasors is uninsured, then the pedestrian's uninsured motorist coverage is applicable. However, if the other joint tortfeasor has insurance coverage, then his insurer will compensate the pedestrian. At this point, the pedestrian's insurer may, under the Standard Policy Provisions,<sup>53</sup> reduce the uninsured motorist coverage

<sup>51</sup> Cf. *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Clem*, 49 Ala. App. 459, 273 So. 2d 218 (1973); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971).

<sup>52</sup> The "excess-escape" clause and the "pro-rata" clause are applicable where the injured party has more than one uninsured motorist provision available. See notes 9 and 16 *supra*. In contrast, the clause under discussion is only relevant where the injured party is compensated by the uninsured motorist or another who is jointly liable to the injured party. See note 53 *infra*.

<sup>53</sup> Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (Revised) (May, 1975).

5. *Limits of Liability*

. . . .

(d) Any amount payable hereunder because of bodily injury or property damage sustained in an accident by a person who is an insured under this coverage shall be reduced by all sums paid on account of such injury or damage by or on behalf of

- (i) the owner or operator of the uninsured motor vehicle and
- (ii) any other person or persons jointly or severally liable together

by an amount equal to the compensation received by the insured. If the pedestrian is fully compensated on behalf of the insured joint tortfeasor, the indemnity principle is satisfied since the pedestrian is unable to recover under his uninsured motorist coverage.<sup>54</sup> If, however, the pedestrian's damages exceed the compensation received, and the compensation equals or exceeds the limits of liability of the pedestrian's uninsured motorist coverage, the uninsured motorist carrier is allowed to reduce its liability to zero.<sup>55</sup> To the extent the pedestrian's uninsured motorist carrier reduces its liability with the pedestrian not being fully compensated, the pedestrian is not in the position he would have been had the uninsured motorist been insured.<sup>56</sup>

Although neither of the Standard Policy Provisions just discussed have been held invalid, the enforceability of either of these clauses is open to question under the analysis employed to invalidate the "excess-escape" clause,<sup>57</sup> since both of these clauses limit the liability of the insurer in a manner "more restrictive than the uninsured motorist statute."<sup>58</sup>

The West Virginia Supreme Court of Appeals in *Bell v. State Farm Mutual Automobile Insurance Co.*,<sup>59</sup> while referring to bodily injury, held that "[w]ithin this required uninsured motorist coverage there are no distinctions with regard to an owned but not insured motor vehicle, as the coverage applies to use or occupancy of 'a motor vehicle or otherwise.'<sup>60</sup> The Standard Policy Provisions were revised to reflect this but retained the exclusion for

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with such owner or operator for such injury or damage including all sums paid under the Bodily Injury Liability or Property Damage Liability coverages of the policy.

<sup>54</sup> See notes 6-8 *supra*.

<sup>55</sup> Assume the judgment against the joint tortfeasors is \$20,000, the limit of liability of the pedestrian's uninsured motorist coverage is \$10,000 and the pedestrian has received \$15,000 from the liability insurer of one of the joint tortfeasors. Under the clause the uninsured motorist carrier may credit the \$15,000 received to its limit of liability, \$10,000, and thereby reduce its liability to zero.

<sup>56</sup> Invalidation of this clause has occurred in some jurisdictions in this situation. *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Clem*, 49 Ala. 457, 273 So. 2d 218 (1973); *Michigan Mut. Liab. Co. v. Karsten*, 13 Mich. App. 46, 163 N.W.2d 670 (1968). *Contra*, *Sylvest v. Employers Liab. Assurance Corp.*, 252 So. 2d 693 (La. App. 1971).

<sup>57</sup> See *Bell v. State Farm Mut. Auto. Ins. Co.*, 207 S.E.2d 147, 151 (W. Va. 1974).

<sup>58</sup> *Id.* at 150.

<sup>59</sup> *Id.* at 147.

<sup>60</sup> *Id.* at 149-50.

property damage caused by an uninsured motorist to a motor vehicle owned by the named insured or a resident of his household if the liability coverages of the policy do not apply to such vehicle.<sup>61</sup> The law requires that the insurer undertake "to pay the insured *all sums* which he shall be *legally entitled to recover as damages* from the owner or operator of an uninsured motor vehicle . . ."<sup>62</sup> In addition, the uninsured motorist law, by reference, requires that the coverage include a minimum of \$5,000 to compensate the insured for injury to or destruction of property caused by the uninsured motorist.<sup>63</sup> The statute, however, is silent as to the particular property of the insured that must be included in the coverage.<sup>64</sup> *Bell* provides little insight into the question since the court was referring to the circumstances under which the members of the family unit may receive uninsured motorist benefits.<sup>65</sup> The decision that members of the family unit receive the coverage regardless of the fact that the loss might occur in a vehicle owned but not insured is based on language in the uninsured motorist law that requires the coverage "while in a motor vehicle or otherwise."<sup>66</sup> It is difficult to infer that by the use of the phrase "while in a motor vehicle or otherwise" the legislative intent was in regard to anything but bodily injury received by a member of the family unit.

Since the question of the enforceability of this exclusionary clause contained within the Standard Policy Provisions is not expressly answered by the uninsured motorist law nor by judicial interpretation of the law, reference to the purpose for which the law was enacted and the goal sought to be achieved becomes even more important. The uninsured motorist law "seeks to assure at least minimum relief from . . . a loss caused by an uninsured motorist."<sup>67</sup> The coverage prescribed by the statute in providing this

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<sup>61</sup> Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2 (Revised) (May, 1975).

<sup>62</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume) (emphasis added).

<sup>63</sup> Five thousand dollars is the amount required to prove financial responsibility for injury to or destruction of property of others. W. VA. CODE ANN. § 17D-4-2 (1974 Replacement Volume). W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume) incorporates this amount as the minimum required.

<sup>64</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume); W. VA. CODE ANN. § 17D-4-2 (1974 Replacement Volume).

<sup>65</sup> 207 S.E.2d at 149.

<sup>66</sup> W. VA. CODE ANN. § 33-6-31(c) (1975 Replacement Volume).

<sup>67</sup> *Id.* at 150.

protection is to put the insured in the same position as if the uninsured motorist had a motor vehicle liability policy with coverage limits at the statutory minimum.<sup>68</sup> This being so, it should be of no consequence that at the time of the collision with the uninsured motorist, the insured's property damage consisted of a vehicle owned but not insured. If the property damage to the owned but not insured vehicle was the result of the negligence of a motorist who had in force a valid liability policy, the property damage would clearly be recoverable. Consequently, the exclusionary clause should be unenforceable because, in attempting to limit the liability of the insurer, the clause operates to defeat the purpose underlying the uninsured motorist law.<sup>69</sup>

The insurance industry in the United States now markets motor vehicle liability insurance with limits of liability of several hundred thousand dollars.<sup>70</sup> It would seem that individuals who purchase motor vehicle insurance in those amounts to protect themselves against claims made as a result of their negligence would also desire to purchase comparable coverage for their own protection against loss inflicted by the uninsured motorist. Yet, such coverage is unavailable in West Virginia, as insurers presently offer the coverage only with limits of liability of \$10,000 for bodily injury per person, \$20,000 for bodily injury for each accident, and \$5,000 for property damage for each accident,<sup>71</sup> which is the minimum limits of liability required by the uninsured motorist law.<sup>72</sup> The uninsured motorist law does not, however, preclude higher limits of liability; it speaks only of the minimum limits of liability required.<sup>73</sup>

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<sup>68</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume) incorporates the requirements of W. VA. CODE ANN. § 17D-4-2 (1974 Replacement Volume). See *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229 (Fla. S. Ct. 1971); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Clem*, 49 Ala. 457, 273 So. 2d 218 (1973); WIDISS, note 10 *supra* at §8.2.

<sup>69</sup> There are no decisions interpreting the enforceability of this exclusionary clause. One possible reason is that only six states require insurers to provide protection against property damage. WIDISS, note 10 *supra* at §2.57.

<sup>70</sup> *Id.* at §8.2.

<sup>71</sup> Interviews with L. Arnold Eddy, Authorized Agent, State Farm Mutual Automobile Insurance Company, Morgantown, W. Va., October 27, 1976 and H. D. White, Authorized Agent, Allstate Insurance Company, Morgantown, W. Va., October 27, 1976.

<sup>72</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume) provides that the coverage must be "within limits which shall be *no less than* the requirements of section two, article four, chapter seventeen-D [§ 17D-4-2] of the Code of West Virginia, as amended from time to time . . . ."

<sup>73</sup> W. VA. CODE ANN. § 33-6-31(b) (1975 Replacement Volume).

The Standard Policy Provisions provide that the maximum limits of liability for the uninsured motorist coverage shall be the statutory minimum.<sup>74</sup> To the extent compliance with the Standard Policy Provisions is required,<sup>75</sup> any initiative an insurer may have to provide the coverage in greater amounts than the statutory minimum is foreclosed. Since the minimum coverage required by law may be inadequate,<sup>76</sup> such foreclosure is undesirable and, also, unnecessary under the uninsured motorist law.

Recent litigation has invalidated some of the exclusionary clauses contained in the Standard Policy Provisions promulgated by the Insurance Commissioner of West Virginia. In response, these clauses have been removed. Whether total removal was required or whether enough has been done is questionable. A further modification of the Standard Policy Provisions is recommended to include a modified "other insurance" clause, to remove certain limiting clauses, and to remove any requirement that the maximum limit of liability for the coverage be at the minimum level required by the law. If for no other reason than to provide certainty of coverage to insurers and insureds, the Standard Policy Provisions should comply with requirements of the statute.

*Thomas Evans*

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<sup>74</sup> Standard Policy Provisions—Uninsured Motorist Insurance, West Virginia Insurance Department, Bulletin No. 2, B-4 (Revised) (May, 1975).

<sup>75</sup> W. VA. CODE ANN. § 33-6-31(i) (1975 Replacement Volume) requires the use of the Standard Policy Provisions, but this requirement can be waived by the Commissioner. Grounds for waiver exist where the use of the standard provision is unnecessary for the insured's protection and inconsistent with the purpose of the policy. W. VA. CODE ANN. § 33-6-10(a) (1975 Replacement Volume).

<sup>76</sup> W. PROSSER, LAW OF TORTS § 84, at 557 (4th ed. 1971).