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THE SOUTH CAROLINA UNINSURED MOTORIST LAW*

WILLIAM W. DOAR, JR.† and DONALD V. RICHARDSON, III‡

The South Carolina Uninsured Motorist Law, modeled after the Virginia act, was enacted in 1959, amended in minor respects in 1960, and drastically amended by the 1963 General Assembly.¹

The law was passed as an amendment to the Safety Responsibility Act² and requires all automobile liability insurance policies issued or delivered after January 1, 1961, to contain an endorsement or provision undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle within specified limits. The burden of providing this protection was placed solely upon insurance companies, who, until January 1, 1961, were allowed by the law to charge for this protection and to furnish it only when purchased by an insured.³

*This article will not deal with any of the sections of the act relating to the uninsured motorist fund.

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1. The South Carolina uninsured motorist law is now contained in S. C. CODE §46-750.11 (1962).

2. Prior to the 1963 amendment only section 46-750.11 and sections 46-750.14 through 46-750.18 comprised the uninsured motorist act. Sections 46-750.12 and 46-750.19 through 46-750.28 dealt with a "Motor Vehicle Liability Policy" which was defined in section 46-702 as "an owners or operators policy of liability insurance, certified as provided in section 46-748 or 46-749 as proof of financial responsibility and issued, except as otherwise provided in section 46-749, by the insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured." In the case of *Barkley v. International Mut. Ins. Co.*, 227 S.C. 38, 86 S.E.2d 602 (1955), the court held that only those liability insurance policies issued pursuant to the Safety Responsibility Act need contain those provisions relating to a "Motor Vehicle Liability Policy."

3. A self-insurer would seem to be excluded from providing uninsured motorist coverage on its motor vehicles. The act requires that "no policy or contract" of liability insurance shall be issued in this State unless it contains the uninsured motorist endorsement. Section 46-750.11 (1). It is obvious that a self-insurer does not issue liability insurance policies and there is no specific requirement that it provide the uninsured motorist endorsement. The legislature has specifically excluded a self-insurer from furnishing uninsured motorist protection. Thus where a self-insured motor vehicle is bailed to another who has no independent liability coverage, the innocent victim of the bailee's negligence is without uninsured motorist protection. The bailed motor vehicle would not be defined

PURPOSE

In the year beginning November 1, 1961, and ending October 31, 1962, there were approximately 29,968 declared uninsured vehicles in the State of South Carolina, which amounted to 3.39 per cent of the total number of vehicles registered in this state at that time.⁴ This total did not include cancellations, forfeitures or denials of coverage which add materially to the number of uninsured motor vehicles. One can readily see, therefore, that the subject of the uninsured motorist in South Carolina merits consideration.⁵

Uninsured motorist insurance is of recent origin. Its purpose is to relieve the problems arising from injuries inflicted by negligent motorists who are uninsured and financially irresponsible, as well as to provide recompense to innocent persons who are injured and to dependents of those who are killed.⁶

PERSONS ENTITLED TO PROTECTION UNDER THE
UNINSURED MOTORIST LAW

There are generally three classes of persons insured under the law.⁷ The first class comprises the named insured and, while a resident of the same household, the spouse of the named insured and the relatives of either. The second class is composed of those persons who use, with the express or implied consent of the named insured, the motor vehicle to which the policy applies. The third class is a guest in any

as an uninsured motor vehicle because of the required bond or cash deposit in lieu of liability insurance. Therefore, there would be no funds from which an innocent victim could recover. The bailor would not be responsible for the torts of the bailee unless the bailor was negligent in furnishing the motor vehicle to the bailee. *Howle v. McDaniel*, 232 S.C. 125, 101 S.E.2d 255 (1957); *Eberhardt v. Forrester*, 241 S.C. 399, 128 S.E.2d 687 (1962). In these novel circumstances although the bailee is uninsured the innocent victim would be unable to qualify under his uninsured motorist endorsement since he would not have been involved in an accident with "an uninsured motor vehicle."

4. Statistics obtained from Uninsured Motorist Section, South Carolina Highway Department.

5. For an excellent discussion of the Virginia Act see the articles of Colin Denny, III, contained in 47 *Virginia Law Review* 145, and 48 *Virginia Law Review* 170.

6. *American Universal Ins. Co. v. Ranson*, 59 Wash.2d 811, 370 P.2d 867, 79 A.L.R.2d 122 (1962); 7 APPLEMAN, *INSURANCE LAW* §4331 (1962); 5A AM. JUR. *AUTOMOBILE INSURANCE* §82.5 (1936).

7. S.C. CODE §46-750.11(3)(c) (1962).

Doar and Richardson: The South Carolina Uninsured Motorist Law such motor vehicle.⁸ The personal representative of any of the three classes is likewise designated an insured.

The first class is afforded protection twenty-four hours a day against injury from an uninsured motorist.⁹ A member of this class is not only covered while using the insured vehicle, but also while occupying another vehicle or while a pedestrian. Regardless of the number of automobiles owned by the named insured, his spouse or the relatives of either who are members of his household, only one uninsured motorist endorsement is needed to protect members of this first class.¹⁰ The second and third classes are insured only during their occupancy of the insured vehicle and while it is being used with the expressed or implied permission of the named insured.

THE UNINSURED MOTOR VEHICLE

There are two requirements necessary to invoke uninsured motorist coverage. First a person must qualify as an insured within one of the above three classes, and second, he must be involved in an accident with an uninsured motor vehicle.¹¹

An uninsured motor vehicle is defined by the law as one which (1) there is no automobile liability insurance in the amount of 10-20-5,¹² or (2) the insurance company carrying such insurance successfully denies coverage,¹³ or (3) there

8. Section 46-750.11(3)(c) restricts uninsured motorist coverage to non-paying passengers since it uses the term "Guest." This eliminates uninsured motorist coverage on commercial vehicles. In *Hobbs v. Buckeye Union Cas. Co.*, 212 F. Supp. 349 (W.D.Va. 1962), this construction was commented on but not passed upon because of a broader policy provision.

9. *Hobbs v. Buckeye Union Cas. Co.*, *supra* note 8.

10. Section 46-750.11(3)(c); comment, 48 CALIF. L. REV. 516 (1960).

11. *Nationwide Mut. Ins. Co. v. Harleyville Mut. Cas. Co.*, 203 Va. 600, 125 S.E.2d 840 (1962).

12. Section 46-750.11(1) and 46-750.11(3)(B).

13. Section 46-750.11(3)(B)(b). In *Nationwide Mut. Ins. v. Harleyville Mut. Cas. Co.*, 203 Va. 600, 125 S.E.2d 840 (1962), a motor vehicle covered by Harleyville was involved in an accident in which was riding Nationwide's insured guest. Harleyville denied coverage because of non-permissive use. Nationwide instituted this action for a declaratory judgment alleging that Harleyville provided uninsured motorist protection to the guest passenger because of two requirements: ". . . first, such person must qualify as an 'insured' under the endorsement of the policy upon which claim is being made; and secondly, that such person must be involved in an accident with the owner or operator of an uninsured motor vehicle." In this case Harleyville's policy did not apply to the automobile at the time of the accident; therefore, the passenger was not a guest in the automobile to which the policy applied.

Prior to the 1963 amendment the mere denial of coverage by an insurance company would in itself render a vehicle uninsured. The fact

is no bond or deposit of cash or securities;¹⁴ or (4) the owner or operator be unknown;¹⁵ or (5) the insurance company is insolvent.¹⁶ Our statute requires minimum coverage and should a motor vehicle carry liability insurance in an amount less than the amounts specified, such a motor vehicle will be considered an uninsured motor vehicle, falling within class one.

If an owner or operator of a motor vehicle is unknown it shall be deemed uninsured. This is the phantom driver which has been designated "John Doe" by the legislature.

OMNIBUS CLAUSE

Enacted as a part of the South Carolina Uninsured Motorist Law is a statutory omnibus clause which is mandatory in all policies of automobile liability insurance. This clause provides that

no policy or contract of bodily injury liability insurance or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of any motor vehicle, shall be issued or delivered in this state to the owner of such vehicle, or shall be issued or delivered by an insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, unless it contains a provision insuring the person defined as insured,¹⁷ against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each motor vehicle, as follows: ten thousand dollars because of bodily injury to or death of any one person in any one accident, and, subject to such limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any

that the denial was in bad faith or unjustified was immaterial. The law now requires that an insurance company must "successfully" deny coverage before a motor vehicle is uninsured. The word "successfully" connotes a favorable result rather than an attempt. Until there has been an adjudication that an insurance company has "successfully" denied coverage the insured would not be entitled to uninsured motorist protection.

14. Section 46-750.11(3) (B) (d).

15. Section 46-750.11(3) (B).

16. Section 46-750.11(3) (B) (c).

17. Section 46-750.11(3) (c).

Doar and Richardson: The South Carolina Uninsured Motorist Law
one accident, and five thousand dollars because of injury to or destruction of property of others in any one accident.¹⁸

This section requires that "No policy or contract of bodily injury liability insurance" shall be issued or delivered in this state unless it contains the provision of this section, and provides that the policy insure "against loss from the liability imposed by law." Uninsured motorist coverage, however, is for the benefit of the insured and does not insure "against liability imposed by law." Otherwise why should the limiting language used in Section 46-750.11(2) refer to "an endorsement or provision" while Section 46-750.11(1) uses the broader language "no policy or contract of bodily injury liability insurance." The legislature by using this differing language clearly recognized the distinction between liability coverage and the uninsured motorist endorsement. Virginia had, upon the adoption of its uninsured motorist act, a statutory omnibus clause pertaining to automobile liability insurance policies.¹⁹ South Carolina, however, upon the adoption of its uninsured motorist law originally had no statutory omnibus clause except that section of the South Carolina Safety Responsibility Act which had been construed in the case of *Barkley v. International Mut. Ins. Co.*²⁰ as applying only to those policies issued pursuant to the Safety Responsibility Act.²¹

The legislature in the 1963 amendment authorized an "automobile liability policy" to exclude the following risks: (1) liability under the Workmen's Compensation Law; (2) liability to an employee of an insured while engaged in the employment, other than domestic, of the insured; (3) liability to one engaged in the operation, maintenance or repair of the motor vehicle; or (4) liability for damage to property owned by, rented to, or in charge of or transported by the insured.²²

18. Section 46-750.11(1).

19. *Strom v. Nationwide Mut. Ins. Co.*, 199 Va. 130, 97 S.E.2d 759 (1957).

20. 227 S.C. 38, 86 S.E.2d 602 (1955); see *Booth v. American Cas. Co.*, 261 F.2d 389 (4th Cir. 1958); *State Farm Mut. v. Cooper*, 233 F.2d 500 (4th Cir. 1956).

21. Cf. *Hunter, Adm'r v. Southern Farm Bureau Cas. Ins. Co.*, 241 S.C. 446, 129 S.E.2d 59 (1962). See *Smitke v. Travelers Indem. Co.*, —Minn.—, 118 N.W.2d 217 (1962), where it held that the plaintiff, a member of the class insured 24 hours a day was denied uninsured motorist protection because he was the owner of a private passenger vehicle not covered by the defendant's policy.

22. Section 46-750.11(9).

South Carolina Law Review, Vol. 15, Iss. 4 [1963], Art. 3
Had South Carolina not had a statutory omnibus clause, it would have been unnecessary to provide for these exclusions in an automobile liability policy. It is well settled that some of these exclusions were authorized in this state without statutory sanction.²³

THE UNINSURED MOTORISTS ENDORSEMENT

The heart of the Uninsured Motorist law is that section which requires all contracts of automobile liability insurance issued or delivered after January 1, 1961,²⁴ by an insurer licensed in this state upon any motor vehicle then principally garaged or principally used in this state to contain the uninsured motorist endorsement.²⁵ The effect of the law was to write this endorsement or provision in all automobile liability policies regardless of whether it was actually contained therein.²⁶ However, if a motor vehicle was principally garaged or principally used in another state at the time the policy was issued, the law is inapplicable and there would be no uninsured motorist protection even though the collision occurred in South Carolina and the insured was then a residence of this state.²⁷ The uninsured motorist protection afforded a motor vehicle meeting the requirements of Section 46-750.11 (1) is good throughout the territorial limits of the United States and Canada.²⁸ This section also requires minimum policy limits of 10-20-5 but the insurer is allowed to exclude the first two hundred dollars of property damage.²⁹

23. *Pardee v. Fidelity Cas. Co. of N.Y.*, 235 S.C. 521, 112 S.E.2d 497 (1960); see also *Ellis v. Metropolitan Cas. Ins. Co. of N. Y.*, 187 S.C. 162, 197 S.E. 510 (1938); Annot. 50 A.L.R.2d 78.

24. If a valid policy was issued or delivered prior to January 1, 1961, and an accident involving an uninsured motorist occurred after that date, no uninsured motorist coverage would be available since no policy or contract of liability insurance was *issued or delivered* after January 1, 1961, unless the insured voluntarily purchased the optional uninsured motorist coverage. The contention that all existing liability insurance policies automatically contained an uninsured motorists endorsement on January 1, 1961, is invalid for such would be a violation of Article I, Section 8, South Carolina Constitution and Article 1, Section 10, United States Constitution prohibiting the impairment of vested contractual rights. See *Ball v. Calif. State Auto. Associates Inter-Ins. Bureau*, 20 Cal. Repr. 31. (1962).

25. 46-750.11(2).

26. *Blackwell v. United Ins. Co. of America*, 231 S.C. 535, 99 S.E.2d 414 (1957); *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215, 45 A.L.R. 1172 (1926).

27. Section 46-750.11(1).

28. *Hodgson v. Doe*, 203 Va. 938, 128 S.E.2d 444 (1962).

29. Section 46-750.11(2).

The uninsured motorist endorsement must contain a provision 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." Recovery under this endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist.³⁰ In an action against the uninsured motorist the only issues to be determined are liability and the amount of damage, and once judgement is entered, these issues cannot be relitigated. Until final judgment is entered against the uninsured motorist, a direct action cannot be brought against the insurance carrier.³¹ In an action against a known or unknown uninsured motorist, the insurance carrier is precluded from raising policy defenses since such an action is one *ex delicto*. But an action against the company is an action *ex contractu* brought to recover from the insurance company on its endorsement, and since this is an action based on contract, policy defenses may properly be raised by the company.³²

JOHN DOE ACTIONS

In order to fully carry out the purpose of the Uninsured Motorist Law the legislature had to solve the problem of the hit-and-run motorist who leaves innocent victims with no method of recovery. Our law, therefore, provides that if the owner or operator of any vehicle causing injury or damage be unknown, an action may be instituted against the unknown motorist as "John Doe."³³

30. Section 46-750.11(7).

31. The South Carolina legislature has clearly shown its intent that an insured cannot maintain an action on the policy to require the insurer to pay him his damages without having first brought suit against the uninsured. Section 46-750.11(2) requires the insurer to 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." Arbitration being expressly prohibited, a judgment is necessary to establish what damages the insured is "legally entitled" to recover. If this had not been the intent of the legislature there would not have been any reason for the obvious fiction of the John Doe action as provided in Section 46-750.11(5). It would have been far simpler to provide for direct action against the insurer. See *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961); *Kirovac v. Healey*, 104 N.H. 157, 181 A.2d 634 (1962); *Rogers v. Danko*, 204 Va. 140, 129 S.E.2d 828 (1963). The law now gives the company the right to defend the uninsured motorist. To allow a direct action against the insurance company would abrogate this statutory right.

32. *Doe v. Brown*, 203 Va. 508, 125 S.E.2d 159 (1962); *Rogers v. Danko*, 204 Va. 140, 129 S.E.2d 828 (1963).

33. Section 46-750.11(5).

“ . . . John Doe is a fictitious person created under the provisions of the Statute to stand in the place of the unknown motorist. John Doe is not a person but for the purposes of this proceeding speaks through the insurance company. The insurance company, which is the party ultimately liable under the provisions of its policy for payment of a judgment obtained against John Doe speaks and defends the action through and in the name of John Doe.”³⁴

Service of process is perfected upon “John Doe” by delivering a copy of the summons and complaint to the clerk of court for the county in which the action is brought and serving one upon the insurance company issuing the policy.³⁵ It is the service of process upon the company which gives it the right to file pleadings and take any other action allowable by law in the name of John Doe.³⁶

There is nothing in our law relating to the proper venue of a suit instituted against an unknown uninsured motorist. It has been held in a recent Virginia decision³⁷ that an unknown uninsured motorist may be sued in any county where the insurance company can be sued, since a suit against John Doe is in effect a suit against the company. With this reasoning we cannot agree. As Justice Whittle pointed out in his dissenting opinion, the action against John Doe is one *ex delicto*, not *ex contractu*. Since the insurance company is not a party defendant to that suit, venue cannot be based upon the insurer’s residence. The real defendant, John Doe, being unknown, venue should not be based upon his unknown residence; the suit should be brought where the cause of action arose. The hardships worked against the company in bringing witnesses from out of state to South Carolina could be staggering. The proper procedure would be to require the insured to bring his tort suit against John Doe where the cause of action arose and then pursue his action against the insurance company in South Carolina for the collection of his judgment.

34. Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962); Doe v. Faulkner, 263 Va. 522, 125 S.E.2d 169 (1962); Hodgsen v. Doe, 203 Va. 938, 128 S.E.2d 444 (1962).

35. Section 46-750.11(5); 46-750.11(2).

36. Section 46-750.11(5); State Farm Mut. Auto. Ass’n v. Duncan, 203 Va. 440, 125 S.E.2d 154 (1962).

37. Mangum v. Doe, 203 Va. 518, 125 S.E.2d 166 (1962).

When the identity of the uninsured motorist is known, the action must be brought in the county in which the defendant uninsured motorist resides. To allow otherwise would be to violate a substantial right of the defendant.³⁸ It should be remembered that a defendant does not give up any of his legal rights, constitutional or otherwise, merely because he is an uninsured motorist. A motorist may be uninsured for several reasons. Probably more motorists become uninsured due to policy cancellations and lapses than to any other cause. Since the uninsured motorist is bound by the judgment entered against him, he has a right to be tried in the county of his residence.

Where the owner or operator of a motor vehicle is unknown, there can be no right of action or recovery unless: (1) the accident was reported to the appropriate police authority within a reasonable length of time; (2) there was physical contact between the insured and unknown vehicle; and (3) the insured was not negligent in not ascertaining the identity of the uninsured motorist.³⁹ These requirements were undoubtedly enacted to protect the insurance companies from fraudulent claims.

Neither the bringing of an action nor the entry of judgment against John Doe constitutes a bar to the insured from later bringing an action against such owner or operator whose identity is subsequently discovered. However, the insurance company is subrogated to the amount paid the insured, but must also pay its proportionate part of any reasonable costs,

38. Section 10-303.

39. Section 46-750.11(4). There was nothing in our law prior to the 1963 amendment which required physical contact between the insured and uninsured motor vehicle. The law allowed the insured to collect from his insurance company "all sums which he shall be legally entitled to recover as damages from the owner or operator of an insured motor vehicle." Section 46-750.14. The law further provided "nor may anything be required of the insured except the establishment of legal liability." Section 46-750.18. Since the insured can establish "legal liability" without physical contact any policy provision which required physical contact was invalid as contrary to the provisions of the law. It is settled in South Carolina that it is not necessary to the establishment of legal liability that there be physical contact between two motor vehicles. *Green v. Sparks*, 232 S.C. 414, 102 S.E.2d 435 (1958); see also *Doe v. Brown*, 203 Va. 508, 125 S.E.2d 149 (1962).

In *Mangum v. Doe*, 203 Va. 518, 125 S.E.2d 166 (1962), the court construed the act as requiring an insured to exercise due diligence or care to ascertain the identity of an unknown motorist causing injury or damage. The legislature by this section has expressly overruled this result.

expenses and reasonable attorney's fees.⁴⁰ Should the indentity of the unknown owner or operator become known during the pendency of an action against John Doe, our statute specifically authorizes the joinder "of any other person."⁴¹ If the known defendant turns out to be in fact insured, obviously the insured's uninsured motorist carrier would be relieved of any further obligation with respect to a judgment recovered against the known insured motorist.

SUBROGATION

An insurer paying a claim under the uninsured motorist endorsement is subrogated to the rights of the insured, to the extent of its payment, against the uninsured motorist.⁴² However, a workmen's compensation carrier and a collision insurer are never subrogated to the rights of the insured under the uninsured motorist endorsement. Both of these carriers are subrogated against the uninsured motorist but not against the contract rights of the insured.⁴³

In the Virginia case of *Horne v. Superior Life Ins. Co.*,⁴⁴ an employee filed a claim against his employer for compensation benefit for injuries sustained. The industrial commission denied the claim because the employee had executed a release to his uninsured motorist insurer and thereby destroyed his employer's right to subrogation. The court allowed a recovery under the Workmen's Compensation Act, however, because the endorsement provides coverage for the insured motorist and not for the uninsured motorist. The uninsured motorist company's liability to its insured is contractual, even though based upon the contingency of a third party's tort liability. Therefore, the workmen's compensation carrier was not subrogated to the rights of the insured under the uninsured motorist endorsement and the release given by the employee did not destroy its right of subrogation.

40. Section 46-750.11(6). As to attorney's fees in other than a John Doe action, see the case of *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961), wherein the court allowed the plaintiff's attorney reasonable attorney's fee deductible from the proceeds from which the insurance company had a subrogation interest.

41. Section 46-750.11(5).

42. Section 46-750.11(6).

43. *Horne v. Superior Life Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962).

44. 203 Va. 282, 123 S.E.2d 401 (1962).

In *Jarrett v. Allstate Ins. Co.*⁴⁵ the insured sought uninsured motorist coverage after recovering workmen's compensation benefits from his employer. The court allowed an offset against the uninsured motorist endorsement for all sums paid by the workmen's compensation carrier. Indicating that a workmen's compensation carrier was not subrogated to the proceeds of its employee under the endorsement, the court said:

This section of the policy does not apply: ". . . so as to enure directly or indirectly to the benefit of any workmen's compensation carrier or any person or organization qualified as a self-insurer under any workmen's compensation law." . . . [s]uch language indicates that the parties did not intend to make a contract for the benefit of a third person, i.e., the compensation carrier, but that it was their intention that in any one accident involving an uninsured motorist the insured would receive the sum of at least \$10,000 for his injuries.

Our law authorizes the uninsured motorist carrier to exclude any liability for property damage for which an insured has been compensated by insurance or otherwise.⁴⁶ Most uninsured motorist endorsements provide that "with respect to property damage the insurance afforded under this coverage shall be excess insurance over any other valid and collectible insurance against such property damage." This exclusion would prevent subrogation by a collision insurer even if it could be subrogated to the contract rights of its insured. The above mentioned exclusion would also operate to prevent the insured from collecting under his collision coverage and recovering again under the uninsured motorist endorsement.

The *Horne* case also held that the employer's right of subrogation against the negligent third party is superior to that of the insurer under the uninsured motorist law. The court considered the public policy, legislative intent and welfare aspects of the workmen's compensation act in arriving at this conclusion. There is no such reasoning which applies to a collision insurer; therefore, it would seem that the collision insurer and the uninsured motorist's carrier would share equal priority to the assets of the uninsured motorist.

45. 26 Cal. Repr. 231 (1962).

46. Section 46-750.11(8).

ARBITRATION

Arbitration of claims under the uninsured motorists endorsement is prevented in South Carolina by statute⁴⁷ as well as by decision.⁴⁸ The section of the law barring arbitration states that the insured shall not be prevented or restricted in any manner from employing legal counsel or instituting legal proceeding.⁴⁹

DEFENSE OF AN UNINSURED MOTORIST

The insurance company has a right to defend a known or unknown uninsured motorist.⁵⁰ Copies of the pleading must be served upon the company who shall have the right to appear and defend in the name of the uninsured motorist within 20 days after service upon it. "A copy of the process must be served on the insurance company before it may be held liable under the uninsured motorist act. The language employed is mandatory and establishes a condition precedent to the benefits of statute unless waived by the insurance company."⁵¹ An insurance company can only be served in this state by service upon the Insurance Commissioner,⁵² and this procedure must be followed to commence uninsured motorist actions. However, there is no duty on the company to defend the uninsured motorist either under the standard endorsement or the South Carolina Uninsured Motorist Law. Most uninsured

47. Section 46-750.11(7).

48. Childs v. Allstate Ins. Co., 237 S.C. 455, 117 S.E.2d 867 (1961).

49. Section 46-750.11(7).

50. Section 46-750.11(2). Prior to the 1963 amendment the uninsured motorist law as adopted in South Carolina contained no provision relating to the defense of a known uninsured motorist by an insurance company. The courts are in general agreement that the insurance company is bound by the judgment obtained against the uninsured motorist by the insured motorist. The general rule is that an automobile liability insurer is bound by the result of litigation only when it has notice of the action and an opportunity to control its proceedings. 9 APPLEMAN INSURANCE LAW §4860 (1962), 5A AM. JUR. *Automobile Insurance* §191, (1936). Apparently this is the rule in South Carolina. *Carolina Veneer & L. Co. v. American Mut. Liab. Ins. Co.*, 202 S.C. 103, 24 S.E.2d 153 (1943). Being bound by the prior adjudication, the insurance company has the right to defend the uninsured motorist. *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961); *Kirovac v. Healey*, 104 N.H. 157, 181 A.2d 634 (1962); *Rogers v. Danko*, 204 Va. 140, 129 S.E.2d 328 (1963). In *Missouri ex rel., State Farm Mut. Ins. Co. v. Craig*, 364 S.W.2d 343 (Mo. 1963) the court held that the insurance company could intervene as a matter of right to defend a known uninsured motorist. See S.C. CODE, §10-219 (1962).

51. *Crateau v. Phoenix Assur. Co. of N.Y.*, 202 Va. 641, 119 S.E.2d 336 (1961).

52. Section 10-425.

motorist endorsements carry a "notice of legal action" clause.⁵³ In the case of *State Farm Mut. Auto. Ins. Co. v. Duncan*⁵⁴ the court stated that

the obvious purpose of the "notice of legal action" provision is to give the insurance company notice of the institution of a suit by its insured against an uninsured motorist in order that the company may inquire into the matter and take such steps as it deems necessary to protect its interests. It is vitally interested in such a suit in two ways. Under the terms of its policy it will have to pay whatever judgment its insured may recover against the uninsured motorist . . . [u]pon the payment of such claim, it is subrogated to the rights of its insured against such uninsured motorist.

The "notice of legal action" clause does not conflict with any provision of our law but is supplemental to the section requiring service of process upon the company.

In order to recover under the uninsured motorist endorsement it must be established that the owner or operator of the adverse motor vehicle was in fact uninsured.⁵⁵ This burden rests upon the insured. Should the record be silent on this question then the insured has failed to bring himself within the terms of the law.

The uninsured motorist endorsement in most policies contains a clause requiring the insured to submit to a physical examination when requested by the company. In at least two cases the court noted that the insured submitted to a physical examination upon the request of the company pursuant to the policy provisions.⁵⁶ Most policies likewise provide that the insured must co-operate with the company.⁵⁷ These two requirements are not in conflict with the statute and must be complied with.

53. "If, before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury or property damage against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the Summons and Complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative."

54. 203 Va. 440, 125 S.E.2d 154 (1962).

55. *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961).

56. *Levy v. American Auto. Ins. Co.*, *supra* note 55.

57. *Pharr v. Canal Ins. Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958).

INSURANCE FOR THE INSURED

It seems to be well settled that "the effect of the uninsured motorist law is not to provide insurance coverage upon each and every uninsured vehicle but is to provide coverage to the insured motorist."⁵⁸ Accordingly, when an insured motorist is involved in an accident with two uninsured vehicles, this will not increase the coverage available to the insured under the endorsement.⁵⁹

Payment of an amount in settlement by the carrier to the insured and the execution of a policy release will not absolve the uninsured motorist from liability. The uninsured motorist's carrier is not a joint tort-feasor with the uninsured motorist; the obligations of the uninsured motorist's carrier are based solely on contract. The law provides for subrogation against the uninsured motorist upon payment to its insured, and a policy release obtained from the insured will have no effect upon the uninsured motorist's liability.⁶⁰

AMOUNT OF RECOVERY

Many problems arise concerning multiple coverage under the uninsured motorist law. One such problem was discussed in a recent case which held that where a guest passenger occupies the status of an insured under both his host's and his own policy, the host's uninsured motorist protection is the prime coverage, the guest's uninsured motorist coverage being excess.⁶¹ The excess clause, being valid, requires that the host's limits be exhausted before recovery can be had under the guest's uninsured motorist endorsement.⁶² Further, where the prime coverage is exhausted the excess insurer need not provide uninsured motorist coverage to its insured where

58. *State Farm Mut. Auto. Ins. Co. v. Drewry*, 191 F. Supp. 852 (W. D. Va. 1961); *Kirovac v. Healy*, 104 N.H. 157, 181 A.2d 634 (1962).

59. *State Farm Mut. Auto. Ins. Co. v. Drewry*, *supra* note 58; *Drewry v. State Farm Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963).

60. *Horne v. Superior Life Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962); and *Kirovac v. Healey*, 181 A.2d 634 (N.H. 1962).

61. "With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance."

62. *Hobbs v. Buckeye Union Cas. Co.*, 212 F. Supp. 349 (W. D. Va. 1962).

there is other valid and collectible insurance available at the *time of the accident*, both policies containing identical policy limits.⁶³ And this follows even though the primary coverage is not exhausted until a judgment is obtained.

Most uninsured motorist endorsements provide that a recovery made under the liability portion of the policy reduces the amount collectible under the uninsured motorist endorsement. This situation would occur if a guest were injured as a result of the concurrent gross negligence of the host driver and the negligence of an uninsured motorist. A guest would be an insured under the host's uninsured motorist endorsement and would also have a cause of action against the host driver for which the insurance company would have liability coverage. It seems to us that the insurance company can limit its coverage to the minimum amounts required by the Uninsured Motorists Law.⁶⁴

The problem of excess coverage has also arisen where an insured is covered by more than one policy in the same household, i.e., where there are two insured motor vehicles containing the uninsured motorist endorsement. Most policies contain a pro-rata clause limiting liability to the minimums required by the law. This limitation does not contravene any requirement of the uninsured motorists law and, therefore, is valid.

CONCLUSION

From our analysis of the Uninsured Motorists Law we are of the opinion that the courts will require an insured to strictly comply with all procedural aspects of the law and the policy. However, when dealing with the question of coverage, a liberal view will be taken. Most of the policy provisions placed in the uninsured motorist endorsement are required by statute. Being mandatory, these provisions should not be construed against the company. Those provisions of the endorsement relating to procedure are a justifiable attempt by the companies to place themselves in a position to properly evaluate the insured's claim, and they should be fairly construed and endorsed by our courts. For an insured to deliberately refuse

63. *Travelers Indem. Co. v. Wells*, 316 F.2d 770 (4th Cir. 1963), overruling *Travelers Indem. Co. v. Wells*, 209 F. Supp. 784 (W. D. Va. 1962).

64. *State Farm Mut. Auto. Ins. Co. v. Drewry*, 191 F. Supp. 852 (W. D. Va. 1961).

to comply with the provisions of his policy would clearly operate to deny the company its fair protection. However, as far as the question of coverage is concerned, the court will, in carrying out the intent of the law, provide coverage within the basic limits if at all possible.