RECENT DEVELOPMENTS IN ARIZONA'S UNINSURED MOTORIST COVERAGE

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Compensating those injured in automobile accidents is a critical problem in this country. Liability insurance plays the major role, but there are many automobile drivers who are unable to pay the damages which their negligence may cause because they are neither financially responsible nor covered by liability insurance. Consequently, states have enacted Financial Responsibility Laws which, in various forms, require drivers without sufficient assets to carry minimum amounts of liability insurance.[1]

The Arizona Financial Responsibility Law[2] does not require a driver to have liability insurance before he is licensed to drive an automobile. Upon being involved in an accident with a specified amount of damage,[3] however, a driver will have his license revoked unless he was covered by a liability policy within the statutory limits.[4] Without such a policy and absent narrowly defined exceptions,[5] he may retain his license only by showing that he has made arrangments to satisfy any judgment which may be recovered against him as a result of the accident.[5a]

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1 For a partial list of states enacting Financial Responsibility Laws, see 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4295 (1962).

2 ARIZ. REV. STAT. ANN. §§ 28-1101 *et seq.* (1956). For a general discussion of the Arizona law see Comment, *Automobile Liability Insurers in Arizona—Are They Absolutely Liable?*, 5 ARIZ. L. REV. 248 (1964).

3 The Financial Responsibility Law applies to those accidents resulting "in bodily injury or death or damage to the property of any one person in excess of one hundred dollars . . . ." ARIZ. REV. STAT. ANN. § 28-1142(A) (Supp. 1970-71). For additional limitations on the application of this section, see *id.* § 28-1143 (1956).

4 The Arizona statute requires $10,000 for injury or death to one person with at least $20,000 available for injuries or death to two or more persons. *Id.* § 28-1142 (C) (Supp. 1970-71).

All registrations of each owner of a vehicle involved in such an accident will also be revoked if the minimum policy limits are not satisfied. *Id.* § 28-1142(A).

It should be noted that in Bell v. Burson, 39 U.S.L.W. 4607 (U.S. May 24, 1971), the United States Supreme Court held that procedural due process requires that before the license of an uninsured motorist who is involved in an accident can be suspended under Georgia's Motor Vehicle Safety Responsibility Act, a procedure must be provided for determining whether there is a reasonable possibility that a judgment will be rendered against him as a result of the accident.

5 *Id.* § 28-1143(A) (1956).

5a In Perez v. Campbell, 39 U.S.L.W. 4618 (U.S. June 1, 1971), the United States Supreme Court held that the driver's license of an uninsured motorist cannot be revoked when the judgment against him resulting from an accident has been discharged in bankruptcy. The court ruled that ARIZ. REV. STAT. ANN. § 28-1163(B) (1956) directly conflicts with § 17 of the Bankruptcy Act, 11 U.S.C. § 35 (1964) and is thus unconstitutional as violative of the Supremacy Clause, U.S. CONST. art. VI, cl. 2.

Kessler v. Department of Public Safety, 369 U.S. 153 (1962), and Reitz v. Mealey, 314 U.S. 33 (1941), two earlier opinions dealing with alleged conflicts be-

This procedure does not guarantee the injured party compensation, however. Without liability insurance, for example, the tortfeasor might be unable to compensate the injured party. This possibility has given rise to uninsured motorist coverage. A policyholder with this type of coverage may recover from his own insurance company the amount of his damages, up to his policy limits, for bodily injury or death caused by an "uninsured motor vehicle."[6] In other words, the policyholder is insuring himself for injuries caused by the negligence of an uninsured motorist. In Arizona, a minimum coverage of $10,000 is required unless specifically rejected by the insured.[7]

On October 8, 1970, the Supreme Court of Arizona handed down three decisions which will have a great impact on Arizona's uninsured motorist statute. In *Porter v. Empire Fire & Marine Insurance Co.*,[8] the court considered whether a motorist, although covered by the statutory minimum liability coverage, could be "uninsured" because the injured policyholder could not recover the full $10,000. *Transportation Insurance Co. v. Wade*[9] dealt with whether uninsured motorist coverage under different policies could be tacked together despite a provision in one of the policies attempting to preclude this result. Finally, the interrelationship of the medical payment and the uninsured motorist endorsements was determined in *Bacchus v. Farmers Insurance Group Exchange.*[10] In each of these cases, the supreme court distinguished earlier decisions by the court of appeals, *Harsha v. Fidelity General Insurance Co.*,[11] *Geyer v. Reserve Insurance Co.*[12] and *Caballero v. Farmers Insurance Group*,[13] thereby giving them its implicit approval. Less than a month later, the court of appeals decided *Mazon v. Farmers Insurance Exchange*[14] concerning the circumstances under which damages caused by a "hit-and-run" driver could come within an uninsured motorist endorsement.

These decisions by the supreme court and the court of appeals add content to Arizona's uninsured motorist statute. They leave other questions unanswered, however. This commentary will examine these cases and attempt to forecast the future development of this area of the law in Arizona.

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tween the Bankruptcy Act and state financial responsibility laws were held to be not controlling to the extent they are inconsistent with the principle that state legislation which frustrates the full effectiveness of federal law is invalidated by the Supremacy Clause.

6 The Arizona uninsured motorist statute is *id.* § 20-259.01 (Supp. 1970-71).
7 *Id.*
8 106 Ariz. 274, 475 P.2d 258 (1970).
9 106 Ariz. 269, 475 P.2d 253 (1970).
10 106 Ariz. 280, 475 P.2d 264 (1970).
11 11 Ariz. App. 438, 465 P.2d 377 (1970).
12 8 Ariz. App. 464, 447 P.2d 556 (1968).
13 10 Ariz. App. 61, 455 P.2d 1011 (1969).
14 13 Ariz. App. 298, 475 P.2d 957 (1970).

WHO IS AN "UNINSURED MOTORIST?"

For an injured party to recover his uninsured motorist coverage, the driver at fault must be an uninsured motorist. The difficulty lies, however, in defining an uninsured motorist for this purpose. A hit-and-run driver is generally considered to be an uninsured motorist.[15] Some courts have broadened this definition to include the driver who gives false identification, and situations where the injured party is afraid to get out of his car at the scene, or where the injured party did not get the negligent driver's identification because he did not think there were any injuries.[16]

In *Mazon v. Farmers Insurance Exchange*, the Court of Appeals of Arizona considered whether "physical contact" between the claimant and another vehicle is required for uninsured motorist coverage to apply.[17] In that case, the claimant, while driving his vehicle, was struck in the eye by a rock thrown by an occupant of another vehicle. There was no identification of the other vehicle or of the assailant. The claimant's uninsured motorist endorsement defined an uninsured vehicle as either a vehicle which is shown to be uninsured, or a hit-and-run vehicle. The policy went on to define a hit-and-run vehicle as one causing bodily harm to the insured by physical contact between it and the insured vehicle.

Since the claimant could not prove the other vehicle was uninsured, he sought recovery on the theory that it was a hit-and-run vehicle. Although there had been no physical contact between the vehicles, the court of appeals allowed recovery. It reasoned that, notwithstanding the policy requirement, coverage should extend to all injuries proximately caused by the hit-and-run vehicle and not merely to those where there has been an actual physical contact.[18] The court noted that the statute was not limited to cases involving "physical contact," but that it required coverage for persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.[19] The court found that the insured's injury resulted from a hit-and-run vehicle and that the coverage applied.

An earlier court of appeals decision, *Lawrence v. Beneficial Fire and Casualty Insurance Co.*,[20] was distinguished by the court. In *Lawrence*, the insured was injured when his vehicle was run off the road by an unidentified motorist although there was no physical contact between the two vehicles. Division One of the Court of Appeals of Arizona relied

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15 Feldman, *Uninsured Motorist Coverage*, 1969 ABA SEC. INS., NEGL. & COMP. L. 370, 375.

16 Pretzel, *Keeping Up-To-Date on Uninsured Motorist Coverage*, 1968 INS. L.J. 865, 866.

17 See Feldman, *supra* note 15, at 375-76 for a discussion of the requirement of physical contact.

18 13 Ariz. App. at 300, 475 P.2d at 959. *But see* Lawrence v. Beneficial Fire & Cas. Ins. Co., 8 Ariz. App. 155, 444 P.2d 446 (1968).

19 13 Ariz. App. at 299, 475 P.2d at 959.

20 8 Ariz. App. 155, 444 P.2d 446 (1968).

on the policy provision requiring physical contact to rule in favor of the insurer.[21] Division Two, in *Mazon* however, determined *Lawrence* to be inapplicable because it was decided prior to the enactment of Arizona's uninsured motorist statute.

Although *Mazon* negates the "physical contact" requirements found in almost all policies,[22] it raises additional questions. Every vehicle which causes injuries to someone may well be an "uninsured vehicle" under the statute unless the insurance company can prove that it was covered by insurance. It would seem that the insurer has this burden of proof because the *Mazon* court treated the terms "uninsured vehicle" and "hit-and-run vehicle" as though they were synonymous.

Secondly, the intentional acts of an occupant of an uninsured vehicle may now come within the ambit of the uninsured motorist endorsement. Although the court in *Mazon* stated that it would presume that the rock-throwing was not intentional,[23] the door is left open for claims for clearly intentional acts. Arizona's uninsured motorist statute does not require negligence, nor does it exclude intentional acts. It states only that coverage must be afforded for persons legally entitled to recover damages for bodily injury from uninsured motorists. A person is legally entitled to recover damages from one who assaults him. Under a liberal reading of the statute and with reference to the facts and ruling in *Mazon,* it seems at least arguable that a claim for an assault by an uninsured motorist could be covered.

The difficulty with this argument, however, is that if coverage is found for an assault, the insured would receive greater protection than if the assailant had been insured. If the rock thrower were insured and his identity known, then his liability carrier would deny coverage because of the standard "intentional act" exclusion in the policy. Therefore, a company writing an uninsured motorist endorsement would have greater exposure than a liability carrier covering the same incident. While this may be desirable for the policyholder with an uninsured motorist endorsement, it is hardly required by the statute.

AN INSURED MOTORIST AS "UNINSURED"

As evidenced by *Porter, Bacchus* and *Wade,* Arizona has a strong public policy in favor of compensating through insurance those injured in automobile accidents. That social objective is the basis for both the Financial Responsibility Laws and the uninsured motorist laws.

Even though a motorist may carry the minimum insurance required

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[21] *Id.* at 158, 444 P.2d at 449. *Contra,* Butts v. State Farm Mut. Auto. Ins. Co., 207 So. 2d 73 (Fla. App. 1968); Prask v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967).

[22] *Accord,* Gavin v. M.V.A.I.C., 57 Misc. 2d 335, 292 N.Y.S.2d 475 (1968).

[23] 13 Ariz. App. at 301, 475 P.2d at 960.

by statute, however, that coverage may be insufficient to compensate all of the injured parties in the amount envisaged by the Financial Responsibility Laws. In *Porter v. Empire Fire & Marine Insurance Co.*, the Supreme Court of Arizona considered the extent to which a motorist covered by liability insurance could be an "uninsured motorist" within the context of another's policy. Porter and four others were injured when the car in which they were riding was struck by another vehicle. The negligent driver's liability policy had the standard minimum limits of $10,000 for each person and a maximum of $20,000 for each accident. His insurer entered into a settlement with Porter and the other four injured passengers, paying out its entire $20,000. Porter, however, received only $2,500.

Porter then filed an action against his insurer under the uninsured motorist provisions of his policy, claiming that to the extent of his uncompensated injuries, the negligent driver was an uninsured motorist. The insurance company moved to dismiss the suit, arguing that uninsured motorist coverage meant just what it said and that there could be recovery only if the other driver was actually uninsured. Because the negligent driver had liability insurance in the minimum amount required by law,[24] the trial court granted the insurer's motion to dismiss.

Judge Hathaway, writing for the court of appeals, reversed the trial court and held that the negligent driver was an uninsured motorist. The court quoted with approval a decision by the Supreme Court of Oregon: " 'In other words, the legislative purpose of creating compulsory uninsured motorist coverage was *to place the insured policyholder in the same position he would have been in if the tortfeasor had had liability insurance.*' "[25] The court construed this language to mean that the injured policyholder should be placed in the same position he would have been in if the tortfeasor had liability insurance available to pay him at least $10,000 for his injuries.

Immediately prior to the decision in *Porter*, a similar case, *Harsha v. Fidelity General Insurance Co.*,[26] was decided by a different division of the court of appeals. In *Harsha* the question was whether uninsured motorist coverage was available to compensate a person for the difference between the tortfeasor's liability insurance and the amount of damages actually incurred by the injured person. The insured's son was injured by a motorist whose automobile liability insurance coverage was $10,000 for any one person and $20,000 for any one accident. After the case had been settled for $9500, the insured commenced an action against her own carrier under its uninsured motorist coverage alleging that her son's injuries approximated $50,000 and that he had not been fully compensated. The

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24 ARIZ. REV. STAT. ANN. § 28-1142(C) (Supp. 1970-71).

25 12 Ariz. App. 2, 5, 467 P.2d 77, 80 (1970) (emphasis by the Arizona court), *quoting* Peterson v. State Farm Mut. Ins. Co., 238 Ore. 106, 112, 393 P.2d 651, 653 (1964).

26 11 Ariz. App. 438, 465 P.2d 377 (1970).

insured argued that the negligent driver was an uninsured motorist to the extent that his insurance did not fully compensate the injuries.

The trial court dismissed the complaint and the court of appeals affirmed. The court of appeals reasoned that although the word "uninsured" is not defined in the statute, its plain and clear meaning is "not insured."[27] It held the uninsured motorist coverage inapplicable on the ground that the negligent driver was insured and the uninsured provision was to cover only uninsured motorists and was not an excess insurance clause.

Because of a possible conflict between *Porter* and *Harsha*, the supreme court granted review of *Porter* although it denied review in *Harsha*. Distinguishing the two opinions, the supreme court approved both *Porter* and *Harsha*. The court held that the purpose behind the uninsured motorist statute was to benefit the injured party to the same degree as if the uninsured motorist had liability insurance available to the injured party in the minimum limits set by the Financial Responsibility Act. The key words in the court's holding appear to be "available to the injured party" since the negligent driver in *Porter* had liability insurance in the minimum statutory limits in a solvent company.[28] *Harsha* was distinguished on the ground that the insured had $10,000 of coverage available to her.

The *Porter* holding seems to go further than those of other courts on similar questions. For example, there are numerous cases, some of which were cited by the court of appeals in *Porter*,[29] which have held that drivers of out-of-state automobiles are uninsured motorists if the amount of their insurance does not satisfy the minimum required under the state's Financial Responsibility Law. Other cases hold that a motorist is uninsured when his liability carrier is insolvent.[30] *Porter*, therefore, is probably one of the first cases to hold that a motorist can be uninsured even though he has valid and enforceable insurance in a solvent company with limits as prescribed by the Financial Responsibility Laws of the state in which the accident occurs.

A brief discussion of an analogous decision will indicate the significance of *Porter*. In *White v. Nationwide Mutual Insurance Co.*,[31] the plaintiff was covered by an uninsured motorist endorsement providing coverage up to $15,000 for one person, which was the minimum prescribed by the applicable Virginia statute. Another statute provided that a motorist must

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27 *Id.* at 440, 465 P.2d at 379.
28 106 Ariz. at 279, 475 P.2d at 263.
29 *E.g.*, White v. Nationwide Mut. Ins. Co., 361 F.2d 785 (4th Cir. 1966); Calhoun v. State Farm Mut. Auto. Ins. Co., 254 Cal. App. 2d 407, 67 Cal. Rptr. 177 (1967); Taylor v. Preferred Risk Mut. Ins. Co., 225 Cal. App. 2d 80, 37 Cal. Rptr. 63 (1964); Carrigan v. Allstate Ins. Co., 108 N.H. 131, 229 A.2d 179 (1967); Allstate Ins. Co. v. Fusco, 101 R.I. 350, 223 A.2d 447 (1966).
30 *E.g.*, Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968). In this regard, see ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1970-71) which deems a motorist uninsured when his insurer becomes insolvent.
31 361 F.2d 785 (4th Cir. 1966).

carry a liability policy, also in the sum of $15,000. The plaintiff recovered a judgment for $22,000 against a driver who had only a $10,000 policy. The liability carrier for the tortfeasor paid $10,000 toward the judgment and the plaintiff made claim against her own uninsured motorist carrier for the balance. The court held that she was entitled to the full $12,000 difference since, by statute the tortfeasor was an uninsured motorist and the carrier's exposure, notwithstanding a provision in its policy to the contrary, was not reduced by the negligent driver's insurance coverage.

Although at first glance *White* would appear to be similar to *Porter*, it may be distinguished on the basis of the governing state law. Virginia defines any motorist with less than $15,000 liability coverage as an uninsured motorist.[32] Therefore, the court in *White* had little difficulty in finding that the plaintiff's uninsured motorist endorsement would apply to that situation. Arizona has no such statutory definition. Indeed, the negligent driver in *Porter* had a liability policy in the amount prescribed by the statute, yet the court held him to be uninsured. This is clearly beyond any other case to date.

There are, of course, arguments that can be raised on both sides of the situation in *Porter*. From the injured party's point of view, he purchases uninsured motorist protection so that he will receive up to $10,000 in the event he is injured in an accident. He pays premiums for this purpose and should not be denied this right because the tortfeasor was technically insured under the statute although no insurance is available to him.

The insurance industry, on the other hand, would argue that the sole purpose of uninsured motorist coverage is to put the injured party in the same position he would have been if the tortfeasor had had minimum limits liability coverage, and that is all he is entitled to. Before uninsured motorist coverage came into being, it would have been possible for an injured party to receive less than the full $10,000 of his tortfeasor's policy because there might have been three or more injured parties who would have to divide up to $20,000 total coverage. Therefore, since the purpose of uninsured motorist coverage is to create the same situation as though every motorist had a $10,000/$20,000 policy, and since even then an injured party might not be able to recover the full $10,000, there is no reason to increase an injured person's recovery because of uninsured motorist coverage.

Porter will apply irrespective of the limits of the tortfeasor's policy. For example, even if a negligent driver had a $1 million policy, the injured party theoretically could still make a claim against his uninsured motorist policy if the other claimants had exhausted the former's policy. While this example is somewhat farfetched, it does point up to the absurdity of the *Porter* holding.

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[32] VA. CODE ANN. §§ 38.1-381(c) (1970), 46.1-1(8) (Supp. 1970).

Nevertheless, the Supreme Court of Arizona might conceivably go further and hold that under facts similar to *Porter*, the entire amount of uninsured motorist coverage is available, even though the injured party has recovered a portion of his damages from the tortfeasor. The court was not faced with this issue in *Porter* because the claimant had only alleged damages of $10,000 in his complaint. Since he was paid $2,500 by the negligent driver's insurer, he sought a judgment of only $7,500. The insured could have claimed, however, that he had been damaged in excess of $12,-500 and asked that the entire $10,000 of coverage be made available. *Porter's* approval of *Harsha* and its holding that an injured party should recover up to, but not more than, $10,000 would seem to mitigate against this result, however.

The supreme court's decision in *Porter* did not consider uninsured motorist coverage in excess of the minimum limits prescribed by the Financial Responsibility Law. A claimant with injuries and an uninsured motorist endorsement of $20,000, for example, could seek reimbursement from his insurer if he were injured by a negligent driver with the minimum $10,000/$20,000 policy. In such a case the negligent driver would not be uninsured within the statutory meaning and the insurer would seek to deny any liability under the uninsured motorist provision. This would leave the injured claimant with a recovery of only $10,000 which is less than it would have been had the negligent driver had no insurance or insurance less than the statutory minimum. Two recent cases have discussed this problem. In both *Detrick v. Aetna Casualty & Surety Co.*[33] and *Smiley v. Estate of Toney*,[34] the courts held that the injured party was not entitled to recover from his uninsured motorist carrier since the tortfeasor was not uninsured and the minimum statutory limits were available to the injured party. *Porter's* holding that the purpose of the uninsured motorist statute is to provide up to $10,000 for the injured party, seems to indicate that the Supreme Court of Arizona would follow these decisions. Adoption of *Detrick* and *Smiley* in Arizona would require an extension of *Porter*, however, because *Porter* dealt with the statutorily required coverage and not that which had been contractually agreed upon by the insurer and the insured.

These decisions, however, have been criticized by Professor Widiss on the ground that the injured motorist would be better off if the other party had no insurance rather than a $10,000/$20,000 policy.[35] He concludes that such a result is contrary to the policy of the uninsured motorist statutes. Professor Widiss also argues that the injured motorist theoretically purchased $20,000 of uninsured motorist coverage in the expectation that he could receive up to this amount in the event his tortfeasor had only mini-

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[33] 261 Iowa 1246, 158 N.W.2d 99 (1968).
[34] 100 Ill. App. 2d 271, 241 N.E.2d 116 (1968).
[35] A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969).

mum limits. Whether the Supreme Court of Arizona will follow this reasoning and limit its language in *Porter* can only be a matter of speculation.

THE PROBLEM OF TACKING[36]

Under the Arizona uninsured motorist statute, coverage must be provided in the minimum amount of $10,000 for each person and $20,000 for each accident unless rejected by the insured. Since $10,000 is frequently inadequate to compensate an injured party for the damage he has sustained, he will usually be interested in recovering under the uninsured motorist endorsements of more than one liability policy if possible.

An example of this situation arose in *Transportation Insurance Co. v. Wade*. There, the driver of an automobile had liability coverage with an uninsured motorist endorsement. His passenger also had uninsured motorist coverage which was applicable whether he was injured while in his own automobile or someone else's. The car in which they were riding was struck by an uninsured motorist. The passenger then made claims under his own uninsured motorist coverage and that of his host. The passenger's insurer denied recovery relying on the "other insurance" clause[37] in its policy.

Since the terms of his policy were clear and unambiguous, the claimant attempted to have the "other insurance" clause declared invalid as contrary to public policy. Relying upon *Geyer v. Reserve Insurance Co.*,[38] the court of appeals held the clause void.[39] The court reasoned that since the statute was designed to protect the insured for as much of his actual loss as possible, if such losses exceeded $10,000 he should be allowed to have the benefit of more than one policy.

In *Geyer*, the court of appeals had held that the uninsured motorist coverage of a policy could be "tacked" to the *liability* coverage of the *same* policy to permit recovery of more than $10,000. There, a passenger was injured when the vehicle in which he was riding collided with one driven by an uninsured motorist. Although both drivers were negligent, only the driver of the car in which the passenger was riding was insured, having the statutory minimum amounts of liability and uninsured motorist coverage. The passenger first recovered $10,000 under the uninsured motorist cover-

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[36] For other discussions relating to the tacking problem, see Drummond, *Uninsured Motorist Coverage—A Suggested Approach to Consistency*, 23 ARK. L. REV. 167, 177-88 (1969); Feldman, *supra* note 15, at 376-77; Melton, *Uninsured Motorist Insurance in Alabama—Recent Developments*, 31 ALA. LAW. 314, 317 (1970); Schalbert, *Uninsured Motorist Coverage—Bane or Blessing?*, 1968 INS. L.J. 917, 922.

[37] Such a clause generally provides that when an insured is making a claim under his own uninsured motorist coverage with respect to any injury caused while he is occupying an automobile owned by a third party, his coverage will not apply if there is another policy in effect which will cover his injuries.

[38] 8 Ariz. App. 464, 447 P.2d 556 (1968).

[39] Transportation Ins. Co. v. Wade, 11 Ariz. App. 14, 461 P.2d 190 (1970).

age and then was awarded a $65,000 judgment against the two drivers in a negligence action. In the meantime, the passenger had sought a declaratory judgment action to determine whether the insurer of the car in which he was riding was liable beyond the $10,000 uninsured motorist coverage.

Even though the policy contained a clause preventing the recovery of more than $10,000 by a single claimant, the court of appeals allowed "tacking" of the liability and uninsured motorist coverage in the policy. Noting that earlier landmark opinions by the state supreme court indicated that the claims of automobile accident victims to insurance proceeds should be carefully protected,[40] the *Geyer* court found a strong public policy in the uninsured motorist statute which avoided the limiting clause in the policy.[41]

Although *Geyer* was not heard by the supreme court, *Wade* was.[42] In *Wade*, the supreme court reversed the finding of the court of appeals that the "other insurance" clause was void. The public policy established in Arizona, the court reasoned, was " 'that every insured is entitled to recover damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance in a solvent company.' "[43]

The supreme court misstated the facts in *Geyer* as involving a situation "where a passenger recovered under the liability clause of the primary policy applicable to the car in which he was riding and also under his own uninsured motorist policy applicable to the car operated by the uninsured tort-feasor."[44] The court went on to distinguish *Geyer* on the ground that both drivers involved in that accident were liable and thus the claimant was allowed to recover the total he would have received had both drivers been insured—$10,000 from each of the drivers. On the other hand, in *Wade*, the host driver's liability coverage was not available since only the uninsured motorist was negligent. The court concluded that since the claimant had already received $10,000 for the negligence of the uninsured driver—the total amount he could have recovered had that driver had the minimum required coverage—the "other insurance" clause in the claimants own policy was valid and he thus was precluded from recovering under his own uninsured motorist coverage for the same driver. The court

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[40] Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967), *noted in* 10 ARIZ. L. REV. 179 (1968); Carpenter v. Superior Ct., 101 Ariz. 565, 422 P.2d 129 (1966); Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963), *noted in* 5 ARIZ. L. REV. 248 (1964). *See generally* Kepner, *Arizona Automobile Liability Insurance Law—Beyond Mayflower,* 10 ARIZ. L. REV. 301 (1968).

[41] The court stated that the supreme court's decisions in *Sandoval, Carpenter* and *Jenkins* "indicate to us that Arizona will be nowhere but in the forefront of jurisdictions in making available to automobile accident victims the fullest benefits of insurance coverage." 8 Ariz. App. at 467, 447 P.2d 559.

[42] Transportation Ins. Co. v. Wade, 106 Ariz. 269, 475 P.2d 253 (1970).

[43] *Id.* at 273, 475 P.2d at 257, *quoting* Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 569, 156 N.W.2d 133, 138 (1968).

[44] 106 Ariz. at 273, 475 P.2d at 257.

added that if greater protection is required, the means for providing it "lies solely within the province of the Legislature."[45]

The distinction drawn by the supreme court in *Wade* is clearly tenable. If the purpose of uninsured motorist coverage is to give the injured party the same right of recovery as if the uninsured tortfeasor had a $10,000/-$20,000 policy, then it is apparent that when an injured claimant is fully compensated for his damages up to $10,000 there is no need to tack uninsured motorist coverage onto uninsured motorist coverage. The injured party could then receive $20,000 although he would have received only $10,000 had the tortfeasor had a $10,000/$20,000 policy. Similarly, it would be unnecessary to tack uninsured motorist coverage onto liability coverage when there is only one negligent driver.

In the application of "other insurance" clauses, however, it should be noted that the other insurance must be actually available to the injured party.[46] If an injured party cannot "*in fact*" collect for his loss under another's uninsured motorist coverage, the "other insurance" clause in the injured party's policy is inapplicable and he can recover under his own uninsured motorist coverage.[47]

A recent court of appeals decision, *State Farm Mutual Insurance Co. v. Edgington*,[48] relying upon *Porter*, has followed this reasoning in holding that under proper circumstances two uninsured motorist policies can be "tacked" together when an injured party remains uncompensated within the $10,000 limits of the statute. In *Edgington*, a couple and their child were riding in an automobile driven by a friend. An uninsured motorist negligently ran into their car, the husband was killed and the other occupants injured. The driver's insurer paid out the policy limits to its insured and the husband's estate. Thereafter, his wife and child, who were uncompensated, made a claim against their own uninsured motorist coverage. The court of appeals permitted "tacking" so that both the wife and the child could recover the policy limits of $10,000 even though all the injuries were caused by the negligence of a single uninsured motorist.

The Arizona courts, therefore, have clearly evidenced a trend toward liberality in allowing uninsured motorist policies to be tacked together to allow a greater recovery than might otherwise be possible. This tendency has been particularly pronounced when it has been the policyholder who sought to tack.

Offsetting Medical Payments

Many motor vehicle insurance policies contain a "medical payment" provision which for an additional premium provides the insured with cov-

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[45] *Id.* at 274, 475 P.2d at 258.
[46] Kraft v. Allstate Ins. Co., 6 Ariz. App. 276, 431 P.2d 917 (1967).
[47] *Id.* at 279, 431 P.2d at 920.
[48] State Farm Mut. Ins. Co. v. Edgington, 13 Ariz. App. 374, 476 P.2d 895 (1970).

erage for medical expenses incurred as a result of an automobile accident regardless of fault. These provisions, which are generally limited to one or two thousand dollars and those expenses incurred within one or two years of the accident, normally must be set-off against other coverage in the policy. In other words, policies generally provide that any payments under the medical clause will reduce the damage payments under the liability or uninsured motorist coverages. Although there is really no difference between the liability and uninsured motorist coverages with regard to the offset of medical payments, the Arizona cases appear to find one.

In *Caballero v. Farmers Insurance Group*,[49] the Arizona court of appeals upheld the validity of medical "advancement" offsets against liability proceeds. The supreme court, in *Bacchus v. Farmers Insurance Group Exchange*,[50] on the other hand, recently held that such offsets against uninsured motorist coverage were void. The reasoning of the court of appeals in *Caballero* was that the offset was a valid contractual provision because it reduced only the medical benefits coverage which was not mandatory. The supreme court in *Bacchus*, however, distinguished *Caballero* and held the offset invalid because it reduced the mandatory uninsured motorist coverage. Whatever ostensible logic this distinction may have can be seen upon analysis to be nonexistent.

The claimant in *Caballero* was negligently injured while a passenger in the insured's car and subsequently was awarded a judgment against him. In satisfying the judgment, the insurance company, relying on the offset clause, sought to reduce the payment by the amount it had advanced to the claimant under the medical coverage. Objecting to this deduction, the claimant garnished the insurance carrier for the amount of the offset.

Distinguishing two Florida decisions[51] on the ground that the offsets there had the effect of reducing mandatory rather than voluntary medical coverage, the court of appeals held for the insurer. Judge Molloy, speaking for the court, said, "While offsets attempting to reduce mandatory coverages will not be permitted, there is nothing to prevent the insurer and a person desiring to have medical expenses insurance from employing any provisions with respect to the payment or nonpayment of these benefits which they choose."[52]

In *Bacchus*, on the other hand, the insurer sought to offset medical payments against the amount due under the uninsured motorist coverage. Relying on *Caballero*, the court of appeals allowed the offset,[53] but on appeal the supreme court reversed. It characterized the uninsured motorist

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[49] 10 Ariz. App. 61, 455 P.2d 1011 (1969).
[50] 106 Ariz. 280, 475 P.2d 264 (1970).
[51] Tuggle v. Government Employees Ins. Co., 207 So. 2d 674 (Fla. 1968); Phoenix Ins. Co. v. Kincaid, 199 So. 2d 770 (Fla. App. 1967).
[52] 10 Ariz. App. at 64, 455 P.2d at 1014.
[53] Bacchus v. Farmers Ins. Group Exch., 12 Ariz. App. 1, 2, 467 P.2d 76, 77 (1970).

coverage as mandatory and reasoned that any offset against it would be a violation of public policy and therefore invalid.

The *Caballero* court ruled that voluntary medical benefits coverage could be reduced so long as liability coverage was left intact. It would be entirely consistent to reduce voluntarily medical coverage so long as the uninsured motorist coverage was left intact. When there is an offset involving either type of coverage—liability or uninsured motorist—the reduction should be viewed in both instances to be of either the medical expense advancement or the primary coverage. The Supreme Court of Arizona, however, viewed the medical coverage as being reduced in *Caballero* while, in *Bacchus*, it reasoned that the uninsured motorist coverage was diminished. Such a distinction is patently inconsistent.

There is simply no logical basis for approving different conclusions as to the validity of the offsets in the two situations. The landmark Arizona cases such as *Jenkins*[54] and *Sandoval*[55] indicate that the public policy of the state requires that liability coverage not be disturbed. Moreover, uninsured motorist coverage is not strictly mandatory since it is only required by statute if a liability policy is already in force,[56] and the coverage may be rejected by the insured.[57] It is obvious, therefore, that uninsured motorist coverage is no more mandatory than liability coverage. Thus, the distinction "created" by the *Bacchus* court appears tenuous, at best.

Admittedly, there are cogent reasons for holding both setoff and advancement clauses to be contrary to public policy. In either instance, the injured party is denied some portion of his damages by a reduction in the medical, liability or uninsured motorist coverage. Since premiums were paid for each of these types of coverage, it is difficult to see why the injured party should not have the benefit of all of them.

CONCLUSION

In a series of recent cases dealing with uninsured motorist insurance coverage, the Supreme Court and Court of Appeals of Arizona have done much to insure that those injured in automobile accidents will be compensated out of whatever insurance proceeds are available. These decisions reflect the public policy of this state, embodied in the Financial Responsibility Law and earlier supreme court opinions, that damages resulting from automobile accidents should be borne by insurance companies, when possible, rather than by the injured party.

While answering many questions, these cases leave many areas open for future legislative and judicial development. A workable definition of

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[54] Jenkins v. Mayflower Ins. Exch., 93 Ariz. 287, 380 P.2d 145 (1963).
[55] Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967).
[56] ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1970-71).
[57] *Id.*

"uninsured motorist" is still needed—this is a task best left to the legislature. The courts, on the other hand, must further examine and explain the interrelationship of uninsured motorist coverage and other types of automobile insurance.