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ARIZONA AUTOMOBILE LIABILITY INSURANCE LAW—BEYOND MAYFLOWER

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The 1963 decision of the Arizona Supreme Court in *Jenkins v. Mayflower Insurance Exchange*[1] commenced a new era of automobile insurance law in Arizona. In *Mayflower*, the court held the omnibus clause prescribed in the Financial Responsibility Act[2] is a part of *every* motor vehicle liability policy. The effect was to invalidate a restrictive endorsement in the policy negating coverage if the automobile was operated by a member of the armed forces. In the same year, this writer queried whether *every* automobile liability policy had to conform to *all* the special requirements which the Act establishes.[3]

The purpose of this article is to examine the various Arizona appellate and federal decisions rendered since *Mayflower* in an effort to clarify, as much as possible, the law in Arizona relating to automobile liability insurance.

THE ARIZONA FINANCIAL RESPONSIBILITY ACT[4]

The Arizona Financial Responsibility Act is based upon the Uniform Motor Vehicle Safety Responsibility Act which has been adopted in most states.[5] The Act is not a compulsory insurance statute nor, on its

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[1] 93 Ariz. 287, 380 P.2d 145 (1963).

[2] The clause provides that an owner's policy of liability insurance "shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured . . . ." ARIZ. REV. STAT. ANN. § 28-1170(B)(2) (Supp. 1967).

[3] Comment, *Automobile Liability Insurers in Arizona — Are They Absolutely Liable?*, 5 ARIZ. L. REV. 248 (1963).

[4] ARIZ. REV. STAT. ANN. §§ 28-1101 *et. seq.* (1956).

[5] *See* the historical note under ARIZ. REV. STAT. ANN. § 28-1101 (1956). The Act was adopted by the Arizona legislature in 1951 and is identical in substance to the Uniform Motor Vehicle Safety Responsibility Act promulgated by the National

face, does it apply to automobile insurance policies carried voluntarily by most drivers. The Act is designed to come into operation if, after an accident, a motorist cannot demonstrate his financial responsibility by showing the existence of an applicable insurance policy.[6] If he cannot make this showing, his driver's license and vehicle registration may be suspended, unless he deposits security in an amount sufficient to satisfy any possible liability *and* furnishes proof of his future financial responsibility.[7] A motorist may give proof of his future financial responsibility by filing with the Superintendent of Motor Vehicles a certificate which shows that a special type of insurance policy, called a "motor vehicle liability policy," has been issued to him.[8] This policy must contain an omnibus clause[9] and must provide for certain minimum amounts of liability coverage.[10] Furthermore, it is subject to several provisions of the Act which need not be enumerated in the policy. Included is a provision that the liability of the insurance company is absolute upon the occurence of an accident and that no violation of the insured shall defeat the policy.[11]

Conference on Street and Highway Safety. The Uniform Act is in force in one form or another in more than forty states. Citations to the various state acts are contained in Kesler v. Department of Pub. Safety, 369 U.S. 153, 165-69 (1962). *See also* Jacobs, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL L. REV. 545 (1965). Historical development of the Uniform Act is traced in Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959), and Note, *Motor Vehicle Financial and Safety Responsibility Legislation*, 33 IOWA L. REV. 522 (1948).

[6] ARIZ. REV. STAT. ANN. § 28-1142(B) (Supp. 1967).

[7] ARIZ REV. STAT. ANN. § 28-1142(A) (Supp. 1967). The Act also provides, apparently as a "catch-all," that a motorist shall have his license suspended if he fails to satisfy a judgment within sixty days. ARIZ. REV. STAT. ANN. §§ 28-1161, 1162 (1956). Since § 28-1162(C) also provides that if the motorist shows that he was covered by insurance at the time of the accident he will not have his license suspended, §§ 28-1161 and 28-1162 seem operative only in the rare case when the uninsured motorist has posted security and this security is insufficient to satisfy the judgment.

[8] ARIZ. REV. STAT. ANN. § 28-1167 (1956). The statute provides that proof of financial responsibility also may be given by filing a bond or a certificate of deposit of money or securities.

[9] *See* note 2 *supra*.

[10] ARIZ. REV. STAT. ANN. § 28-1170(B)(2) (Supp. 1967) states that the policy

> shall insure the person . . . against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle . . . subject to limits exclusive of interest and costs, with respect to each motor vehicle as follows:
>
> (a) Ten thousand dollars because of bodily injury to or death of one person in any one accident.
>
> (b) Subject to the limit for one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident.
>
> (c) Five thousand dollars because of injury to or destruction of property of others in any one accident.

[11] ARIZ. REV. STAT. ANN. § 28-1170(F)(1) (Supp. 1967) provides:

> The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurence of the injury or damage, and no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy. [A "violation" would

MAYFLOWER

As we have already seen, it was the omnibus clause requirement that was before the court in *Jenkins v. Mayflower Insurance Exchange.*[12] In *Mayflower,* the insured, who had voluntarily procured a policy from the insurer permitted the automobile to be driven by a member of the U.S. Air Force, who drove it off the road, injuring the passengers. The insurance company refused to defend a suit brought by the passengers against the insured on the ground that the policy contained a restrictive endorsement which negated coverage if the automobile was operated by a member of the armed forces. After recovering a judgment, the passengers brought an action against the insurance company, which raised as a defense the restrictive endorsement. The *Mayflower* court, by holding that the omnibus clause[13] was a part of *every* automobile liability policy, *regardless of whether or not the policy was required by the Financial Responsibility Act,* invalidated the endorsement.

A "motor vehicle liability policy" is defined by the act to mean a policy which has been certified as proof of financial responsibility.[14] The defendant in *Mayflower* argued that a "motor vehicle liability policy," as defined in the statute, could *only* refer to a policy that had been certified as proof of financial responsibility. Therefore, the insurer contended, it was not liable because the policy it issued was not a "motor vehicle liability policy" and as such did not have to contain the statutory omnibus clause.[15] The court, however, refused to make any "artful distinctions," and decided, apparently on "public policy" grounds, that the term "motor vehicle liability policy" simply meant *any* motor vehicle liability policy. Thus the court reasoned that no allowable distinction could be drawn between policies carried voluntarily by most drivers and certified policies carried by certain drivers who are required by the Financial Responsibility Act to show proof of their financial responsibility.

By holding that the omnibus provision of the Financial Responsibility Act applied to the normal automobile liability policy which was voluntarily carried by the insured, the court refused to consider the large body of case law from the many jurisdictions that have passed upon the application of financial responsibility acts substantially similar to the Arizona Act. The great majority of these jurisdictions have held that the Act has no effect upon an automobile liability policy *unless* the policy was actually required and certified under the Act.[16]

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include, *e.g.,* lack of notice or lack of cooperation.]

[12] 93 Ariz. 287, 380 P.2d 145 (1963).

[13] *See* note 2 *supra.*

[14] ARIZ. REV. STAT. ANN. § 28-1170(A) (Supp. 1967).

[15] Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 289-90, 380 P.2d 145, 147 (1963).

[16] *See, e.g.,* Mooradian v. Canal Ins. Co., 272 Ala. 373, 130 So. 2d 915 (1961); Galford v. Nicholas, 224 Md. 275, 167 A.2d 783 (1961); United States Fid. & Guar.

Whether regarded as sound or unsound, the court's extreme interpretation of the Financial Responsibility Act has raised several automobile liability insurance questions. Due to the dearth of applicable case law, the trial and intermediate appellate courts and the federal courts in Arizona have had some difficulty in interpreting and resolving these questions.

BEYOND MAYFLOWER

Sandoval v. Chenoweth[17] — *Round One*

In 1966, the Arizona Court of Appeals was faced, in *Sandoval*, with the task of resolving whether the defense of lack of notice was still available to an insurer.[18] There the insured who voluntarily procured his policy violated an express policy provision by failing to give the insurer notice of the fact that a lawsuit had been filed against him as a result of an automobile accident. Subsequently, a default judgment in the amount of $35,000.00 was entered against the insured. When the insurer learned of the default judgment it unsuccessfully attempted to set it aside. In a garnishment action by the judgment creditor against the insurer, the insurer asserted the policy defense of lack of notice. The trial court granted summary judgment against the insurer to the extent of the then existing limits of the Financial Responsibility Act ($5,000.00)[19] and relieved the insurer from any obligation on all sums in excess of $5,000.00. The court of appeals reversed the judgment and agreed with the contention of the insurer that the Financial Responsibility Act in Arizona does not abrogate the policy defense of lack of notice. The court noted that the policy was a voluntary one and was not certified to satisfy any proof of financial responsibility. The court held:

> The policy defense of notice of a lawsuit is one which the insurance company may properly assert after the accident to defeat liability.[20]

In so holding, the court stated that *Mayflower* "should not be extended to include the situation in the case at bar."[21] The supreme court granted review of this decision in April, 1966, but its opinion was not handed down until after several other significant appellate decisions had been rendered.

Co. v. Walker, 329 P.2d 852 (Okla. 1958). *See* Comment, *supra* note 3, at 250-51. *Contra*, Wildman v. Government Employees' Ins. Co., 48 Cal. 2d 31, 307 P.2d 359 (1957). *See* Annot., 8 A.L.R.3d 388, 404 (1966).

[17] 2 Ariz. App. 553, 410 P.2d 671 (1966).

[18] As previously mentioned, the Financial Responsibility Act provides that no violation of a "motor vehicle liability policy" shall defeat or void the policy. *See* note 11 *supra*.

[19] ARIZ. REV. STAT. ANN. § 28-1170(B)(2) (1956).

[20] Sandoval v. Chenoweth, 2 Ariz. App. 553, 554, 410 P.2d 671, 672 (1966).

[21] *Id.*

Carpenter v. Superior Court[22]

Carpenter, decided in December, 1966, reached the supreme court upon a writ of certiorari. It originally appeared that this extraordinary writ was granted for the purpose of reviewing and clarifying the *Mayflower* doctrine.[23]

In *Carpenter* the trial court was involved with the policy defense of lack of cooperation. Based upon this defense the insurer was granted summary judgment. On appeal, the supreme court sidestepped the *Mayflower* issue and reversed the summary judgment upon the ground that the insurer had failed in its burden to establish the defense of non-cooperation. This holding certainly implied that the defense of non-cooperation did exist, and that *Mayflower* was inapplicable.

The *Carpenter* decision was not unanimous. In his dissenting opinion, Justice Bernstein severely criticized the majority for not considering and clarifying the *Mayflower* decision. He stated that *Mayflower* misinterpreted the Financial Responsibility Act and urged that the decision be overruled. He also noted that if *Mayflower* eliminated the defense of non-cooperation, the majority's concern with whether the insurer had met the burden of establishing the defense was purely academic. As a result of this decision the confusion and uncertainty in Arizona continued to exist.

Universal Underwriters v. Dairyland M.I. Co.[24] — *Round One*

In *Universal Underwriters,* the court of appeals initially had to rule upon the validity of a policy provision excluding coverage when the insured's automobile was being operated by an employee of an automobile repair shop.[25] While driving the insured's automobile, an employee of a repair shop was involved in an accident. The owner's insurer refused to defend the repair shop's employee because of the exclusionary clause. The repair shop's insurer defended, and after satisfying a judgment against the insured, sought indemnification from the owner's insurer. The court found that the exclusionary clause was in direct conflict with the omnibus clause, which the court in *Mayflower* held to be applicable to all motor vehicle policies, and held that the exclusionary clause was invalid.

This holding was probably not unexpected in view of *Mayflower.* After invalidating the garage exclusion, however, the court was faced with deciding the respective coverage obligations of the two applicable insurance policies.

The car owners policy contained a standard "pro rata" clause which

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[22] 101 Ariz. 565, 422 P.2d 129 (1966).

[23] See the dissenting opinion of Justice Bernstein in Carpenter v. Superior Court, 101 Ariz. 565, 572, 422 P.2d 129, 136 (1966).

[24] 5 Ariz. App. 174, 424 P.2d 465, *rehearing denied with supplemental opinion,* 5 Ariz. App. 296, 425 P.2d 866 (1967).

[25] This provision is commonly known as the "garage" exclusion.

provided that if there was other applicable insurance, the loss would be prorated in accordance with the respective policy limits.[26] The repair shop's policy contained a standard "excess" clause, which applies when an insured is operating a non-owned automobile. It provides that if there is other applicable insurance, the policy shall apply only after the other policy's coverage is exhausted.[27]

The court of appeals admitted that the general rule provides that where the same loss is covered by an excess clause of one policy and a pro rata clause of another, the policy under which liability is on a pro rata basis shall be regarded as primary.[28] Thus, if the general rule were applied, the car owner's insurer would provide primary coverage even though the repair shop's employee was operating the car at the time of the accident. The shop's policy would provide excess coverage since the employee was operating a non-owned vehicle. The court, however, did not apply the general rule, but rather reasoned that since the employee was the active tort-feasor the repair shop's policy should provide primary coverage. In its original opinion,[29] the court justified this result by reliance upon *Busy Bee Buffet v. Ferrell*,[30] a negligence action which did not involve insurance coverage. There, the Arizona Supreme Court held that as between "active" and "passive" joint tort-feasors, the active tortfeasor is primarily liable. The court of appeals reasoned that the liability of the insurance companies was derivative and, since the repair shop's employee was the active tortfeasor, its policy should provide primary coverage. In its supplemental opinion,[31] the court abandoned its reliance upon *Busy Bee* and restated its original decision in terms of the *Mayflower* doctrine, stating:

> In the instant case we have determined that . . . Mayflower . . . does apply and we see no reason why it should not apply to this situation. It is our view that the provisions in both policies are of no effect in this case and the primary liability should be derivative of the negligence of the named insured.[32]

It is difficult to understand how *Mayflower* could have any effect

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[26] The "pro rata" clause stated:
> If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion for such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss . . . . Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 5 Ariz. App. 296, 297-98, 425 P.2d 866, 867-68 (1967).

[27] The "excess" clause stated: "[t]he insurance under this policy with respect to . . . the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance." Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 5 Ariz. App. 296, 298, 425 P.2d 866, 868 (1967).

[28] *See generally* Annot., 76 A.L.R.2d 502 (1961).

[29] Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 5 Ariz. App. 174, 424 P.2d 465 (1967).

[30] 82 Ariz. 192, 310 P.2d 817 (1957).

[31] Universal Underwriters Ins. Co. v. Dairyland Mut. Ins. Co., 5 Ariz. App. 296, 425 P.2d 866 (1967).

[32] *Id.* at 298, 425 P.2d at 868.

upon the pro rata and excess clauses of the policies, and, except for the above language, the court's opinion does not shed any light on this question.

The Arizona Supreme Court granted review on May 9, 1967, and handed down its opinion in November of that year. The interim was a period of great uncertainty for local insurance companies involved in claims where two or more policies were applicable. Prior to the court of appeals decision in *Universal Underwriters*, a car owner's insurer, whose policy contained a pro rata clause, would have undertaken the defense of a permissive driver, since, pursuant to the established rule, the pro rata insurer's coverage was primary. However, after the court of appeals imposed primary coverage on the permissive driver's insurer, the owner's insurer tendered the defense to the "excess" insurer. Many of these tenders were refused because insurance companies probably felt that the Arizona Supreme Court would reverse the anomalous doctrine set forth by the court of appeals. As a result, both insurers looked with disfavor upon settling a case, pending final determination by the supreme court. It would not be unreasonable to assume that since most insurers were at one time or another on both sides of the question, the decision could not have been well-received.

During this period of uncertainty, the supreme court decided *Sandoval v. Chenoweth.*[33]

Sandoval — Round Two

The court of appeals decision, which had said that *Mayflower* should not be extended to bar an insurer from raising policy defenses, was vacated by the supreme court. In reaffirming the *Mayflower* doctrine, the court held that since it had decided that the Arizona Financial Responsibility Act applied to *all* automobile liability insurance policies, and since the Act provided that no violation of a "motor vehicle liability policy" provision "shall defeat or void the policy,"[34] the insurer could not raise failure to give notice as a defense. By so holding, the court again refused to distinguish between "certified" and voluntary policies, thus judicially incorporating into *all* policies the strict liability requirements of subsection (F) of A.R.S. § 28-1170. As a result, Arizona stands apart from all other states in barring all policy defenses as a matter of law.[35]

The court, in reaching its decision, stated:

> In the absence of any showing of injustice or a legislative

[33] 102 Ariz. 241, 428 P.2d 98 (1967).

[34] ARIZ. REV. STAT. ANN. § 28-1170(F)(1) (Supp. 1967). *See* note 11 *supra.*

[35] *See, e.g.*, Connell v. Indiana Ins. Co., 334 F.2d 993 (4th Cir. 1964); Temperance Ins. Exch. v. Coburn, 85 Idaho 468, 379 P.2d 653 (1963); Fidelity and Cas. Co. v. McConnaughby, 228 Md. 1, 179 A.2d 117 (1963). *See also* Comment, *supra* note 8, at 250-51.

> change of public policy, we find no reason to depart from *the established law of the state and the doctrine of stare decisis.* (emphasis added).[36]

This statement is somewhat interesting in light of the chronology of the court's respective decisions on the *Mayflower* doctrine. It should be noted that the court granted review of *Sandoval* in April, 1966. Eight months later, in December, 1966, the supreme court rendered its decision in *Carpenter v. Superior Court*[37] which impliedly held that the defense of lack of cooperation was a valid defense. Then, five months later, the court decided *Sandoval* stating that *Mayflower* compelled the holding that such defenses do not exist!

In *Sandoval* the insurer further contended that being held liable for a default judgment against its insured when it had no notice of the lawsuit constituted a denial of due process of law. The court had little difficulty in sweeping aside this contention.

> In light of the foregoing facts, Financial has not been deprived of its constitutional right of due process of law, as the Financial Responsibility Law was in effect at the time of the issuance of this policy, and its counterpart in California had been interpreted in accord with our subsequent decision in Mayflower.[38]

At the very least this reasoning is misleading since the California decision to which the court makes reference[39] involved a significantly different Financial Responsibility Act.[40] Under the California Act, there is no provision similar to A.R.S. § 28-1170(F) which eliminates the defenses an insurer would normally have, *e.g.*, lack of notice and lack of cooperation.[41] Also, the default judgment in *Sandoval* occurred in 1961, two years *prior to Mayflower.*

Under the court's reasoning the insurer in *Sandoval* should have recognized:

(1) That two years hence the Arizona Supreme Court would apply the omnibus clause requirement of a certified policy to all policies;

(2) That six years hence the supreme court would extend the absolute liability requirements of the Act to all policies even though the California law upon which the court would rely does not even have a statutory provision providing for absolute liability of certified policies; and

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[36] Sandoval v. Chenoweth, 102 Ariz. 241, 244, 428 P.2d 98, 101 (1967).
[37] 101 Ariz. 565, 422 P.2d 129 (1966). *See* p. 305 *supra.*
[38] Sandoval v. Chenoweth, 102 Ariz. 241, 245-46, 428 P.2d 98, 102-03 (1967).
[39] Wildman v. Government Employee's Ins. Co., 48 Cal. 2d 31, 307 P.2d 359 (1957).
[40] CAL. VEHICLE CODE §§ 16450 *et. seq.* (West 1959).
[41] In fact, the Supreme Court of California had expressly said in Campbell v. Allstate Ins. Co., 32 Cal. Rptr. 827, 384 P.2d 155 (1963), that policy defenses were valid.

(3) That the supreme court in these decisions would take a position contrary to that of every other jurisdiction which had decided this question under the Uniform Act.[42]

As pointed out by Justice Bernstein in his dissenting opinion, the insurer had every reason to believe that its contractual policy defense constituted a complete defense. The Justice stated that: "[T]o say that our Mayflower decision was a surprise to both members of the legal profession and the insurance companies of this state is, perhaps, to put it mildly."[43]

It is apparent that the court's statement to the effect that the insurer should have predicted this turn of events is simply incredible. In fact the court itself did not predict this in *Carpenter* when it impliedly recognized the defense of lack of cooperation!

The court was faced with an additional question in *Sandoval.* The insurer contended that if it no longer had any defenses and was obligated to pay solely by force of the Arizona Financial Responsibility Act, its liability should be limited to the financial limits of the Act.

A.R.S. § 28-1170(G) provides:

> A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the *excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess of additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this section.* (emphasis added).

The insurer contended that if the term "motor vehicle liability policy" was to be construed to include all policies for the purpose of abrogating defenses, the term, as used in § 28-1170(G), should likewise be construed to include all policies when defining the extent of the insurer's obligation. Therefore, the insurer argued, since § 28-1170 (G) plainly stated that the Act had no effect on a "motor vehicle liability policy's" coverage in excess of that required,[44] the lack of notice was a valid defense as to the excess coverage. In spite of the obvious merit of the insurer's argument, the court held that the insurer's liability was not limited to the financial limits of the Act. It reasoned:

> In Mayflower we refused to consider artful distinctions between the terms 'motor vehicle liability policy,' 'automobile liability policy,' or 'policy of insurance.' The same reasoning applies in regard to the limitation of liability under A.R.S. §

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[42] *See* p. 307 & note 35 *supra.*

[43] Sandoval v. Chenoweth, 102 Ariz. 241, 248, 428 P.2d 98, 105 (1967).

[44] ARIZ. REV. STAT. ANN § 28-1170(B)(2) (Supp. 1967) sets forth the coverage required by the Act. *See* note 10 *supra.*

> 28-1170, subsection G, supra. There being no distinction between the terms, the second sentence of subsection G is ineffectual to limit coverage to the minimum amount required.[45]

The logic of this is hard to understand. The court first uses the "artful distinction" reason to justify application of the Act to *all* insurance policies and then uses the same "artful distinction" reason to justify not applying another section of the very same Act, which expressly limits the application of the Act to a specified financial limit!

The court has now come the full circle of specious reasoning. Initially, in *Mayflower,* in order to provide insurance coverage *which did not exist,* it borrowed from the Financial Responsibility Act the omnibus requirement, which was intended only to be applicable to "certified" policies, and applied it to all policies as a matter of public policy. The court then held that *Mayflower* required that the Act be applied to all policy defenses. Finally, the court held, that while the other provisions of the Act were applicable to all policies, the statutory limits of the Act were not applicable to any of the policies!

As in *Carpenter,* Justice Bernstein vigorously dissented, saying:

> The majority has chosen to again term as 'artful' those distinctions which lay at the very heart of A.R.S. Title 28, Chapter 7, Articles 3 and 4, and in this manner, to again ignore the master plan of the Financial Responsibility Law as well as obvious legislative intent.[46]

Universal Underwriters — Round Two

In November, 1967, the supreme court decided *Universal Underwriters v. Dairyland M.I. Co.*[47] Relying on *Mayflower,* it affirmed that portion of the court of appeals' decision which invalidated the "garage" exclusion clause. However, the court reversed that portion of the decision relating to the pro rata and excess clauses and adopted the general rule that an "excess" clause prevails over a "pro rata" clause.[48] The uncertainty in this area of the law therefore was removed.

Dairyland Mutual Ins. Co. v. Andersen[49]

Andersen, while driving a non-owned vehicle, caused an accident. The vehicle owner's policy specifically excluded coverage when Andersen was operating the vehicle. Andersen's own policy contained a

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[45] Sandoval v. Chenowith, 102 Ariz. 241, 247, 428 P.2d 98, 104 (1967). In Globe Indem. Co. v. Universal Underwriters Ins. Co., 20 Cal. Rptr. 73, 201 Cal. App. 2d 9 (1962), the court applied the full policy limits rather than the limits imposed by the Financial Responsibility Act. Apparently, California is the only jurisdiction besides Arizona to extend liability beyond the limits of the Act.

[46] Sandoval v. Chenoweth, 102 Ariz. 241, 248, 428 P.2d 98, 105 (1967).

[47] 102 Ariz. 518, 433 P.2d 966 (1967).

[48] The court treated this issue more extensively in the companion case of Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963 (1967). *See* note 50 *infra.*

[49] 102 Ariz. 515, 433 P.2d 963 (1967).

clause which extended coverage to the insured while driving a non-owned vehicle.[50]

The owner's insurer urged that the *Mayflower* doctrine should not invalidate its exclusion of Andersen for two reasons. First, *Mayflower* was a case where a whole class of persons was excluded from coverage, whereas in this case, only a single, named individual was excluded. Secondly, if the exclusion were given effect, Andersen's policy would still cover the loss; thus, the public was protected against the uninsured driver. The court rejected these arguments and held the exclusionary clause invalid. It stated: "It is neither desirable nor advisable to engraft exceptions upon the statutory pronouncement now so firmly recognized as a public policy of this jurisdiction."[51]

There was another interesting problem in *Andersen.* The owner's policy contained a standard clause relating to the application of the Financial Responsibility Act. By this clause, the insured agrees to reimburse the company for any sums which the company is obligated to pay solely by reason of the Act.[52] In other words, if the insurer had a defense under the terms of the policy but could not assert this defense by reason of the Act, the insurer may recover this amount from the insured. The Act expressly permits a "motor vehicle liability policy" to contain such a clause.[53]

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[50] Both policies also contained "pro rata" clauses, and Andersen's, in addition, contained a provision that the coverage was "excess" as to a non-owned vehicle. The owner's insurer argued that even if it was liable on its policy, Andersen's insurer was primarily liable because its insured was the "active" tortfeasor. The court disposed of this argument by holding (as it did in the companion case of *Universal Underwriters*) that the "excess" clause prevailed over the "pro rata" clause. The court stated:

> The cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control. An insurance policy is a contract, and in an action based thereon the terms of the policy must govern. . . . [W]here the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there. Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 517, 433 P.2d 963, 965 (1967).

[51] *Id.* at 517, 433 P.2d at 965.

[52] Section 9 of the "Conditions" of the policy provided:

> Financial Responsibility Laws — Coverages A and C: When this policy is certified as proof of financial responsibility for the future under the provisions of the motor vehicle financial responsibility law of any state or province, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph. Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 518, 433 P.2d 963, 966 (1967).

[53] ARIZ. REV. STAT. ANN. § 28-1170(H) (Supp. 1967) provides:

The court, in applying this clause, arrived at a rather interesting result in light of *Mayflower* and *Sandoval* where in each case the court had construed the term "motor vehicle liability policy" to mean any policy, and had drawn no distinction between voluntary and certified policies. The *Andersen* court ordered that if it was determined on remand that the policy was certified as proof of financial responsibility, an appropriate judgment should be rendered in favor of the insurer against Andersen pursuant to the reimbursement clause.[54] It is apparent that the court, in arriving at this conclusion, necessarily distinguished between certified policies and those policies carried voluntarily by most motorists. We therefore have an anomalous situation in Arizona. All insurers must comply with the provisions required of a "certified" policy and thereby incur liability solely by force of the Act. However, the insurer is not entitled to the commensurate benefit of recovery from its insured *unless* the policy was in fact certified.

Harleysville Mutual Insurance Co. v. Clayton[55]

Harleysville, the supreme court's latest pronouncement on the *Mayflower* doctrine, reaffirmed the *Andersen* holding by voiding a provision in an automobile liability policy providing that coverage would not apply on the vehicle when being driven by the owner's husband. As in *Andersen,* the insurer argued that while excluding a whole class of people was unreasonable, excluding a specific individual who was a known bad driver was completely reasonable. The court found the argument untenable because of the "soundness" of the *Mayflower* doctrine.[55a]

A motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for provisions of this chapter.

The owner's insurer argued that since it was entitled to reimbursement from Andersen, it was not indebted to him, and therefore, there was nothing to garnish. This argument was rejected as being contrary to public policy:

> The purpose of certification as proof of financial responsibility for the future . . . is to supply financial responsibility against which a person damaged or injured by the insured's act may have recourse. To hold with Great Basin would be to completely destroy the purpose of certifying proof of financial responsibility. Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 518, 433 P.2d 963, 966 (1967).

[54] Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 518, 433 P.2d 963, 966 (1967). It is interesting to note that Andersen was not a party to the contract of insurance between the owner of the vehicle and the owner's insurer. Andersen was an additional insured only by application of the *Mayflower* doctrine.

[55] 103 Ariz. 296, 440 P.2d 916 (1968).

[55a] In Geyer v. Reserve Ins. Co., No. 2 CA-CIV 546 (Nov. 22, 1968), the Arizona Court of Appeals held that even though the policy limited recovery by one person to $10,000 the insurance company's ultimate possible liability to a guest passenger, who was injured when her host driver's automobile collided with an uninsured motorist was $20,000, $10,000 under the liability coverage and $10,000 under the uninsured motorist coverage. The court reasoned:

> Our Supreme Court has made it clear in its Sandoval, Carpenter and Jenkins decisions, supra, that it regards the claims of automobile accident victims to funds created by insurance as interests of the highest protectible

Federal Decisions

In applying Arizona law, the federal courts on several occasions have been confronted with the application of the *Mayflower* doctrine. In *Travelers Insurance Company v. McElroy*,[56] the court of appeals was involved with a provision of an insurance policy which excluded coverage from leased vehicles which were not being used exclusively in the business of the named insured. In that case, the insured leased a vehicle which at the time of the accident was not being used exclusively in his business.[57] The court, finding the exclusionary provision to be inconsistent with *Mayflower*, invalidated it.

It is interesting to note that no appeal was taken from that part of the district court's summary judgment limiting recovery to the Financial Responsibility Act's limit of $10,000.00.[58]

In *Weeks v. Atlantic National Ins. Co.*,[59] the court of appeals invalidated an exclusion which negated coverage while the automobile was being operated by any person "under the influence of intoxicants." Relying on *Mayflower*, the court "predicted" *Sandoval* by indicating that the "intoxicants" exclusion was nullified by subsection (F) of Ariz. Rev. Stat. Ann. § 28-1170 which allows no violation of a policy to defeat or void the policy. The court, however, held that subsection (F) nullified the intoxicants exclusion only to the extent of the limits of the Financial Responsibility Act relying upon subsection (G).[60] Thus, the court logically applied the limitation of the Financial Responsibility Act which the Arizona Supreme Court, calling this another "artful distinction," later refused to do.[61]

In *State Farm Mutual Automobile Ins. Co. v. Thompson*,[62] the court of appeals again predicted *Sandoval* by holding that the defense of non-cooperation was no longer available in Arizona by virtue of the application of Ariz. Rev. Stat. Ann. § 28-1170(F). The court based its decision upon the dissent of Justice Bernstein in *Carpenter v. Superior*

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order. . . . [These decisions] remain intact as strong expressions of the public policy of our state. They 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.

[56] 359 F.2d 529 (9th Cir. 1966).

[57] Section 28-1170(A) provides that a "motor vehicle liability policy" means an "owner's" policy. The insurance company argued that since the policy was issued to the insured as lessee of the vehicle at the time of the lease, it was a non-owner policy, and, therefore, not within the purview of the Financial Responsibility Act and *Mayflower*. The court rejected this argument, reasoning that where a lessee is given exclusive possession and control of a vehicle and agrees to procure liability insurance, he is an "owner" for purposes of insurance coverage.

[58] Unless the policy coverage did not exceed this amount, had counsel been "ingenious" enough to foresee *Sandoval* (decided shortly after *Travelers*), the claimant might have recovered a more substantial judgment.

[59] 370 F.2d 264 (9th Cir. 1966).

[60] *See* p. 309 *supra*.

[61] Sandoval v. Chenoweth, 102 Ariz. 241, 428 P.2d 98 (1967). *See* p. 304 *supra*.

[62] 372 F.2d 256 (9th Cir. 1967).

Court[63] where he indicated that the logical interpretation of *Mayflower* would require such an application.

SUMMARY

It is now clear that in Arizona an automobile insurer must provide coverage to *any* permissive user. All exclusions in the policy negating coverage for certain classes of persons or named individuals are invalid. An insurer no longer may raise *any* policy defense to defeat or void coverage even though there is other automobile insurance covering the accident. Although an insurer may be required to pay solely by force of the Financial Responsibility Act, its liability is not limited to the financial limits of the Act. If an insurer is compelled to pay by virtue of the Act, it is not entitled to reimbursement from its insured, as provided by most policies and specifically allowed by the Act, unless the policy is in fact certified.

A most interesting observation of the entire problem is that the court has never clearly defined the basis and legal justification behind its original decision in *Mayflower.* Whenever confronted with the question, the doctrine is justified upon the grounds of "public policy" and that the result is "sound." In contrast, note the court's language in *City of Phoenix v. Lane,*[64] which was an earlier case involving the Financial Responsibility Act:

> If the law be found to be clear, there is nothing to interpret, as it is not our prerogative to *rewrite* the law to accomplish what counsel for respondent considers the prime object of the Act, i.e., full and complete insurance coverage for the public under any and all circumstances, where injury or damage results from an automobile accident.[65]

It is apparent that the philosophy the court enunciated in the *Lane* decision is no longer applicable. In view of the court's consistent refusal to reconsider or legally justify the *Mayflower* doctrine, it appears that the only way the confusion and misinterpretation of the Financial Responsibility Act can be corrected is by legislative action.

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[63] 101 Ariz. 565, 572, 422 P.2d 129, 136 (1966).
[64] 76 Ariz. 240, 263 P.2d 302 (1953).
[65] *Id.* at 243, 263 at 303.