

Comments

AUTOMOBILE LIABILITY INSURERS IN ARIZONA- ARE THEY ABSOLUTELY LIABLE?

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In March, 1963, the Arizona Supreme Court handed down a decision which in its sweeping terms may have changed the entire field of automobile liability insurance underwriting in Arizona. In *Jenkins v. Mayflower Ins. Exch.*, 93 Ariz. 287, 380 P.2d 145 (1963), which involved an action by judgment creditors of the insured against the automobile liability insurer, the court held that the omnibus clause prescribed in the Financial Responsibility Act¹ is a part of every motor vehicle liability policy, and thus the insurer could not set up the defense of a restrictive endorsement, negating coverage if the automobile was operated by a member of the armed forces other than the named insured.

The total import of the decision is not readily apparent. It does say that anyone who drives an insured vehicle with the permission of the insured is automatically an additional insured under the policy, irrespective of whether or not there was a restrictive endorsement in the policy excluding that person as an insured. In reaching this decision, the court reasoned that there was no allowable distinction between those policies carried voluntarily by most drivers and those policies required by the Financial Responsibility Act of certain drivers who under the act must show proof of their financial responsibility. A serious question is raised as to whether the court, in this reasoning to include the omnibus clause, has not made all automobile liability insurance policies conform to all the strict requirements of the special type of policy required of the financially irresponsible motorists.

At this point it would perhaps be helpful to review briefly the Arizona Financial Responsibility Act and then examine how other jurisdictions with similar laws have interpreted the Act in order fully to realize the potential effect of the *Mayflower* decision.

Arizona Financial Responsibility Act

The Arizona Financial Responsibility Act is based on the Uniform Motor Vehicle Safety Responsibility Act, promulgated by the National Conference on Street and Highway Safety. The Arizona Act

¹ ARIZ. REV. STAT. ANN. §§ 28-1101 through 28-1225 (1956). ARIZ. REV. STAT. ANN. § 28-1170(B)(2) 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, . . ." In the trade, this provision is referred to as the "omnibus clause."

is substantially identical to that of the Uniform Act, which has been adopted in most of the states.²

The Act works basically in the following way: A driver involved in an accident is required to file an accident report.³ The superintendent then determines what amount of security the driver must deposit to satisfy any judgment that may later be recovered.⁴ The driver's license and vehicle registration will be suspended if such security is not deposited.⁵ However, this security deposit is not required if the driver had in effect at the time of the accident an automobile liability policy covering the motor vehicle involved in the accident.⁶ Although the Act does not require liability insurance before an accident, carrying such insurance is probably the best way to satisfy the security requirement following an accident. The law thus induces drivers to carry liability insurance.

The Act further provides under Article 4, entitled "Proof of Financial Responsibility for the Future," that in the event a judgment is obtained against the driver and is not satisfied, his license shall be suspended until the judgment is paid and the driver gives proof of future financial responsibility.⁷ In addition, the Act provides for the suspension of the vehicle registration, if a driver's license is suspended pursuant to a conviction or forfeiture of bail, unless that person maintains proof of financial responsibility.⁸ Thus it is clear by the terms of the Act that only those drivers who have failed to establish their financial responsibility after an accident or those convicted of a serious driving offense are required by the Act to show and maintain proof of financial responsibility.

The Act then provides for a method by which this class of drivers can show proof of their financial responsibility. It provides that proof may be given by filing a certificate of insurance with the superintendent.⁹ The Act then defines what this policy must provide.¹⁰ The motor vehicle liability policy required by these drivers must contain the omnibus clause.¹¹ It must be absolute upon the occurrence of an accident; no defenses will be allowed an insurer to defeat the coverage afforded the injured victim after an accident, such as lack of notice or lack of cooperation by the insured, fraud and misrepresentation by the insured in procuring the policy, or any other defense that would defeat the recovery of the injured third

² See the Historical Note under ARIZ. REV. STAT. ANN. § 28-1101 (1956). See also, Murphy and Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959).

³ ARIZ. REV. STAT. ANN. §§ 28-667 and 28-1141 (1956).

⁴ ARIZ. REV. STAT. ANN. § 28-1142(A) (1956).

⁵ *Ibid.*

⁶ ARIZ. REV. STAT. ANN. § 28-1142(B)(1) (1956).

⁷ ARIZ. REV. STAT. ANN. § 28-1162 (1956).

⁸ ARIZ. REV. STAT. ANN. § 28-1166 (1956).

⁹ ARIZ. REV. STAT. ANN. § 28-1168 (1956).

¹⁰ ARIZ. REV. STAT. ANN. § 22-1170 (1956).

¹¹ ARIZ. REV. STAT. ANN. § 28-1170(B)(2) (1956).

person.¹²

The Arizona court in *Mayflower*, in refusing to distinguish between a "motor vehicle liability policy" certified as proof of financial responsibility (commonly called a "certified policy") and the normal automobile liability policy carried voluntarily by drivers not required to show proof of their financial responsibility, may have gone too far. The refusal to make this distinction would seem to require that all voluntary automobile liability policies issued in Arizona conform to all the requirements set forth in the definition of a certified policy required of irresponsible drivers with major accidents or convictions. Under such construction of the opinion, all automobile liability policies in Arizona not only contain the omnibus clause, but are absolute in nature upon the occurrence of an accident and all normal defenses of an insurer are barred. Such a drastic requirement may be necessary, as required by the Act, for the issuance of policies to financially irresponsible motorists, who undoubtedly pay a substantially higher premium for such a policy. But to require all policies to conform to such requirements without clear legislative intent is a bold step indeed.

On the other hand, if the decision is to be construed to mean that only the omnibus clause provision is a part of every policy, and not the other provisions required of a certified policy, an anomalous situation results. Arizona Revised Statutes section 28-1170, which sets forth the requirements of a certified policy, states in subsection G that the Act does not apply to any coverage in excess of or in addition to that required by the Act. We then have the result that all policies not issued pursuant to the Act must comply with the omnibus clause requirement, while certified policies are expressly "not subject to this chapter" as to excess coverage.¹³ Thus an insurer in providing a certified policy would be free, under the Act, to except liability under the omnibus clause as to the excess amount of the policy limits over the minimum amounts required by the Act; while, on the other hand, voluntary policies would contain no such exception.¹⁴

Under either interpretation of the *Mayflower* decision, the case raises many serious problems and unanswered questions.

The Law in Other Jurisdictions

Without exception, the many jurisdictions that have passed upon this precise question, involving financial responsibility acts substan-

¹² ARIZ. REV. STAT. ANN. § 28-1170(F)(1) (1956).

¹³ "Excess coverage" would seem to refer to that amount of the policy limits which exceeds the minimum required by the Act.

¹⁴ The California court in *Globe Indem. Co. v. Universal Underwriters Ins. Co.*, 20 Cal. Rptr. 73 (1962), held that a permissive user automatically afforded coverage by virtue of the financial responsibility law, was entitled to coverage to the full limits of the automobile liability policy.

tially similar to that of Arizona, have held that the Act has no effect on automobile liability policies unless the policy was actually required and certified under the Act. The following states have so held: Alabama,¹⁵ Arkansas,¹⁶ Colorado,¹⁷ Idaho,¹⁸ Illinois,¹⁹ Kentucky,²⁰ Louisiana,²¹ Maryland,²² Missouri,²³ New Jersey,²⁴ New York,²⁵ Oklahoma,²⁶ Texas,²⁷ and Virginia.²⁸ The federal courts in the following states have also so held: Georgia,²⁹ Kentucky,³⁰ Illinois,³¹ Indiana,³² Iowa,³³ Louisiana,³⁴ New Mexico,³⁵ Oklahoma,³⁶ South Carolina,³⁷ and Virginia.³⁸ These courts have stated that the clear language of the

¹⁵ Mooradian v. Canal Ins. Co., 272 Ala. 373, 130 So. 2d 915 (1961).

¹⁶ Aetna Cas. & Sur. Co. v. Simpson, 228 Ark. 157, 306 S.W.2d 117 (1957).

¹⁷ Western Mut. Ins. Co. v. Wann, 147 Colo. 457, 363 P.2d 1054 (1961).

¹⁸ Temperance Ins. Exch. v. Coburn, 379 P.2d 653 (Idaho 1963).

¹⁹ Porterfield v. Truck Ins. Exch., 28 Ill. App. 2d 195, 171 N.E.2d 108 (1960); Stollery Bros., Inc. v. Inter-Insurance Exch., 15 Ill. App. 2d 179, 145 N.E.2d 768 (1957); McCann v. Continental Cas. Co., 8 Ill. 2d 476, 134 N.E.2d 302 (1956).

²⁰ Kentucky Farm Bureau Mut. Ins. Co. v. Miles, 267 S.W.2d 928 (Ky. 1954); Travelers Ins. Co. v. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1950).

²¹ Johnson v. Universal Auto. Ins. Ass'n., 124 So. 2d 580 (La. 1960).

²² Galford v. Nicholas, 224 Md. 275, 167 A.2d 783 (1961).

²³ State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635 (Mo. 1960); Gabler v. Continental Cas. Co., 295 S.W.2d 194 (Mo. 1956); Perkins v. Perkins, 284 S.W.2d 603 (Mo. 1955).

²⁴ Buzzone v. Hartford Accident & Indem. Co., 41 N.J. Super. 511, 125 A.2d 551 (1956), *aff'd*, 23 N.J. 447, 129 A.2d 561 (1957), applying New York law.

²⁵ Cohen v. Metropolitan Cas. Ins. Co., 233 App. Div. 340, 252 N.Y.S. 841 (1931).

²⁶ United States Fid. & Guar. Co. v. Walker, 329 P.2d 852 (Okla. 1958).

²⁷ United States Cas. Co. v. Brock, 345 S.W.2d 461 (Tex. Ct. App. 1961); National Sur. Corp. v. Diggs, 272 S.W.2d 604 (Tex. Ct. App. 1954); McCarthy v. Ins. Co. of Texas, 271 S.W.2d 836 (Tex. Ct. App. 1954).

²⁸ State Farm Mutual Auto. Ins. Co. v. Arghyris, 189 Va. 913, 55 S.E.2d 16 (1949).

²⁹ Henderson v. Trans-Continental Mut. Ins. Co., 227 F.2d 106 (5th Cir. 1955).

³⁰ StateAuto. Mut. Ins. Co. v. Sinclair, 96 F. Supp. 267 (W.D. Ky. 1950).

³¹ Hawkeye-Security Ins. Co. v. Myers, 210 F.2d 890 (7th Cir. 1954).

³² Hill v. Standard Mut. Cas. Co., 110 F.2d 1001 (7th Cir. 1940).

³³ Hoosier Cas. Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).

³⁴ New Zealand Ins. Co. v. Holloway, 123 F. Supp. 642 (W.D. La. 1954).

³⁵ Farmers Ins. Exch. v. Ledesma, 214 F.2d 495 (10th Cir. 1954). This case reached a *contra* result on other grounds. *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118 (D.N.M. 1954). This case applied Texas law.

³⁶ Duff v. Alliance Mut. Cas. Co., 296 F.2d 506 (10th Cir. 1961); Adriaenssens v. Allstate Ins. Co., 258 F.2d 888 (10th Cir. 1958).

³⁷ State Farm Mut. Auto. Ins. Co. v. Cooper, 233 F.2d 500 (4th Cir. 1956).

³⁸ Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949).

statute shows that the Act is a voluntary rather than a compulsory financial responsibility act since it acts only in the future, *i.e.*, after an accident, as to compulsory insurance.³⁹ It is intended to protect the public from suffering loss through the carelessness of automobile owners who have manifested their financial irresponsibility.⁴⁰ These courts have repeatedly said that proof of financial responsibility is necessary for the removal of a suspension of a license and registration which resulted on account of a prior accident.⁴¹ The Act differentiates between car owners who have shown themselves to be irresponsible, and those who have not.⁴² The only provision for absolute insurance occurs in cases where such a certificate has been furnished.⁴³

It should be noted here that many standard automobile liability policies, including the policy in the instant case, contain a condition to the effect the policy shall comply with the provisions of the Motor Vehicle Financial Responsibility Law of any state which shall be applicable. Although it has been argued that this provision makes the policy an "absolute" one, it has been held almost without exception that such a provision does not constitute a contractual agreement that the policy shall, in effect, be amended so as to include the provisions of the Act where the insured has never been required to furnish proof of financial responsibility.⁴⁴ This provision comes into play only if the policy is certified as proof of financial responsibility.⁴⁵ It could be argued that this provision in the policy in the principal case was the basis upon which the court made its decision. If it was, the effect of the decision could be avoided by a careful redrafting of this common provision for future policies.

However, a careful reading of the opinion appears to indicate that this was not the basis of the decision. The Arizona court relied on the California decision of *Wildman v. Government Employees Ins.*

³⁹ See, *e.g.*, *Duff v. Alliance Mut. Cas. Co.*, 296 F.2d 506 (10th Cir. 1961); *New Zealand Ins. Co. v. Holloway*, 123 F. Supp. 642 (W.D. La. 1954); *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118 (D.N.M. 1954); *McCarthy v. Ins. Co. of Texas*, 271 S.W.2d 836 (Tex. Ct. App. 1954).

⁴⁰ *Duff v. Alliance Mut. Cas. Co.*, 296 F.2d 506 (10th Cir. 1961).

⁴¹ See, *e.g.*, *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118 (D.N.M. 1954); *Perkins v. Perkins*, 284 S.W.2d 603 (Mo. 1955); *McCarthy v. Ins. Co. of Texas*, 271 S.W.2d 836 (Tex. Ct. App. 1954).

⁴² See *e.g.*, *Temperance Ins. Exch. v. Coburn*, 379 P.2d 653 (Idaho 1963); *Cohen v. Metropolitan Cas. Ins. Co.*, 233 App. Div. 340, 252 N.Y.S. 841 (1931).

⁴³ See *e.g.*, *Perkins v. Perkins*, 284 S.W.2d 603 (Mo. 1955); *McCarthy v. Ins. Co. of Texas*, 271 S.W.2d 836 (Tex. Ct. App. 1954).

⁴⁴ *Johnson v. Universal Auto. Ins. Ass'n.*, 124 So. 2d 580 (La. 1960).

⁴⁵ See *e.g.*, *Hoosier Cas. Co. v. Fox*, 102 F. Supp. 214 (N.D. Iowa 1952); *Porterfield v. Truck Ins. Exch.*, 28 Ill. App. 2d 195, 171 N.E.2d 108 (1960); *Galford v. Nicholas*, 224 Md. 275, 167 A.2d 783 (1961); *Gabler v. Continental Cas. Co.*, 295 S.W.2d 194 (Mo. 1956); *United States Fid. & Guar. Co. v. Walker*, 329 P.2d 852 (Okla. 1958); *United States Cas. Co. v. Brock*, 345 S.W.2d 461 (Tex. Ct. App. 1961). *But cf.*, *Farmers Ins. Exch. v. Ledesma*, 214 F.2d 495 (10th Cir. 1954).

Co.⁴⁶ for its authority. At the time of the *Wildman* decision the California law differed from that of the Uniform Act in that it did not include the certification requirement in its definition of a "motor vehicle liability policy."⁴⁷ After this decision, however, the California legislature, in an apparent attempt to remedy the problem, amended the act to make it applicable only to certified policies.⁴⁸ Later, the California court, when faced with the same question after this amendment, decided not to change its former position and gave no effect to this legislative enactment.⁴⁹ However, the California Act still differs from the Uniform Act in that there is no provision for "absolute" policies taking away the normal legal defenses an insurer would have.⁵⁰ Thus the California rule, because of a different statute, is still not as harsh as the Arizona rule.

Summary

There is no doubt that under the present type of financial responsibility act, there is a "gap" in the desired result of protecting all innocent victims from financial loss created by those negligent drivers who do not carry insurance and who are unable to satisfy a judgment against them. Although such drivers cannot retain their right to drive without satisfying the judgment and showing proof of future financial responsibility, this does not compensate the innocent victims injured by such drivers. There would be perhaps another "gap" created under certain circumstances, such as in the *Mayflower* case, by exclusions in the liability policy. However, it is submitted that the type of policy required in Arizona under the *Mayflower* decision will undoubtedly now cost more, which will encourage more drivers to risk not buying insurance protection at all, thereby increasing the first gap. This might ultimately increase the number of uncompensated innocent victims of highway accidents, intended to be reduced by the *Mayflower* decision. In addition, this decision will deprive an insured from contracting with an insurance company to exclude certain classes of risks in order to reduce the cost of the policy. Also, it is probable that such a decision may place a premium upon the practice of deceit and fraud by prospective purchasers of insurance.⁵¹

Whether regarded as sound or unsound, the *Mayflower* decision has raised many legal questions in the field of automobile liability insurance and the Arizona Financial Responsibility Act. Probably the best solution would be for the legislature to clarify its purpose by an amendment of the Act in order to prevent further uncertainty and litigation in this area.

⁴⁶ 48 Cal. 2d 31, 307 P.2d 359 (1959).

⁴⁷ CAL. VEH. CODE § 415 (before 1957 amendment).

⁴⁸ CAL. VEH. CODE § 16450.

⁴⁹ *Interinsurance Exch. of Auto. Club v. Ohio Cas. Ins. Co.*, 23 Cal. Rptr. 592, 373 P.2d 640 (1962).

⁵⁰ CAL. VEH. CODE § 16450.

⁵¹ *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118 (D.N.M. 1954).