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Insurance -- Statutory Definition of an Uninsured Motor Vehicle When the Liability Insurer is Insolvent or Denies Coverage

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of the offense may be the same whether it be a civil or criminal proceeding.

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Insurance—Statutory Definition of an Uninsured Motor Vehicle When the Liability Insurer is Insolvent or Denies Coverage

North Carolina General Statute section 20-279.21 defines a motor vehicle liability policy, contains certain requirements for provisions of owner's and operator's policies, and includes certain provisions to which such policies will be subject even though not contained in the policy. It provides that unless such coverage is rejected by the insured, no owner's policy shall be issued without coverage for the protection of the persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. The practical effect of this latter provision is that when a motorist driving what is determined under the statute to be an "uninsured motor vehicle" negligently injures another motorist covered by liability insurance with uninsured motorists coverage, the injured motorist can be compensated for his injuries up to the limits stated in the policy by his own liability insurer under that uninsured motorists coverage.

A question immediately arises. What is an "uninsured motor vehicle?" In 1965 the North Carolina General Assembly undertook to provide certain definitions of the term which had not been previously defined in the statute itself.

The North Carolina Supreme Court held in 1965 that a vehicle was uninsured when the liability of the negligent party causing the accident was not covered by the policy issued on the vehicle.[1] This decision was made without the benefit of the statutory definition of an uninsured motor vehicle.

After the amendments, North Carolina General Statute section 20-279.21(b)(3) provided that "under this section the term 'uninsured motor vehicle' shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make

[1] Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965). The liability of the negligent party was not covered by the policy because he was driving the vehicle without the permission, knowledge or consent of the named insured.

payment . . . *because of insolvency.*" (Emphasis added.) Also, "[f]or the purpose of this section, an 'uninsured motor vehicle' shall be a motor vehicle as to which there is . . . [liability insurance in at least the amounts specified in North Carolina General Statute section 20-279.5(c)][2] . . . but the insurance company writing the same *denies coverage* thereunder, or has *become bankrupt.* . . ."[3] (Emphasis added.)

In *Rice v. Aetna Cas. & Sur. Co.*[4] plaintiff's automobile was insured under a bodily injury and property damage liability insurance policy issued by the defendant insurance company. The policy contained a rider affording protection against personal injuries and property damage resulting from the negligent operation of an uninsured motor vehicle by another motorist. In 1962 plaintiff was injured in an automobile accident resulting from the negligence of a motorist whose automobile was covered by liability insurance. Subsequent to the accident the negligent motorist's insurer became insolvent. Although this situation seems to fall squarely within the statute, our court held that plaintiff could not obtain compensation from his own liability insurer under the uninsured motor vehicle endorsement since the negligent party's vehicle was not uninsured.[5]

[2] The amounts specified are $5000 because of bodily injury or death of one person in any one accident, $10,000 because of bodily injury or death to two or more persons in any one accident, and $5000 for damage of property of others in any one accident.

[3] Under the amendment further definitions of an "uninsured motor vehicle" are: (1) a vehicle as to which there is no liability insurance in at least the amounts required by statute; or no bond or deposit of securities in lieu of such insurance; (2) a vehicle the owner of which has not qualified as a self-insurer; and (3) a vehicle not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act. However, the term does not include: (1) a motor vehicle owned by the named insured; (2) a motor vehicle owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law; (3) a motor vehicle owned by the United States, Canada, a state, or any agency of these, but excluding political subdivisions thereof; (4) a land motor vehicle or trailer, if operated on rails or crawler treads or while located for use as a residence or premises and not as a vehicle; and (5) a farm type tractor or equipment designed for use principally off public roads, except while actually upon public roads. N.C. GEN. STAT. § 20-279.21 (b)(3) (Supp. 1965).

[4] 267 N.C. 421, 148 S.E.2d 223 (1966).

[5] *But cf.* North River Ins. Co. v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964) where the Court held that when the receiver of the insolvent insurer lacked sufficient funds to continue defense of the action against the insured's administratrix, it had effectively denied coverage, and under a statute defining an uninsured motor vehicle as one where the liability insurer denies coverage, the negligent party's vehicle was uninsured; State Farm Mut.

The court said:

> The fact that [the negligent party's liability insurer] . . . was, subsequent to the collision causing damage to the plaintiff, placed in receivership because of insolvency did not render defendant [plaintiff's liability insurer] liable on the policy issued plaintiff. Such insolvency did not make the . . . [negligent party's vehicle] . . . an uninsured automobile.[6]

The court relied for authority on *Hardin v. American Mut. Fire Ins. Co.*[7] decided in 1964 on similar facts and reaching the same result as *Rice*.

In a case decided subsequent to the *Hardin* decision and to the amendments, the court said, "It is noted that G.S. § 20-279.21(b)(3) was amended . . . so as to preclude the result reached by this court in *Hardin v. American Fire Insurance Company*."[8] However, the result in *Hardin* was reached again in *Rice*.

The amendments were raised in briefs by counsel for both sides. Counsel for defendant appellant insurance company argued that since the accident occurred before the statute was amended, it did not provide coverage to the plaintiff in this case.[9] Counsel for plaintiff appellee argued that since the act was to be in full force from and after its ratification and did not provide that it should affect pending litigation, the statute governed the insurance company's liability to plaintiff under the uninsured motor vehicle endorsement.[10]

The result is at least questionable. For a fair resolution of the interests of the injured plaintiff and his insurer from whom he seeks

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Auto. Ins. Co. v. Brower, 204 Va. 887, 134 S.E.2d 277 (1964) where the Court held, under a similar statute, that since the insolvent insurer did not appear or defend the suit against its negligent insured, nor pay the judgment, it had denied coverage thereby making the negligent party's vehicle uninsured.

[6] 267 N.C. at 424, 148 S.E.2d at 225.

[7] 261 N.C. 67, 134 S.E.2d 142 (1964). The court relied on Federal Ins. Co. v. Speight, 220 F. Supp. 90 (E.D.S.C. 1963) where the judge noted that the South Carolina statute defining an uninsured motor vehicle had been amended after the accident occurred to include a vehicle covered by liability insurance from an insolvent carrier, but without discussion did not apply it to the parties; and Uline v. Motor Vehicle Acc. Indem. Corp., 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961); *accord*, Swaringin v. Allstate Ins. Co., 399 S.W.2d 131 (Mo. Ct. App. 1966); Stone v. Liberty Mut. Ins. Co., 397 S.W.2d 411 (Tenn. Ct. App. 1965).

[8] Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 290, 144 S.E.2d 34, 37 (1965) (dictum).

[9] Brief for Appellant, p. 18, Rice v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966).

[10] Brief for Appellee, p. 15.

compensation, the court should have discussed and decided whether or not the amendment applied retroactively. On its face, the statute would clearly apply to any case such as *Rice* in which the accident occurred after the amendments in 1965.

As stated above, North Carolina General Statute section 20-279.21(b)(3) now provides by virtue of the amendment that an "uninsured motor vehicle" for the purpose of that section is a motor vehicle as to which there is liability insurance in at least the amounts required by statute, but the insurer writing it "denies coverage thereunder."

This provision makes a judicial definition of the term "denies coverage" necessary. The cases available in other jurisdictions with similar provisions lay down only broad guidelines to aid in defining the term.

A New York statute, operating upon the same principle as that of North Carolina, provides protection for the injured party when the liability insurer of the negligent party has "disclaimed liability or denied coverage because of some act or omission of [the negligent party]. . . ."[11] "To deny coverage is to take the position that for some reason or other the policy does not encompass the particular accident."[12] A disclaimer of liability occurs where the insurer refuses to respond because of some act of the insured, not directly connected with the accident itself, such as lack of cooperation, fraud, or giving late notice of the accident.[13]

A disclaimer of liability under the New York view apparently would not be applicable in North Carolina to a carrier registered to do business in the state since by statute a violation of the liability policy by the insured will not void the policy,[14] nor under the North Carolina view, prevent the injured party from recovering from the insurer if the negligent insured's liability has been established.[15]

It has been held in New York that there was a denial of cover-

[11] N.Y. INS. LAW § 608(c).

[12] Uline v. Motor Vehicle Acc. Indemn. Corp., 28 Misc. 2d 1002, 1005, 213 N.Y.S.2d 871, 874 (Sup. Ct. 1961) (dictum).

[13] *Id.* at 1005, 213 N.Y.S.2d at 874.

[14] N.C. GEN. STAT. § 20-279.21(f)(1) (Supp. 1965) provides that "The liability of the insurance carrier . . . shall become absolute whenever injury or damage . . . occurs; . . . no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy. . . ."

[15] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960); *accord*, Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962) (insurance issued under an assigned risk policy).

age when the insurer notified the injured party that there was "no liability on its policy" because the insured had loaned his automobile to the party who had negligently caused the injuries while driving it.[16] On the other hand, there is no denial of coverage (or disclaimer of liability) where the liability insurer did not answer inquiries of the injured party's attorney for eight and one-half months.[17] Also, there is not a denial of coverage where the liability insurer denied liability because the policy had expired before the accident,[18] terminated for non-payment of premiums prior to the accident,[19] or been cancelled before the accident.[20] Of course in these latter three instances, the vehicle would be uninsured in North Carolina since there was no applicable liability policy in effect.

Other jurisdictions with statutory provisions similar to that of North Carolina concerning denial of coverage have spoken on the matter. The South Carolina Supreme Court has held that when the liability insurer expressly denied coverage to its insured because of misstatements in his application, his automobile became an uninsured motor vehicle within the meaning of the statute.[21] The Virginia Supreme Court of Appeals has held that a motor vehicle became uninsured under the terms of its statute when the liability insurer denied coverage because the insured failed to cooperate with the insured in the suit against the insured by the injured party.[22] Under the North Carolina view, the insurers in these two cases apparently could not deny coverage when faced with a suit by an injured party who has recovered a judgment against the insured if they were registered to do business in the state, and if the policy had been issued in the state. North Carolina General Statute section 20-279.21(f)(1) (Supp. 1965), providing that no statement by or for the insured and no violation of the policy will defeat that policy,

[16] Rivera v. Motor Vehicle Acc. Indem. Corp., 22 App. Div. 2d 201, 254 N.Y.S.2d 480 (App. Div. 1964), *motion for leave to appeal denied*, 15 N.Y.2d 485, 206 N.E.2d 363, 258 N.Y.S.2d 1025 (1965).

[17] Application of DeStefano, 34 Misc. 2d 68, 228 N.Y.S.2d 404 (Sup. Ct. 1962).

[18] Brucker v. Motor Vehicle Acc. Indem. Corp., 41 Misc. 2d 281, 245 N.Y.S.2d 640 (Sup. Ct. 1963).

[19] Application of Johnson, 218 N.Y.S.2d 289 (Sup. Ct. 1961).

[20] Arculin v. Motor Vehicle Acc. Indem. Corp., 232 N.Y.S.2d 615 (Sup. Ct. 1962).

[21] Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965).

[22] McDaniel v. State Farm Mut. Auto. Ins. Co., 205 Va. 815, 139 S.E.2d 806 (1965).

applies only to insurance companies duly authorized to transact business in North Carolina.[23] However, these cases could be applicable (1) where the insurer who avoided making payment was not registered to do business in North Carolina and its insured was a non-resident,[24] and (2) where the insurance policy was issued in another state to a resident of that state, in which case the rights and obligations of the parties would be fixed by the laws of that other state.[25]

The North Carolina Supreme Court has not specifically defined the term "denies coverage" as it applies to the recently amended statute. However, it has used the term "deny coverage" to describe action of a liability insurer when it desired to avoid payment on the policy on the ground that the vehicle (a tractor-trailer unit) its insured was driving was not an "automobile" within the terms of the policy, and therefore the policy did not provide coverage.[26] It has said that the refusal of a liability insurer to defend an action against its insured "was tantamount to a denial of liability."[27] Where the liability insurer sought to avoid payment alleging that the vehicle involved in the accident was excluded from the coverage of the policy, the court said that the insurer had "denied liability."[28] The action of the insurers in these cases should place the vehicle involved in the category of an "uninsured motor vehicle" under the statute.

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[23] See notes 14-15 *supra.*

[24] N.C. GEN. STAT. § 20-279.20 (Supp. 1965) provides that the "non-resident owner of a motor vehicle not registered in this State may give proof of financial responsibility by filing with the Commissioner [of Motor Vehicles] a written certificate . . . of an insurance carrier authorized to transact business in the state in which the motor vehicle . . . is registered. . . ." The commissioner shall accept that certificate upon the condition that the insurance carrier agrees in writing that the policy shall be deemed to conform with the laws of North Carolina with respect to the terms of motor vehicle liability policies issued in the state. Presumably, if such an insurance carrier does not want to pay on the policy because of a violation of a condition by the insured, and does not agree that its policy will conform to the laws of the state, there is no way to compel it to pay in North Carolina, assuming its refusal to pay is justified, and the injured party would be deprived of any protection by insurance unless he could collect upon his own liability insurance under the uninsured motorists coverage.

[25] Conner v. State Farm Mut. Auto. Ins. Co., 265 N.C. 188, 143 S.E.2d 98 (1965).

[26] Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 724, 117 S.E.2d 733, 737, 85 A.L.R.2d 496, 501 (1961).

[27] Harris v. Nationwide Mut. Ins. Co., 261 N.C. 499, 502, 135 S.E.2d 209, 211 (1964).

[28] Kirk v. Nationwide Mut. Ins. Co., 254 N.C. 651, 654, 119 S.E.2d 645, 647 (1961).

It has been said that "[u]ninsured motorists coverage 'is designed to further close the gaps inherent in the motor vehicle financial responsibility and compulsory insurance legislation.' "[29] Such a "gap" certainly occurs when a motorist, driving a vehicle supposedly covered by liability insurance, negligently injures another party, insured under uninsured motorists coverage, and the negligent party's liability insurer refuses to pay the injured party on the ground that the policy did not cover the vehicle, the driver, or the type of accident involved. The vehicle involved should then be considered "uninsured" within the terms of the statute because the liability insurer has denied coverage, thus enabling the injured party to collect upon his uninsured motorists coverage. Such a result fits the judicially stated purpose of our statutory scheme of compulsory liability insurance "to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. . . ."[30]

If a vehicle is uninsured when there is no liability policy at all or when the liability insurer is insolvent, then it should be uninsured when the liability insurer will not pay. The effect in each instance is to deprive the injured person of the protection afforded by liability insurance contrary to the principle of protection for all innocent motorists provided by the Motor Vehicle Financial Responsibility Act.

PENDER R. MCELROY

Labor Law—Collective Bargaining—Is the Court Replacing the Union

Labor-management disputes in railroad operations are regulated by the Railway Labor Act.[1] It provides for negotiation,[2] mediation,[3] voluntary arbitration,[4] and fact finding.[5] However, the ulti-

[29] Buck v. United States Fid. & Guar. Co. 265 N.C. 285, 288, 144 S.E.2d 34, 36 (1965).
[30] Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 126, 116 S.E.2d 482, 487 (1960).

[1] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1964).
[2] 64 Stat. 1238 (1951), 45 U.S.C. § 152, Second (1964).
[3] 78 Stat. 748, 45 U.S.C. § 154 (1964).
[4] 48 Stat. 1197 (1934), 45 U.S.C. § 157 (1964).
[5] 63 Stat. 107 (1949), 45 U.S.C. § 155 (1964).