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UNINSURED MOTORIST INSURANCE NOW COVERS PUNITIVE AWARD — *HUTCHINSON v. J.C. PENNEY CASUALTY INSURANCE COMPANY*

INTRODUCTION

Assuming an injured party is entitled to recover punitive damages from an uninsured negligent motorist, can the injured party recover those damages from his insurance company under an uninsured motorist policy?

A split of authority exists among the few states which have decided the issue.¹ In jurisdictions permitting recovery of punitive damages, uninsured motorist coverage is intended to place the insurer in the shoes of the uninsured tortfeasor.² Since the insurer stands in the shoes of the tortfeasor, and since punitive damages could be covered if the tortfeasor had his own insurance, it is illogical to deny the victim punitive damages simply because the tortfeasor is uninsured.³ Other jurisdictions believe that punitive damages should not be awarded since that award would not operate to punish the tortfeasor and would therefore violate public policy.⁴ In *Hutchinson v. J.C. Penney Casualty Insurance Company*⁵, the Ohio Supreme Court held that such recovery is permissible and does not violate public policy.

FACTS OF *HUTCHINSON*

Plaintiff, Natalie S. Hutchinson, was legally crossing a street⁶ when she was struck by Raymond Garrett, an uninsured motorist. Garrett had collided with a motorist shortly before and was attempting to elude the police when he struck plaintiff. The police apprehended Garrett who subsequently pleaded guilty to operating a motor vehicle while intoxicated,⁷ reckless operation, and failure to obey traffic control devices.⁸

¹Several states have permitted recovery: *Hutchinson v. J.C. Penney Casualty Ins. Co.*, 17 Ohio St. 3d 195, 478 N.E.2d 1000 (1985); *Cuppett v. Grange Mut. Companies*, 12 Ohio App. 3d 82, 466 N.E.2d 180 (Erie County Ct. App. 1983); *Mullins v. Miller*, 683 S.W.2d 669 (Tenn. 1984); *Home Indem. Co. v. Tyler*, 522 S.W.2d 594 (Tex. Civ. App. 1975); *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972). Several states have denied recovery: *Hanna v. State Farm Mut. Auto. Ins. Co.*, 233 F. Supp. 510 (E.D.S.C. 1964); *California State Auto. Ass'n Inter-Ins. Bureau v. Carter*, 164 Cal. App. 3d 257, 210 Cal. Rptr. 140 (1985); *Suarez v. Aguiar*, 351 So. 2d. 1086 (Fla. Dist. Ct. App. 1977); *Brale v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me. 1982); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Burns v. Milwaukee Mut. Ins. Co.*, 121 Wis. 2d 574, 360 N.W.2d 61 (Wis. Ct. App. 1984).

²*See, e.g., Mullins*, 683 S.W.2d at 670.

³*Id.*

⁴*See e.g., Burns*, 121 Wis. 2d at 580, 360 N.W.2d at 64-65.

⁵17 Ohio St. 3d 195, 478 N.E.2d 1000 (1985).

⁶Issues of contributory or comparative negligence were not considered since it was presumed by both sides that plaintiff did not negligently cross the street. Brief of Plaintiff-Appellant at 2, *Hutchinson v. J.C. Penney Casualty Ins. Co.*, 17 Ohio St. 3d 195, 478 N.E. 2d 1000 (1985).

⁷An alcohol-urine test administered to Garrett after the accident revealed .17 alcohol content. *Id.* at 2.

⁸Evidence shows that Garrett failed to yield to a "35 mph" speed limit sign, a yellow school zone sign, a "20 mph" speed limit sign, and a stop light. *Id.* at 1-2.

As a result of the accident, plaintiff was dragged 70 feet, suffered a fractured pelvis and sustained multiple abrasions. Plaintiff was hospitalized where doctors discovered a lump in her right groin. The lump was a secondary injury to the fractured pelvis and required surgical removal. Plaintiff was left with a permanent deformity of her right thigh.⁹

Plaintiff was a "covered person" within the coverage of defendant J.C. Penney Casualty Insurance Company's four insurance policies. Each policy provided bodily injury coverage of \$50,000 for each person and \$100,000 for each accident. It was agreed that the policies could be "stacked" to provide plaintiff with coverage up to \$200,000.¹⁰

After being unable to reach a settlement with defendant, plaintiff submitted the issue of damages to binding arbitration. The arbitration panel awarded plaintiff \$17,500 compensatory damages, \$35,000 punitive damages, and \$17,500 in attorney fees. Plaintiff then applied to the Franklin County Court of Common Pleas to reduce her award to judgment according to Ohio Revised Code § 2711.09.

The common pleas court held that the arbitration panel exceeded its authority and vacated the award of punitive damages and attorney fees.¹¹ Plaintiff then appealed. The court of appeals reversed the common pleas court and held that the award for punitive damages and attorney fees was not against public policy and was within the uninsured motorist coverage of the policies.¹² However, instead of reinstating the amounts awarded, the court of appeals remanded the case with instructions to redetermine the amounts awarded by the arbitration panel.¹³ Plaintiff then appealed to the Ohio Supreme Court to reinstate the arbitration panel award. Defendant cross-appealed claiming that punitive damages and attorney fees should not be awarded.¹⁴

OHIO'S PUNITIVE PHILOSOPHY

Punitive damages are imposed for one of two reasons: either to punish the tortfeasor in order to discourage the reoccurrence of similar behavior, or to permit the victim to recover for the supposed aggravation of the injury.¹⁵ The clear majority of states adopt the punishment view of punitive damages.¹⁶ In

⁹*Id.* at 3.

¹⁰*Id.* at 2.

¹¹Hutchinson v. J.C. Penney Casualty Ins. Co., No. 82CV-08-4883, (C.P., Franklin County, Ohio 1982).

¹²Hutchinson v. J.C. Penney Casualty Ins. Co., No. 83AP-136, slip op. at 176 (10th Cir. Ct. App. Feb. 7, 1984).

¹³*Id.* at 188.

¹⁴Issues concerning the authority of binding arbitration were resolved in favor of plaintiff and will not be further discussed. The balance of this paper focuses on the punitive damage aspect of the cross appeal. *Hutchinson*, 17 Ohio St. 3d 195, 478 N.E. 2d 1000 (1985).

¹⁵*Southern Farm Bureau Casualty Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969).

¹⁶Excepting Louisiana, Massachusetts, Nebraska and Washington, all states permit punitive damages in ap-

*Detling v. Chockley*¹⁷, the Ohio Supreme Court held in a *per curiam* decision that "the rationale for allowing punitive damages has been recognized in Ohio as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct"¹⁸ While the *Hutchinson* court purported to maintain the punishment philosophy of *Detling*, its decision operates to ignore the punitive effect and award damages simply to provide additional compensation to the victim.

One issue in *Hutchinson* is whether the punitive effect of punitive damages can be realized if those damages are paid by the victim's insurance company under an uninsured motorist policy. The court answered in the affirmative for two reasons. First, the court determined that in the majority of states it is not against public policy to allow liability insurance to include coverage for punitive damages.¹⁹ The court then held that uninsured motorist coverage of punitive damages would not violate public policy since uninsured motorist coverage should be construed to operate as liability insurance.²⁰ Second, the court reasoned the tortfeasor remains ultimately liable to the insurance company for indemnification and is, therefore, indirectly punished for his wrongdoings.²¹ Both of these rationales are disputed by the dissent²² and other jurisdictions.²³

A significant difference exists between liability insurance and uninsured motorist coverage. Many states permit apparent frustration of the punitive effect of punitive damages by permitting the potential tortfeasor to insure against them with liability insurance.²⁴ In actuality, that apparent frustration

appropriate situations. Belli, *Punitive Damages: Their History, Their Use And Their Worth In Present-Day Society*, 49 U. MO. KANSAS CITY L. REV. 1,4 (1980).

Only Connecticut, Kentucky, Michigan, and New Hampshire view punitive damages as compensatory. All other states view punitive damages as a form of punishment. Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 875 (1976).

¹⁷70 Ohio St. 2d 134, 436 N.E.2d 208 (1982).

¹⁸*Detling*, 70 Ohio St. 2d 134, 436 N.E.2d 208.

¹⁹*Id.* It is curious to note that the Ohio Supreme Court has never decided this issue, and that lower Ohio courts have determined that public policy is violated when liability insurance offers protection against punitive damages. *Willowick Towers Inv. Co. v. General Ins. Co.*, Lake App. No. 7-239 (Sept. 22, 1980); *Troyer v. Horvath*, Cuyahoga App. No. 46530 (Nov. 3, 1983).

²⁰*Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1002.

²¹*Id.* at 198, 478 N.E.2d at 1003.

²²In his dissenting opinion, Justice Wright viewed the award solely as additional compensation and believed that the punishment function of punitive damages had been defeated. *Id.* at 201, 478 N.E.2d at 1005 (Wright, J., dissenting). Wright also believed that this decision would violate public policy by increasing the rates for uninsured motorist coverage. *Id.* at 202-3, 478 N.E.2d at 1007.

²³See *supra* note 1.

²⁴These courts permit insurability of punitive damages: *Pennsylvania Thresherman & Farmers' Mut. Casualty Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Casualty Co. of America v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *Fagot v. Ciravola*, 445 F. Supp. 342 (E.D. La. 1978); *Norfolk & Western Ry. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92 (N.D. Ind. 1976); *Concord Gen. Mut. Ins. Co. v. Hills*, 345 F. Supp. 1090 (D. Me. 1972); *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Southern Farm Bureau Casualty Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Greenwood Cemetery, Inc. v. Georgia Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); *Abbie Uriguen Olds-*

does not exist. The potential tortfeasor specifically contracted for that protection and realizes the punitive effect of increased premiums or loss of insurability.²⁵ In the case of uninsured motorist coverage, the tortfeasor has not contracted for the protection nor is he influenced by the non-existent threat of increased premiums. Since the tortfeasor and insured are different persons, the punitive effect of increased rates cannot be realized in uninsured motorist coverage.

The *Hutchinson* court further noted that the effect of punitive damages is not defeated since the defendant insurance company may bring an action against the uninsured motorist for indemnification, including indemnification for punitive damages.²⁶ This rationale purports to find a punitive effect in holding the tortfeasor ultimately liable. In practice, however, an uninsured motorist tortfeasor is a poor candidate from which to seek indemnification.²⁷ First, it is unlikely that the uninsured motorist will be able to reimburse the insurer because his lack of insurance implies that he is probably judgment proof.²⁸ Second, punitive damages may be awarded in the absence of the uninsured motorist as in the case of the hit-and-run accident. In these cases, the tortfeasor is not available as a source of indemnification.²⁹

The *Hutchinson* decision creates another problem with respect to the supposed punitive effect of punitive damages. The amount of damages should operate as a proper punishment relative to the tortfeasor's pecuniary condition.³⁰ If punitive damages are awarded in the absence of the tortfeasor, as in the case of a hit-and-run accident, then evidence of the tortfeasor's pecuniary condition is not available, thereby making the punitive award arbitrary.³¹

mobile Buick, Inc. v. United States Fire Ins. Co., 95 Idaho 501, 511 P.2d 783 (1983); City of Cedar Rapids v. Northwestern Nat'l Ins. Co., 304 N.W.2d 288 (Iowa 1981); Continental Ins. Companies v. Hancock, 507 S.W.2d 146 (Ky. 1973); First National Bank and Deposit Co. v. Fidelity and Deposit Co., 283 Md. 228, 389 A.2d 359 (1978); Anthony v. Firth, 394 So. 2d 867 (Miss. 1981); Colson v. Lloyd's of London, 435 S.W.2d 42 (Mo. Ct. App. 1968); Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013 (1977); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908 (1965); Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Dairyland County Mut. Ins. Co. v. Wallgren, 477 S.W.2d 341 (Tex. Civ. App. 1972); State v. Glenn Falls Ins. Co., 137 Vt. 313, 404 A.2d 101 (1979); Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W. Va. 1981). See also Morrissy, *Punitive Damages — Insurability*, 25 TRIAL LAW GUIDE 257 (1981).

²⁵Mullins v. Miller, 683 S.W.2d 669, 675 (Tenn. 1984) (Drowata, J., dissenting).

²⁶*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

²⁷Telephone interview with Jerome B. Haddox, Secretary, Vice President, and General Counsel for J.C. Penney Casualty Insurance Company (Aug. 20, 1985). J.C. Penney actively seeks indemnification from tortfeasors. *Id.* In 1984, J.C. Penney recovered 1.5% of their subrogation payouts for uninsured motorist coverage. *Id.* Litigation expenses and improbability of collection make the punitive effect of punitive damages theoretically possible, but practically improbable. *Id.*

²⁸*Burns v. Milwaukee Mut. Ins. Co.*, 121 Wis. 2d 574, 580, 360 N.W.2d 61, 64-65 (Wis. Ct. App. 1984).

²⁹*Mullins*, 683 S.W.2d at 673 (Drowata, J., dissenting). In *Mullins*, a default judgment was entered against a hit-and-run defendant and plaintiff was awarded punitive damages without proof of defendant's pecuniary condition.

³⁰*Id.*

³¹*Id.*

The difficulty of realizing the punitive effect of punitive damages in uninsured motorist coverage is ignored by a small minority of courts who treat the insurance contract as controlling.³² In order to justify an award of punitive damages, those jurisdictions only require that the insurance contract provide for such coverage.³³ The majority in *Hutchinson* adopted this minority view focusing on the contractual relationship between insured and insurer.³⁴

The court examined the provision of the policy³⁵ and held that the extent of coverage is ambiguous when an insurer promises to pay for all "bodily injury" caused by an uninsured motorist. The court believed that the provision could be read to either include or exclude punitive damages.³⁶ The court further held that in cases where policy language is ambiguous, the language "will be construed liberally in favor of the insured and strictly against the insurer."³⁷ Accordingly, the court interpreted this policy to include coverage for punitive damages.³⁸

This finding raises two additional issues. First, was the contract language really ambiguous enough to warrant an interpretation against the insurer? Second, assuming that a contract could be found, is that contract void as against public policy?

³²See *supra* note 1.

³³See, e.g., *Mullins*, 683 S.W.2d at 671.

³⁴*Hutchinson* is a 4-3 decision which represents a departure from the philosophy espoused in *Detling*. In *Detling*, a unanimous court held that punitive damages are proper only if punishment will result. *Detling*, 70 Ohio St. 2d at 136, 436 N.E.2d at 209. The *Hutchinson* decision permits punitive damages where a provision for such damages has been included in the insurance contract. A change in personnel may explain this change in philosophy. *Detling* was decided by Milligan, C.J., Brown, Sweeney, Locher, Holmes, Brown, and Krupansky, JJ. In *Hutchinson*, Locher and Holmes, J.J., maintained their opinion in *Detling* and were joined in dissent by Wright, J., Brown, Douglas and Sweeney, J.J., apparently changed their position from *Detling* and were joined by Celebrezze, C.J., who did not participate in the *Detling* decision.

³⁵The pertinent provision of the policy reads as follows: "We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person and caused by an accident . . ." *Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1002.

³⁶*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

³⁷This canon of insurance language construction was previously defined by the Ohio Supreme Court in *Buckeye Union Ins. Co. v. Price*, 39 Ohio St. 2d 95, 313 N.E.2d 844 (1974). The canon is broadly accepted on two theories. First, in cases where the insurer promises a broad plan of coverage, he assumes a duty to define any limitations he wishes to place on that coverage. An absence of expressed limitations presumes that the insurer did not intend to limit the coverage at the time the policy was sold. Second, insurance policies are viewed as contracts of adhesion since they are offered to the insured on a take-it-or-leave-it basis. As such, the policies will be interpreted to mean what a reasonably prudent person would understand them to mean. Note, *Punitive Damages — Public Policy Does Not Preclude Payment Of Punitive Damages Under An Insurance Policy*, 33 *DRAKE L. REV.* 177, 178 (1983-84).

³⁸*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003. In applying the aforementioned principles of liberal construction to the uninsured motorist provision, the court found the plaintiff's arguments well taken in that "punitive damages are the type of damages which a party would be legally entitled to recover . . . where the facts and circumstances of a particular case warrant such an award." *Id.* By structuring the language as it did, the defendant insurance company has agreed to subrogate itself into the position of the uninsured motorist tortfeasor. The court then reasoned that since the provision did not clearly prohibit such an award of punitive damages, it is reasonable to assume that such an award should be awarded in a proper case as a consequence of bodily injury. *Id.*

As to the first issue, whether a promise to pay for all "bodily injury" can be construed to include coverage for punitive damages, the court looked to Ohio's statutorily-mandated minimum of uninsured motorist coverage.³⁹ The maximum extent of coverage is limited by the type of insurance purchased. No state has permitted punitive damages where the statute and insurance policy have limited coverage to "bodily injury."⁴⁰ The only states to permit recovery for punitive damages have found that either the statute or the policy extends coverage beyond mere "bodily injury."⁴¹

In *Hutchinson*, Ohio has gone one step further. J.C. Penney's policy provided for statutorily mandated coverage.⁴² Ohio law requires coverage for "bodily injury."⁴³ The scope of the coverage cannot be extended beyond "bodily injury" either by statute or by contract.⁴⁴ The court must have adopted the belief that "bodily injury" coverage, alone, includes punitive damages. Since no other state, even those permitting recovery for punitive damages, has reached

³⁹See *supra* note 43.

⁴⁰The following cases represent a list of states that have considered the issue of whether an uninsured motorist provision includes a punitive damage award. However, these states have refused to authorize such coverage: California State Auto. Ass'n Inter-Ins. Bureau v. Carter, 164 Cal. App. 3d 257, ___, 210 Cal. Rptr. 140, 142-43 (1985); Suarez v. Aguiar, 351 So. 2d 1086, 1088 (Fla. Dist. Ct. App. 1977); Braley v. Berkshire Mut. Ins. Co., 440 A. 2d 359, 360 (Me. 1982); Laird v. Nationwide Ins. Co., 243 S.C. 388, ___, 134 S.E. 2d 206, 210 (1964); Burns v. Milwaukee Mut. Ins. Co., 121 Wis. 2d 574, 579-80, 360 N.W. 2d 61, 63 (Wis. Ct. App. 1984). In each case the policy provided coverage equal to the statutory requirement of "bodily injury," and in each case recovery for "bodily injury" did not include punitive damages.

See also Kahn, *Looking For "Bodily Injury": What Triggers Coverage Under A Standard Comprehensive General Liability Insurance Policy?*, 19 FORUM 532 (1984). The article points out that "bodily injury" has been construed to include "any localized abnormal condition of the body." *Id.* at 537. The term is limited to internal injuries, damaged tissue, some forms of disease, sickness, emotional stress, mental distress, rape, and birth of a deformed child. *Id.* at 537-38. "The concept of bodily injury must be distinguished from 'personal injury,' which results from false arrest, false imprisonment, malicious prosecution, libel, slander, and similar acts." *Id.* at 538.

⁴¹Only the following states have permitted recovery for punitive damages. In each, recovery was predicated on the theory that either the statute or the policy provided for more than mere "bodily injury." *Mullins*, 683 S.W.2d at 670 (legislative history indicates a desire to equate uninsured motorist coverage with liability insurance in all respects, including punitive damage coverage); *Home Indem. Co. v. Tyler*, 522 S.W.2d 594, 597 (Tex. Civ. App. 1975) (policy extended coverage beyond "bodily injury" by promising to cover "all sums which . . . the insured shall be legally entitled to recover"); *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 85, 189 S.E.2d 320, 323 (1972) (statute requires that each policy contains "provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle").

⁴²See *supra* note 35.

⁴³OHIO REV. CODE ANN. § 3937.18(A)(1) (Page 1984). The statute reads in pertinent part:

Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for *bodily injury* or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of *bodily injury*, sickness, or disease, including death resulting therefrom. (Emphasis added.)

⁴⁴The *Hutchinson* court, in its decision, did not examine the statute, its intent, or its legislative history. The court based its judgment solely on an understanding of "bodily injury" coverage as it appeared in the policy provision. *Hutchinson*, 17 Ohio St. 3d at 197-98, 478 N.E.2d at 1003. See also, Brief of Defendant-Appellee and Cross-Appellant at 16, *Hutchinson v. J.C. Penney Casualty Ins. Co.*, 17 Ohio St. 3d 195, 478 N.E. 2d

this conclusion,⁴⁵ this may be a strained interpretation.

The court rationalized its finding of a punitive damage contract by reasoning that uninsured motorist coverage should provide a broad-based source of coverage, including coverage for punitive damages.⁴⁶ The *Hutchinson* court cites *Kish v. Central National Insurance Group*,⁴⁷ in support of that proposition.⁴⁸ However, this support is untenable.⁴⁹

The *Kish* court held that intentional injuries could be covered within the meaning of uninsured motorist coverage, even though such an award would be excluded from liability insurance coverage.⁵⁰ Accordingly, the *Hutchinson* court reasoned that uninsured motorist coverage must be a broader form of coverage than ordinary liability insurance.⁵¹

While the *Kish* decision mandates coverage for intentionally caused injuries, it does not stand for the proposition that uninsured motorist coverage should be liberally construed in order to provide a broad based form of coverage. The *Kish* court expressly rejected a liberal interpretation of the policy language which defined the extent of coverage.⁵² *Kish* directly opposes the proposition that uninsured motorist policies should be read more liberally than other types of policies.⁵³

In *Hutchinson*, the court has given a highly liberal construction to "bodily injury" coverage. Until *Hutchinson*, Ohio courts have refused to give in-

⁴⁵See *supra* note 40.

⁴⁶*Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1002-03.

⁴⁷67 Ohio St. 2d 41, 424 N.E.2d 288 (1981).

⁴⁸*Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1002-03.

⁴⁹In dissent, Justice Wright rejected the majority's position that *Kish* lends support to its position because "*Kish* involved essentially the availability of *compensatory*, and not punitive damages." 17 Ohio St. 3d at 202, 478 N.E. 2d at 1006 (Wright, J., dissenting). (Emphasis original).

⁵⁰*Kish*, 67 Ohio St. 2d 41, 424 N.E.2d 288. In *Kish*, an uninsured motorist intentionally shot and killed the insured after the two had accidentally collided. *Id.* at 42, 424 N.E.2d at 289. The insured's estate sought to recover under the insured's uninsured motorist coverage. The insurer argued that since the killing was intentional, the claim would be excluded from coverage. The estate argued that the killing was accidental since it was the result of an accidental car accident. *Id.* at 43, 46, 424 N.E.2d at 290, 292.

The *Kish* court adopted the estate's view and held that the mind of the insured should determine if the act was accidental or intentional. *Id.* at 48, 424 N.E.2d at 293. Accordingly, the killing was viewed as accidental and payment of the claim was possible. *Id.* at 49, 424 N.E.2d at 293. The *Hutchinson* court rationalized that since liability insurance would have excluded coverage for such an intentional tort, that uninsured motorist coverage must be a broader form of coverage.

The *Kish* court, however, refused to find for the estate. The language of the policy covered injuries sustained as the result of an accident with an uninsured motor vehicle. The court held that reasonable minds could not interpret this language to include coverage for a shotgun death, even though the death was accidental relative to the insured, and was the result of a traffic accident. *Id.* at 52, 424 N.E.2d at 295.

The *Kish* decision actually runs counter to *Hutchinson*. The *Hutchinson* court used *Kish* to support a liberal reading of coverage defined as "bodily injury." In *Kish*, the court refused to apply a liberal construction to the provision of coverage.

⁵¹*Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1003.

⁵²*Kish*, 67 Ohio St. 2d at 52, 424 N.E.2d at 295.

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insurance policy provisions a highly liberal construction, especially in cases where the intent of the parties, at the time of contracting, would be defeated by such construction.⁵⁴

The second issue concerns the contract's application in light of public policy. Even if a contract for coverage is found, it will be struck down as void if it operates to contravene public policy.⁵⁵ Likewise, an insurance contract will be struck down if the beneficiary does not have an insurable interest.⁵⁶ Assuming that the insurer had contracted to include punitive damages within the uninsured motorist policy, and that punitive damages will be awarded without punishing the tortfeasor, is the contract void as against public policy?

Most courts have answered no.⁵⁷ The troublesome area is determining whether or not a contract exists. If it can be shown that the insurer had contracted to provide for such coverage, most courts will not consider enforcement of that contract to be violative of public policy.⁵⁸

Public policy may be compromised, however, when an insurer is forced to pay the punitive award. In *Hutchinson*, the court interpreted "bodily injury" coverage to provide punitive damages.⁵⁹ Had the insurer assumed that the policy was clear in excluding punitive awards, then public policy would be violated. The insurer did not exact payment for that coverage and, as such, must increase premiums among all other policy holders or compromise the viability of his company.⁶⁰ An understanding of the intended punitive effect of punitive damages would prevent an insurer from presuming that public policy demands payment for punitive damages when the insurer offers "bodily injury" coverage.⁶¹

⁵⁴See, e.g., *Orris v. Claudio*, 63 Ohio St. 2d 140, 143, 406 N.E.2d 1381, 1383 (1980). In *Orris*, the court reasoned that "... there is a preponderance of merit in the insurance company's argument that the terms of the contract of insurance must be given due consideration, and that weight must be given to what was contemplated by the parties." *Id.* In *Randolph v. Grange Mut. Casualty Co.*, 57 Ohio St. 2d 25, 385 N.E.2d 1305 (1979), the court held that "the rule of liberal construction of ambiguities in favor of the insured is inapplicable where the result obtained would not conceivably have been intended by the parties." *Id.* at 28, 385 N.E.2d at 1307.

⁵⁵RESTATEMENT OF CONTRACTS § 598 comment a (1932). "If . . . it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance."

⁵⁶*Loomis v. Eagle Life & Health Ins. Co.*, 72 Mass. 396 (6 Gray 1856). Insurance coverage is valid only when it is a contract to indemnify the beneficiary from loss. A life insurance policy on the life of another is not valid unless the beneficiary has an interest in the life of the insured. Absence of such an interest operates as a wager which may provoke criminal behavior. *Id.*

⁵⁷See *supra* note 24.

⁵⁸*Id.*

⁵⁹*Hutchinson*, 17 Ohio St. 3d at 197-98, 478 N.E.2d at 1002-3.

⁶⁰Premium rates include "amount[s] which] will enable the company to (1) to pay losses to be incurred during the life of such policies . . . , (2) to pay other proper operating expenses of the company, and (3) to retain a fair and reasonable profit." Allen, *Insurance Rate Regulation And The Courts: North Carolina's "Battleground" Becomes A "Hornbook"*, 61 N.C.L. REV. 97, 100-101 (1982-83).

However, the situation is different when the insurer volunteers to provide punitive damage coverage by contract. Public policy is not violated since such coverage does not punish the wrong party, or lessen the punitive effect of punitive damages.⁶² The tortfeasor is still ultimately liable; he is subjected to the same peril regardless of whether the victim is covered by uninsured motorist coverage. The liability of the tortfeasor merely shifts to the insurer. The only difference is that the victim is guaranteed to receive the punitive award while the insurer must cover any loss. The insurer is not punished by the loss. He has contracted to receive increased premiums as compensation for that risk, and he is not faced with an unexpected claim.

Finally, public policy is violated if insurance coverage is provided to an insured who does not have an insurable interest.⁶³ In *Hutchinson*, the insured does have an insurable interest, an interest he could otherwise recover from the tortfeasor had the tortfeasor been available for payment.⁶⁴ The insured simply receives an amount to which he is entitled. The insurance coverage merely operates as a conduit from which the insured is guaranteed payment and does not operate as a wager.

IMPACT PUNISHES POLICYHOLDERS

The *Hutchinson* court has reached a bizarre decision.⁶⁵ The decision represents a strained interpretation of policy language and operates to punish an innocent party. While the *Hutchinson* decision seems to violate the intended purpose of punitive damages, it will have a minimal direct impact on the insurance industry since most insurers are now incorporating language specifically excluding punitive damage coverage.⁶⁶ The real importance of the decision lies in the inferences that can be drawn from the opinion.

For example, the *Hutchinson* decision may indicate a softening of the view that punitive damages are intended solely for the purpose of punishment. The court permitted punitive damages without any showing of punitive effect simply because the contract provided for such coverage.⁶⁷ The court may now

⁶²*Home Indem. Co.*, 522 S.W.2d at 597.

⁶³See *supra* note 56.

⁶⁴BLACK'S LAW DICTIONARY 720 (5th ed. 1979). An insurable interest is "[s]uch a real and substantial interest in specific property as will prevent a contract to indemnify the person interested against its loss from being a mere wager policy."

⁶⁵Provoked by the *Hutchinson* decision, Charles Horn introduced a bill proposing legislation that would prohibit punitive damage awards under an uninsured motorist policy. S. 249, 99th Cong., 1st Sess. (1985). Charles Horn is a Republican state senator from Dayton, Ohio.

⁶⁶Telephone interview with Jerome B. Haddox, Secretary, Vice President, and General Counsel for J.C. Penny Casualty Insurance Company (Aug. 20, 1985). The Insurance Service Office drafts insurance policies on behalf of its member companies that currently insure 50% of the private passenger automobiles in Ohio. *Id.* It is presumed that they will consider amending their policy language to expressly exclude punitive damage coverage. *Id.*

⁶⁷*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

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be adopting the philosophy that punitive damages are intended, at least in part, to compensate the victim for the aggravation of the tort. Prior to this decision, the Ohio Supreme Court has strictly required that punitive damages punish the tortfeasor.⁶⁸

Furthermore, while the Ohio Supreme Court has never decided the issue, *Hutchinson* stands in dicta for the proposition that punitive damages are also insurable under liability insurance. The court was likely influenced by appellant's argument that the majority of other jurisdictions permitted liability insurance to cover punitive damages.⁶⁹

This philosophy runs counter to previous case law in Ohio. Prior to this decision, lower Ohio courts had decided that punitive damages were not insurable under a liability insurance policy.⁷⁰ These courts reasoned that it was against public policy to award punitive damages if that award did not operate to punish the tortfeasor.⁷¹

Additionally, the court exhibits the liberal construction it will give to insurance contracts in order to benefit the insured.⁷² The court held that "bodily injury" coverage was to include coverage for punitive damages.⁷³ No other jurisdiction has been willing to extend "bodily injury" coverage to this degree.⁷⁴

The Ohio legislature has been on a campaign since 1980 to simplify insurance policy language.⁷⁵ Ohio believes that simplified language is necessary to provide policy holders with a meaningful understanding of their coverage.⁷⁶ The *Hutchinson* decision may hinder that goal by preventing insurers from using simplified "plain English" language. Insurers will refuse to compromise contract precision in order to obtain "plain English" policies.⁷⁷

⁶⁸*Detling*, 70 Ohio St. 2d 134, 136, 436 N.E.2d 208, 209 (1982).

⁶⁹*Hutchinson*, 17 Ohio St. 3d at 197, 478 N.E.2d at 1002.

⁷⁰*See supra* note 20.

⁷¹*Id.*

⁷²In dissent, Justice Wright said that "[u]nfortunately, the majority has ignored the well-founded rationale underlying punitive damages and instead has provided an enhanced reward to an adequately compensated party solely for reward's sake." *Hutchinson*, 17 Ohio St. 3d at 201, 478 N.E. 2d at 1005 (Wright, J., dissenting).

⁷³*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

⁷⁴*See supra* note 40.

⁷⁵OHIO REV. CODE ANN. § 3902.01-08 (Page 1984).

⁷⁶*Id.*

⁷⁷In *Graham v. Public Employees Mut. Ins. Co.*, 98 Wash. 2d 533, 656 P.2d 1077 (1983), a similar issue arose. Several homeowners were protected by a "plain English" homeowner's policy issued by defendant. *Id.* at 534, 656 P.2d at 1079. The homeowners suffered a loss as a result of mud slides caused by the eruption of Mount St. Helens. *Id.* Defendant's "plain English" policy excluded coverage for "earth movement" in simplified language. A prior unsimplified policy, offering the same coverage, contained language which expressly excluded coverage for damage caused by volcanic eruption. The enumerated exceptions to coverage were removed in order to simplify the readability of the policy. *Id.* at 535, 656 P.2d at 1079.

The Washington Supreme Court held for plaintiffs. *Id.* at 539, 656 P.2d at 1081. The court reasoned that mud slides and volcanic eruptions were not forms of "earth movement" as excluded by the new "plain

Finally, the costs of uninsured motorist coverage must necessarily rise as a result of *Hutchinson*.⁷⁸ Insurers are faced with one of two choices. They must either provide coverage under the *Hutchinson* decision or rewrite the language of the policy to specifically exclude that coverage. In either case, the increase in expense is a result of *Hutchinson*. Since insurance rates are calculated based on the amount of claim dollars paid, those additional expenses will be passed on to the policyholders.⁷⁹

CONCLUSION

In *Hutchinson*, the Ohio Supreme Court adopted the philosophy that it is not against public policy to provide uninsured motorist coverage that covers punitive damages.⁸⁰ By doing so, Ohio places itself in the minority.⁸¹

The court justifies its decision by holding that an insurer can provide such coverage under contract law.⁸² By giving liberal construction to the provisions of the policy, the court held that since the terms of the policy were ambiguous, the policy would be construed in favor of the insured and accordingly provide coverage.⁸³ The court strained the terms of the policy to effect this result. When compared to other jurisdictions, the *Hutchinson* court interpreted policy provisions most liberally.⁸⁴

The court then sought further support for its decision by finding that the uninsured motorist provision would indirectly impose a punishment on the tortfeasor.⁸⁵ The court reasoned that the tortfeasor would be punished since the insurer could bring an action for indemnification.⁸⁶

The final analysis of *Graham* is that "[i]f insurers must communicate the substance of their policy to their insureds in order to rely on its terms, they will have to produce policy forms that both their customers and their agents can readily understand. The *Graham* decision discourages such simplification." *Autopsy Of A Plain English Insurance Contract: Can Plain English Survive Proximate Cause?*, 59 WASH. L. REV. 565, 581 (1984).

⁷⁸Telephone interview with Jerome B. Haddox, Secretary, Vice President, and General Counsel for J.C. Penny Casualty Insurance Company (Aug. 20, 1985). In an effort to minimize the impact of *Hutchinson*, J.C. Penny has redrafted their current policy to expressly exclude punitive damage coverage. *Id.* However, since the decision in *Hutchinson* was unanticipated when the original policy was drafted, all uninsured motorist policy holders in Ohio will be ultimately charged for all expenses resulting from that decision. *Id.* These expenses include the *Hutchinson* award, possible awards under policies which have not yet expired, litigation expenses, and costs of incorporating new policy language. *Id.* It is anticipated that these rate increases will be minimal. *Id.* If, however, J.C. Penny had decided to continue punitive damage coverage, as defined by *Hutchinson*, premiums for uninsured motorist coverage would have significantly increased. *Id.*

⁷⁹In simple terms, premium prices are set presuming that 70% will be paid out in claims, 25% will be used to run the company, and 5% will be used as profit. *Id.* Accordingly, premiums will increase as either claims or operating expenses increase. *Id.*

⁸⁰*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

⁸¹See *supra* note 1.

⁸²*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

⁸³*Id.*

⁸⁴See *supra* note 40.

⁸⁵*Hutchinson*, 17 Ohio St. 3d at 198, 478 N.E.2d at 1003.

The practical aspects of such a finding are doubtful.⁸⁷ An uninsured motorist is a poor candidate from which to seek indemnification.⁸⁸ The probability of recovering is further lessened by the fact that the identity of the tortfeasor may not be known, as in the case of the hit-and-run tortfeasor.⁸⁹ Thus, under the facts in *Hutchinson*, it appears that the Ohio Supreme Court has reached a bizarre result.

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⁸⁷See *supra* note 27.

⁸⁸*Burns*, 121 Wis. 2d at 580, 360 N.W.2d at 64-65.

⁸⁹*Mullins*, 683 S.W.2d at 673 (Drowota, J., dissenting).