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Uninsured Motorists Coverage Validity of Other Insurance Provisions; Curran v. State Automobile Mutual Insurance Co.

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RECENT CASES

INSURANCE LAW—UNINSURED MOTORIST COVERAGE VALIDITY OF OTHER INSURANCE PROVISIONS

Curran v. State Automobile Mutual Insurance Co., 25 Ohio St. 2d 33, 266 N.E. 2d 566 (1971).

THIS CASE CAME to the Ohio Supreme Court on an appeal from two separate actions heard by the Court of Appeals for Hamilton County and consolidated therein because of their identical legal issues.

In the first case, plaintiff-appellee sustained personal injuries when the car in which she was riding as a passenger was involved in a collision resulting from the negligent operation of another car by an uninsured motorist. The owner of the car in which the plaintiff-appellee was riding was insured under a policy of insurance which provided uninsured motorist coverage in the amount of \$10,000 for injury to one person and \$20,000 for injuries to two or more persons injured in the same accident. Plaintiff-appellee was one of five passengers who subsequently shared in the \$20,000 of insurance proceeds under this policy. At the time of the collision, plaintiff-appellee had in force an auto insurance policy issued by the defendant-appellant, which also provided for uninsured motorist coverage to plaintiff-appellee and in the same amounts as the driver's policy. Plaintiff-appellee filed an action in declaratory judgment against defendant-appellant seeking a ruling as to whether she was entitled to collect from her insurer under the uninsured motorist clause of her policy. The Court of Appeals affirmed the lower court's decision that the plaintiff-appellee was entitled to collect from her insurer the difference between either the smaller of her full damages or the policy limit for a single injury (\$10,000), and the amount received under the driver's policy of insurance.

The second case also involved a collision of a car in which the plaintiff-appellee was a passenger with another vehicle negligently operated by an uninsured motorist. As in the first case, plaintiff-appellee recovered from her driver's insurer under the driver's uninsured motorist provision and sought recovery under her own policy of insurance which included a provision for uninsured motorist coverage. The Court of Appeals, in holding for plaintiff-appellee, reversed the lower court which had granted the insurer a summary judgment.

It was the contention of the defendant-appellant insurers that their liability was limited in both instances by the "other insurance" provisions of their respective policies. These provisions were both "excess insurance"

clauses.¹ The Ohio Supreme Court, in ruling upon what it considered to be the sole issue in this case, denied effectiveness to these clauses. In holding for the plaintiff-appellees the Court stated:

...where an insurer provides uninsured motorist protection, as required by R.C. 3937.18, it may not avoid indemnification of its insured under that coverage by including in the insurance contract an "other insurance" clause, which, if applied, would relieve the insurer from liability in circumstances where the insured has other similar insurance available to him from which he could be indemnified.²

As noted in the Court's opinion, although this is the first instance in which the Ohio Supreme Court has passed on this question, the question is not a novel one elsewhere. Of nineteen states which have ruled on this question of law, twelve has given effect to these clauses and seven have denied their validity.³ The argument used by those courts which give effect to these clauses is that the Uninsured Motorist Statute was not designed to provide a means by which the insured would obtain greater insurance protection if injured by an uninsured driver than he would if injured by a person having a policy containing the minimum required statutory limits under the Financial Responsibility Statute.⁴ Those states denying validity offer several reasons, among which are the following:

- (1) To give effect to such offsetting clauses would result in no coverage at all, where both policies contain "other insurance" clauses;⁵
- (2) Insurers may not, after accepting premiums for uninsured motorist coverage, deny coverage on the ground that the insured had other coverage available to him.⁶
- (3) Such unilateral escape clauses are in conflict with the statutory purpose of the uninsured motorist statutes.⁷

¹ "Other insurance" provisions vary from policy to policy. They generally are one of three types of clauses: "pro-rata," "excess insurance," or "excess-escape." A "pro-rata" clause provides that where there is similar insurance available to the insured, the policy will provide pro-rata coverage in conjunction with such insurance. If a policy contains an "excess-escape" clause there will be no coverage provided thereunder where other similar insurance is available to the insured. Where a policy contains an "excess insurance" clause, the insurer will only pay to the insured that amount by which its policy limit exceeds the policy limits of the other similar insurance, up to the amount of actual damages.

² *Curran v. State Automobile Mutl. Ins. Co.*, 25 Ohio St. 2d 33, 35, 266 N.E. 2d 566, 569 (1971).

³ For a good treatment of this subject including case citations, see 28 A.L.R. 3rd. 551.

⁴ *M.F.A. Mut. Ins. Co. v. Wallace*, 245 Ark. 230, 431 S.W. 2d 742, 744 (1968).

⁵ *Smith v. Pacific Automobile Ins. Co.*, 240 Ore. 167, 171, 400 P. 2d 512, 514 (1965).

⁶ *Sellers v. United States Fidelity & Guarantee Co., Fla.*, 185 So. 2d 689, 690 (1966).

⁷ *Harleysville Mutual Casualty Co. v. Blumling*, 429 Pa. 389, 396, 241 A. 2d 112, 116 (1968).

The Ohio Supreme Court, although noting the elements of the first two arguments stated above, adopted the third unequivocally when it stated:

To permit an insurer, who provides uninsured motorist coverage, to avoid liability by an "other insurance" clause in cases where other insurance is available to his insured would thwart . . . legislative intent. . . R.C. 3937.18 itself indicates that uninsured motorist coverage is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles."⁸

Aside from the fact that the instant case settles one important legal issue as to uninsured motorist insurance coverage, it also is an indication of a much broader policy decision on the part of the court as to the future interpretation of Ohio's Uninsured Motorist Statute. The remainder of this article is an attempt to illustrate one possible extension of this policy.

The question might be raised as to whether one could recover under a provision for uninsured motorist coverage where the tortfeasor is carrying a policy of bodily injury liability insurance. It is entirely possible that the tortfeasor could be carrying bodily injury liability insurance in amounts sufficient to satisfy the State's Financial Responsibility Act and, because of multiple injuries, still be "partially insured" as to parties injured by his negligent actions.⁹ Based upon the liberal construction given the Uninsured Motorist Statute by the Court in *Curran*, it would appear that such a finding is entirely possible, if not probable.

Assuming that the courts will permit recovery, the amount of such recovery will depend directly on how far future courts will be willing to extend the rationale of the *Curran* decision in interpreting Ohio's Uninsured Motorist Statute.

On October 1, 1970, Ohio's Uninsured Motorist Statute was amended in part and the following provision was incorporated therein:

- (c) In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made. . . .¹⁰

⁸ *Supra*, note 2 at 38.

⁹ In *Porter v. Empire Fire and Marine Insurance Co.*, 12 Ariz. App. 2, 467 P. 2d 77, 80 (1970), the Arizona Court of Appeals adopted this rationale and went on to say:

In keeping with the strong policy . . . of the Financial Responsibility Act, we are of the opinion that [the insured] must be permitted to proceed against his uninsured motorist carrier for his unsatisfied damages, at least until he has received the minimum protection afforded by statute. Whether or not involved in an accident with multiple injured parties, all victims of automobile accidents should be assured of at least the statutory minimum level of protection.

¹⁰ Ohio Rev. Code 3937.18(c).

At first glance, this statutory provision seems to provide that in the event the injured party should collect from his insurer under the uninsured motorist provision, that insurer will be entitled to be subrogated to *all* rights of the insured as to proceeds received from the tortfeasor. This is based on the premise that there should not be a double recovery for the same damage sustained as a result of the same accident.

Although such a purpose is based upon sound equitable principles, a strict interpretation of the statute could well bring about an inequitable result as illustrated by the following example: In an accident involving multiple injured parties the tortfeasor has the statutory \$12,500—\$25,000 coverage required by the Financial Responsibility Act,¹¹ but because there are multiple injured parties, our insured recovers only \$5,000 from the tortfeasor's insurer, although recovering a judgment for \$15,000. At the time of the collision, our insured had a policy with an uninsured motorist coverage provision in the amount of \$10,000 and subject to an "other insurance" clause. Three different amounts of recovery are possible.

(1) If the court gives a liberal construction of Ohio's Uninsured Motorist Statute and stresses the rationale of making the injured party whole, the insured should recover the full amount of his policy, (\$10,000) in addition to the \$5,000 already received, or \$15,000;

(2) If the court chooses to follow a middle-of-the-road approach, and limits recovery to the statutory amount,¹² the insured would recover \$7,500 from his insurer in addition to the \$5,000 already received or \$12,500;

(3) If the court reads Ohio Revised Code section 3937.18(c) strictly, the insured would recover the \$10,000 policy limit, but because of the subrogation feature, the total recovery (\$15,000) would be reduced by the \$5,000 received from the tortfeasor's insurer on behalf of the tortfeasor, and thus the insured will recover only \$10,000 and his insurer will only have paid out \$5,000.

Interpreting Ohio Revised Code section 3937.18(c) in such a way as not to reduce coverage to persons injured through the acts of uninsured motorists below the amount of uninsured damages sustained, seems to be in line with the following language of the Court in the *Curran* case:

... we are of the opinion that the uninsured motorist statute should be construed *liberally* in order to effectuate the legislative purpose that coverage be provided to persons injured through the acts of uninsured motorists.¹³ (Emphasis added).

¹¹ Ohio's Financial Responsibility Act (O.R.C. 4509.01 et seq) specifies minimum coverage for bodily injury liability insurance of \$12,500-\$25,000.

¹² *Id.*

¹³ *Supra*, note 8.

If, indeed, courts should construe the Uninsured Motorist Statute liberally, it would seem to follow that in an effort to secure protection for persons injured by the partially insured tortfeasor, the courts would permit recovery by the insured from his own insurer to the extent of the *uninsured portion* of his damages.

In making its decision in *Curran*, the court has painted the barn with a wide brush. In so doing, it has noticeably left out some trimming as stated above. In addition, it may have covered more than it wished. By denying effectiveness to the broad category of "other insurance" clauses, it has invalidated not only the type of provisions found in this case, but also other types of "other insurance" clauses such as the "pro-rata" clause which may or may not be repugnant to the statutory scheme of uninsured motorist protection. What the insured has contracted for and is relying upon is uninsured motorist coverage in a certain amount. It is questionable whether Ohio's Uninsured Motorist Statute would dictate a greater recovery; but, in view of the *Curran* decision, future courts would have a sound basis upon which to permit such a recovery.

DENNIS J. FOX