Uninsured Motorist Arbitration

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UNINSURED MOTORIST ARBITRATION*

ENFORCEABILITY OF THE ARBITRATION PROVISION

Most attorneys who are familiar with arbitration provisions of uninsured motorist endorsements to automobile liability insurance policies have encountered them under distressing situations such as the following: An insured has an automobile collision with an uninsured motorist; he suffers property damage to his automobile and personal injuries; under the terms of his uninsured motorist endorsement to his insurance policy, he is allowed to recover the cash value of these damages from his own insurance company if the uninsured motorist was at fault; he and his insurance company disagree as to the issues of liability of the uninsured motorist and the amount of his damages, and for that reason no settlement is reached. As a result of this situation, the insured hires an attorney in order to sue his insurer for his damages. After reading the uninsured motorist endorsement, the attorney informs the insured that he cannot sue due to the existence of the arbitration clause which is uniformly inserted in uninsured motorist endorsements. This is the first time that the insured realizes that his right to sue under the endorsement, carrying with it the 7th Amendment right of jury trial, has been contracted away. His reaction is often anger and frustration.

One section is common to all arbitration provisions in uninsured motorist endorsements. It provides that, should the insured and his insurer disagree on the question of the tortfeasor’s liability or the amount of damages, then, on written demand of either party, the disputed matters are to be settled by arbitration.2

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*The research for the sections treating the scope of the arbitration provision and the loss of the right to arbitrate was compiled by Robert C. Brown, a recent graduate of the University of New Mexico Law School and currently an attorney in Casa Grande, Arizona.

1. 1966 Standard Endorsement, Part I: Coverage. The standard form of uninsured motorist coverage referred to in this section is the language issued by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau, Standard Form, entitled “Family Protection Coverage Endorsement Against Uninsured Motorists.” Most of the major automobile insurers throughout the United States use the same language.

2. 1966 Standard Endorsement, Part VI: Additional Conditions, F. “Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of the amount of payment which may be owing under this endorsement, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by
The crucial question is whether the insured is always bound to arbitrate even though he would rather settle his differences with the insurer by court litigation.

A. Reasons for adoption of the Uninsured Motorist Endorsement and its Arbitration Clause.

The uninsured motorist endorsement, first adopted in 1954, was a voluntary response by the insurance industry to the problem of compensating the innocent victims of the financially irresponsible motorist. It apparently quieted the clamor in legislatures throughout the country for an answer to this problem. Today uninsured motorist coverage is (by statute in all 50 states) to be offered with each automobile policy.3

The adoption of the endorsement, however, caused a serious problem for insurance companies. It became obvious that, in many cases, they would find themselves in disputes with their own policyholders over the legal liability of the uninsured motorist and the extent of the insured's injuries. If the two of them could not agree, the company and the insured would find themselves involved in a court litigation in which the insurer would have to take the position that the uninsured motorist was not negligent. But the same automobile collision also gives rise to a potential third party claim by the uninsured motorist against the policyholder. In this second action, the insurance company must reverse its position and prove that the uninsured driver was negligent. This led to a potential conflict of interest, and certainly created an anomalous situation, one that the insurance companies desired to resolve.4

A second problem for insurers was that if they had to meet the claimant in court, they would be in the impractical and undesirable position of being the named defendant in the litigation. Thus, aware of the successful experience with arbitration under Inter-Company agreements,5 insurance companies decided that any award made by the arbitrators pursuant to this endorsement." This clause is used by most major insurers. One major exception is the State Farm Insurance Company which uses rules different from those of the American Arbitration Association. See note 131 infra.


5. In 1970, approximately 141,000 cases were disposed of under the Nation-wide Inter-Company Arbitration Agreement involving nearly $56 million. Casey, Arbitration and Company Procedures for Installing 'No-Fault' Coverage, 588 Ins. L. J. 21, 23 (1972).
an arbitration clause in the uninsured motorist endorsements would solve these problems as well. Their decision has since led to an unprecedented rash of litigation testing that policy provision.

B. Disenchantment with the Arbitration Provision.

The uninsured motorist endorsement for the first time brought the concept of arbitration to the general public and to the majority of the Bar. The response was not an overwhelming acceptance of the process. While many reasons, including the hostility of the courts, the ignorance of the plaintiff’s Bar, and the nature of the arbitral process, have been given for the problem, the basic difficulty is that the factors which made the process so attractive in the inter-company area are not present in the uninsured motorists disputes.

When viewed from the position of the insurer there are valid reasons for utilizing arbitration in the resolution of uninsured motorists disputes. For instance, to the insurer there are a substantial number of disputes which need to be disposed of in an economical and efficient manner. In addition there is a continuing relationship with the insured which needs to be protected from the bitterness associated with protracted litigation.

However, from the viewpoint of the individual insured and his attorney there are not the same compelling reasons to arbitrate. They have no volume problem, and, in fact, can use the company’s defense backlog to their own advantage in some cases to increase settlement value. They have only one chance to recover, and if they lose there is normally no subsequent case in which the arbitral process can work to their advantage. As a result, to place all of their chances in a single arbitration proceeding and to forfeit their resort to appellate review is to severely limit their chances of recovery.

Assuming then, for whatever reason, that an insured would rather litigate his differences with his insurer under the uninsured motorist endorsement, the question becomes whether he can sue despite the existence in the endorsement of the arbitration clause.


7. A discussion of the advantages and disadvantages of the arbitral process to the insured will be given at pages 238-47, infra.
C. The issue of enforceability under “present controversy” type statutes.

The effect of legislation and judicial decisions interpreting the enforceability of arbitration clauses in uninsured motorist endorsements should be analyzed with respect to a long-standing reluctance in the United States to enforce such agreements. This reluctance stems from the English common law which precluded specific performance of arbitration agreements. The common law rule has been attributed both to the English judges’ reluctance to force parties to adjudicate rights without the safeguards of a court of law, and to a less charitable judicial disinclination to relinquish disputes to arbitrators at a time when judges’ incomes were derived mostly from fees for the causes they heard. Because of the common law, American courts will not enforce arbitration agreements if one of the parties desires to litigate unless the common law is modified by legislation.

Before 1971, New Mexico’s arbitration statute had modified the common law only to sanction agreements to arbitrate existing disputes. It was generally assumed that an arbitration clause in an uninsured motorist endorsement under this statute would be held to be unenforceable because the disputes to arise would not be “present controversies” at the time of the signing of the uninsured motorist endorsement agreement, but instead they would be future disputes. Although no New Mexico case has ever considered the question of the enforceability of the arbitration provision in the uninsured motorist endorsement, two of eighteen states having “present controversy” type arbitration statutes

10. A. Corbin, supra note 8; J. Cohen, Commercial Arbitration 226-41 (1918) [hereinafter cited as J. Cohen].
12. N.M. Stat. Ann. § 22-3-1 (1953): “All litigants in the State of New Mexico shall have the right, whenever they so desire, to terminate their suits, in whatever condition they may be, in any court of this state, by means of arbitrators, according to the provisions of this chapter.”
have expressly held in court decisions that the clause is unenforceable.\textsuperscript{14} One of these, \textit{Barnhart v. Civil Service Employees Insurance Company}, held the arbitration provision voidable and against public policy in that it both denied a party his right to have his disputes determined in a court of law and tended to oust the court of its jurisdiction.\textsuperscript{15}

The New Mexico Supreme Court recently held an agreement to arbitrate a future dispute voidable and unenforceable as against public policy in \textit{State ex rel. Duke City Lumber Co. v. Wood}.\textsuperscript{16} The agreement in issue concerned a secured loan and a provision providing for binding arbitration of all disputes under the contract. The court held that the parties had not clearly contemplated all of the disputes that later developed under the contract. For that reason, the agreement was held unenforceable under New Mexico's then "present controversy" type arbitration statute. Citing Corbon on Contracts, the court concluded with this policy argument:\textsuperscript{17}

\begin{quote}
It seems, therefore, that the supposed vice of general and unlimited arbitration agreements lay in the fact that parties try to bind themselves to avoid the courts and to submit to private arbitration issues that at the time they do not have clearly in mind, which after they have arisen one of them is no longer willing to submit to the private arbitrators.
\end{quote}

Despite the existence of New Mexico's "present controversy" type arbitration statute, two New Mexico State District Courts have held that the arbitration clause in the uninsured motorist endorsement is enforceable because of the existence of the trial

\textsuperscript{14} Barnhart v. Civil Service Employees Insurance Company, 16 Utah 2d 223, 398 P.2d 873 (1965); Heisner v. Jones, 184 Neb. 602, 169 N.W.2d 606 (1969). One other case, in a state which has since changed its arbitration statute, has also held the arbitration provision in the uninsured motorist endorsement unenforceable because it applied to a future dispute: Indiana Insurance Company v. Noble, 265 N.E.2d 419 (1970) [hereinafter cited as Indiana Insurance Co. v. Noble].

\textsuperscript{15} 16 Utah 2d 223, 398 P.2d 873 (1965).

\textsuperscript{16} 81 N.M. 285, 466 P.2d 562 (1970).

\textsuperscript{17} \textit{Id.} at 287.
This statute, N.M. Stat. Ann. § 64-24-107 (Repl. 1972) allows any aggrieved party to an arbitration award in an uninsured motorist case the right to appeal to a district court for a trial de novo. Both judges, held, therefore, that this statute eliminated the policy argument against the enforcement of arbitration agreements for future disputes because the court is not ousted of its jurisdiction. Also, as long as this New Mexico trial de novo statute remains, the policy of the finality of the arbitration award is expressly abrogated for uninsured motorist arbitrations.

D. The issue of enforceability under the Uniform Arbitration Act.

In 1971, the New Mexico legislature adopted the Uniform Arbitration Act which repealed the old arbitration statute and added New Mexico to the growing number of states that have adopted the so-called “modern” arbitration statutes allowing parties to enforce agreements to arbitrate both present and future disputes. N.M. Stat. Ann. § 22-3-9 (Supp. 1971) states:

22-3-9. VALIDITY OF ARBITRATION AGREEMENT. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. The Uniform Arbitration Act (22-3-9 to 22-3-31) also applies to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement.

This section is copied from § 1 of the Uniform Arbitration Act as approved in 1955 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. As of 1972, this section has been adopted verbatim in eleven states. Thirteen other states have arbitration statutes substantially analogous to the Uniform Act; thus, there are a total of twenty-four “modern” arbitration states.

The only requirement which the Uniform Arbitration Act seems to impose for an agreement to arbitrate a future dispute in order for it to be enforceable is a written provision in a contract. Although, no New Mexico appellate decision has considered the enforceability of an uninsured motorist endorsement arbitration provision under the Uniform Act, it is often assumed that in modern arbitration states such a provision is strictly enforceable at the will of one of the parties. Indeed, there is a modern trend to enforce these provisions in some modern arbitration states because of the strong public policy favoring arbitration. Despite this assumption of enforceability, however, a compelling argument can be made against the enforceability of the uninsured motorist endorsement arbitration provision because it has not been voluntarily agreed upon by the insured.

Questions concerning the existence in a contract of an arbitration provision are decided by a court. The court should determine whether there was mutuality of assent. It is stated as the general rule:

To be enforceable, the arbitration agreement must have all the elements of a contract. Without mutuality of assent, there can be no enforceable arbitration contract.

To determine mutuality of assent with respect to an arbitration provision in a modern arbitration state, the character of the Uniform Arbitration Act legislation should be considered in light of the Commissioners’ Prefatory Note which says: “This Act


26. 9 Williston on Contracts, supra, note 11, at 472-77.
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covers voluntary written agreements to arbitrate.”\(^{27}\) It has been stated that the intent of the New Mexico legislators who adopted the Uniform Arbitration Act was to also adopt this “voluntary agreement” language of the Prefatory Note.\(^{28}\) In other Uniform Act states in which there is an absence of specific legislative intent underlying provisions of the Uniform Act, it has been held that the records of the National Conference of Commissioners on Uniform Laws could be examined to determine the intent of the Act.\(^{29}\) If the language of the Uniform Act, then, is combined with this expressed intent of the drafters, the issue of enforceability is not only a question of whether the arbitration provision is in a written contract, but also whether the provision is the result of a voluntary agreement. The real question to be decided by appellate courts interpreting a state’s Uniform Arbitration Act or other modern arbitration statute, is whether the uninsured motorist endorsement is, in fact, such a voluntary agreement.

Appellate court decisions interpreting either a modern arbitration state statute or the Federal Arbitration Act,\(^{30}\) which is substantially similar to the modern statutes, seem to assume that a party’s decision to use arbitration must result from a voluntary agreement.\(^{31}\) One of these decisions, *Allstate Insurance Company v. Schmitka*,\(^{32}\) held that an arbitration provision would not be enforced unless there was a clear showing that the parties voluntarily agreed to such arbitration.

Some state statutes have provisions which require a voluntary

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27. 9 U.L.A. 76.
28. Interview with Turner Branch, Attorney at Law, in Albuquerque, New Mexico, February 23, 1972. Mr. Branch is a New Mexico legislator in the New Mexico House of Representatives; he was also the sponsor of the Bill to adopt the Uniform Arbitration Act in the 1971 legislative session.
agreement on the arbitration clause by an insured in order for the clause to be enforceable against the insured in an uninsured motorist dispute. For instance, some states require that the parties sign, acknowledge, execute bonds, file or otherwise duly execute contracts in order to create an enforceable agreement to arbitrate; several of these states have additional legislation that necessitates compliance with two or more of these prerequisites. Such a procedure demonstrates a strong public policy that the insured be aware of the arbitration clause before he purchases the uninsured motorist coverage.

One of the rare judicial discussions of these special requirements occurred in a recent Rhode Island case involving the enforceability of the Uninsured Motorist endorsement arbitration clause. The Rhode Island arbitration statute requires that an agreement to arbitrate must be “clearly written and expressed and contained in a separate paragraph immediately before the testimonium clause of the signatures of the parties.” In light of this statute the Supreme Court stated:

We believe that the legislature in promulgating this condition reflected the concern of this court as to the adoption of binding arbitration of future disputes and consequently felt that, should such a clause be included in an agreement, it was to be placed in such a location that its chances of being seen by the parties who would be bound hereby would be enhanced. (Emphasis added).

Since insurance policies are rarely, if ever, signed acknowledged, filed or duly executed, it is asserted that in the jurisdictions with these special requirements the arbitration provision in the uninsured motorist endorsement is unenforceable.

Because of the danger that the insured almost never voluntarily agrees to the arbitration clause in the uninsured motorist

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endorsement, five states have statutory rules which explicitly exclude the use of arbitration to preclude a claimant's right to sue under the endorsement. Furthermore, six other state statutes and one ruling by a state insurance commissioner expressly prohibit insurers from specifying the use of arbitration in their uninsured motorist endorsements.

An extensive examination in all states discloses no appellate decision where a state court was required to face the issue of whether the arbitration terms in the uninsured motorist endorsement satisfied the voluntary agreement requirement of that state's arbitration statute. Until now, most insured claimants attempting to avoid arbitration have not questioned the validity of the clause with respect to the necessary voluntary agreement or mutuality of assent. Such a glaring omission is shown in an appellate decision in New Hampshire, a state with a modern arbitration statute. The decision, *Kirouac v. Healey,* involved appellant seeking to avoid the enforcement of the arbitration clause on the ground it deprived him of his constitutional right to trial by jury. In dictum, the Court made this interesting observation about the necessity of voluntary agreement:

The plaintiff and *amici* urge that the arbitration provisions of the policy are invalid, while the insurer contends that they are a voluntary waiver of the plaintiff's right to jury trial against the insurer, if not a waiver of all rights of trial in the courts. . . . So far as the record discloses, the plaintiff has agreed to submit, upon written demand, to arbitration of his claim against the insurer, and to consider himself bound by the award. American Fidelity Co. v. Schemel, 103 N.H. 190, 195, 168 A.2d 478 and cases cited. *Voluntary agreements to arbitrate are made valid in this jurisdiction by statute.* RSA Ch. 542, cf. *Childs v. Allstate Ins. Co.,* 237 S. C. 455, 117 S.E.(2d) 867; *Boughton v. Farmers' Ins. Exch. (Okla),* 354 P.(2d) 1085. The provisions of RSA Ch. 28, *supra,* permit but do not require uninsured motorist coverage to include arbitration.
provisions. Cf. Va. Code Ann. sec. 38.1-381 (g) (Supp. 1960). There is no evidence in the record that the plaintiff's acceptance of such provisions in his policy was anything but voluntary. Hence, he should be bound by them to the same extent that any party to such an agreement would be bound. RSA Ch. 542 supra. (Emphasis added.)

Two observations on this case are appropriate. First, the court said clearly that contracts to arbitrate future disputes are valid and enforceable. Second, the opinion is equally clear that only voluntary agreements are valid. The court's statement that there was no evidence in the record that the insured's agreement was anything but voluntary is indicative of the fact that counsel for the insured failed to lay a basis during the trial for raising this issue on appeal.

Several reasons can be advanced to show that the arbitration provision in an uninsured motorist endorsement is not a voluntary written agreement. These arise from certain marketing practices which exist generally in the automobile liability insurance business, and from some conditions related specifically to the endorsement.

The first and basic reason is that the acceptance by the insured of a unilaterally drafted arbitration provision within a detailed multipaged document is not an adequate basis upon which to forfeit the insured's right to have any controversies judicially determined. The insurance policy is typical of a contract of adhesion (and thus should not be enforced in all aspects against an insured) for the following reasons: 1) Economic necessity today requires the motorist to carry automobile liability insurance; 2) there is a lack of alternatives in the standard form (automobile insurance is a "take it or leave it" proposition); 3) One party controls the risks under the contract.

Automobile insurance is a "take it or leave it" proposition because there is no bargaining with the insurance company over terms. This is due to the great disparity in bargaining power between the parties. Even if someone had sufficient power to bargain over the terms of the policy, it is implausible that he

42. Id. at 637-38.
44. Kessler, Contracts of Adhesion, 43 Colum. L. Rev. 629, 631 (1943); A. Widiss, supra note 8, at 185.
45. A. Widiss, supra note 8, at 190.
46. Id. at 185 and note 4.
would seek the guidance of an insurance lawyer to interpret for him the meaning of the arbitration clause; nor do the costs involved (a premium of usually between $2.00 and $15.00; $5.00 in New Mexico) warrant the economic cost to society of countless negotiations over the inclusion of such a term in the policy. One writer has vehemently asserted the following:

When "take it or leave it" contracts and standardized order forms, which anyone with the slightest business experience knows are signed without being read, contain an arbitration clause, it should not be enforced against the recipient of the contract.

Second, the insured usually does not have the opportunity to examine the policy until after he has made application—when it is either mailed to him or delivered by the company's agent. Professor Patterson in Essentials of Insurance Law has pointed out:

. . . the insured, because of his indifference to an event that will probably never happen, and because of his inability to understand the technical conditions imposed by the insurer, needs guidance and protection to a greater extent than in most other business deals in which he engages.

Third, as emphasized by Morris Stone, an editor of the Arbitration Journal, the uninsured motorist endorsement is normally the least of what concerns the insured when he is shopping for insurance, and thus he is most likely to pay little attention to it with its arbitration provision.

Fourth, it is a general rule that statutes in derogation of the common law are to be strictly construed. The application of this rule to the Uniform Arbitration Act and other "modern" arbitration statutes seems justified by the following reasoning. Historically, arbitration statutes were designed to modify, not completely eliminate the special status of agreements to arbitrate disputes; the Uniform Act seems equally clear that parties must submit to arbitration by a voluntary agreement; therefore, as long as terms in automobile insurance policies represent something much less than actual voluntary agreements, these terms

47. Id.
49. A. Widiss, supra note 8, at 186.
50. E. Patterson, Essentials of Insurance Law 44 (1935).
53. A. Widiss, supra note 8, at 187.
should not be taken as a voluntary agreement abridging an insured's right to a judicial determination.\textsuperscript{54}

Fifth, it is also submitted that silence on the part of the purchaser after receiving the written policy containing the arbitration terms should not be taken as agreement unless the individual was both aware of the terms and understood their importance.\textsuperscript{55} As has already been stated, in most instances the individual is not only totally unaware of the provision, but would not comprehend the import of the arbitration clause even if he were to read it.

In light of the foregoing arguments it is submitted that in a state with a "modern" arbitration statute like New Mexico, neither the terms of the uninsured motorist endorsement which include an arbitration provision nor the insured's apparent silent acceptance of those terms constitute a voluntary, written agreement as contemplated by the Uniform Arbitration Act and numerous court decisions.\textsuperscript{56}

The allocation of the burden of proof in the court hearing on the question of whether there is a voluntary agreement to arbitrate in the uninsured motorist endorsement may be determinative. The burden is usually on the party seeking to enforce the agreement.\textsuperscript{57} If the insurance company has this burden initially, the question becomes whether the introduction into evidence of the arbitration clause in the uninsured motorist endorsement is sufficient to shift the burden to the insured. If the insurer were allowed to shift the burden in this manner, and ignorance of these provisions is not allowed as a defense, then the insured would be compelled to make his defense based upon the involuntary nature of the purported agreement.\textsuperscript{58} Thus, the issue in terms of burden of proof is whether the insurer has to prove the voluntary nature of the purported agreement, or whether the insured has to prove the involuntary nature because the insurer's burden is satisfied by the presence of the written arbitration clause. It is believed that the complex character of the insurance policy and the manner in which the policy is marketed are

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} For a further general discussion involving the insurance contract as being a typical contract of adhesion, see, Widiss, Perspectives on Uninsured Motorist Coverage, 62 Nw. U. L. Rev. 497 (1967-68); and Comments on Recent Important Tort Cases, 32 J. Am. Trial Lawyers Assoc. 344-46 (1968).
\textsuperscript{57} J. Appleman, Insurance Law in Practice, § 12094 (1962).
\textsuperscript{58} A. Widiss, supra note 8, at 195.
excellent reasons which justify requiring the insurance company to prove a knowledgeable acceptance of the arbitration terms by the insured.

If it is the insured claimant who desires to compel arbitration under the arbitration provision of an uninsured motorist endorsement, the arbitration clause should always be enforceable. There is no doubt that the company's inclusion of the arbitration provision is truly voluntary. It may be argued that enforcement against the company could be attacked for lack of mutuality of obligation. However, the situation is analogous to the treatment accorded insurance policy provisions in cases of ambiguity, where it is the generally accepted proposition that ambiguities in a policy are to be construed in favor of the insured, and against the company.

E. Conclusion.

It is submitted that an insurance policy represents neither an agreement between parties to submit their disputes to arbitration nor a knowledgeable waiver by the insured of his right to a jury trial under the Uniform Arbitration Act. If, as seems evident, the legislative purpose in the enactment of uninsured motorist statutes such as N.M. Stat. Ann. § 64-24-105 (Repl. 1972) is to protect the insured, then the arbitration provision of the endorsement should not be forced upon an unwilling insured. Alterations in the marketing practices of the insurance industry could be introduced so that the terms of the endorsement would, in fact, represent an actual voluntary agreement. At this time, however, this has not occurred.

SCOPE OF THE ARBITRATION PROVISION

The arbitration provision of the uninsured motorist coverage is not a general agreement to arbitrate all disputes arising under the coverage. By its terms it is limited to the issues of the liability of the uninsured motorist to the insured and the amount of the damages to which the insured is entitled. This makes the clause

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59. Text at 221, supra.
60. J. Appleman, Insurance Law in Practice, § 7481 (1948); Couch, 1 Insurance 2d § 15:73-84 (1959).
62. Text at 220 and note 2 supra.
particular rather than general in that the parties have agreed only to arbitrate these two issues.

A problem arises, however, in that issues other than those of liability and damages are frequently disputed in the adjustment of an uninsured motorist claim. Such issues as the uninsured status of the other motorist, the compliance by the insured with policy conditions, the status of the person making the claim as an insured under the policy, the applicability of "other insurance" clauses and the question of the "hit-and-run" vehicle must frequently be determined. Such "coverage" questions are not expressly covered by the arbitration provision, and the courts have adopted varying positions as to the proper method for the resolution of such issues.

Although no New Mexico appellate decision has considered such coverage questions, the general rule appears to be that coverage questions are not arbitrable and must be decided by the courts. This position is adopted by strictly construing the

64. "Other Insurance" clauses are normally inserted in casualty policies to apportion the payment of a claim between overlapping insurance policies. The clause as found in the Family Auto Policy reads as follows:
"Other insurance: With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance."
65. The uninsured motorist coverage of the Family Automobile Policy defines a "hit-and-run" vehicle as follows:
"'Hit-and-run-Automobile' means an automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which is insured at the time of the accident, provided:
(a) there cannot be ascertained the identity of either the operator or the owner of such 'hit-and-run-automobile';
(b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within thirty days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support, thereof, and
(c) at the company's request the insured or legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident."

This clause has produced a great deal of litigation, especially in the area of the question of physical contact between the insured auto and the "hit-and-run-automobile."
66. State Farm Fire and Casualty Co. v. Rossini, 14 Ariz. App. 235, 482 P.2d 484 (1971);
provision as a particular agreement in accordance with the view that the parties cannot be required to arbitrate any issues which they have not contracted to arbitrate.\textsuperscript{67} The normal procedure in the jurisdictions following this rule is to stay the arbitration proceeding pending a trial of the coverage questions.

However, one jurisdiction has varied this procedure while adhering to the general rule. In Florida the courts have recognized that the coverage questions are to be determined by the courts but have held that once the matter is brought to the court, the court has jurisdiction to resolve all matters in dispute between the parties.\textsuperscript{68} This procedure, while effectively negating the arbitration provision in such cases, does have the advantage of preventing undue delay and expense which would otherwise be involved in multiple proceedings. The Florida procedure would seem to be preferable to jurisdictions which insist that coverage questions must be determined by a court rather than the arbitrator.

Several jurisdictions have held that the coverage questions may be determined by the arbitrator in the first instance.\textsuperscript{69} These decisions have been reached either by adopting a strained construction of the language of the arbitration provision\textsuperscript{70} or by placing the grounds for the decision upon considerations of public policy in avoiding multiple proceeding.\textsuperscript{71}

This position would appear to be preferable in that the parties are allowed to proceed with the arbitration subject to review by the courts, thus, providing a relatively quick resolution of the dispute. In most cases this should work to the advantage of the insured who is normally not in the same position as the insurer to withstand the expense and delay of multiple proceedings. It is


\textsuperscript{68} Cruger v. Allstate Ins. Co., 162 So.2d 690 (Fla. 1964).


normally the insurer who attempts to delay the arbitration proceeding pending the resolution of the coverage questions and then to arbitrate the dispute. The delay involved in this procedure places increased pressure upon the insured to settle the matter in order to avoid increased expense.\textsuperscript{72}

Whatever the position of the jurisdiction as to the interpretation of the arbitration provision, it is clear that the parties may submit coverage questions to the arbitrators on a voluntary basis.

\textbf{LOSS OF THE RIGHT TO ARBITRATE}

Either party to the insurance contract may lose the right to arbitrate an uninsured motorist dispute. Such loss may occur either as a result of the conduct of the parties or by agreement.

Where the parties agree to dispense with arbitration and to litigate the dispute, the arbitration provision is terminated and neither party should be able to successfully demand arbitration at a later date.

The insurer has been held to have forfeited its right to arbitrate the dispute where it has not made a timely demand for arbitration.\textsuperscript{73} What is a reasonable time for demanding arbitration will be determined on a case by case basis in the various jurisdictions. This failure to demand arbitration is particularly important when the arbitration provision is not mandatory but, rather, depends upon the demand of a party to initiate the arbitration process.\textsuperscript{74}

The insurer has also been held to have waived its right to insist upon the arbitration of the dispute where it has answered a suit brought by the insured.\textsuperscript{75} In such cases the insurer is entitled to move for a stay of the litigation in most jurisdictions\textsuperscript{76} and the answer is construed as forfeiting the right to arbitrate. Where the answer sets up a defense of the insured's failure to arbitrate the courts are not in accord as to the forfeiture of the right to arbitrate and differing results have been reached.\textsuperscript{77}

Lack of compliance by the insurer in the insured's attempts to

\textsuperscript{72} See generally, Phillip Hermann, Better Settlements Through Leverage, 205 (1965).


\textsuperscript{75} Schramm v. Dotz, 23 Wis.2d 678, 127 N.W.2d 779 (1964).


arbitrate have also been construed as a forfeiture of the right to arbitrate the dispute. Thus, where the insurer had not joined the Accident Claims Tribunal, thus, increasing the cost of arbitration to the insured\(^7\) the court found that the right to arbitrate had been lost. The same result has been reached where the insurer refused to respond to the request of the insured for arbitration.\(^7\)

Some courts have held that where the insurer has denied coverage under the policy, the right to arbitrate the dispute has been forfeited since the insured could go to court on the coverage question with the court taking jurisdiction of all of the issues in dispute between the parties.\(^8\) However, a mere denial of liability (as opposed to coverage) will ordinarily not forfeit the right to arbitrate.\(^8\)

The insured may forfeit the right to arbitrate by bringing an action against the uninsured motorist,\(^8\) although a contrary result has been reached in several cases.\(^8\) The right of the insured to arbitrate will also be lost by bringing an action on the policy against the insurer\(^8\) or by releasing the other motorist.\(^8\)

The rules as to the forfeiture of the right to arbitrate, while varying from jurisdiction to jurisdiction, constitute an important area of inquiry for the attorney in the handling of an uninsured motorist claim and should be reviewed carefully in each case.

EVALUATION OF THE USE OF ARBITRATION

As pointed out by Phillip Hermann in Better Settlements through Leverage,\(^8\) both plaintiffs and defendants must consider their costs when deciding whether to settle or litigate an action. Where settlement is not feasible and the cost of litigation prohibitive in proportion to an insured's assets or potential recovery, the arbitral process may provide a desired third alternative. In fact, one member of the plaintiff's bar has

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\(^8\) P. Hermann, supra note 72.
indicated to the author that he considers arbitration the only feasible method of obtaining a day in court for his client in smaller personal injury cases.  

For the uninsured motorists' claimant, however, the decision to arbitrate is best made on a case by case basis. As a result, it is not surprising that such claimants have chosen to attack the mandatory arbitration provision of the uninsured motorist coverage on numerous occasions when it appeared in their best interest to do so.


In most cases (at least in those where the injured insured has incurred less than $2,000.00 of medical expenses) it is believed that it will be to the advantage of the insured claimant to resolve any dispute with his insurer by arbitration if the arbitration is in accord with the rules and regulations of the American Arbitration Association.

The first consideration is cost. Many courts have expressly stated that arbitration is inexpensive when compared to court litigation. The filing fee of an American Arbitration Association

87. Interview with Turner Branch, Attorney at Law in the law firm of Branch & Dickson in Albuquerque, New Mexico, October, 1971.

88. The figure of $2,000.00 is not the total claim the insured claimant may have because it does not include property damage to the automobile or pain and suffering. Including these latter two items of damages, the total claim could well be $10,000.00, which is the limit of liability per person under most uninsured motorist endorsements.

The figure of $2,000.00 was selected because it is 25 percent of an average annual income of $8,000.00. It is believed by the author that claims under the uninsured motorist endorsement involving more than $2,000.00 out of pocket medical expenses are so serious that the injured claimant should always be able to protect his rights by suing in court.

A survey was made on April 26, 1972, of four major insurance company claims managers and adjusters in Albuquerque, New Mexico concerning the number of uninsured motorist cases that would not be litigated in court if all claimants with out of pocket expenses of under $2,000.00 arbitrated their differences with their insurers. The results are as follows: Tom Jetter, Claims Manager of U.S.F.&G. Insurance Company stated that "the great majority" of uninsured motorist cases would be kept out of court; Dennis Depies, casualty examiner of Allstate Insurance Company stated that at least 90 percent of uninsured motorist cases would be kept out of court; Ed Foree, claims manager of State Farm Insurance Company stated that more than 75 percent of uninsured motorist cases would be kept out of court; and Jim Grindstaff, chief adjuster for Safeco Insurance Company, stated that at least 95 percent of uninsured motorist cases would be kept out of court. From a public policy standpoint therefore, it is asserted that the policy urged by the author for claimant's attorneys in uninsured motorist cases would greatly reduce the problem of court congestion.

uninsured motorist case is $50 paid by the filing party and a $100 surcharge paid by the insurance company. A contributing factor to lower arbitration costs under the American Arbitration Association than under other schemes of arbitration is the fact that AAA regional offices have been able to obtain free services of qualified negligence attorneys to serve as arbitrators.

There are good reasons not to compensate arbitrators. Attorneys who have been asked by the AAA to be on its uninsured motorist panels have found this situation satisfactory. Uninsured motorist arbitrations typically take only a few hours, and the attorneys are never asked to be arbitrators more than two or three times a year. Many lawyers also see in their service as arbitrators an opportunity to supply an important public service to the community. If private arbitration were not available to dispose of these claims at a reasonable cost, there would either be no remedy for the motorist who is injured by an uninsured driver or else thousands of such claims would be thrown upon an already congested court system. Another reason for not compensating arbitrators is to insure their independence. If an attorney arbitrator is not receiving a fee, he has no pecuniary reason to award one way or the other. More specifically, since the insurance company is always a party, he would have no reason to satisfy the company with awards so that they would not be likely to challenge him.

Although it has been argued that attorneys spend just as much time preparing for an arbitration as for a court case and that arbitration costs are actually higher than court costs, it is submitted that the total cost to the client of arbitration is much less than the total cost of court litigation due to the speed of arbitration. Speed is thus a second major consideration. Courts frequently have endorsed the use of arbitration because it is quick. In metropolitan areas it often entails a delay of three

91. Text at 242, infra.
92. Aksen, supra note 90 at 76-78.
93. Id. Interview with Turner Branch, Attorney at Law in the law firm of Branch & Dickson in Albuquerque, New Mexico, February 23, 1972; Interview with Richard F. La Roche in the law firm of Smith & Ransom in Albuquerque, New Mexico, March 18, 1972. Both Turner Branch and Richard F. La Roche are arbitrators on the American Arbitration Association's Uninsured Motorist Panel.
94. Aksen, supra note 90, at 78.
96. Pretzel, Uninsured Motorist, supra note 89, at 711.
years or longer between the time a court action is filed and the
time the case is decided; whereas, use of arbitration to resolve
the same claims is often completed within eight weeks from the
time a request for arbitration is filed. A survey of the situation
in Illinois in 1965 disclosed that the average time between the
filing of a case with an AAA regional office and receiving a
decision from the arbitrator was fourteen weeks, as compared to
an average of over five years for handling comparable cases in
Cook County. Thus, arbitration is a very attractive option
when a prompt resolution is particularly desirable to the small
personal injury claimant.

A third consideration involves the award of the arbitrator. It
has been suggested that one of the reasons the insurance industry
selected the arbitral process was its hope that arbitrators would
give more "reasonable" (lower) awards than juries. This hope
has largely been frustrated, however. Some of the major differ-
ences between an arbitration award and a jury verdict include:

1. There is usually no defendant in the uninsured motorist
hearing. A typical uninsured or hit-and-run driver does not make a
very credible witness.

2. Defense counsels are usually restricted to cross examination to
prove their case.

3. Both court decisions and legislation have taken a view of
uninsured motorist protection that favors the policyholder.

4. While the claimant is an adversary in the hearing, it is still
obvious that he is a premium paying customer of the insurer. He is
not the stranger that is found in the third party action in court.

Recently, the Columbia Project for Effective Justice completed a
three year study of AAA uninsured motorist arbitrations.
While their findings have not yet been published, a preliminary report made to the AAA’s Law Committee is relevant:

The data obtained in this study indicated that the quality of an arbitration hearing as seen by the arbitrator is as good as, or better than, the quality of a court trial as seen by the judge. As far as the attorneys’ views are concerned, we do not have comparative data, but the incidence of dissatisfaction is very low and the opinion that arbitration is suitable for adjudication of some personal injury cases is very widely shared. On the average, the result obtained in the arbitration of a moderate-sized personal injury case would be the same as though it were tried before a jury.104

Thomas J. Casey, Vice President of Claims of Allstate Insurance Company, has stated some impressive statistics that indicate that arbitration is more favorable to the insured than court litigation.105 Of the 21,668 uninsured motorist claims by his company in 1968 (excluding New York), Casey explains that 1,611 were submitted to arbitration. In seven of the larger regional offices of Allstate in this year 933 claims in arbitration were concluded by an award by the arbitrator; 29 were settled while arbitration was in process; 626 were settled before the arbitration began; 64 arbitrations were dropped. Of the 214 cases that proceeded all the way through the arbitral process, the arbitrator ruled in 42 that there was no liability and in 172 that there was liability. In terms of percentages this is equivalent to a ruling in 19% of the cases in favor of the company and in 81% in favor of the insured. This experience, Casey concludes, is more heavily balanced in favor of the claimant than is the suit experience under the bodily injury coverage in the Uninsured Motorist area because his company’s suit experience shows that approximately 48.7% of the cases are won on the basis of no liability and an additional 18.4% are considered as won since the damages awarded are less than the last settlement offer by the company.106

Several commentators have noted that the reason awards in

104. Aksen, supra note 90, at 73. For a fuller treatment of the findings of the Columbia Project, see, Aksen, Arbitration of Automobile Accident Cases, 1 Conn. L. Rev. 70 at 80-90 (1968). For an opinion of two claimants’ attorneys the author interviewed Turner Branch and Richard F. La Roche. supra note 93.


106. The status report on uninsured motorist claims filed with the AAA from the State of New Mexico is as follows:

<table>
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<tr>
<th></th>
<th>Total</th>
<th>Awarded</th>
<th>Settled</th>
<th>Withdrawn</th>
<th>Pending</th>
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<tr>
<td>1970</td>
<td>23</td>
<td>10</td>
<td>12</td>
<td>1</td>
<td>0</td>
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<tr>
<td>1971</td>
<td>32</td>
<td>12</td>
<td>11</td>
<td>2</td>
<td>7</td>
</tr>
</tbody>
</table>

Paul A. Newnham, Southwest Regional Director, AAA, Phoenix, Arizona.
uninsured motorist arbitration are more often given to insureds is that there are more attorneys eligible to serve as arbitrators who have made their living suing insurers than defending them.\footnote{107. Hapner, A Dozen Problems in Arbitration of Uninsured Motorist Claims Under American Arbitration Association Rules, 34 Ins. Counsel J. 92, 96 (1967); Pretzel, supra, note 89; Casey, supra note 105, at 66.} Paul Pretzel has quoted the results of a survey of 500 cases that were arbitrated.\footnote{108. Pretzel, supra note 89.} In 304 cases the arbitrators were plaintiff’s attorneys; in 57 cases the arbitrators were members of the defense bar. The study is also quoted as depicting the average award made by the plaintiffs’ lawyers as being 25\% higher than the award of the arbitrators who were classed as defense lawyers.\footnote{109. An analysis of the New Mexico Accident Claims Advisory Committee of the AAA in Albuquerque, New Mexico does not show a substantially greater number of plaintiff’s lawyers. However, there is a larger number of plaintiff’s lawyers that defendant’s lawyers, and undoubtedly this fact would increase a claimant’s chances of getting a plaintiff’s lawyer as arbitrator.}

A fourth major consideration is the procedure used in arbitrating Uninsured Motorist claims. The unique advantages of the AAA arbitrations to the insured are contained in the uniform rules and procedure found in all 50 states.\footnote{110. American Arbitration Association, Accident Claims Tribunal Rules, (1971) [hereinafter cited as Tribunal Rules].} When a claimant files a demand for arbitration with an AAA tribunal clerk, a copy of the demand is sent to the opposing party for an answer.\footnote{111. Tribunal Rules, § 4.} Then comes the most important stage in the arbitration process—the selection of the arbitrator. This attorney is selected from an accident claims panel maintained by the AAA,\footnote{112. Tribunal Rules, § 3.} and he must be agreed upon by both parties.\footnote{113. Tribunal Rules, § 8.} Either party can object as often as he wants until an attorney is finally agreed upon.\footnote{114. \textit{Id.}} Today the AAA maintains on its accident claims panels lawyers who are truly knowledgable in negligence law and practice.\footnote{115. Aksen, supra note 90, at 73.} In this way the parties can be assured that the arbitrator is a person who has the technical competence to determine legal liability and damages in a field of law with which he is completely conversant. To assure the AAA that the arbitrators are indeed men of knowledge, experience and impartiality, the AAA has established an \textit{ad hoc} screening committee in each of its major cities to help advise each regional office on the qualifications of attorneys.
within that region and to nominate additional qualified lawyers to the accident claims panel.\(^{116}\)

It has been argued that two serious pitfalls in the arbitration process are: 1) that there is no burden of proof and therefore the burden is upon each party to establish his defense or claim;\(^{117}\) and, 2) that the rules of evidence are not applied.\(^{118}\) Actually, this fact seems to be to the advantage of the claimant because he can more easily present his case. It is conceded by several Albuquerque trial lawyers that the fact that the rules of evidence are not strictly applied is a benefit because in some cases these rules are purely obstructionist.\(^{119}\) In any event, since all arbitrators are attorneys and since they are thoroughly experienced as trial attorneys in negligence practice themselves, it is asserted that no real difference results. In a discussion between three Albuquerque arbitrators and the author on this point, it was noted that all of them assume that they have the ability to accept evidence for "what it is worth" in order to keep the hearings proceeding while nevertheless actually deciding the matter according to the local rules of evidence law that apply.\(^{120}\)

The lawyer's preparation for the arbitration hearing, while somewhat different in its emphasis, should be no less thorough than that which he would undertake in preparing for a court trial. The necessity for mastering the factual details of the case is no less important in arbitration. The main emphasis of the arbitration preparation should be placed on development of facts. The arbitrator will base his award upon the factual determinations he reaches. Like court litigation, the lawyer should obtain expert opinions concerning the issues in dispute, preserve physical evidence, obtain statements from witnesses, and, in general, fully develop the case. Finally, under Section 7 of the Uniform Arbitration Act,\(^{121}\) the parties are entitled to the issuance of

\(^{116}\) Id. at 74-75.

\(^{117}\) Hapner, supra note 107.

\(^{118}\) Pretzel, supra, note 89, at 719. For instance, it has been held that statements given by insureds to companies (admissible in arbitration) are privileged and cannot be reached in a district court taking an appeal "de novo" from arbitration. People v. Ryan, 30 Ill.2d 456, 197 N.E.2d 15 (1964). See also, Lambert, The Case for the Collateral Source Rule, 524 Ins. L. J. 531 (1966); Peckinpaugh, An Analysis of the Collateral Source Rule, 524 Ins. L. J. 545 (1966).

\(^{119}\) Interviews with Turner Branch and Richard F. La Roche, supra note 93; Interview with Roland Kool, Attorney at Law in the law firm of Kool, Kool & Bloomfield in Albuquerque, New Mexico, March 21, 1972.

\(^{120}\) Interviews with Turner Branch and Richard F. La Roche, supra note 93; Interview with Fred Hart, Dean of the University of New Mexico School of Law in Albuquerque, New Mexico, February 24, 1972.

subpoenas and depositions. The subpoena power extends to the production of books, records, documents and other evidence. The correct procedure is to direct the request for the subpoena to the AAA regional office, who in turn sends the request to the arbitrator.

The arbitration hearing is essentially an adversary proceeding. The parties are entitled to opening statements, introduction of documents, examination and cross-examination of witnesses, presentation of exhibits, and final summations. The claimant is usually heard first. Because the rules of evidence are not strictly applied, objections should go to the weight of the evidence and not to its admissibility. Therefore, the lawyer should make every effort to anticipate the argument of the other party with a view to countering, rather than excluding it. It is the strength of the party's own case rather than the weakness of his opponent's which is the important factor in the arbitration process. Lastly, it is noted that arbitrators often require written briefs on points of law.

After the close of the hearing, the arbitrator has thirty days in which to render his award. He is not required to render a written opinion or explain the reasons for the award. As we will note later this is a possible defect in the arbitral process. Once the award has been given, voluntary compliance with its terms by the parties normally disposes of the matter. Under Section 11 of the Uniform Arbitration Act the award may be confirmed as a judgment upon the application of a party unless some objection is filed within ninety days.

Section 12 of the Uniform Arbitration Act provides five grounds upon which an award may be vacated upon the application of a party within ninety days of the delivery of his copy of the award. Section 13 provides for the modification or correction of an award upon a similar application. These applications are made by motion to the court and are served in the manner prescribed by law for the service of complaints. Lastly, a party may appeal from any of these orders, or from an

123. Tribunal Rules, § 22.
order to stay either an action or an arbitration hearing in the manner prescribed for civil appeals in the jurisdiction.\textsuperscript{128}

A fifth policy consideration, one that is often favored by courts, is that arbitration helps reduce the case load in courts.\textsuperscript{129} Robert Coulson, current president of the American Arbitration Association, has stated that the arbitration clause facilitates quick settlement of claims, a policy favored by the law, because both parties are aware of the fact that they will be forced into quick arbitration if they do not settle.\textsuperscript{130} As stated previously,\textsuperscript{131} quick settlement of the Uninsured Motorist claim is often advantageous to the insured because he will have little cost.

The sixth and final consideration to be made in deciding whether to use AAA arbitration is the comparison between AAA arbitration as has been set forth with arbitration under other systems. Although the AAA has been the primary administrator of uninsured motorist arbitrations, it has not been the sole agency utilized by the insurers to arbitrate uninsured motorist claims. A few companies have employed an \textit{ad hoc} system specified in the Uninsured Motorist endorsement which calls for a tripartite panel of paid arbitrators. The most notable company using this system is State Farm Mutual Automobile Insurance Company. It is suggested that arbitration under the AAA is better for the insured than those other systems for the following reasons:\textsuperscript{132}

1. The AAA offers a uniform set of rules nationwide that are known to the parties. The other systems do not.

2. Through the AAA, the public and the insurance industry are afforded impartial administration by a disinterested non-profit corporation so that complete integrity of the adjudicative process can be assured.

3. The AAA provides administration so that the parties themselves need not be burdened with all the miniscule tasks that necessarily accrue in choosing arbitrators, setting dates for

\textsuperscript{131} Text at 235, supra.
\textsuperscript{132} Aksen, supra note 90 at 75-76.
hearings, obtaining hearing rooms, sending out notices of hearings, postponements, cancellations, etc. The other systems do not do this.

4. The AAA chooses a single neutral arbitrator to hear and determine the uninsured motorist claim. By comparison the ad hoc system utilized by State Farm calls for a tripartite board of arbitrators wherein each party selects one and the two so selected then choose a third neutral. The tri-partite system of arbitration in addition to adding delays to the process also becomes expensive when all three arbitrators are compensated.

5. Under the prevailing State Farm policy the insured and the insurer divide the costs of arbitration fees equally so that the insured has a higher threshold to overcome before he can get to arbitration.\textsuperscript{133}

6. The State Farm policy maintains that local rules of evidence shall apply in contrast to the AAA rules.

7. Under the AAA rules procedure is available to appoint an arbitrator promptly. Under the tripartite system, if the parties cannot agree to the selection of an arbitrator it requires one or the other to apply to court to appoint an arbitrator. This is unsatisfactory because the cost is increased and because the object of speedy arbitration is usurped by having the courts get involved.

8. The last major difference is that AAA arbitrators volunteer their services without compensation.\textsuperscript{134}

In summary, it is believed that the claimant under a State Farm Uninsured Motorist endorsement has more reason to seek avoidance of the arbitration clause than the claimant under the AAA arbitration clause, even when his out-of-pocket medical expenses are less than $2,000.00. Gerald Aksen, general counsel for the AAA has stated:

Our records indicate that the average total cost for arbitration fees and expenses is $155 per case ($50 paid by the insured and balance paid by insurer); whereas it has been reliably reported to me that the three-man system averages a cost of $700 per case just for arbitration fees and expenses.\textsuperscript{135}

\textsuperscript{133} Text at 246, infra.
\textsuperscript{134} Text at 239, supra.
\textsuperscript{135} Aksen, supra, note 90 at 78.

A major reason against the use of any form of arbitration for uninsured motorist claims is the existence of a state statute like the one in New Mexico allowing the loser in an uninsured motorist arbitration proceeding the right to appeal to the district court for a trial de novo. The arguments is that the losing party will often desire to appeal for a trial de novo; therefore, proceeding to trial in the first place will both save unnecessary cost and court time and prevent a multiplicity of suits. A contributing reason for this is that only the issues of liability of the uninsured motorist and damages to the injured claimant are proper subjects of arbitration and that many other issues are subject to court litigation in the first place.

In opposition to the preceding argument it is believed that such trial de novo statutes should be reviewed in light of current statutory law and the normally prompt resolution of uninsured motorist disputes under the Uniform Arbitration Act and other modern statutes. The New Mexico trial de novo statute had been enacted in the 1969 New Mexico legislative session so that uninsured motorist arbitration provisions would be enforced under New Mexico's old arbitration statute. It was believed by the legislators who enacted this statute that its existence would insure that the arbitration clause in the uninsured motorist endorsement would not be contrary to existing public policy because courts would not be ousted of their jurisdiction. With the passage of the Uniform Arbitration Act in the 1971 New Mexico legislative session, there is now no need for the de novo statute. It should be repealed.

In states without a trial de novo statute the finality of the arbitration award is another possible liability of the arbitral process to the insured claimant. Under Section 12 of the Uniform

138. Text at 233, supra.
139. Interview with Turner Branch, supra note 93. See also the opinions of Judge Musgrove and the late Judge Reidy, text at 224, supra.
140. In an interview with Turner Branch, supra note 93, Mr. Branch a New Mexico legislator, stated that there would be a movement in the coming session of the New Mexico legislature to repeal N.M. Stat. Ann. § 64-24-107 (Repl. 1972) because it is inconsistent with the policy of the Uniform Arbitration Act.
141. The vast majority of states fall into this category.
Arbitration Act,\textsuperscript{142} a party has a right to appeal an arbitrator's award only if he alleges that the award was procured by corruption, fraud, or other undue means; that there was evident partiality by the arbitrator; that the arbitrator exceeded his powers; that the arbitrator refused to postpone the hearing upon sufficient cause; or, if there was no arbitration agreement, the issue was not adversely determined by a court. Furthermore, under Section 13 of the Uniform Act,\textsuperscript{143} a party has a right to have a court modify or correct the award only where there was evident miscalculation of figures or other evident mistake, where the arbitrator awarded upon a matter not submitted to him, or where the award is imperfect in form. While these constitute a variety of grounds for vacating and modifying or correcting an award, it is obvious that these elements will not be involved in most cases.

While thus far the number of appellate decisions involving issues concerning review of arbitrator's awards is not great, the volume of cases is now increasing.\textsuperscript{144} The holding of the Pennsylvania Supreme Court in \textit{Great American Insurance Co. v. American Arbitration Association} illustrates the approach most often taken by courts on this issue: "The misconduct necessary to overturn an arbitrator's action is not a mere mistake of law, nor even several mistakes aggregated."\textsuperscript{145}

There are now, however, a number of cases where arbitration decisions have been vacated for a variety of reasons. For example, where an appellate court was convinced that the arbitrator failed to regard medical testimony in the determination of the loss of future earnings, the court decided that even though such conduct "may not have constituted fraud, misconduct, corruption or some other irregularity 'of this nature,' yet it was conduct which amounted to a denial of a full and fair hearing. . . ." such that the award should be vacated and the case remanded to be heard by another arbitrator. (Emphasis added.)\textsuperscript{146} In light of recent decisions like the foregoing it is


asserted that the decision of an arbitrator in an uninsured motorist case may not be as unassailable as was once thought.

In any event the criticism of arbitration due to its finality is of little importance, for under the proposal of the author the insured claimant would only seek arbitration for the less serious claims. For these claims the policy favoring the finality of arbitration is strong, and this actually operates to the advantage of the insured because statistics show that he wins in the vast majority of the cases.

A third possible defect in the arbitration process is the fact that the arbitrator does not have to render an opinion. In view of the advantages of arbitration stated herein, however, it is felt that in most cases this defect is relatively minor.

A final problem is that of possible inconsistencies in result stemming from the fact that two tribunals decide the same issues of law and fact. For instance, arbitration may impose liability on the insurer whereas a jury may not find liability against the uninsured motorist in a suit by him against the insured. Also, if the insurer has a subrogation right, he may lose the right to collect from the uninsured motorist at trial after being held liable to the insured in arbitration. Although this is a legitimate fault with the arbitral process from the standpoint of the insurer, it does not seem to pose any problems for the insured claimant.

CONCLUSION

It has been suggested that attorneys who are unfamiliar with arbitration and are biased in favor of the judicial process invariably choose determination by a judge or jury rather than arbitration. It is also possible that the reader might conclude from the amount of space that has been devoted to the question of enforceability of the arbitration clause and the problems with respect to a restricted scope of arbitration that the author manifests a hostile attitude toward the use of arbitration. In light of the foregoing arguments, however, it is suggested that there

147. Text at page 238 and supra note 88.
148. Text at 241, supra.
There are many advantages to the insured claimant in the use of arbitration. More particularly, when he has suffered out of pocket losses of less than $2,000.00 as the result of a collision with an uninsured motorist, the insured should usually seek to solve any differences with his insurer by arbitration.

CHARLES ANTHONY SHAW