Insurer Intervention in Uninsured Motorist Cases

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Insurer Intervention in Uninsured Motorist Cases

The Indiana Code requires companies which write automobile insurance to provide their insured drivers with coverage for collisions with uninsured motorists. When an insured motorist sues an uninsured motorist for damages sustained in an accident, the question arises whether the insurance company, in order to contest the liability of the uninsured motorist, as well as the damages, may or even must intervene as a party defendant when it receives notice of the suit. Intervention, while eliminating problems of multiple litigation over the same fact situation, can lead to substantial

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The problem of the uninsured motorist is significant; it has been determined that approximately 20% of drivers nationwide are uninsured. See U.S. DEP’T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: APPLICATIONS FOR TORT LIABILITY 205-07 (1970).

A number of casenotes dealing with this issue appeared following a decision prohibiting intervention in Allstate Ins. Co. v. Hunt, 469 S.W.2d 151 (Tex. 1971). E.g., Note, 24 BAYLOR L. REV. 436 (1972); Comment, 2 ST. MARY’S L.J. 182 (1970); Note, 50 TEX. L. REV. 146 (1971); Comment, 3 TEX. TECH. L. REV. 143 (1971). Since the insurer in the underlying case consented to be bound by any judgment against the uninsured motorist and waived its right of subrogation and since there was no counterclaim filed, these commentaries dealt only peripherally with the res judicata and conflict of interest issues raised in a more complicated case.
prejudice and conflicts of interest. A recent Indiana case, *Vernon Fire and Casualty Insurance Co. v. Matney,* held that the company must intervene upon notice or be bound by the judgment rendered in its absence. Although one commentator considered this to be the last word on the subject, the courts of appeals in Indiana are still split on the issue.

The *Matney* court concentrated primarily upon problems resulting from multiple litigation after a failure to intervene, but dealt in very little detail with possible prejudice to the original parties and potential conflicts of interest upon intervention. *Matney* treated intervention as an all or nothing proposition, as have the other appellate decisions in Indiana and many other jurisdictions. Yet such rigid treatment is not mandated by the Indiana Rules of Court. In light of the split between the courts of appeals and given that the *Matney* decision addressed only one of the several procedural postures of intervention, under current Indiana law it is unclear whether there are situations where intervention is not justified and whether the judicial discretion allowed by the rules could still be exercised in those situations to prevent intervention. After examining the desirability of intervention in uninsured motorist cases where the alleged tortfeasor fails to appear, where he does appear and where he asserts a counterclaim against the insured plaintiff, this note will suggest that the court should require intervention when the defendant fails to appear, deny intervention when the defendant asserts a counterclaim and use its discretion in

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7 See notes 28-29 & accompanying text infra.
all other cases through a balancing test.

**Uninsured Motorist Coverage**

The Indiana uninsured motorist statute requires liability insurers to insure for the damages a person is "legally entitled to recover" from an uninsured motorist.\(^8\) After establishing the duty to provide uninsured motorist coverage, the statute goes on to say that the insurer may provide for subrogation in its policy.\(^9\) To comply with this coverage requirement, the insurance industry has developed standard policy terms which obligate the insurer to pay any sums the insured is "legally entitled to recover from the uninsured motorist"\(^10\) subject to the requirements that the insured supply necessary information to the company and submit to a physical examination,\(^11\) that the insured cooperate with the company,\(^12\) and that the insured notify the insurer of any legal action taken against the uninsured motorist.\(^13\)

An obvious view of uninsured motorist coverage is as "substitute" liability insurance for the uninsured motorist. This can be misleading, however, in that it implies a relationship between the uninsured motorist and the insurer which does not actually exist. A more useful view is that uninsured motorist coverage is analogous to accident insurance for accidents caused by a specific class of tortfeasors.\(^14\) This emphasizes the separate nature of the in-
sured's claims against the uninsured defendant and the insurer.

PROBLEMS WITH MULTIPLE LITIGATION

The victim of an accident involving an uninsured vehicle has three options concerning potential defendants: he may sue the uninsured motorist alone; he may sue his insurer alone; or he may join them as co-defendants. Joinder could resolve all issues in one action, but there may be tactical reasons for avoiding this course. Suit against the insurer alone limits the recovery to the policy limits and would require a second action against the uninsured motorist to obtain a judgment for any excess damages. Suit against the uninsured motorist alone places no limit on the possible size of the judgment but could still require a second action to recover from the insurer if the uninsured motorist has insufficient assets or subsequently cannot be found.

Implicit in the institution of an action by the insured against the uninsured motorist is a failure of the insurer's settlement offer to satisfy the claims of the insured. This could be a result either of damages in excess of the policy limits or of disagreement about what the insured is legally entitled to recover. Generally, the insurer may pay the policy limits and cease to be a factor except in the role of subrogee plaintiff. If there is a coverage disagreement, however, the insured may be forced, absent intervention, to man-

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16 In Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 265 N.E.2d 419 (1971), the court detailed four options open to a potential plaintiff. He may file an action against his insurer alone; he may file an action joining the uninsured motorist and his insurer; he may file an action against the uninsured motorist alone and notify his insurer; he may file an action against the uninsured motorist alone and not notify his insurer. The court indicated that the insurer would unquestionably be bound by a judgment under the first two options and would not be bound by a judgment under the fourth. Id. at 319, 265 N.E.2d at 433. A few states require the claimant to proceed initially against the alleged tortfeasor as a condition precedent to uninsured motorist indemnification. See generally A. Widiss, A GUIDE TO UNINSURED MOTORIST COVERAGE § 7.16 (Supp. 1980).

If the insured sues his insurer alone, the insurer may be able to require joinder of the uninsured motorist under the terms of the insurance policy. 1966 Standard Form, supra note 10, § VI C; see American States Ins. Co. v. Williams, 151 Ind. App. 99, 102, 278 N.E.2d 295, 298 (1972) (affirming the insurer's right "to bring in as parties the uninsured motorist and his principal"). It has been held, however, that such joinder may not be used to defeat the jurisdiction of the court. Puckett v. Liberty Mut. Ins. Co., 477 S.W.2d 811, 814 (Ky. App. 1971).

16 See, e.g., notes 37-42 & accompanying text infra.
tain a suit against his own insurer to collect a judgment against the uninsured motorist.

If the insurer does not intervene and is not required to do so, it will not be a party to, or in privity with, a party to the initial action. Consequently, any judgment rendered cannot be binding on the insurer since it has not had its "day in court." Thus, if the insurer refuses to pay, the insured will be forced to start an action against his insurer and relitigate the issues of liability and damages.

In such a case, when the insured must litigate the same facts twice to obtain a recovery, the effects of stare decisis tend to foster consistent results: the first case will be fairly strong legal precedent for judicial decisions in the second. The passage of time may also make the evidence stale and cause witnesses to rely on the decision in the prior action in framing their testimony. Even though two trials are thus likely to produce the same result, they waste the court's time, waste the litigants' time and add expense.

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18 See Indiana Ins. Co. v. Noble, 148 Ind. App. 297, 327, 265 N.E.2d 419, 438 (1970) (dissenting opinion) & cases cited therein. In Noble the insurer was asked to join in the insured's action against the uninsured motorist, but it denied coverage and did not join. The court held that since the insurer had the right to intervene and was fully advised of the suit, there was no good reason to put the burden on the insured plaintiff to relitigate his case against the insurer. Id. at 320, 265 N.E.2d at 434 (majority opinion). Hence, the judgment against the uninsured defendant was binding on the insurer. The dissent argued that the insurer could not be bound because it was not a party or in privity with a party to the suit and that ethical considerations compelled a contrary result. Id. at 328, 265 N.E.2d at 438 (dissenting opinion).

19 A mitigating factor in favor of the insured who wins his first action is the potential liability of the insurer for punitive damages for a bad faith failure to pay the claim. The remedy of punitive damages has been extended to uninsured motorist cases in California, Richardson v. Employers Liab. Assurance Corp., 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972), and the specter of a large punitive damage award would probably make a second suit against the insurer unnecessary in many instances. See generally Levit, Punitive Damages Extended to Uninsured Motorist Provision, 1972 Ins. L.J. 514. The actual effect of Richardson on the problems of multiple litigation is difficult to ascertain since the doctrine it announces applies only to California and represents a major judicial step for any state to take. The doctrine has not been adopted in many states and has been expressly rejected by one court. Baxter v. Royal Indem. Co., 285 So. 2d 652 (Fla. App. 1973). A federal appellate court sitting in a diversity action, however, has decided that the doctrine applies in Indiana. Craft v. Economy Fire & Cas. Co., 572 F.2d 565 (7th Cir. 1978).


21 From filing to termination the majority of motor vehicle accident cases require more than two years to resolve. Federal Judicial Center, U.S. Dep't of Transportation, Automobile Accident Litigation § (1970). Some may continue as long as eight years. Id.

22 In 1968 the approximate average cost per trial was $4,200 in state court and $7,800 in
mains the possibility that the results could be inconsistent. The many issues present in a determination of liability and damages in the typical automobile accident case increase the chances of inconsistency as every jury is different in its approach to a case. Also, the healing effect of time and imbalances in resources of the litigants could lead to inconsistency. In addition to undermining public confidence in the judicial system, inconsistent results allow the insurer and the insured to pick and choose among judgments for one to their liking, and breed confusion about the plaintiff’s right to recover.24

INTERVENTION

Intervention by the insurer provides a procedural answer to the problem of multiple litigation. When the insurer successfully intervenes it occupies a position identical to that of an original defendant to the action. Hence, both the insurer and the uninsured are motivated to defeat a recovery by the insured.

Two bases for intervention exist in the rules. The first is intervention as a matter of right. Intervention must be permitted under an unconditional statutory right or

when the applicant claims an interest relating to a property fund, or transaction, which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund, or transaction, unless the applicant’s interest is adequately represented by existing parties.26

This basis for intervention is grounded in due process; since there would be a fundamental unfairness in allowing outside interests to be adversely affected without allowing a defense of those interests, intervention is allowed.27

The second basis for intervention is permissive. Intervention may be permitted under a conditional statutory right or “when an applicant’s claim or defense and the main action have a question of

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25 One treatise devotes four of its fifteen volumes to issues which can arise in an automobile accident case. See D. Blashfield, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE (3d ed. 1965).
26 See 3B J. MOORE, FEDERAL PRACTICE ¶ 24.16[4], at 24-631 (2d ed. 1948).
27 IND. R. Ct. 24(a)(2).
law or fact in common." This type of intervention depends on judicial discretion and is inherently more flexible than intervention as a matter of right. The rule sets a standard for the exercise of this discretion. "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

No matter which of these bases is invoked, intervention on the part of the insurer following notification of an uninsured motorist claim puts the insured in an adversary position with respect to his own insurer. In general, he must prove that his fact situation comes within the terms of his uninsured motorist coverage in order to recover.

The first item to be proven is the uninsured status of the defendant. Some courts, however, consider this a prerequisite to intervention and may insist that the insurer stipulate that the defendant is uninsured. Such a position is not sound because it forces the insurer either to abandon any contract defense on this point or abandon its chance to intervene. If the defendant is later shown to be uninsured it may be too late to intervene on the negligence issue. A better view is that the insurer's interests may be sufficiently in jeopardy to qualify it for intervention as a result of the notification process undertaken by the insured. Alternatively, the court could determine at the outset of the case whether the defendant motorist is uninsured. Since the uninsured status of

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1980] UNINSURED MOTORISTS 723

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18 Ins. R. Cr. 24(b)(2).

19 Id.

20 For example, a Missouri appellate court has taken a narrow view of the interest necessary for intervention:

The petitioner for intervention must have an "interest" in the subject matter of the action. Such interest does not include a mere, consequential, remote or conjectural possibility of being in some manner affected by the result of the original action. It must be such a direct claim upon the subject matter of the action that the intervenor will either gain or lose by direct operation of the judgment to be rendered. State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343, 346 (Mo. Ct. App. 1963). In Smith v. Midwest Mut. Ins. Co., 154 Ind. App. 259, 289 N.E.2d 788 (1972), the court stressed that the uninsured status of the tortfeasor had not been pleaded so it could not be established that the insurer would have a definite interest in the outcome. This led in part to a denial of the right to intervene. Id. at 268, 289 N.E.2d at 793.

21 In Rawlins v. Stanley, 207 Kan. 564, 486 P.2d 840 (1971), the insurer was notified by letter of the insured's intent to file suit but received no copy of the summons. See note 13 & accompanying text supra. The court allowed the intervention, observing that "by failing to intervene after receiving notice of the pendency of such an action a carrier . . . subjects itself to a distinct and real hazard that it might be . . . bound." Id. at 569, 486 P.2d at 844.

22 See Wert v. Burke, 47 Ill. App. 2d 453, 197 N.E.2d 717 (1964) (intervention allowed on the condition that lack of insurance be established or submitted to the court for determina-
the negligent motorist is a condition of the insured's recovery on his insurance contract, the burden of proof on this issue is on the insured.\textsuperscript{38} Such proof of a negative—lack of insurance—is easy if the defendant appears and can testify, but it can become extremely difficult where the defendant defaults.\textsuperscript{34}

The second item to be proven is that all conditions precedent to recovery on the insurance contract have been satisfied.\textsuperscript{35} In many cases this will probably not be an issue, but where it is, the addition of these extra questions could confuse the jury. The opinion in \textit{Vernon Fire and Casualty Insurance Co. v. Matney}\textsuperscript{36} was unclear as to whether such issues could be raised in the trial of the negligence action. It held that the insurer may have "a full and complete adjudication of all the issues at a single trial," without discussing whether that included the coverage issues. More importantly, these issues definitely inject the notion of insurance into the case.\textsuperscript{37} In the context of a voluntary intervention, the insurer might be held to waive protection against the effect of insurance

\textsuperscript{38} Although there are no Indiana cases on point, the general rule seems to be that in an uninsured motorist case, the burden is on the insured claimant to prove that the tortfeasor was uninsured. \textit{Olenick v. Governmental Employees Ins. Co.}, 68 Misc. 2d 764, 328 N.Y.S.2d 50 (1971), \textit{modified on other grounds}, 42 App. Div. 2d 760, 346 N.Y.S.2d 320 (1973). The uninsured status of the offending motorist has been characterized as a condition precedent to recovery, and as such the insured has the burden of proving that status. \textit{Talazac v. Phoenix of Hartford Ins. Co.}, 259 So. 2d 636 (La. Ct. App. 1972). From a policy standpoint this is probably unwise in that it forces the claimant to prove a negative, the lack of insurance, and puts the burden on the party with the inferior resources. A better course would be to establish a presumption of no insurance in an uninsured motorist case which the insurance company could rebut with affirmative evidence.

\textsuperscript{34} Various methods to prove the uninsured status of an absent defendant have been tried unsuccessfully. It has been held that a default judgment in another state against the motorist does not prove he was uninsured, \textit{Ross v. Hardware Mut. Cas. Co.}, 13 Misc. 2d 739, 173 N.Y.S.2d 941 (1958), that the testimony of an attorney as to declarations by the motorist and the results of sending letters to the motorist is insufficient, \textit{Levy v. American Auto. Ins. Co.}, 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961), and that a declaration by the motorist that he did not have insurance coverage is not evidence that the vehicle was uninsured, \textit{Southwestern Underwriters Ins. Co. v. Miller}, 254 Ark. 387, 493 S.W.2d 432 (1973). Plaintiffs have also tried to evade the hearsay rule and introduce statements by the offending motorist made at the scene of the accident by claiming that they were part of the res gestae of the accident, but this approach has met with limited success. See \textit{Talazac v. Phoenix of Hartford Ins. Co.}, 259 So. 2d 636 (La. Ct. App. 1972). \textit{See generally Ryan, The Uninsured Motorist: How Proved? And by Whom?}, Ky. BENCH & B., April, 1978, at 16.

\textsuperscript{35} \textit{See}, e.g., \textit{Universal Ins. Co. v. Glover}, 100 Ind. App. 327, 195 N.E. 583 (1935) (conditions precedent must be proven in an action on an automobile fire insurance policy).

\textsuperscript{36} 170 Ind. App. 45, 351 N.E.2d 60 (1976).

\textsuperscript{37} \textit{See Oliver v. Perry}, 293 Ala. 424, 304 So. 2d 583 (1974); \textit{A. Widiss, supra note 15, § 7.23. But see Kalven, The Jury, the Law, and the Personal Injury Damage Award}, 19 Ohio St. L.J. 158, 171 (1958) (concludes that the effect is negligible).
on the jury. Where the intervention is forced or where the verdict might exceed the policy limits, the prejudice to the insurer or to the original defendant flowing from jury knowledge of insurance coverage could be severe.38

The final item to be proven is that the insured is legally entitled to recover from the uninsured motorist. Obviously, the proof of this condition of the insurance contract will coincide with the plaintiff's negligence case against the uninsured motorist. This dual role for plaintiff's case can create conflicts which would prejudice the positions of the original parties. The potential for such prejudice may motivate the parties to protest the intervention and should be taken into account by the court.

Objections to Intervention by the Parties

The Insured

The practical impact of intervention in the uninsured motorist case is that the insurer contributes resources and expertise to the defense of the uninsured motorist in an attempt to defeat the interests of its own insured. Thus, the insurer forsakes its former client from whom it has received premium payments. In addition to feeling some chagrin about this, the insured may have cause for complaint about the results of the intervention.

Shortly after the accident the insured must furnish the insurer with full details and submit to a physical examination if requested.39 Thus, the insurer may possess a considerable body of information about the accident which the insured may wish it did not have in the event a lawsuit is later brought against the uninsured.40 Of course, the liberality of discovery would make much of this available anyway,41 and anything damaging to the insured in the initial report would not be admissible at trial.42 Even the inad-

38 The prejudice is similar to that which motivates courts to make the presence of liability insurance irrelevant to a determination of liability and damages in a negligence case. See C. McCormick, McCormick's Handbook on the Law of Evidence § 201 (2d ed. E. Cleary 1972).
39 1966 Standard Form, supra note 10, § VI B.
40 Some of this information may even be in the form of a sworn statement which the insurer can require the insured to make. Id.
41 See generally Pace, Some Problems Which Arise When an Insurer Has Coverage on Both Parties to an Accident, 1967 Ins. L.J. 532.
42 The rationale for making this information inadmissible is that admitting it would tend to discourage full disclosure by the insured to the insurer. Id. at 536. In People v. Ryan, 30
missible information, however, could create a tactical courtroom advantage for the insurer. Along this same line, the information could have an extrajudicial effect on the conduct of settlement negotiations. If the insurer is aware of all of the weaknesses in the insured’s case, it could dramatically decrease the chances of the insured to obtain a favorable settlement.

The insured may also have cause to complain about the extra litigation resources arrayed against him at trial. Particularly in a case where expert witnesses become a factor, the addition of “deep pockets” to the defense side could influence the result. In addition, if the jurisdiction were to limit the number of experts each party could call, the defense allotment would be increased by intervention.

The Uninsured

The uninsured defendant could have some complaint with the results of intervention as well. He may simply not want interference in his defense. More seriously, the insurer may actually work against his interests. Typically, uninsured motorist coverage is cou-

Ill. 2d 456, 197 N.E.2d 15 (1964), the trial court had ordered production of a statement made to the defendant’s insurer prior to her prosecution for driving under the influence. The Illinois Supreme Court held the statement to be privileged on the grounds that “the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured.” Id. at 461, 197 N.E.2d at 17. The public policy preference for full disclosure would seem to outweigh any interest of the insurer in admitting information from the initial report.

The situation is analogous to that created when an attorney’s work product is discoverable. In Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court prohibited discovery of statements gathered by an attorney where opposing counsel wanted them to prepare himself to examine witnesses. This doctrine was extended to include statements made to a private investigator in United States v. Nobles, 422 U.S. 225 (1975). Possession by an insurer of intimate knowledge about its insured’s case could give the insurer an immeasurable advantage in the cross-examination of witnesses and the structuring of the defense.

The question of settlement is significant: statistics indicate 87% of automobile accident cases are terminated prior to trial and only 7% reach final judgment. FEDERAL JUDICIAL CENTER, supra note 21, at 8. It also appears that the earlier an insured settles the smaller his recovery will be in relation to his economic loss. 1 DEPT' OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS 67 (1970). Knowledge on the part of the insurer of the weaknesses in the insured’s case allows the insurer to hold out longer since there is less uncertainty to spur a high settlement.

Although settlement is a desirable goal, it should not be promoted at the expense of the insured’s interests. The Seventh Circuit has held that “under Indiana law an insurer who attempts to force its insured to settle an uninsured motorist claim for less than the amount claimed, although aware that it is liable for the full amount, breaches its duty of good faith.” Craft v. Economy Fire & Cas. Co., 572 F.2d 565, 571 (7th Cir. 1978).
pled with other independent types of insurance such as medical coverage. If the insured recovers nothing from the uninsured, a loss will still be borne by the insurer. Since the Indiana uninsured motorist statute allows the insurer that pays an uninsured motorist claim to be subrogated to the insured's right to collect from the uninsured, it may be to the insurer's advantage for the uninsured defendant to be found liable if he has any available assets. Thus, a conflict of interest may exist between the insurer and the uninsured who thinks he is getting the advantage of the intervention defense.

This right of subrogation also creates a difficult situation for the uninsured who has availed himself of a defense offered by the insurer. Since the insurer is not a liability carrier for the uninsured, there is no duty of cooperation. If the uninsured does not cooperate with the insurer, he loses the benefit of the insurer's resources and assistance. If he does cooperate, he runs the risk that the information and help he provides could be used against him later. The effect of this upon a knowledgeable uninsured will be to cause strain between him and the insurer during the trial and decrease the potential ability of intervention to protect the insurer's interests. The effect upon an ignorant uninsured will be to put him at the mercy of the insurer.

The Insurer

Where the insurer has intervened and the uninsured has filed a counterclaim against the insured, a serious conflict of interest arises which may be objectionable to all parties. Uninsured motorist coverage is an appendage to liability insurance. By the terms of the standard liability policy, the insurer must provide a defense to its insured against liability claims covered by the policy. This is beneficial to both parties since it allows the insurer to control the defense of a claim on which it may ultimately be liable and it gives the insured a defense financed out of company funds. However, when the insurer has intervened on behalf of the uninsured defendant and is bound by contract to defend a counterclaim asserted by that defendant against the insured plaintiff, an obvious

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45 IND. CODE § 27-7-5-1 (1976).
46 See note 14 & accompanying text supra.
47 See note 8 supra.
48 See J. DONALDSON, supra note 45, § 1604.
conflict of interest results. The insurer will want both parties to be found negligent because such a result would bar recovery by either party and afford the insurer complete protection on both its liability and uninsured motorist exposures.

Several solutions to this conflict could be proposed although none is entirely satisfactory. Perhaps the simplest, suggested by American Bar Association guidelines, is disclosure of the conflict to the parties. Although disclosure is certainly desirable, it hardly seems sufficient in light of the potential for the insurer to control both sides of the litigation. Alternatively, the insurer could employ separate counsel to represent the two positions, but the question of how much control the insurer will exert still must be resolved. At least in the case of the liability (counterclaim) defense, the insurer will normally direct all aspects of the defense including set-

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52 ABA News Release, National Conference of Lawyers and Liability Insurers § V (December 1, 1969), reprinted in P. PRETZEL, supra note 10, at 245 app. These were approved by the American Bar Association House of Delegates on February 7, 1972. 97 REPORTS OF THE ABA 706 (1975). An attorney placed in such a potential conflict of interest position might have serious concerns about his ability to "preserve the confidence and secrets of [the] client," ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4, and to "exercise independent professional judgment on behalf of [the] client, id., Canon 5. The attorney will be representing divergent interests no matter which party he is affiliated with since the insurer hired him initially. Although full disclosure of the conflict and consent to such representation by the client can obviate the problem in many instances, this is generally not true in litigation. See id. E.C. 5-15.

Of course, in many cases there will not be a formal conflict but rather a desire on the part of the attorney to maintain a good business relationship with the insurance company. The effect could be the same as if a formal conflict existed, however.

53 Under the proposed ethics rules of the American Bar Association, this course may be mandatory. The comments to Rule 1.8 on conflicts in litigation indicate: "The question of separate representation should not necessarily depend on the fact that one of the parties is paying for the representation, for example where conflict of interest arises between a liability insurer and its insured. Separate representation may be required in such situations." Discussion Draft of ABA Model Rules of Professional Conduct, Rule 1.8, Comment, reprinted in 48 U.S.L.W. (February 19, 1980) at 7. This prohibition is extended to participation in settlement negotiations as well:

[U]nder no circumstances could a lawyer properly . . . represent parties to a negotiation whose interests are fundamentally antagonistic to each other. When it is plain that prejudice to the client's interests is likely to result, the lawyer should not undertake the representation even with the consent of the client. A client's consent does not legitimize a lawyer's abuse of professional office.

Id. at 8.
Such complete decisionmaking power could render the use of separate counsel inadequate to avoid the conflict.

The situation is similar in many respects to that where one insurer covers both parties to an accident. If the insurer simply fails to provide a defense to its insured, it is denied the chance to protect its interests, and the insured loses the benefits of a defense for which he contracted and paid premiums. It has been suggested that the insured be allowed to employ independent counsel at the insurer's expense; however, the insurer still loses some of its decisionmaking authority and will definitely want a right of approval on the independent counsel employed. There is also some question about whether the insurer can be held liable for the costs of the independent counsel. The basic difficulty seems to be a reluctance on the part of the courts to reform the contract of insurance when there is no statutory basis for awarding costs of independent counsel.

THE NEED FOR A FLEXIBLE PROCEDURE

In light of the possibilities for prejudice to the original parties as well as conflicts of interest for the insurer, there are circumstances where intervention is not desirable. Further, the possibility that intervention will add contractual issues to what began as a negligence action can create confusion about the proper scope of intervention if it is allowed. These conflicts and uncertainties about the

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84 See J. DONALDSON, supra note 45, § 1605.
85 See generally Pace, supra note 41.
86 Id. at 540.
87 Compare O'Morrow v. Borad, 27 Cal. 2d 794, 167 P.2d 483 (1946) (allowing fees on the basis that public policy does not allow a conflict of interest but also does not favor a forfeiture of the defense provision in an insurance contract) with Hoffman v. Allstate Ins. Co., 21 Misc. 2d 583, 188 N.Y.S.2d 408 (1959) (denying fees on the basis of a refusal to "rewrite" the insurance contract). Both of these cases involved a plaintiff and defendant insured by the same company where separate attorneys had been hired for each side.
88 See Hoffman v. Allstate Ins. Co., 21 Misc. 2d 583, 188 N.Y.S.2d 408 (1959). This issue has been considered in another context in All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160 (N.D. Ind. 1971). The insurer had issued a liability policy in which it was bound to defend the tavern in question on a suit arising from injuries to a customer. The insurer claimed the injuries were intentionally inflicted. This contradicted the story of the tavern owner and created a conflict of interest. The court said:

There is no reason to handle this situation any differently than the usual situation where the insurer has a conflict of interest. The insurer must either provide an independent attorney to represent the insured, or pay for the cost of defense incurred by the insured hiring an attorney of his choice.

Id. at 165.
permissibility and scope of intervention are reflected in the inability of the courts to agree on the intervention question. Since blanket solutions either requiring or denying intervention in all cases do not eliminate the potential for prejudice and conflicts of interest, a more flexible response is called for. The desired flexibility can be achieved by utilizing the judicial discretion built into the permissive intervention rules.

Discretion is often exercised to address problems associated with analogous issues such as joinder. The Indiana Rules of Court provide a number of opportunities for the court to weigh potential prejudice against the problems of multiple litigation. When considering questions of joinder or whether to sever claims or issues for separate trial, the court must exercise its discretion in this manner. Further, the discretion built into intervention has been used in other contexts, so it seems incongruous to remove discretion in uninsured motorist cases as the court did in Matney. The rule contemplates that cases will vary significantly in the strength of their arguments for and against intervention; attempts to deny this by removing the court’s discretion sacrifice justice for formalism.

STANDARDS FOR AN INTERMEDIATE APPROACH

Any scheme for approaching the intervention question from a flexible perspective must suggest appropriate judicial responses for cases where the defendant fails to appear, where he appears and asserts a counterclaim, and where he appears and simply defends the action. The first step in such a scheme, however, is to bring the question before the court, and to that end an insurer properly notified of a pending uninsured motorist action should be required to file an intervention petition in the appropriate court or suffer a waiver of its right to contest the liability of the uninsured motorist and the determination of damages. Whether this petition is

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See notes 5-6 & accompanying text supra.

Ind. R. Ct. 19(b).

Ind. R. Ct. 42.


A similar result could be achieved by requiring the insured plaintiff to join his insurer in the original suit as a defendant. Such coerced joinder, which would presumably be accom-
granted must depend first on whether the uninsured motorist appears to defend.

If no appearance is entered by the uninsured motorist and a default is imminent, the insurer's petition should be granted. This will result in the equivalent of a suit by the insured against his insurer alone, and all issues, both contractual and tort-related, may be litigated together. The only possible objection to intervention concerns the information that the insured has provided to his insurer prior to intervention, but any such prejudice would occur anyway if the insured sought to collect a default judgment from the insurer in a second suit. If there are no contractual defenses involved in the case, the presence of the insurance company could even be hidden from the jury by allowing the insurer to defend in the name of the uninsured motorist. Granting the petition to intervene is the most efficient use of judicial resources since a second trial would be necessary after a default judgment were intervention to be denied.

If the uninsured defendant does appear, whether the court permits intervention should depend first on whether the defendant counterclaims. When the defendant asserts a counterclaim, the petition to intervene should be denied. The insurer faces a serious conflict of interest problem in this situation as to which side of the case it will control. Indeed, the insurer will probably be reluctant to involve itself for fear of a charge of bad faith, and the insurer's counsel may be concerned over potential disciplinary action. Even in the case where separate attorneys can be employed to handle the two sides of the litigation, the original parties will object to the free flow of information which must accompany the insurer's investigation of both the uninsured motorist claim and the counterclaim. The court could eliminate the conflict by severing the claim and counterclaim, but this would lead to two trials. Thus, intervention would not prevent multiple litigation. Since two trials
will be necessary, it is better to avoid the adverse effects of intervention on the original parties by denying intervention and, thus, allowing the insurer to concentrate on defending the counterclaim in the first action.\footnote{There is a chance that the second trial will be unnecessary if the insured wins the first trial as the insurer may decide to settle the insured’s claim. See note 19 supra. If the claim and counterclaim are severed instead, it is much more likely that two trials will occur.}

Although a counterclaim should normally preclude insurer intervention, the counterclaim could be for a much lower sum than the uninsured motorist claim, and a form of conditional intervention could then be allowed if all parties assented and the court in the exercise of its discretion decided it should be allowed. The minimum conditions for allowing the intervention should be: (1) consent by the insurer to be bound by the judgments rendered in both the claim and the counterclaim; (2) consent by the insurer to relinquish its right to defend the counterclaim; and (3) consent by the insurer to pay reasonable attorney’s fees to provide the insured with an independent counterclaim defense.\footnote{There would seem to be nothing wrong in allowing the insurer a right of approval of the independent counsel chosen to protect itself from collusion or incompetence. Of course, a limited requirement of good faith would be necessary so the insurer would not hold out for the counsel of its choice.}

A third procedural possibility is an appearance by the defendant but no counterclaim. When the uninsured defendant appears but asserts no counterclaim, the court should adopt a balancing test to decide whether to permit intervention. The interests to be balanced are avoidance of multiple litigation and prejudice to the parties. At a hearing on the intervention motion\footnote{Such hearings are permitted by Ind. R. Ct. 73.} the original parties could object to the intervention on the ground that they will suffer prejudice. As a practical matter these objections will be sufficient to deny intervention under the rule 24 test of “[undue] delay or prejudice [to] the adjudication of the rights of the original parties”\footnote{Ind. R. Ct. 24(b).} only when they involve damaging information about the insured known to the insurer\footnote{See notes 39-44 & accompanying text supra.} or when they involve a risk of substantial conflict of interest in the relationship between the insurer and the uninsured defendant.\footnote{See text accompanying notes 45-47 supra.}

Objections relating to an imbalance of resources or the use of experts can be avoided by judicial control over the proceedings and
the use of an appropriate pre-trial order. Where there are contractual issues which the insurer wishes to raise, the court may decide that a bifurcation of the trial or even a complete separation into two trials is warranted. Such a severance would avoid jury confusion and the injection of insurance into the case.

The timing and effect of the decisions to be made in the foregoing procedure are best illustrated by a hypothetical example. A, an insured driver, is involved in an accident with B, an uninsured driver. A sues B and, pursuant to the terms of his insurance policy, A sends a copy of the complaint and summons to I, his insurer. At this point I must decide (1) whether it is convinced that B is uninsured; (2) whether A has performed all of the conditions of his insurance contract; and (3) whether A is legally entitled to recover damages from B. If I decides all of these questions in the affirmative, I will settle the claim with A and can proceed against B by right of subrogation. If I does not settle, it must decide whether to waive its chance to contest B's liability and the amount of damages by failing to intervene.

Assuming I petitions to intervene, the court should set a hearing on the petition to take place after the time to answer the original complaint has run. At this hearing A and B (if he appears) can contest the intervention. Here the court must undertake the balancing analysis unless B defaults or asserts a counterclaim; then the court must determine the scope and conditions of intervention if it is permitted.

See, e.g., Barry v. Keith, 474 S.W.2d 876 (Ky. 1971). The court allowed intervention on a set of conditions, one of which allowed the trial judge to impose whatever controls he believed reasonably necessary to insure a fair and orderly trial. Id. at 878. See generally Shapiro, Some Thoughts on Intervention before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 761 (1968).

Severance is permitted under Ind. R. Ct. 42(b).

Alternatively, the effect of insurance on the jury might be counteracted by instructing the jury that the insurer will be subrogated as against the uninsured defendant. This would tend to lower the verdict where the fact of insurance would tend to raise it. See note 37 supra. This is analogous to allowing a defendant to testify that he has no liability insurance after the plaintiff has suggested the contrary to the jury. See C. McCormick, supra note 38, at 481.

See text at note 13 supra.

This period is generally 20 days after the complaint was filed. Ind. R. Ct. 12(a). Whether a petition to intervene filed after this point is sufficiently timely to be allowed under Ind. R. Ct. 24 must turn on whether the original parties have suffered any prejudice by the delay and whether the insurer has waived its right to intervene by the delay. See Rawlins v. Stanley, 207 Kan. 564, 486 P.2d 840 (1971).

If prejudice or a conflict of interest were to appear at a later stage of the trial after intervention had been permitted, under Ind. R. Ct. 41(a)(2) a judge could always dismiss the insurer from the case without prejudice. Alternatively, under Ind. R. Ct. 42(b) the court
CONCLUSION

In the face of competing evils of multiple litigation and conflict of interest, the potential injustice of a rule requiring insurer intervention in every uninsured motorist case is not justified by its simplicity. When the victim of an automobile accident elects to sue an uninsured motorist alone, he raises fundamental questions of cost and fairness. It is nearly axiomatic that the victim's insurance company cannot be bound by the judgment if it is not involved. Forcing the insurance company into the case through intervention can allow all issues to be resolved neatly in one trial and avoids the expense, delay, and possible inconsistency of two trials. This justification for intervention may be outweighed, however, by the potential for prejudice to the parties when the insurer is brought in. The adversary posture of the insured and his insurer where once there was cooperation can put the insured at a disadvantage. The uninsured defendant may object to interference in his defense and the injection of insurance into the case which necessarily accompanies intervention. If a counterclaim is filed, the insurer is placed into a direct conflict of interest in its competing roles as defendant in the claim and defender in the counterclaim. Pervading the entire intervention question is the potential for jury confusion resulting from an extra party and extra issues.

It is the duty of the courts to adopt a more flexible approach which accounts for the competing interests of these different situations. Intervention should be required when the defendant fails to appear and prohibited when the defendant asserts a counterclaim. In all other cases the court should balance the desirability of intervention against its cost in prejudice to the parties. Only in this way can the benefits of intervention be obtained without a sacrifice of justice.

ALAN W. BECKER

\[\text{could sever the trials of the two defendants to avoid prejudice.}\]

\[E.g.,\] \textit{Vernon Fire & Cas. Ins. Co. v. Matney, 170 Ind. App. 45, 351 N.E.2d 60 (1976).}\]