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Subrogation Under Uninsured Motorists Insurance

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Uninsured Motorists Insurance or Family Protection Coverage, is about twelve years old. It developed as a complement to compulsory insurance laws, financial responsibility laws, Unsatisfied Judgment Fund Acts, and the New York Motor Vehicle Accident Idemni-
These statutory schemes, while all designed to close the "solvency gap" between motor vehicle tort judgments and impecunious judgment debtors, still left lacunae in the protection of a state's citizens. Compulsory insurance laws did not protect against out-of-state uninsured tort-feasors, financial responsibility laws did not protect the first victims of uninsured and impecunious tort-feasors, and unsatisfied judgment funds did not protect a state's citizens against motor vehicle accidents occurring outside the state.

Uninsured Motorists Insurance does all of these things. Now being written in all states, it provides that the insured's or his personal representative will be paid his damages, up to the amount stated in the policy, for personal injury or death, and sometimes property damage, arising out of an accident for which an uninsured or unidentified motorist is legally responsible. Uninsured Motorists Insurance is usually offered in an amount equal to the amount of security required for proof of financial responsibility for personal injury under the financial responsibility law of the state where the insured vehicle is registered or principally garaged. At least 30 states require that such coverage be offered to their policyholders, but most permit the policy-


6 "The insured" is defined by the contract and ordinarily includes the named insured and any relative living in the same household, whether or not they are occupying an insured automobile, and any other person while occupying an insured automobile.

7 Uninsured Motorists Insurance does not provide that the uninsured motorist's tort liability is insured by the insurance company of the purchaser of the coverage, but that the insurance company promises to pay, up to the limits of the coverage, what the uninsured motorist would be legally liable to pay. Since the insurance company has not promised to indemnify the uninsured motorist, the insurance company is not precluded from asserting a claim against the uninsured motorist for its damages arising out of the uninsured motorist's wrong.

8 Typically, $10,000 for the injury or death of one person, and $20,000 for the injury or death of more than one person. Where Uninsured Motorists Coverage includes damages for harm to property, as is required in some states, the amount of such property damage coverage ranges between $1,000 and $5,000.

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holder to reject such coverage. The premium is quite low, typically under $10 per year for insurance covering the driver and passengers in a single passenger car.

When the insurance company pays an insured's claim under the coverage, the payment does not extinguish the insured's claim against the insured motorist. The insured's total claim may be greater than the maximum amount of the insurance company's liability, or the damages as compromised between the company and the insured may be less than the potential common-law liability of the insured motorist to the insured. Moreover, even if the insured feels that he has been fully compensated for his damages, the insurance company may wish to recoup its losses by pursuing, as subrogee, the uninsured motorist. Sometimes both the insurance company and the insured will assert a claim against the uninsured motorist, the insurance company to recover by virtue of contracted-for subrogation what it has paid the insured, and the insured to recover his damages above what he has been paid by the insurance company. The problems raised by the insurance company's attempt to assert subrogation rights against the uninsured motorist, devices presently used to resolve these problems, and suggestions for other ways to resolve such problems are the subjects of this article.

I. PROBLEMS RAISED BY SUBROGATION TO CLAIMS AGAINST UNINSURED MOTORISTS

A. The Social Desirability of Subrogation

Lawsuits are expensive enterprises. They exact an economic toll of investigation expenses, attorneys' fees, loss of worktime by parties

10 In the classic sense, subrogation occurs "where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred. . . ." Restatement of Restitution, § 162 (1937). The obligation is thus revived in equity for the benefit of him whose property was used to discharge it. In the Uninsured Motorists Insurance situation the insurance company's payment is not used to discharge the tort-feasor's liability. Under the collateral source rule compensation from someone who has committed no breach of duty does not reduce the amount of the victim's claim against the tort-feasor. Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958); Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 349, 170 P.2d 448, 450 (1946); Harding v. Town of Townshend, 43 Vt. 199, 200-201 (1871); see Note, Unreason In The Law Of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964). But the term subrogation is well established in the insurance context as referring to the equitable right of the insurance company to assert the rights of the insured against the tort-feasor.

11 We are here speaking of contractual, or conventional subrogation, provided for in the insurance contract. In the ordinary automobile property damage, theft or fire insurance policy, subrogation rights would be recognized in equity even in the absence of a contract providing for them. Univeral Credit Co. ex rel. Lewallen v. Service Fire Ins. Co., 69 Ga. App. 357, 25 S.E.2d 526 (1943); King, Subrogation Under Contracts Insuring Property, 30 Texas L. Rev. 62 (1951); 16 G. Couch, Insurance § 61:238 (2d ed. 1966). But for reasons to be discussed in this article, the insurance companies are unwilling to rely on "equitable" or "legal" subrogation, that is subrogation in the absence of a policy provision providing for it, when subrogation rights under an Uninsured Motorists Endorsement are involved.

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and witnesses, and expense to the community for judicial facilities and personnel, and an emotional toll of stress wrought upon litigants and witnesses. It would seem, then, that an attempt by an insurance company, which has paid a loss under its policy, to redistribute the loss through subrogation, should be rewarded only if such redistribution will produce advantages worth the economic and social cost.

One reason for the allowing of subrogation to underwriters of Uninsured Motorists Insurance lies in the stimulus such subrogation rights might give for the purchase of liability insurance. If a financially irresponsible person were operating a motor vehicle in a state where Uninsured Motorists Insurance was widespread, but subrogation was not allowed to the writers of such coverage, he might be led to purchase no bodily-injury insurance at all, on the assumption that any damage he does will be paid for by the victim's insurance company, and that the victim, who may have been fully compensated, will not pursue him, and the insurance company will have no right to do so.

Another reason for allowing subrogation would be that the insured, in the absence of subrogation, would be allowed, under the collateral source rule, to recover from the uninsured motorist, even if the insurance company had paid all the insured's damages. If society's resources are to be invested in a lawsuit by a victim who has been paid by his insurance company, the benefits ought to redound to the parties who have suffered uncompensated loss, including the insurance companies.\footnote{Statistics on recoveries by insurance companies through the pursuit of claims against uninsured motorists have been difficult to collect. Insurance companies apparently keep statistics only on the basis of the amount of money paid out under Uninsured Motorists Coverage during a calendar period and the amount of money recovered by the companies from uninsured motorists during the same period. There is available no breakdown as to how much money is recovered before suit against the uninsured motorist, after suit and before judgment, and after judgment. Nor could there be obtained any statistics as to how much was recovered by insureds from uninsured motorists, above what was recovered by insurance companies. What figures are available indicate that insurance companies recover from uninsured motorists a minute percentage of what they pay out to the insureds under Uninsured Motorists Insurance. For example, from January 1, 1967, through June 30, 1967, Aetna Casualty and Surety Company paid out $2,037,561 and recovered $87,710. Letter from Blaney C. Turner, Vice President Claim Department, Aetna Life and Casualty Company, August 22, 1967. The statistical experiences of the New York Motor Vehicle Accident Indemnity Corporation (MVAIC) is similar. During the period from January 1, 1959, through December 31, 1966, MVAIC paid out $30,059,902, and recovered $569,188. Letter from Frank Karwayne, Chief Actuary, New York Insurance Department, August 23, 1967. (This recovery, less than 2 percent of the amount paid out, is substantially less than the 33 1/3 percent recovery, which the New York Department of Motor Vehicles in 1955 estimated could be had from legally liable Uninsured Motorists. George, Insuring Injuries Caused By Uninsured Motorists, 1956 Ins. Law J. 715, 718.) Statistics developed from a study of automobile accidents which occurred in Southeastern Pennsylvania in 1956, however, indicated that 11 percent of those injured in automobile accidents by legally responsible uninsured motorists were able to recover from the uninsured motorists at least 150 percent of their "tangible losses" (loss of earnings, medical expenses, burial expenses), after deducting attorney's fees. Morris & Paul, The Financial Impact of Automobile Accidents, 110 U. Pa. L. Rev. 913, 933 (footnote) (1962).}
Some of the recoveries by insurance companies might eventually flow through to insurance buyers in the form of reduced premiums for Uninsured Motorists Insurance.\textsuperscript{13}

B. Subrogation And The Rule Against Assignments Of Causes Of Action For Bodily Injury

When an Uninsured Motorists Insurance carrier has paid, under that coverage, a claim for bodily injury, difficulties can arise when the company asserts, against the uninsured motorist, that it is subrogated by virtue of the insurance contract to the insured's claim for bodily injury. Conventional, or contractual, subrogation to a cause of action has been equated with assignment of the cause of action.\textsuperscript{14} At common law a cause of action for personal injury was not assignable\textsuperscript{15} because the courts feared champerty,\textsuperscript{16} (the buying of a claim from one who might not be disposed to prosecute it himself in the hope of making a speculative profit), and because the damage was too personal to be asserted by an assignee.\textsuperscript{17}

Since the enactment, within the last century, of statutes providing for the survivability of causes of action for personal injury, courts in about half the states have held that assignability and survivability are convertible terms and that since causes of action for personal injury can pass to personal representatives, they can be transferred inter vivos to an assignee.\textsuperscript{18} If such causes can be trans-

\textsuperscript{13} R. Horn, Subrogation In Insurance Theory and Practice 25 (1964). But see E. Patterson, Essentials of Insurance Law 51 (2d ed. 1957).


\textsuperscript{15} North Chicago St. Ry. v. Ackley, 171 Ill. 100, 49 N.E. 222 (1897); Rice v. Stone, 83 Mass. (1 Allen) 566, 569-70 (1861); Restatement of Contracts \S 547 (1932); Annot., 40 A.L.R.2d 500 (1955).


\textsuperscript{17} "A claim to damages for a personal tort, before it is established by agreement or adjudication, has no value that can be so estimated as to form a proper consideration for a sale. Until it is thus established, it has no elements of property sufficient to make it the subject of a grant or an assignment. The considerations which are urged to a jury in behalf of one whose reputation or domestic peace has been destroyed, whose feelings have been outraged, or who has suffered bodily pain and danger, are of a nature so strictly personal, that an assignee cannot urge them with any force." Rice v. Stone, 83 Mass. (1 Allen) 566, 570 (1861).

ferred, it should be possible to transfer them to a subrogee.\textsuperscript{19} There should be no fear of champerty. The purpose of the rule against champerty "is to prevent strife and litigation, and this it aims to secure by forbidding parties not interested to contract for an interest in the thing to be recovered, upon condition of their carrying on the suit."\textsuperscript{20} The subrogated insurance company is not a speculator buying up another’s claims. The insurer has paid pursuant to an endorsement which, in many states, it has been required to offer to purchasers of automobile liability insurance.\textsuperscript{21} The insurance company has acquired an interest in the cause of action only after paying a claim that it had a contractual duty to pay, and the promise to make such payment was made before the cause of action arose. (There is no chance of speculative profit to the insurance company, since it will be allowed to keep against the insured no more than the amount it has paid him, plus expenses.)\textsuperscript{22}

It is true that in about one-half the states causes of action for personal injury remain unassignable, either because the concomitance between survivability and assignability is rejected,\textsuperscript{23} or because a statute expressly says that causes of action for personal injury are not assignable,\textsuperscript{24} or because the survival statute does not include causes of action for damage to the person\textsuperscript{25} or because there is no survival statute.\textsuperscript{26}

Even in such non-assignability states, it seems that subrogation ought to be allowed to Uninsured Motorists Insurance carriers and ought not to be equated with assignment. If the reasons for not permitting assignments of causes of action for bodily injury are fear of

\textsuperscript{19} See D'Angelo v. Cornell Paperboard Prods. Co., 19 Wis. 2d 390, 397, 120 N.W.2d 70 (1963).
\textsuperscript{20} Barker v. Barker, 14 Wis. 142, 144 (1861); see City of N.Y. Ins. Co. v. Tice, 159 Kan. 176, 180, 152 P.2d 836, 839 (1944).
\textsuperscript{21} See statutes cited in note 9 supra.
\textsuperscript{22} See the policy provisions quoted in note 56 infra, and trust agreement provisions quoted in note 55 infra.
\textsuperscript{26} See Employers Cas. Co. v. Moore, 60 Ariz. 544, 142 P.2d 414 (1943).
the buying of causes of action in order to prosecute them in hope of profit, and doubt that anyone but the injured party can properly urge his damages upon the court, these dangers do not seem present in Uninsured Motorists Insurance subrogation situations. The insurance company is not "trafficking" in causes of action; it is seeking to recover a sum that it was contractually constrained to pay. It is not seeking any speculative increment but merely reimbursement. The objection that the injured person's damages cannot be urged by anyone other than the victim is not very persuasive, especially if the victim is a plaintiff, as he often will be, or if he will be there to testify to his injuries.

C. The Restriction of Insurance Subrogation To Contracts Of Indemnity

Legal or equitable insurance subrogation, that is subrogation that is not provided for in the insurance policy, has been traditionally restricted to insurers who pay claims under contracts of indemnity. The term "contracts of indemnity" includes fire, theft, marine, and automobile property damage policies, but has been said not to include life insurance policies or accident insurance policies which pay a specified sum per injury. It is not altogether clear why life and accident insurance coverages are not deemed to be policies of indemnity. The reason may be that they involve a promise to pay a sum certain rather than to make the insured whole for his loss. Under life and accident insurance there is no necessary relation between the amount of the insured's loss and the amount payable under the policy. Also, there are intimations that an insurance policy is not an indemnity policy if it insures against loss which is not pecuniary, out-of-pocket loss. The restriction of the meaning of the term "indemnity insurance" to insurance which compensates for out-of-pocket loss and the restriction of insurance subrogation to such indemnity contracts may reflect the policy against assignment of causes of action where damages are uncertain and a speculative profit is possible. Whatever the reasons

27 See text at notes 15-17 supra.
28 See text at note 54 infra.
30 W. Vance, supra note 29, at 797.
34 Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., 115 F.2d 277, 281 (4th Cir. 1940), cert. denied, 312 U.S. 702 (1941); Kimball & Davis, supra note 29, at 856.
for confining insurance subrogation to contracts of indemnity, the question whether the Uninsured Motorists Insurance Endorsement is an indemnity coverage subject to subrogation will be asked. The answer to this question should not make any difference in a state where a claim for personal injury is assignable, because if such a claim is assignable, it ought to be susceptible of contractual subrogation, even if contractual subrogation is deemed to be assigned pursuant to an insurance policy provision. Even in states in which claims for personal injury are not assignable, subrogation for Uninsured Motorists Insurance carriers should not fail on the grounds that the contract is not one of indemnity. The insured can recover from the company under Uninsured Motorists Coverage only to the extent that he can prove loss or damage (although damage can include pain and suffering), and this is one of the identifying marks of a contract of indemnity. The objection that the other indication of a contract of indemnity, the restriction of payments to the amount necessary to make good pecuniary loss, is not present, should be met by noting that there is no chance of speculative profit to the insurance company. Non-economic harm is recognized as compensable by our legal system and there is no reason why insurance for it should not be subject to subrogation in the same way that insurance for economic loss is subject to subrogation when there is no danger of speculation. After all, the person primarily liable, the tort-feasor, is going to be liable for all proved damages, pecuniary or non-pecuniary, and his payment of such damages should redound to the benefit of the person who has already paid such damages, the would-be subrogee. Besides, the insurer and insured have contracted for subrogation and there is no convincing reason not to permit it whether or not the contract under which the insurer paid the insured is technically a contract of "indemnity."  

D. Subrogation And The Rule Against Splitting A Cause Of Action

There is a common-law rule that subrogation rights will not arise until the subrogor's entire loss has been paid. The reason for this rule purportedly is that the creditor should not be required to share con-

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trol of his security and of his debt until he has been fully reimbursed. 38

The insured under Uninsured Motorists Insurance, who has a claim against the tort-feasor, may not have been fully reimbursed by the insurance company. He may claim his damages exceed the coverage under Uninsured Motorists Insurance, and wish to retain an interest in the claim against the tort-feasor. In addition he may have security for that claim by way of the bond given by the tort-feasor under the state's financial responsibility law. 39 But it has been said that if the insured has agreed to subrogation the debtor cannot object that the creditor is sharing his debt or his security. 40

The debtor may be able to object that the splitting of the cause of action subjects him to double harassment. In the property insurance context, where the policy contains a deductible provision, the insured will frequently give the insurer a "subrogation receipt," which can be construed not only as a subrogation agreement, but also as an assignment of the entire cause of action for property damage, with the insurer agreeing to retain out of any recovery, only what the insurer has paid the insured, plus a pro rata part of the costs of recovery from the tort-feasor. 41 In the property damage insurance cases then, no problem arises as to the splitting of a cause of action. But where a partial subrogation situation exists, and no assignment of the cause of action has taken place, cannot the debtor successfully claim that he is now being harassed by two creditors instead of one, that the insured's cause of action is being split? Is not the rule against the splitting of a cause of action meant to protect the defendant from harrassment by multiple claims for a single breach of duty? 42 Does not the tort-feasor now have to come to terms with two creditors instead of one? If partial subrogation is permitted and the tort-feasor settles with the insured knowing of the insurer's claim, he will be still liable to the insurer. 43

Still, courts will sometimes allow a cause of action to be split, and the defendant to be subjected to dual claims, when such a split is considered justified. For example, when a single act in breach of duty

38 Mid-States Ins. Co. v. American Fidelity & Cas. Co., 234 F.2d 721, 731 (9th Cir. 1956).
39 See note 3 supra.
40 Mid-States Ins. Co. v. American Fidelity & Cas. Co., 234 F.2d 721, 731 (9th Cir. 1956); Maryland Cas. Co. v. Cleveland, Cinc., C. & St. L. Ry., 74 Ind. App. 272, 124 N.E. 774 (1919); King, supra note 11.
42 See Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 258, 42 S.W. 946, 947 (1897).
affects both the person and property of another, most jurisdictions say that only one cause of action arises because there has been only one breach of duty. Among these states, however, some will allow the insurance company to prosecute separately the property damage claim as subrogee, because the rule against splitting is not directed against one who acquires an interest in a cause of action by virtue of a contractual duty to reimburse the victim of another's breach of duty. Also, where an insurance company has acquired part of a cause of action by subrogation and the insured, the owner of the balance of the cause of action, is unwilling to join in the suit because he cannot be reached by process, the insurance company may sue for its damage independently of the claim of the insured.

In the Uninsured Motorists Insurance subrogation situation, a court might be unwilling to allow the insured and insurer ordinarily to harass the tort-feasor in separate actions, but why should they not be allowed to sue together but settle separately? If the insurer settled, the jury in the insured's action could be instructed to reduce the damages awarded by the amount of money paid to the insured by the insurer. Such instructions would be similar to those now given when a plaintiff who sues one joint tort-feasor has been paid money by the other joint tort-feasor in return for a covenant not to sue. And if the insured settled, and only the insurer's subrogation claim remained to be prosecuted, the court could order the amount claimed in the ad damnum clause to be reduced to the amount paid by the insurance company.

E. The Insurance Company's Desire To Keep Its Identity Undisclosed To The Jury

The subrogated insurance company will wish to pursue its claim against the tort-feasor in an action in which the insured is named as the only plaintiff, so that the insurer can keep its interest undisclosed to the jury. This objective can be difficult to attain in a state which

In addition, cases which consider an occurrence resulting in damage to both person and property as giving rise to separate causes of action sometimes expressly state that they reach such a result at least partially for the reason that treatment of the claim as a single cause of action would inhibit transfer of the cause of action for property damage to the insurance company. Clancey v. McBride, 338 Ill. 35, 169 N.E. 729 (1929); Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902).
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has a real party in interest rule. About three-quarters of the states have statutes or rules of court which provide that actions shall, or may, be prosecuted in the name of the real party in interest. 48 A few are permissive, merely authorizing the real party in interest to sue, 49 but most such statutes or rules are mandatory. They state that an action must be prosecuted in the name of the real party in interest. 50 The majority of the mandatory statutes or rules have been construed to require that when the insurance company has paid the entire loss and is totally subrogated to the rights of the insured, the action against the tort-feasor must be prosecuted in the name of the insurance company, since the insured is no longer a party in interest. 51 The insured may be able to sue "for the use and benefit of" the insurer 52 but, the insurance company will apparently be identified. 53 And in the partial subrogation situation, when the insured sues for the entire amount of the loss, the defendant can, in some states having mandatory real party in interest rules, compel joinder of the insurance company as a party. 54 Some jurisdictions having mandatory real party in interest

50 Many mandatory real party in interest rules are modeled after Rule 17(a) of the Federal Rules of Civil Procedure which reads: "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought ...." E.g., S.D. Code § 33.0402 (Supp. 1960); Utah Code Ann. R. Civ. P. 17(a) (1953); Wash. Rev. Code Ann. §§ 4.08.010, 4.08.020 (1962).
51 Annot., 13 A.L.R.3d 229 (1967). The totally subrogated insurance company prosecutes both the legal claim of the subrogor and its own equitable claim, since law and equity jurisdiction are now merged. Before the merger of law and equity, the subrogor could sue in equity in his own name, but at law would sue in the name of the subrogor for the use and benefit of the subrogee. Clark & Hutchins, The Real Party in Interest, 34 Yale L.J. 259, 262-63, 271 (1925).
53 "The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim." United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 382 (1949); see Jenkins v. Westinghouse Elec. Co., 18 F.R.D. 267, 270 (W.D. Mo. 1955). In Missouri, which has a mandatory real party in interest statute, the insured can apparently sue in his own name without identifying the totally subrogated insurer in the pleadings. Hayes v. Jenkins, 337 S.W.2d 259, 261 (Mo. Ct. App. 1960).
54 See Salzwedel v. Pinkley, 140 Ore. 671, 15 P.2d 718 (1932); Annot., 13 A.L.R.3d 140 (1967). Under a 1966 amendment to the Federal Rules of Civil Procedure, it may be that the insurance company need not be ordered joined as a party unless there is a danger that the defendant will incur "double, multiple, or otherwise inconsistent obligations ...." Fed. R. Civ. P. 19(a). It can be argued, however, that since the subrogated insurance company's interest is not distinct and severable, it is an indispensable party and must be joined. Cf. Washington v. United States, 87 F.2d 421, 429 (9th Cir. 1936). The "indispensable party" doctrine may be a rule of substantive law and therefore not be affected by Rule 19 of the Federal Rules of Civil Procedure. See Provident Tradesmens' Bank & Trust Co. v. Lumberman's Mut. Cas. Co., 365 F.2d 802 (3d Cir. 1966).
rules do allow, either by legislation or court decision, an insurance company totally to hide its identity behind the insured, and not to disclose its interest to the trier of fact.\textsuperscript{55} But, in many jurisdictions, mandatory real party in interest rules pose a real threat to the desire of the subrogated insurance company for anonymity.

II. \textbf{THE USE OF THE TRUST AGREEMENT TO AVOID THE PROBLEMS OF SUBROGATION}

In order to avoid the problems raised by an attempt to contract for the right to be subrogated to the insured's cause of action, or part of it, against the tort-feasor, the insurance companies have inserted in the insurance contract a provision that, if any person receives payment under the Uninsured Motorists Endorsement, such person will hold his cause of action in trust for the insurer to the extent of the insurer's payment to him, and shall, if requested by the insurer, take appropriate action to recover in his own name, such payment, as damages from the person legally responsible therefor.\textsuperscript{56}

The injured person, the Uninsured Motorists Insurance claimant, is bound by this contract provision, unless it is against public policy. He is bound either because as a purchaser of insurance he is a party to the contract, or because he claims as an "insured" under


\textsuperscript{56} The policy form provided by the National Bureau of Casualty Underwriters reads as follows:

\begin{quote}
Trust Agreement. In the event of payment to any person under this endorsement:
(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;
(b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this endorsement;
(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;
(d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith;
(e) such person shall execute and deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the company established by this provision. (Form A 608A, January 1, 1963.)
\end{quote}

The right held in trust is the right of recovery not only against an uninsured motorist, but against an insured motorist who might be jointly liable with the uninsured motorist for the claimant's injuries.
the policy and thus would be deemed, as a third-party beneficiary of the contract, to have accepted its terms. In addition, before an insurance company pays the claimant any moneys under the Uninsured Motorists Endorsement, it customarily requires him to execute a trust agreement, in which he expressly undertakes to hold his cause of action in trust. But it is doubtful that the use of the trust agreement will serve as a cure for all of the insurance companies' subrogation problems under Uninsured Motorists Insurance.

With respect to the splitting of the cause of action and double harassment of the defendant, the need that the defendant bargain with, and settle with, both the insured and the insurer will be eliminated. Since the insured is the trustee of the cause of action, the insured will be in full control of any settlement and a release from the trustee to the uninsured motorist, if purchased for a price not so patently low as to make the granting of the release an obvious breach of trust, will bind the insurer-beneficiary, even though the uninsured motorist knows of the trust.

58 A typical trust agreement provides:
   The undersigned does hereby release, acquit and forever discharge Insurance Company from all claims, known or unknown, that the undersigned may ever have against it under the uninsured motorists coverage of its policy No. , arising out of the accident mentioned below and agrees to hold in trust for the benefit of the company all rights of recovery the undersigned shall have against anyone who may be legally liable for the damages for bodily injuries sustained by the undersigned caused by the automobile accident that occurred on , at or near , and agrees that the company shall be entitled, to the extent of its payment hereunder, to the proceeds of any settlement or judgment that may result from the exercise of any such rights, and agrees to do whatever is proper to secure such rights and to do nothing to prejudice such rights, and to take, through any representative designated by the company, such action as may be necessary or appropriate to recover the damages suffered by the undersigned in said action, and that such action may be taken in the name of the undersigned and that, in the event of a recovery the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith, and to execute and to deliver to the company such instruments and papers as may be appropriate to secure the rights and obligations of the insured and the company established by the provisions of the above endorsement.
59 The policy and trust agreement require the trustee to "take action [against the person legally responsible] through a representative designated by the company." The decision to settle and the signing of a release is not action which is ordinarily done through a representative. The word "action" should be taken to refer only to legal action, to pleading before the courts, which is ordinarily done through a representative. Even if the quoted language is ambiguous on this point, any ambiguity in an instrument should be construed against the drafter of the instrument, the insurance company. Rees v. Midway Liquors, Inc., 30 III. App. 2d 132, 149, 174 N.E.2d 7, 15 (1961); In re Travelers Indem. Co., 26 Misc. 2d 513, 514, 205 N.Y.S.2d 741, 742 (Sup. Ct. 1960). Since the insured would have the right against the insurer to settle with the tort-feasor for a fair figure, a release from the insured to the tort-feasor, in return for payment in a fair amount, would bind the insurer, the beneficiary of the trust, in his relations with the tort-feasor. The insurer, the beneficiary of the trust, having entered into the trust agreement, could
The trust agreement should also foreclose the putative tort-feasor from raising the objection that the Uninsured Motorist Endorsement is not a contract of indemnity and is not therefore the subject of subrogation. If the insured and the insurer take the position that the insurer has no direct relationship with the tort-feasor, but is only the beneficiary of a trust of the insured's cause of action against the tort-feasor and cannot directly prosecute the action against the tort-feasor or even control its prosecution, it would not seem that the tort-feasor could raise any question about the indemnity nature of the insurance contract. It would seem to be of no concern to the defendant what the insured does with the proceeds of any settlement with, or judgment against, the defendant. If, on the other hand, the insurer sought to be represented by a separate attorney and sought the right to cross-examine witnesses, or to challenge prospective jurors, and the insured concurred in the insurer's position, then the insured should be treated as a subrogee and questions of the indemnity nature of the insurance contract would be raised. But, as we have seen, the Uninsured Motorists Endorsement ought to be treated as a contract of indemnity and properly the subject of subrogation anyway.

In the absence of a trust agreement an insurance company might have difficulty in asserting subrogation rights to a cause of action for personal injury. And where a cause of action for personal injury cannot be assigned and subrogation to a cause of action for personal injury is equated with the assignment of a cause of action for personal injury, it could be argued that a declaration of trust of a cause of action would not give the insurance company a beneficial interest in the cause of action, on the theory that what cannot be transferred directly cannot be transferred indirectly by means of a trust. "A person who has a cause of action for tort which cannot be transferred cannot create a trust of the cause of action." But this view seems to oversimplify matters. Causes of action for personal injury cannot be transferred because of the fear of speculative profit and because one person cannot assert another's personal injury. Even without the trust agreement, the fear of speculative profit is removed by the fact that the insurance company is given by the contract and trust agreement an interest in the claim only to the extent of its payments to the

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60 See text at notes 93-97 infra.
61 See text at notes 35 and 36 supra.
62 See text at notes 14-27 supra.
63 See text at notes 23-26 supra.
64 See text at note 14 supra.
66 See text at notes 16 and 17 supra.
insured plus expenses. The argument that only the injured party can assert his own injuries is an artificial one, but even if it has any viability, it ought to be overcome by the use of the trust agreement, under which the insured, as trustee will assert his own injuries, in behalf of the insurer as well as himself, even though he may be using an attorney selected by the company. Of course, if the insured and the insurer retain separate attorneys and they plead separately, or both try the case, then it can be argued that someone other than the insured is asserting his injuries.

Where a mandatory real party in interest rule requires that a totally subrogated insurance company be named as a party to the action or identified in the pleadings, or allows the defendant to compel joinder of a partially subrogated insurance company in a suit by the insured, it can be argued that the fact that the insurance company has become a beneficiary of a trust, rather than a mere subrogee, should not make any difference. It is true that the mandatory real party in interest rules usually contain a provision which reads, typically, "an executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name." But it has been held in the federal courts that the rules of evidence allow the defendant to bring before the jury the identity of the beneficiaries of the trust of which the plaintiff is trustee. In any event, it is doubtful whether the insured should be considered as a trustee for the purpose of the provision in favor of trustees. A trust usually exists for some purpose other than the desire to avoid prohibitions against the assignment of causes of action. The provision in favor of trustees may have been inserted to make it clear that passive beneficiaries of conventional trusts need not be joined with the trustee as plaintiff, as some older cases had required. It was probably not intended to provide a cloak of anonymity for an insurance company which is seeking reimbursement for an amount it has paid out under an insurance policy, especially an insurance company which has reserved to itself the right to choose the attorney who will represent the trustee, who represents the insurance company.

67 See text at note 22 supra.
68 See text at note 96 infra.
69 See text at notes 51-54 supra.
72 See Atkinson, supra note 48, at 952; Dunn v. Seymour, 11 N.J. Eq. 220 (Ch. 1856).
73 See policy and trust agreement provisions quoted in notes 56 & 58 supra. Another device for avoiding the real party in interest rules, the "loan receipt," has been struck
Perhaps there is good reason to keep the identity of the insurance company from the trier, in order to prevent the trier from inclining toward the uninsured motorist on the issues of liability and damage. Identification of the insurance company could be prejudicial, not only to it, but to the insured-trustee, since a judgment for the uninsured motorist, or a low damage award, would cut down or eliminate the insured’s recovery, for his own account, from the uninsured motorist. But if such an approach is to be adopted, it ought to be done so expressly by court or legislature, and confrontation on this issue should not be avoided by a too-ready assumption that the insured is a "trustee" as that word is used in real party in interest statutes.

III. OTHER PROBLEMS RAISED BY THE TRUST AGREEMENT

Apart from the question whether the trust agreement is effective to overcome the problem for which it was designed, the typical trust agreement contains some provisions which ought to be objectionable from a public policy standpoint, that is, from the point of view of persons or institutions who are expected to protect the public and represent its interests, such as insurance commissioners, legislators and the courts themselves.

A. The Trustee’s Duty With Respect to Settlement With a Third Party

The policy and trust agreement customarily contain, with respect to the insured’s privilege to settle with the uninsured motorist, language to the effect that the trustee “shall do whatever is proper to secure and shall do nothing after loss to prejudice” his rights of

down by some courts as a subterfuge without substance. When insurance companies have paid out property damage claims to insureds, by virtue of property damage provisions in automobile or fire or marine insurance policies, and wish to pursue the wrongdoer under subrogation rights, the companies have frequently attempted to skirt real party in interest rules by providing in the policy that they will “lend” the insured the amount of his damage, the insured promising to repay the company out of any recovery from the tortfeasor. The insurance company then argues that it is not a real party in interest, since it is only a creditor of the insured, and not the equitable owner of any part of the cause of action. This device has failed in those states which view the insurance company’s payment as a reimbursement of an insured loss rather than a loan and therefore view the insurance company as having acquired an equitable interest in the cause of action and as being a real party in interest. Cleveland Paint & Color Co. v. Bauer Mfg. Co., 155 Ohio St. 17, 97 N.E.2d 545 (1951); Purdy v. McGarity, 262 App. Div. 623, 30 N.Y.S.2d 966 (1941); Annot., 13 A.L.R.3d 42 (1967).

The use of the loan receipt for this purpose, however, has been upheld elsewhere. Glancy v. Ragsdale, 251 Iowa 793, 102 N.W.2d 890 (1960); Blair v. Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950); see Atkinson, supra note 48, at 945; Annot., 13 A.L.R.3d 42 (1967).

recovery against the persons legally responsible for the insured's injuries. But a conflict of interest between the insured, the "trustee" and the subrogated insurance company, "the beneficiary," does not seem unlikely. The insurance company may have paid the insured its maximum liability under the Uninsured Motorists Endorsement, say $10,000, but the insured may claim he has an additional $10,000 worth of damage and therefore be unwilling to settle with the third person, who may or may not be insured, for less than a total of $20,000, while the "beneficiary" insurance company is willing to settle with the third person for $10,000. Suppose the third person offers $13,000 for a release from the trustee and the trustee turns it down, not being willing to settle for $3,000 for himself from the third person but wanting $10,000 for himself as well as $10,000 for the insurance company. The claim is then tried and the litigation ends in a judgment for the defendant. By what standards do we determine whether the trustee's failure to settle amounted to a breach of duty to the insurance company? The insured can hardly be expected to accept any offer of settlement which the insurer wishes him to accept. The insured has his own beneficial interest to protect. As trustee who is part owner of the beneficial interest in the cause of action, the insured would have a duty to give equal weight in the administration of the trust to the interests of the insurer and to his own interests. This is the same duty as that imposed by many courts on a casualty liability insurer which assumes control of the defense of its insured and there is a risk that a judgment will exceed the policy limits.

75 See notes 56 and 58 supra. The quoted policy provision requires the insured to take appropriate action to recover the insurer's payment. The quoted trust agreement requires the insured to take appropriate action to recover his damages. What is appropriate for one purpose may not be appropriate for another. E.g., settlement with the defendant for the amount paid by the insurance company. But any ambiguity or discrepancy as to the duty of the insured would probably be construed against the insurance company, which prepared both instruments. Remsen v. Midway Liquors, Inc., 30 Ill. App. 2d 132, 149, 174 N.E.2d 7, 15 (1961); In re Travelers Indem. Co., 26 Misc. 2d 513, 514, 205 N.Y.S.2d 741, 742 (Sup. Ct. 1960). Therefore the insured ought to be held only to the duty to do what is appropriate to recover his damages.

76 An uninsured motorist and a driver of another car may be jointly liable for the insured's injuries. The Uninsured Motorists Insurance carrier may have paid the insured under the Uninsured Motorists Endorsement, as the contract requires it to do, since an uninsured motorist is legally responsible, and may now be seeking to recover its loss from the insured driver who was also legally responsible for the accident.

77 Title Guar. Trust Co. v. Sessinghaus, 325 Mo. 420, 429, 28 S.W.2d 1001, 1005 (1930); 2 A. Scott, Trusts § 183 (3d ed. 1967).


A casualty liability insurance company which assumes control of an insured's defense is required, by some courts, to give more weight to the interests of its insured than to its own interests. Tyger River Pin Co. v. Maryland Cas. Co., 170 S.C. 286, 292, 170 S.E. 346, 348 (1933). An insured under an Uninsured Motorists Endorsement who was in con-
But there is an additional problem. Can the insured be expected to recognize a reasonable offer of settlement when it is made to him? He will ordinarily have no expertise in determining the value of claims. In this respect he differs from the public liability insurance company who assumes control of the defense of one of its insureds. Of course, the insured could consult with an attorney who owed his undivided loyalty to the insured. He probably would be protected if he relied on the advice of such an attorney. But he still would have the burden of proving that he gave sufficient regard to the interests of the insurance company, the beneficiary of his trust.

It is true that the insured could seek the advice of a court of equity before rejecting any offered settlement. But this would put an additional burden on the insured, and it is doubtful that equity courts should be saddled with the task of giving such advice.

The fact remains that it is frequently difficult for a trustee who owns a beneficial interest in the subject matter of the trust to give equal regard to his interests and those of the other beneficial owners. The courts are often reluctant to appoint an owner of a beneficial interest in the trust as trustee and will sometimes require a trustee who acquires a beneficial interest to resign. Even though this policy of the courts is designed to protect the non-trustee beneficiaries, it also seems unfair to the insured to thrust the insured into the position of trustee. He should not be required to undertake the demanding office of trustee, with its heavy burdens of watchful care and skill and control of litigation might be held to the same duty, although it is unlikely that this would be the case, when it is considered that the insurance company drafted the policy and the trust agreement and imposed no such duty on the insured in the policy or trust agreement. See Renssen v. Midway Liquors, Inc., 30 Ill. App. 2d 132, 149, 174 N.E.2d 7, 15 (1961); In re Travelers Indem. Co., 26 Misc. 2d 513, 514, 205 N.Y.S.2d 741, 742 (Sup. Ct. 1960).

Some cases hold that when the insurance company assumes control of the defense of the insured and there is a danger that an adverse judgment will be for an amount in excess of the policy limits, the insurance company, if it has reserved the right to settle, may give paramount consideration to its own interests in deciding whether or not to settle. Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 52, 155 N.W. 1081, 1086 (1916); Hilker v. Western Auto Ins. Co., 204 Wis. 1, 14-15, 235 N.W. 413, 415 (1931).

See text at notes 94-97 infra.
most, highly-scrutinized loyalty, in order to be paid a claim by an insurance company.

B. The Problem Of Apportioning Attorneys' Fees And Other Expenses Of Recovery From Third Parties

Uninsured Motorists Insurance policy provisions and trust agreements sometimes state not only that the insurance company will be entitled to be paid by the insured out of his recovery, the amount it has paid him, but also "in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred in connection therewith." This provision means that before the insured can keep any portion of the recovery from a third party for himself, he must pay to the insurance company the amount that it has paid him, plus attorneys' fees incurred for the prosecution of the insurance company's portion of the claim, court costs incurred by the insurance company, witness fees paid by the insurance company, and possibly the insurance company's expenses for investigation of the accident as well, at least insofar as the costs of investigation relate to the liability of the third party. This provision seems contrary to the usual practice where subrogor and subrogee share attorney's fees and expenses in a proportion, based on the ratio that the amount of money paid by the insurance company to the insured bears to total recovery from the tort-feasor. The provision also may be inequitable because after the insurance company has partially indemnified the claimant, the claim, at least in equity, belongs to both the claimant and the insurance company, and fairness suggests that the insurance company should pay the proportionate cost of collecting the claim. In addition, if the insured has collected $10,000 under the Uninsured Motorists Endorsement and has incurred an attorney's fee in connection with his representation on that claim and then collects $20,000 from the tort-feasor, and must pay out of his $10,000 share of the recovery the attorney's fee for the collection of the $10,000 which goes to the insurance company, he will, in effect, be paying a double attorney's fee for his collection of $10,000 under the Uninsured Motorists Endorsement. If we view the trust agreement as creating a trust, should one owner of an equitable interest, the insured, have the total cost of the trustee's suit deducted from his distribution rather than have expenses deducted equally from the dis-

84 See notes 56 and 58 supra.
tribution of each equitable owner of the cause of action? This provision, as written into the insurance policy and trust agreement, seems contrary to the policy of some Workmen's Compensation Acts, which provide that expenses of a recovery from a third party tort-feasor will be deducted on a pro rata basis from the share of the claimant and from the share of the employer or insurance carrier. It is true, of course, that the claimant, if he is the policyholder, has agreed to the provision in the policy entitling the insurance company to be reimbursed for attorneys' fees and expenses out of any recovery. And even if he is not the policy holder, he would ordinarily be bound by the provision as a third-party beneficiary of the insurance contract. In either event, the claimant would have executed a trust agreement containing such language. But the provision in the trust agreement with regard to attorneys' fees and expenses could be set aside by a court exercising the powers of equity on the ground that it is inequitable, especially since the insured lacked independent legal advice when he executed the trust agreement. The provision in the insurance policy is less susceptible to modification by a court, since the contract, unlike the trust agreement, has standing at law as well as in equity, but insofar as the contract is one to create a trust, and the contract and the performance of the contract are effective to create a trust, the trust ought to be administered by a court of equity according to equitable principles. Also, it might be argued that the provision that the claimant shall reimburse the insurance company for attorneys' fees and other expenses incurred by it refers only to attorneys' fees and other expenses attributable to the insured's share of the recovery. Whether or not courts will enforce such a provision regarding attorneys' fees, legislatures may want

86 See statutes cited in note 123 infra.
87 S. Williston, supra note 57.
88 The sum in equity and good conscience due to the plaintiff [the insurance company] may well be less than that amount [the amount the insurance company paid to the insured under the policy] because of necessary and reasonable expenses and perhaps also attorney's fees, all of which it may be proper to allocate in just proportion [between the insured's and the insurer's interests in the recovery from the tort-feasor]. General Exch. Ins. Co. v. Driscoll, 315 Mass. 360, 366, 52 N.E.2d 970, 973 (1944). See authorities cited in note 85 supra.

An inequitable or illegal provision in the trust may be struck down without causing the entire trust to fail if failure to enforce the inequitable provision will not defeat the purposes for which the trust was created. 1 A. Scott, Trusts §§ 60, 65.1-65.3 (3d ed. 1967).
89 Insurance adjusters are instructed to try to settle claims before the claimant sees an attorney. There is reason to believe that the practice under Uninsured Motorists Insurance is no different.
90 As a contract with standardized provisions which the offeror, the insurance company, is not willing to vary, but offers on a "take it or leave it" basis, the contract is one of adhesion and any ambiguities will be construed against the offeror. Neal v. State Farm Ins. Co., 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961); see Remsen v. Midway Liquors, Inc., 30 Ill. App. 2d 132, 149, 174 N.E.2d 7, 15-16 (1961).
to legislate with respect to attorney’s fees, spelling out the rights of the insurance company and the claimant in this regard, and in the absence of such legislation insurance commissioners might wish to disapprove the provision discussed.

C. Ethical Problems For Attorneys Prosecuting The Insured’s Action Against Third Persons

The Uninsured Motorists Endorsement and the trust agreement both provide that, if the insurer so requests, the insured will pursue the uninsured motorist or any other person who may be legally responsible for the accident, through an attorney designated by the insurance company. Ordinarily the insurer will not exercise this right, but will allow the action against the third party to be prosecuted by the insured’s own attorney, if such attorney agrees to protect the insurer’s interest. But this provision on the face of it would allow the insurer to choose an attorney, who will prosecute the action on behalf of the insured and the insurer, protecting both their interests. In some cases the insurer will wish to do this, if its interest, acquired by virtue of its payment of a claim under the Uninsured Motorists Endorsement, is substantial enough. Also, if the insured has no interest in pursuing a claim against a third person, the insurer will often retain its own attorney to do so. Even here, any recovery above what the insurer is entitled to by virtue of the policy and trust agreement will redound to the benefit of the insured, so the insured retains an interest. The same attorney, then, whether chosen by the insurer or insured often represents the interests of both parties.

If an attorney sues a third party while representing the interests of both the insured and the insurer, the attorney should make clear to both the insured and the insurer that he may have a divided loyalty.

91 The Virginia statute governing Uninsured Motorists Insurance expressly provides that the insurance company shall have deducted from the amount paid to it as subrogee, its proportionate share of the reasonable costs and expenses of recovery, including attorneys’ fees. Va. Code Ann. § 38.1-381(f) (Supp. 1966).

92 Some statutes expressly authorize the insurance superintendent or another official to issue regulations governing provisions to be inserted in Uninsured Motorists Endorsements. Conn. Pub. Acts, No. 510, § 4 (1967); N.Y. Ins. Law § 167 (2-a) (McKinney 1966). A New Jersey statute allows the Insurance Commissioner to “order the discontinuance of any provision in a policy of automobile liability insurance providing for . . . disability or death benefits which he finds to be unjust, unfair, inequitable, misleading or contrary to law.” N.J. Stat. Ann. § 17:28-1 (1963). The context in which this language appears makes it seem that such power exists only as to policies which contain a medical payments endorsement, but one court has stated that such power exists with respect to any insurance contract. Smith v. Motor Club of America Ins. Co., 54 N.J. Super. 37, 148 A.2d 37 (Ch.), aff’d, 56 N.J. Super. 203, 152 A.2d 369 (App. Div. 1959).

93 "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." ABA Canons of Prof-
If the third party makes an offer of settlement for, say, the amount the insurer paid under the Uninsured Motorists Endorsement, the attorney's duty to the insured may require him to advise the insured not to accept the offer, if he thinks the insured is justified, in the light of his fiduciary duty to the insurer, in seeking a higher payment. Yet the attorney's loyalty to the insurer may incline him to advise acceptance of the offer.

Consider also this case. There has been a three-car accident in which the insured-trustee (T) was riding in car #1, driven by a named insured, (NI), who carries liability insurance as well as Uninsured Motorists Insurance, both with X Company. Car #2 is driven by an uninsured motorist, (UM). Car #3 is driven by an insured motorist (IM), who carries casualty liability insurance with Y Company. Assume UM is clearly at fault for the accident and IM is possibly at fault and NI is also possibly at fault. T is seriously hurt and IM is slightly hurt. X Company, the beneficiary of the trust agreement, which also insures NI's liability against IM, may prefer that the trustee not sue IM, because such a suit might arouse IM to sue NI. Yet it would clearly be in the interest of the trustee (T) to sue IM.

Likewise, suppose the trustee wished to sue his own driver, NI. Under most policies and trust agreements, this cause of action would not be declared to be held in trust, so the attorney acting for the insured, (T), would not be acting for the insurer, X Company. And even if, as is the case with the trust agreement of at least one major insurer, the cause of action against NI were declared to be held in trust, X Company would not be the beneficial owner of it, at least to the extent that the liability of NI was covered under X Company's policy, because otherwise, to that extent, the insurer would be, in effect, the beneficial owner of a cause of action against itself. Yet, even though the attorney, in suing NI, would not be acting for anyone but T, such attorney might be acting for both the insured and the insurer, X Company, in a related action against UM, and would still have a divided loyalty. It would be in T's interest that the attorney attempt to fasten liability on either UM or NI, but it would be in the insurer's, X Company's, interest that liability be fastened only on UM.94

94 X Company's Uninsured Motorists Endorsement, under which the insured-trustee originally recovered payment from X Insurance Company, would ordinarily provide that X Company's third party liability exposure, as insurer of NI would be reduced by the amount recovered by the insured-trustee under the Uninsured Motorists Endorsement. But such a provision, though it protected X Company, would not necessarily protect its insured, NI, from the casualty liability exposure. And even if NI were protected to the same extent
Furthermore, in the case mentioned immediately above, the attorney for T and X Company, if he were suing NI as well as UM or IM, might not wish to reveal to X Company, except through the introduction of evidence at the trial or to the extent required by the rules of discovery, any evidence as to the injuries of his client T, which was not presented to X Company in connection with the claim under the Uninsured Motorists Endorsement. There can be good reason for this strategy. X Company not only has a beneficial interest in T's cause of action against UM and IM, but X Company is also the insurer of NI's common-law liability and T is suing NI in a common-law action.

An attorney selected by either the insured or the insurer to represent both should recognize potential conflicts of interest and suggest that the parties retain separate attorneys. The courts also should recognize the policy and trust agreement to allow separate representation of the insured and insurer if the parties so wish. If the insured and insurer wish to have the same attorney, after being apprised of the potential conflicts, then the same attorney would be allowed to represent both parties, but he should not solicit such dual employment. And if he does agree to represent both parties and a potential conflict becomes an actual one, he should review the situation with his clients and give them a chance to retain separate attorneys.

IV. ALTERNATIVES TO THE USE OF A TRUST OF THE INSURED'S CAUSE OF ACTION

A. A Trust Of Rights Against Third Parties Acquired By Judgment Or By Settlement Contract

The usual policy provides that the claimant, upon receiving payment under the Uninsured Motorists Endorsement, will not only declare a trust of his cause of action, but will promise to pursue the tort-feasor and to hold the proceeds of any judgment against, or set-
tlement with, the tort-feasor in trust. The trust agreement purports to carry out these provisions. The promise to hold the proceeds of any judgment or settlement in trust, separate from a declaration of trust of an existing cause of action, does not create a trust of the proceeds when the promise is made. It does not even give rise to a constructive trust, on the theory that “equity regards as done what ought to be done.” This is because there cannot be a trust of a nonexistent entity, an interest which has not yet come into existence, and there can be no proceeds of a settlement or judgment before there is a settlement or judgment. But a trust will arise once the settlement or judgment money is paid to the claimant on the theory that, since the promisee-insurance company is entitled to specific performance of the promise to declare a trust of the proceeds, the promisee has an equitable interest in the proceeds, even before a trust is declared. This device would protect the insurer from an attachment of property paid to the trustee in liquidation of the settlement or judgment debt or from the bankruptcy of the insured before the insured had paid over to the insurer its share of the proceeds. Even during the interval between the time of liquidation of the debt by judgment or settlement contract and the time of payment for the judgment or settlement debt to the claimant, the insurer would, in some states, have an equitable lien on the judgment or settlement debt and thus be protected against garnishment of the debt or the bankruptcy of the insured. The insurer does not need any additional protection against attach-

98 See policy provisions in note 56 supra.
99 See trust agreement provisions in note 58 supra.
100 Brainard v. Commissioner, 91 F.2d 880 (7th Cir. 1937); Restatement (Second) of Trusts § 75 (1959); G. Bogert, Trusts and Trustees § 113 (2d ed. 1965). It is true that rights of the third party donee beneficiary of a life insurance contract which will mature on the death of a living person can be held in trust, but there the liability of the insurance company to pay a beneficiary of the policy is not so inchoate or so uncertain as the liability of a third party tort-feasor, whose duty to pay is subject to a finding of negligence or legal wrong.
102 See Austin v. Young, 90 N.J. Eq. 47, 106 A. 395 (Ch. 1919); Restatement (Second) of Trusts § 30, comment b (1959).
103 G. Bogert, Trusts and Trustees § 113 (2d ed. 1965).
104 Restatement (Second) of Trusts § 308 (1959).
107 Williams v. Ingersoll, 89 N.Y. 508 (1882). Some courts do not give effect to a promise to assign the proceeds of a cause of action for bodily injury as against a creditor of the promisor who garnishes the judgment debt, if the promise is made before settlement or judgment. Harvey v. Clemen, 65 Wash. 2d 853, 858, 400 P.2d 87, 90 (1965); cf. Goldfarb v. Reichner, 112 N.J.L. 413, 171 A. 149 (Ch.), aff’d, 113 N.J.L. 399, 174 A. 507 (Ct. Err. & App. 1934).
ment or garnishment of the insured's claim against the uninsured motorist, or against bankruptcy of the claimant, before the insured's claim is settled or reduced to judgment. The reason is that, as a rule, claims for personal injury cannot be garnished or attached, or reached by creditor's bill before they are reduced to settlement or judgment. And if they cannot be garnished or attached, they cannot be reached by a trustee in bankruptcy.

A sole reliance on the promise to hold the proceeds in trust might also seem to protect the insurance company from the defense that a cause of action for personal injury is being assigned. Courts have sometimes drawn a distinction between the assignment of a cause of action and an assignment of the proceeds, for the purposes of allowing the assignee to proceed against the defendant after judgment and of protecting the assignee against garnishment of the settlement debt.

If there were only to be a trust of the proceeds, the cause of action would not be split and the defendant would not be subject to double harrassment. Also, whether or not the insurance contract were one of indemnity should make no difference. It would be no concern of the judgment debtor what the insured does with the proceeds. Even if garnishing creditors could object to a promise to declare a trust of the proceeds, the judgment debtor ought not be able to do so successfully.

The trust of the proceeds device might also protect the insurer from being identified in any suit against a third party. Since the claimant would retain the amount of any proceeds above the insurance company's share, the claimant would remain a real party in interest. Under a permissive real party in interest statute, the claimant could not be prevented by the defendant from proceeding alone. Even under a mandatory real party in interest statute, since the insurance company would have no interest in the action but only in

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111 A trustee in bankruptcy's rights to the bankrupt's property would not extend beyond the rights of a hypothetical creditor with a judicial lien. 11 U.S.C.A. § 110(c) (Supp. 1967).

112 See cases cited at notes 106 and 107 supra.

113 Grossman v. Schlosser, 19 App. Div. 2d 893, 244 N.Y.S.2d 749 (Sup. Ct. 1963). The court in this case made the distinction, reluctantly, observing that this was the indirect assignment of a cause of action, but feeling bound by the New York cases which protected an assignee of the proceeds against a creditor garnishing the judgment.

the recovery, it has been held that the insurance company would not be a necessary party.116

The use of a trust of the proceeds would also be of advantage to the claimant, because if he were not to be trustee of the cause of action, but only of the proceeds, he probably would not have a trustee's burden of proving that he acted properly in refusing to settle a claim. And his duty to accept an offered settlement would probably not require any more than an equal regard for his interests and those of the insurance company.116

If the insurance company claimed only a trust of the proceeds, it is doubtful that it could force prosecution of the cause of action. This would depend on the intent of the parties to the insurance contract and trust agreement. If, however, the insurance company could force prosecution of the cause of action, it would appear to have an equitable interest in the cause of action. The problems of assignment and real party in interest which exist under a trust of the cause of action would arise again. Likewise, if the insurer claimed it was entitled to separate legal representation, it would be claiming more than an interest in the proceeds, and the spectres of assignment, splitting, indemnity and real party in interest would appear.

B. Handling The Problems By Statute: The Workmen's Compensation Acts as Models

In some ways Uninsured Motorists Insurance is similar to the protection provided under Workmen's Compensation Acts. Workmen's Compensation Acts and statutes requiring that Uninsured Motorists Coverage be offered to buyers of automobile liability insurance both represent a judgment by a state legislature that persons should be reimbursed, or at least have a chance to purchase insurance providing reimbursement, for a loss caused by a person who is legally responsible for the loss, but who is unlikely to have the assets to make good the loss. Workmen's Compensation Acts also provide, of course, for reimbursement of workers who suffer loss for which no one is legally responsible at common law. In the Workmen's Compensation situation, as well as in the Uninsured Motorists Insurance context, there might arise questions about the employer's or insurer's right to subrogation to a cause of action for personal injury, about the right of the employer or insurer to keep its interest undisclosed to the trier of fact, about whether the decision as to settlement with


the third-party tort-feasor should be controlled by the injured victim or the employer or insurer, and about the apportionment of a recovery from the tort-feasor between the victim and the employer or insurer. These questions, when they arise in the Workmen's Compensation context, are frequently answered by statute.

Employers or insurers who pay Workmen's Compensation claims do not have to rely on "trust agreements" in order to share in the workman's recovery from the tort-feasor. Legislation in almost every state provides for participation by the employer or insurer in recoveries from third parties. Laws in many states allow the employer or insurer itself to sue the tort-feasor. Nor do employers or Workmen's Compensation insurers necessarily have to pose as beneficiaries of trusts in order to hide their identity from juries. Many states allow the employer or insurer to institute a suit in the name of the insured. When the suit is instituted by the insured, the employer or insurer ordinarily is entitled to remain unidentified. Similar clarity in the Uninsured Motorists Insurance area seems preferable to the present


118 Many states allow the injured employee the first chance to sue the third party even though the employee has claimed compensation, but provide that the employer or insurance company liable to pay compensation may sue if the employee does not within a period provided by statute, the period running from the date of the accident to a cutoff date regulated by the statute of limitations on the common law action against the third party. See, e.g., Ala. Code tit. 26, § 312 (Supp. 1967); Fla. Stat. § 440.39(4)(a) (1966); Ill. Rev. Stat. ch. 48, § 138.5(b) (1963); Mich. Stat. Ann. § 17.189 (1960); N.J. Stat. Ann. § 34:15-40(f) (1959); N.Y. Workmen's Comp. Law § 29(2) (McKinney 1965).

Other statutes provide that the employer or his insurance company has the exclusive right to sue the third party, but if he does not, the employee may. E.g., Mass. Gen. Laws Ann. ch. 152, § 15 (1965). Other states allow both the employer and employee to sue. E.g., Wis. Stat. Ann. § 102.29(1) (1957).


uncertainties which have spawned the "trust of the cause of action" device.

Questions which arise when the insurance company wants to settle and the insured does not could be handled by legislation, which could provide that each claimant may settle independently of the other, as some states provide in their Workmen's Compensation Acts.\textsuperscript{123} Or it could be provided that any dispute between the insured and the insurer would be settled by the court before which the claim against the third party is pending, or settled by a court of record if no suit is pending.\textsuperscript{124}

With respect to the sharing of the attorney's fees and expenses, the Workmen's Compensation Acts of several states require the employer or his insurance company to count a \textit{pro rata} share of the costs of recovery from a third-party tort-feasor toward the employer's reimbursement for the compensation which he has paid, or is liable for, and thus provide that the employer or insurer absorb part of the costs of recovery, even when there is enough money available to pay expenses and reimburse the employer in full.\textsuperscript{123} It is true that some states provide in their Workmen's Compensation Acts that the employer will receive nothing out of any recovery from the third-party tort-feasor until the employer has been fully reimbursed for the compensation he has paid, or remains liable for, and these states thus require the employee's share, if any, of the recovery, to bear the expense of recovery.\textsuperscript{124} States which do require the employer or insurer to absorb part of the cost of recovery from a third party, may wish to make the same provision with respect to recoveries from uninsured motorists when part of the recovery is to go to the Uninsured Motorists Insurance carrier, and thus negate the effect of the provisions in

\textsuperscript{122} Wisconsin has a similar provision as part of its Workmen's Compensation Act. Wis. Stat. Ann. § 102.29 (1957).
\textsuperscript{124} In Wisconsin, if the amount of the recovery exceeds the expenses of suit, the employee gets one-third of the balance, and then the employer or insurer is reimbursed out of what is left. This in effect causes the employer or insurer to absorb the expenses of recovery if there is not enough left, after payment of expenses and the employee's one-third, to reimburse the employer or insurance company in full. But if the excess after giving the employee one-third is sufficient to fully reimburse the employer or insurance company, the balance will be paid to the employee and thus he will effectively absorb the expense of recovery. Wis. Stat. Ann. § 102.29 (1957).
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the insurance contract and the trust agreement which provide that the costs of making claims are to be deducted from the claimant’s share, if any, of the recovery.

Those states which provide in their Workmen’s Compensation Acts that the net recovery from the third party is not merely to go to the employer or insurance company to the extent of their liability, with the balance to the employee, but is to be divided according to some other formula, may wish to make a similar provision with respect to recoveries from uninsured motorists.

V. Conclusion

The answers to the questions raised by the desire of insurance companies to be subrogated to the claims of their insureds under Uninsured Motorists Insurance should proceed from a direct confrontation of these problems by courts, legislators and insurance commissioners. There are values to be chosen as part of the process of answering the questions posed. And these choices ought to be consciously made and not swept under the rug of a “trust agreement” drafted by the insurance companies and offered to the public on a “take it or leave it” basis. Insurance commissioners should be alert for such problems when exercising whatever powers they have to control the contents of insurance policies. And there should be development in the legislative approach to this area, similar to that which has been made in the Workmen’s Compensation area.

It is true that if these issues were to be solved by legislation or administrative regulation there would be differences in legislation among the various states, and that policy filings and endorsements would differ among states, thus increasing the cost of administration of Uninsured Motorists Insurance and possibly increasing the cost of such insurance to the purchaser. But the same administrative problems for insurance companies arise under the Workmen’s Compensation Acts. If regulation of Uninsured Motorists Insurance is found to be desirable, the burden ought to be on the insurance companies to show that increased administrative costs would substantially affect the premiums. Then the legislature could weigh the disadvantage of an increased premium against the advantages to be gained from remedying the uncertainties, and the occasional unfairness, in the present arrangement.

125 Mass. Gen. Laws Ann. ch. 152, § 15 (1965). (If the insurer brings the action, the employee gets only four-fifths of the recovery in excess of the amount of the compensation for which the insurer is liable.) N.Y. Workmen’s Comp. Law § 29(2) (McKinney 1965). (If the employer sues, the employee gets only two-thirds of the recovery in excess of the employer’s liability under the Act.) Wis. Stat. Ann. § 102.29 (1957). (The employee gets one-third of any recovery above the expenses of making claim, even though this result means the employer or insurer will not be fully reimbursed.)
Insurance companies will also gain something from such a comprehensive approach to the problem. While much of what they seek through the use of the trust agreement should be theirs without the use of that artificial device, administrative and legislative regulation in this area would bring comparative certainty out of the present murkiness.