Embattled Victims of the Uninsured: In Court with New York's MVAIC, 1959-1969

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Sixteen years ago, the American insurance industry advertised a novel solution for a problem endemic to the automobile age: the uninsured motorist who lacks the means to compensate the victim of his negligent driving. Henceforth, the industry announced, protection would be available to those who wanted it. It had designed a unique policy, the “Uninsured Motorist Coverage,” to insure its holder against the financial risk of being hit by uninsured or “hit-run” drivers. Since then, under the industry’s energetic sponsorship, this policy has become a nationwide insurance device sold almost automatically to most American motorists. This paper will examine one of the serious problems which has arisen, namely, the litigation which has engulfed many claimants under these policies at a juncture when American courts were already staggering under the burdens created by more conventional disputes.

Although litigation involving “Uninsured Motorist Coverage” is nationwide, this paper, to stay within tolerable limits, will focus on only one jurisdiction. New York has been a pacemaker for the new jurisprudence, since 1958 when it enacted legislation compelling all motorists to purchase the “Uninsured Motorist Coverage” together with a liability policy. To be sure, New York’s legislature, as will be shown later, was not content to give the novel coverage its statutory blessing. In contrast to all other jurisdictions, it improved on it by adding, separately from the policy, protection for one group of victims—largely pedestrians—whom the industry’s solution ignores. Even so, New York’s record of litigation is sufficiently typical to illuminate a nationwide situation. The statute created a special body, the Motor Vehicle Accident Indemnification Corporation composed entirely of representatives of the insurance industry to administer the new scheme: the MVAIC itself was to prescribe the conditions under which New York’s insurers were to issue the new policy; it would investigate, handle and, if possible, settle all claims; finally, it was to litigate with those whose right to compensation it denied. This paper is concerned with that litigation which has been carried on for nearly twelve years. To understand its peculiar nature, the background and the basic features of the underlying legislative scheme will be considered first.

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4. Id. §§ 602, 603.
I. THE STATUTORY FRAMEWORK

A. Historical Background

In 1953, Governor Dewey proposed that the State adopt a scheme of compulsory liability insurance. This proposal met fierce resistance from most of the insurance industry which considered it a threat to its existence. For the preceding 30 years the industry had been able to persuade all American legislatures but one to reject compulsory liability insurance in favor of a solution it approved: to let each motorist freely decide whether or not to insure against liability until he had injured another and was unable to pay the resulting judgment for damages. Then and only then was he to be compelled to insure or to give up driving. This solution, embodied in so-called “financial responsibility laws,” left the victim of the first accident of an uninsured, financially irresponsible motorist without effective remedy. After a few years, it became obvious to all that this solution failed to work mainly because the first victim had little incentive to obtain a judgment against a driver who could not pay it. As a result, the latter continued to drive, as before, without insurance. Beginning in 1937, these laws were improved by requiring, in addition, an uninsured motorist to post security for the eventual payment of damages once he became involved in a serious accident. If he could not do so, he was supposed to surrender his license and registration. If he chose the latter alternative, his first victim remained, as before, without effective remedy. Despite the flaw, this solution has remained the law of most American jurisdictions. During this period, Australian lawyers developed a quite different scheme to cope with uninsured, financially irresponsible motorists. A special fund was created to indemnify accident victims. The public fund, personified as a “nominal defendant,” compensated plaintiffs who held unsatisfied judgments against financially irresponsible motorists. Under the name of “unsatisfied judgment funds” the invention spread to Canada and then to North Dakota. Although these funds were compatible with both compulsory or voluntary insurance, the insurance industry viewed them in the same light as compulsory insurance, i.e., as threats of government control or worse. It decided collectively to oppose them by promoting, as

5. Netherton & Nabhan, supra note 1, at 37, 43-45.
6. Id. at 45-48.
10. North Dakota, N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (1960), as amended, N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (Supp. 1969); New Jersey, Maryland and Michigan now have similar funds; for statutory citations see Laufer, Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement, 1969 DUKE L.J. 227, 234 n.35.
11. See generally G. HALLMAN, UNSATISFIED JUDGMENT FUNDS (1965) for the later American developments.
already noted, the novel policy. As one insurance writer put it, "faced . . . with the threat of compulsory insurance or government take-over, the companies invented . . . [uninsured motorist coverage] and hastily presented it as their defense to these threats." Since the policy was to be attached to a standard automobile policy, it became known as the "Uninsured Motorist Endorsement" (hereinafter referred to as endorsement). Consistent with the industry's official philosophy, the endorsement was originally offered on a "voluntary" basis. Although designed to cope with the problem of the uninsured motorist it ignored a substantial group of potential victims: those who could not claim its protection were Americans who do without cars, mostly the poor, the aged and the disenchanted. All these remained, as before, without protection unless they shared an endorsement-insured's household or were injured while occupying his car with his consent. According to New York statistics, this group comprises 27% of all victims; it suffers one-third of all compensated damages.

Despite the industry's new invention, one of the threats to be warded off by it materialized in New York, which in 1956, became the second American jurisdiction to adopt compulsory insurance. By then, it had become widely recognized that even the adoption of compulsory insurance could not fully solve the problems posed by uninsured and hit-run drivers. A public fund to compensate all victims of such drivers seemed to offer a possible solution to this remaining problem. The industry, however, remained adamant in rejecting this solution. Instead, it continued to advocate its endorsement as the only sensible answer. New York's legislature, on the other hand, was evidently unwilling to sanction the industry's solution, without at the same time providing for those victims whom the endorsement overlooked.

Out of this clash, a strange compromise emerged which has never ceased to baffle New York's lawyers and judges, to say nothing of the public at large. In effect, New York's legislature made the novel insurance policy compulsory in exchange for the industry's acquiescence in a limited plan of statutory protection for victims who were beyond the endorsement's reach. As a result, the New York scheme falls into two disparate segments. The first consists of a single section, simply making the endorsement, to be drafted by the MVAIC (and approved by the Superintendent of Insurance), compulsory for all those who hold the required New York automobile liability policy. These are the

13. It has recently become the subject of a 400 page book, A. Widess, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969) [hereinafter cited as Widess].
17. For the legislative history see Note, 1963 BROOKLYN L. REV. 286, 287.
endorsement-insured claimants.19 The second consists of thirteen elaborately phrased sections20 designed to provide for those who are not endorsement-insureds. These are called “qualified” persons.21 Both were to claim compensation from the MVAIC which obtains the funds it needs from assessments collected from time to time from all New York liability insurers.22

B. The Endorsement

The endorsement is issued annually for a premium of three dollars payable to the insurer issuing the liability policy which every New York motorist must purchase.23 The complex definitions, exclusions and conditions of the 2,400 word instrument have been analyzed elsewhere.24 Since some of the more frequently litigated provisions will be later noted, a simplified outline will suffice here.

The endorsement protects the insured against the financial risk of being injured or killed by an uninsured driver.25 For harm thus suffered, the MVAIC undertakes to compensate the insured victim in an amount not exceeding $10,000 for a single claim, and $20,000 for several claims arising out of the same accident.26 To recover from the MVAIC, the insured need not first sue the uninsured motorist. The endorsement assumes, as it were, that the uninsured motorist is also financially irresponsible, an assumption borne out by common experience. After the MVAIC compensates the victim, special provisions safeguard its right to pursue the claim against the offending motorist.28 There are three categories of endorsement-insured: the individual whom the liability policy names as insured (the named insured); if they share the named insured’s household, his or her spouse and the relatives of either; and those occupying

19. Id. § 601(i).
20. Id. §§ 608-20.
21. Id. § 601(b).
22. Id. § 607. Effective July 1, 1965, the statutory scheme was amended to provide that the endorsement-insured would claim directly against the insurer issuing the policy, thus relieving the MVAIC of its previous responsibility for handling, settling and litigating claims arising under endorsements issued after July 1, 1965. Id. §§ 167(2-a), 605. Since most of the litigation herein discussed was carried on by the MVAIC, this change has not further been considered. The MVAIC continues, of course, to litigate claims asserted by “qualified persons.” It has also retained a substantial backlog of cases involving insured claimants which arose under the statute as originally worded. On December 31, 1968, 3,275 such claims were still pending against which the MVAIC had set up reserves of 7.6 million dollars. 1969 MVAIC Ann. Rep. of Secretary & Manager, Schedule H (mimeo).
26. Id. Under the 1965 version the obligations arising under the endorsement rest on the issuing insurer, pursuant to the 1965 amendment of the statute, N.Y. Ins. Law § 605 (McKinney 1966). Unless otherwise indicated, future references will be to the 1959 version.
27. N.Y. Ins. Law § 167(2-a) (McKinney 1966); see Corsley, App. B, at 52.
the insured automobile with the named insured's consent. While the first two categories of endorsement-insured are covered wherever the accident occurs, those within the third category are covered only while they "occupy" the insured automobile. That automobile is primarily the one covered by the principal policy, namely the automobile liability policy to which the endorsement is appended, as long as it is used with the named insured's permission. To be compensable, the injury must have been caused by "an uninsured automobile," namely, "an automobile to which no [liability insurance] policy [is] applicable at the time of the accident," an automobile for which the insurer "disclaims liability or denies coverage" under the liability policy which otherwise would be applicable, or a "hit-run" automobile. The claimant must further show that the injury resulted from "physical contact" with the hit-run automobile; that he reported the hit-run accident within 24 hours to a public agency, and that the driver's or owner's identities are not ascertainable.

No claim against the MVAIC can be made unless it has been filed within 90 days. The same is true if a claimant settles with those responsible for the accident without the MVAIC's written consent, or if he fails to submit the required proofs, etc. Payments to the claimant by one or more tortfeasors or their insurers reduce pro tanto the MVAIC's obligation. This is also true of amounts paid or payable under a workmen's compensation law, disability benefits law, or other similar laws. If there is overlapping coverage under endorsements issued for other cars, special provisions further limit the amounts recoverable from the MVAIC.

Finally, and crucially, the endorsement requires arbitration under the rules of the American Arbitration Association whenever the claimant and the MVAIC disagree as to whether he is "legally entitled to recover" damages from the owner or operator of the uninsured car or disagree about the amount "owing under this endorsement."

C. "Qualified" Victims

In contrast to victims who are protected by the endorsement, those beyond its reach are without protection against irresponsible motorists unless they can bring themselves within the terms of the statute itself as "qualified persons." Qualified are: (1) New York residents, unless they are endorsement-insureds or

29. Id. at 51.
32. Id.
33. Id.
34. Id.
35. Id. at 52.
36. Id.
37. Id. at 50. Insuring Agreements: 1. Damages for Bodily Injuries Caused by uninsured Automobiles, Conditions 6. Arbitration.
38. N.Y. Ins. Law § 601(b) (McKinney 1966). The statutory definition also excludes persons who own uninsured automobiles as well as their spouses "when a passenger in such vehicle." Id.
(2) residents of other jurisdictions that provide substantially similar protection to New Yorkers for injuries caused by uninsured motorists within their territory. Generally speaking, the statutory provisions for their compensation parallel those of the endorsement, for example the maximum amount recoverable, the restriction to accidents occurring in New York, several notices required, etc. There are, however, some significant distinctions. A "qualified" victim's recovery is not diminished by workmen's compensation and similar payments; until amended, the statute rigidly limited the excuses for filing late notices by qualified victim's. No "qualified" claimant can be compelled to arbitrate with the MVAIC. As noted, the endorsement has sensibly abandoned the need for pursuing first the uninsured motorist—usually a futile, costly and difficult exercise—before a claim against the MVAIC can be asserted. It is otherwise with the "qualified" claimant; he must first secure a judgment against the uninsured driver, and only if that judgment remains unsatisfied may he apply to a court for an order directing the MVAIC to pay it. If an unidentifiable hit-run driver is involved, the victim cannot sue the MVAIC before obtaining a special court order permitting him to do so; in seeking the order, he must demonstrate, usually over the MVAIC's opposition, that he has complied with a lengthy set of enumerated conditions precedent, paralleling many of the conditions of the endorsement. In the action against the MVAIC, he faces an adversary that has available to it all the defenses arising out of the statute and those available under the law of torts to the uninsured or hit-run driver. Elaborate provisions finally govern court approvals of voluntary settlements, reached between the qualified victim and the MVAIC.

II. THE COURT OF APPEALS AND THE SCOPE OF MVAIC LITIGATION

The outline of the main provisions of the statute and the endorsement does not adequately mirror the inherent complexities and resultant opportunities for litigation which characterize New York's compensation scheme. These characteristics were further enhanced by two decisions of the Court of Appeals which, in effect, widened the MVAIC's opportunities to litigate and thus worsened the strategic position of most claimants. One relates to the arbitration compelled by the endorsement, the other to the problem created when the offending motorist's insurer disclaims the liability policy which otherwise would be available to compensate the innocent victim.

39. Id. §§ 610, 608(a-c), 619.
40. Id. § 610.
41. Id. §§ 610-12; payment of default, consent, or collusive judgments against the uninsured motorist will not be sanctioned, id. §§ 614-15.
42. Id. § 618.
43. Id. §§ 618, 608(b).
44. Id. §§ 609, 618(d).
45. Id. §§ 613, 618(e). Both sections were recently simplified by substituting approval by the MVAIC's Board for the previously required court approval of settlements, N.Y. Ins. Law § 617 (McKinney Supp. 1969-70).
NEW YORK'S MVAIC—1959-1969

A. Arbitration and Rosenbaum v. American Surety Co.

The endorsement, it will be recalled, compels the claimant to arbitrate with the MVAIC any disagreement over whether “[he] . . . is legally entitled to recover . . . damages from the owner or operator of an uninsured automobile” and what is “the amount which may be owing under . . . [the endorsement].” On their face, the two phrases deal with different aspects of the typical dispute between a claimant and the MVAIC; the first, concerned with the tort component of the dispute clearly relates to the three basic issues raised by a victim's claim against an offending motorist; namely, was he negligent, was his victim free from contributory negligence, and what, if any, are the damages? While the second phrase seems to channel into arbitration any dispute over “the amounts owing” from the MVAIC “under this . . . [endorsement],” its meaning is ambiguous. It is possible to interpret it in at least three ways, none of them fully satisfactory: to make arbitrable all issues under the endorsement once it is established (if need be, judicially) that it has been validly issued, including questions of coverage, conditions, limitations, etc.; to limit arbitration to those issues arising under the endorsement which affect “the amount owing” under it, i.e., issues that qualify or limit the victim's claim to compensation, e.g., those arising under the endorsement's “limits of liability” and “other insurance” provisions; or to ignore them and read the entire arbitration clause as if it contained only the first phrase, i.e., to confine arbitration to the three tort issues.

Since 1958 insurers and MVAIC alike pressed the third and narrowest interpretation on the courts. Since then more than 50 New York decisions have struggled with the problem with the four appellate divisions divided evenly in approving what seems to be either the first or the third interpretation. Finally, in 1962, the Court of Appeals sanctioned the industry's narrow reading by a four-to-three decision in Rosenbaum v. American Surety Co. in which an endorsement-insurer had refused to arbitrate on the ground that it had no

46. CORBLEY, App. B, at 50. Compare the phraseology in § 1, damages for bodily injury caused by uninsured motorists, id. at 49.
47. For discussion of the issue under the New York and nation-wide endorsements, see WINISS at 202-16.
information that the offending motorist was uninsured. The insurer's refusal was upheld on the ground that the issue of non-insurance was not covered by the arbitration clause. The holding, which was equally applicable to the New York endorsement, raised the further problem of how the legal and factual issues thus excluded from arbitration should be determined; the Court treated them as conditions precedent to arbitration. It therefore thought the situation was covered "reasonably" by the arbitration provisions of the Civil Practice Act which authorized a jury trial "if evidentiary facts [are] set forth raising a substantial issue as to . . . the failure to comply with a contract to arbitrate."

More than any other decision, Rosenbaum has profoundly affected the operation of New York's compensation scheme with respect to "insured" victims. In light of the MVAIC's attitude towards any claim for compensation, this holding vastly strengthened its strategic position. The decision split the compensation process for a single accident into two disparate segments; one, arbitration, that is informal, inexpensive, speedy, unhampered by rules of evidence and procedure; the other, a "special proceeding" under the CPLR, that is complex, subject to traditional litigation techniques, expensive and fraught with delays. It established an open-ended catalog of multifarious threshold questions of law and fact to be determined by a judge, or, if demanded, by a jury before arbitration may be had. A recent monograph lists some 15 such questions. It enabled the MVAIC to bring the arbitration process to at least a temporary halt, by the simple device of moving for a temporary or permanent stay. Since the MVAIC has used this device extensively, such claims "now occupy a substantial part of the . . . motion calendar." If the MVAIC or the claimant demand a jury trial, further "undue" delays are incurred. As a result of MVAIC's advantages, the practitioner faces on the trial level complexities "especially inherent in a multi-judge and multi-part court system that has arisen as a result [of the MVAIC scheme]."

52. Id. at 313, 183 N.E.2d at 668, 229 N.Y.S.2d at 378.
53. N.Y. CIV. PRAC. ACT § 1450, as amended, N.Y. CIV. PRAC. LAW § 7503(a) (McKinney 1963) [hereinafter cited as CPLR].
55. Winiss at 206-07.
56. Pursuant to CPLR § 7503(b) (McKinney 1963).
58. Id.
59. Turner v. MVAIC, 47 Misc. 2d 1097, 1098, 264 N.Y.S.2d 204, 205 (Sup. Ct. 1965). In this case, an infant victim demanded arbitration. When the MVAIC sought a stay, the motions judge ordered the determination of the motion to be held in abeyance, pending trial of the issue whether the car causing the injury was a "hit-and-run" vehicle. He ordered the case to be set down for trial upon filing of a note of issue and statement of readiness and payment of calendar fees. He also stayed arbitration pending the determination of the preliminary issue. The trial judge determined that the car causing the injury was in fact a "hit-and-run" vehicle. He then observed:
B. Disclaimers and MVAIC v. Malone

The impact of the *Rosenbaum* case was deepened by a second Court of Appeals decision which supported arguments of the MVAIC. It dealt with the situation created by an insurer's disclaimer of an offending motorist's liability policy. Under general principles of contract law, the insurer would be free, even after an accident, to avoid its obligation under the policy if the motorist had fraudulently induced it to issue the policy or had later breached his obligations by failure to cooperate or otherwise. The result is, of course, to put the innocent victim in the same position as if the motorist had never been insured. Since, in that event, the victim would be left without compensation, the MVAIC statute listed as one of the gaps it sought to close the situation created by "insured motor vehicles where the insurer disclaims liability or denies coverage."

Neither the statute nor the endorsement expressly require that a disclaimer or denial of coverage be valid. Nevertheless, from the outset, the MVAIC insisted that the victim establish the validity of the disclaimer by a binding judgment obtained in a plenary suit against the tortfeasor's insurer, as a
further prerequisite to recovery against the MVAIC. The argument left open the question whether the MVAIC would recognize such a judgment as binding upon itself when it had chosen not to intervene in the plenary suit. Trial and appellate courts agreed that, under the terms of the Rosenbaum case, the victim must establish the fact of the disclaimer if that was in dispute. Most of them rejected, however, as unsupported by the terms of the statute or the endorsement, the MVAIC's insistence that the claimant must also show the disclaimer's validity. They considered the heavy additional burden imposed on the claimant as inconsistent with the purposes of the statute. Accordingly, they left it to the MVAIC as the victim's subrogee to pursue the disclaiming insurer with a demand for reimbursement on the ground that the disclaimer had been unjustified.

When the issue finally reached the Court of Appeals in MVAIC v. Malone, it unanimously approved the MVAIC's position. Without stating any reason, the brief memorandum opinion (after a reference to the Rosenbaum holding) simply announced that the Court construed the statutory reference to a "disclaimer or denial of coverage" as giving the MVAIC an opportunity to litigate before a court rather than before an arbitrator the question of whether the . . . policy . . . was validly cancelled. The decision, adding further complexities to litigation involving disclaimers, had several effects. The "threshold" issue involved is now the validity of the disclaimer. Disclaimer litigation is notoriously complex and often results in appellate review. Since joinder of the MVAIC and the insurer, usually in a suit for declaratory judgment, may not always be feasible there is a real risk that a victim may be left stranded between inconsistent verdicts without any remedy whatsoever. Since frequently more than one "threshold" issue is raised, the "insured" victim must usually seek a declaratory judgment first; if the final judgment declares the disclaimer valid, he then will return to court to face further trial hearings over

63. MVAIC v. Scott, 28 Misc. 2d 492, 214 N.Y.S.2d 600 (Sup. Ct. 1961) (the statutory scheme "is sufficiently onerous and restrictive of a claimant's rights, with its highly technical and obscure requirements, without the court's adding to a claimant's burdens by implication," id. at 493, 214 N.Y.S.2d at 602).
67. Id.
68. E.g., Jones v. MVAIC, 19 N.Y.2d 132, 224 N.E.2d 880, 278 N.Y.S.2d 382 (1967);
additional "threshold" issues. Similarly, the qualified victim may have to sue the uninsured motorist, the MVAIC and the disclaiming insurer (usually in a suit for declaratory judgment). He must finally apply to a court for an order directing the MVAIC to pay the judgment against the uninsured motorist. The victim, a stranger to both the tortfeasor and his insurer, bears the burden of proof with respect to their mutual relations so far as they affect the validity of the disclaimer. The result is that the victim incurs the burden, cost and delay in settling an issue which, in the context of the statutory scheme, is, or should be, a dispute between the MVAIC and a strange insurer over the propriety of the latter's conduct toward its own insured.

It is against the background of *Rosenbaum* and *Malone* that the following samples of MVAIC litigation must be read. To put them in some order, it will be convenient to examine first some of the common "threshold issues" or "conditions precedent"; thereafter, "procedural" aspects of the litigation will be examined. Since in actual litigation several issues, whether procedural or substantive, are usually pressed simultaneously by the MVAIC, the results of the MVAIC's total strategy will be illustrated by profiles of seven case histories.

III. **A Miscellany of MVAIC Litigation**

A. **Hit-Run Cases**

In drafting the 1956 standard endorsement, the insurance industry singled out claims based on hit-run accidents for the most restrictive treatment. The insurers not only sought to guard themselves against claimants whom they suspected of falsifying reports of single car accidents as hit-run episodes, they also distrusted juries and judges who, naively, would be swayed by the perjured testimony required for such fraud. Hence, the 1956 endorsement established two major limitations on hit-run claims.

First, the victim's injury must have arisen out of "physical contact of [the hit-run] . . . automobile with the insured or with an automobile which the insured is occupying. . . ."\(^70\) This provision was not only copied by the MVAIC,\(^71\) but the same language found its way into the New York statute, the only instance in which a substantive provision concerning endorsement-insureds was anchored in the statute itself.\(^72\) The second requirement, also copied from the standard endorsement, was that the hit-run accident be reported to the authorities "within 24 hours or as soon as reasonably possible."\(^73\)

The following instances will show that the MVAIC, in viewing hit-run claimants with profound mistrust, has sought unsuccessfully to enforce not only all restrictions against them as rigidly as legal argument permits, but to confine the very concept of a hit-run accident to its most literal limits. In appraising

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\(^{71}\) *Id.* at 49.

\(^{72}\) *N.Y.* INS. LAW § 617 (McKinney 1966); the $10,000-$20,000 limit on recovery is also fixed by statute. *Id.* §§ 167(2)(a), 510(1)(a).

\(^{73}\) *Corbley*, App. B, at 49.
the applicable provisions and the spirit in which the MVAIC approaches them, it is pertinent to note that according to its own figures, and in the face of severe restrictions, the MVAIC itself discovered in 1968 that no less than 16.2 per cent of all compensated New York victims were injured or killed by hit-run drivers, and that compensation paid to them represented 25.4 per cent of the total paid out by the MVAIC.

The MVAIC's reading of the "physical contact" requirement appears from two cases in which the courts held the MVAIC liable. Where a child fell off an ice cream vending truck which then disappeared, the MVAIC unsuccessfully claimed that the child's physical contact was not with the vehicle but "with the roadway." The same contention was made and characterized by the court as "completely without merit" when the victim was dragged by her clothes along the street and injured after the driver started up his cab without giving her an adequate chance to alight and then simply drove off.

The MVAIC was more successful with another contention. During a seven year period it was able to persuade both trial and appellate courts that the physical contact between the offending car and the victim or the car in which he was riding must also be "direct." Thus, on the strength of this argument a blind pedestrian was denied recovery when he was first knocked to the ground by a car and then a hit-run vehicle crashed into the same car causing it to hit the victim, who was still lying in the street, again. Other victims have fared no better. Recovery was denied in a case where a parked car was pushed against a pedestrian on the sidewalk after a stolen vehicle had crashed into it.

It was not until 1966 that a victim finally received a favorable ruling by the Court of Appeals on this issue in a case in which a hit-run car had propelled another vehicle into his automobile. Rejecting the MVAIC's narrow reading, the Court found the required physical contact present even where the contact was indirect. It noted that the usually available visible evidence of impact reduced, as in the case of a direct physical contact, the danger of fraud.

Despite this ruling, the MVAIC opposed unsuccessfully the claim of one who was injured "through the intermediacy of a piece of metal pipe propelled out of the hit-and-run vehicle." In another case decided two years later, the MVAIC moved to dismiss (six years after the accident) the claim of a young child, severely and permanently injured by a careening hit-run truck.

The truck had propelled a piece of rail into the child’s head causing “dire injuries.” Casting aside its usual reliance on the literal meaning of the statute, the MVAIC claimed that the Eisenberg case applies only when the offending motorist is “clearly conscious of propelling the tangible thing which makes the physical contact.” The Court rejected the strange distinction and found it “shocking that [six years after the accident] compensation had not been paid.”

The standard pattern of a hit-run accident involves a driver, who flees from the scene of an accident to escape identification and responsibility. There are occasional variants from this pattern, e.g., when the offending motorist seeks to escape by means other than prompt flight. Consistent with its policy of a narrow, literal interpretation of the claimant’s protection, the MVAIC has always insisted that only the “hit and promptly flee” situations are covered by the endorsement and the statute. Accordingly, it rejected claims with the argument that the victim had not promptly made reasonable effort to identify the offending motorist or, more broadly that no hit-run accident was involved. For instance, when the motorist stopped and furnished the victim with false information, or transported the victim to his home or to a hospital and then simply disappeared without identifying himself, or when the driver left information that turned out to be fictitious, the MVAIC contended that there was no hit-run accident. Rejecting this narrow approach, the Court of Appeals extended the hit-run concept to a situation in which the offending motorist left the scene without being identified; the driver of the victim’s car had decided not to seek the motorist’s identity or license number because seemingly no one had been injured, an assumption that later turned out to be erroneous.

Despite this decision the MVAIC continued to resist—unsuccessfully—claims arising out of facts such as these: two policemen promptly arrived at the scene of a “run-down” accident; neither bothered to question, let alone identify, the offending motorist who took the pedestrian victim, a shy, excited, 17-year old girl to a hospital and then vanished.

B. The Innocent Victim

The endorsement, it will be recalled, was the insurance industry’s answer to proposals for compulsory liability insurance and a public fund to compensate

all victims of financially irresponsible motorists. Beginning in 1954 the endorsement was offered on a "voluntary basis." Rather than rely on the prosaic term "uninsured motorist coverage," the industry devised various appealing descriptions to promote the newly created policy, one such label being "innocent victim coverage." The term, like other advertising euphemisms, would long have been forgotten had it not found its way into the New York statute. The declaration of purpose stated that the recently enacted compulsory insurance law "failed to accomplish its full purpose of securing [compensation] . . . to innocent victims . . . in that [it leaves uncompensated] persons who, through no fault of their own," were injured or killed by uninsured motorists. This phrasing clearly expresses the legislative view that both the compulsory insurance law and the MVAIC statute, each within its reach, should seek to protect innocent persons who suffer automobile accident injuries "without fault of their own." This, it should be noted, is the only statutory context in which the term "innocent victim" was used.

Without advert ing to the commercial background of the term or its solitary use in the declaration of purpose of the statute, the MVAIC in 1962 began to insist that the phrase expressed a broad legislative purpose to restrict protection to those victims who are morally and legally innocent of any wrong-doing, whether or not the wrong-doing had anything to do with the injury they suffered. It was a latter-day revival of the long-buried tort doctrine of versari in re illicita.

Thus the MVAIC claimed that a girl passenger in a car which she knew had been stolen was not an "innocent victim" entitled to compensation under her father's endorsement. In a brief memorandum opinion, the Second Department not only accepted this view, but also agreed with the MVAIC that the innocence of a prospective claimant was yet another one of the threshold issues to be resolved by the courts rather than the arbitrator. In another case a court, on factual grounds, rejected the MVAIC's claim that a passenger lost his status as an innocent victim when he did not leave the car of a despondent and perhaps intoxicated driver. In doing so, however, the court restated the novel doctrine in a sweeping dictum.

88. See text accompanying note 4 supra.
89. See note 14 supra.
90. Plummer, The Uncompensated Automobile Accident Victim, 1956 Ins. L.J. 459, 464. Credit for inventing the label is probably due the "Fireman's Fund Insurance Company," which is reported to have introduced "the innocent victim cover" early in 1955. George, Insuring Injuries Caused by Uninsured Motorists, 1956 Ins. L.J. 715, 716.
91. N.Y. Ins. Law § 600 (McKinney 1966).
92. The declaration of purpose of the Motor Vehicle Financial Security Act, N.Y. VEH. & Traf. Law § 310(2) (McKinney 1960) also refers to a public concern that motorists be able to compensate the "innocent victims" of their negligent driving.
Those standing without... [the] cover [of the statute's canopy] are ‘persons who when injured were wrongdoers—persons engaged in criminal conduct or motivated by evil intent or committing an act not acceptable under our standards of morality.'

The doctrine did not fare as well in later cases. Once, the MVAIC tried to apply it to a girl passenger, who was riding with an allegedly drunken driver, where "claimant and operator may have been under the influence of alcohol to such an extent that they were incapable of exercising reasonable care for their own safety." The court considered this argument, at best, as one raising issues of the claimant's contributory negligence or assumption of risk, which under the established approach was to be decided by the arbitrator. On another occasion, the MVAIC vainly tried to broaden the doctrine to disqualify a victim because of his failure to give notice of the accident to the offending motorist's insurer. If accepted, it would have opened a new spectrum of disqualifications for recovery.

A month later, in its first encounter with the problem, the Court of Appeals rejected the doctrine in its entirety as "untenable." In that case, an infant claimant assisted in transporting an unregistered motor vehicle with improper license plates while it was driven by the claimant's friend, an under-age, unlicensed and uninsured driver. Although the claimant's wrong-doing was totally unrelated to the injury he suffered as a result of his friend's negligent driving, the lower courts had agreed with the MVAIC that he was disqualified because he had participated in an illicit scheme. A unanimous Court of Appeals declared that it was "convinced that the legislature intended the term innocent to be synonymous with the phrase without fault, insofar as it connotes freedom from negligence;" this question should be decided "by an arbitrator and not by a court as a condition precedent to arbitration."

C. Residence in New York

Reminiscent of the "innocent victim" theory are other attempts to question the status of injured claimants who otherwise have complied with the requirements for compensation. Thus, e.g., qualified persons must be "resident[s] of this state." Relying on the statutory phrase, the MVAIC unsuccessfully sought to deny resident status to an illegal immigrant employed in New York, who was under a deportation order when injured by an uninsured driver, and to a Philippine national injured by a hit-run car. The victim had lived in

96. Id. at 825-26, 279 N.Y.S.2d at 905.
100. Id. at 170, 239 N.E.2d at 188, 292 N.Y.S.2d at 85. See Murphy v. MVAIC, 30 A.D.2d 711, 292 N.Y.S.2d 182 (3d Dep't 1968) (denial of preliminary trial of the question of innocence).
101. N.Y. INS. LAW § 601(b) (McKinney 1966).
New York for eight years while a full-time student and intended to remain in the United States.¹⁰³

D. Derivative Causes of Action

Following an approach long embodied in the standard liability policy, the endorsement expressly includes derivative causes of action in its coverage; however, so far as qualified victims are concerned the statutory provisions simply refer to claims for personal injury¹⁰⁴ which may be asserted against the MVAIC. Pointing to the absence of any explicit allowance of derivative causes of action for qualified victims, the MVAIC rejected the claim of a qualified victim’s husband for loss of services and medical expenses. An appellate court rejected¹⁰⁵ the MVAIC’s contention in reliance on the General Construction Law¹⁰⁶ which defines the term personal injury as including a derivative cause of action.

E. Accidents Occurring in New York

In contrast to the standard version issued in all other jurisdictions, the MVAIC endorsement does not protect residents against out-of-state accidents. It applies “only to accidents which occur within the state of New York.”¹⁰⁷ The MVAIC insisted that this phrase must be read as confining coverage to accidents occurring on the public highways of the State of New York. Accordingly, it resisted arbitration when a victim, working in his automobile body shop was injured when an unregistered, uninsured vehicle was backed into him. The court ordered arbitration.¹⁰⁸ Noting that it was the MVAIC’s function “to afford the same protection as a standard insurance policy . . . [which] permits no exclusions for liability arising out of accidents occurring on private property or limitations to accidents occurring on public highways.”¹⁰⁹ The MVAIC similarly resisted a claim of an airman injured at Griffis Air Force Base by a hit-run driver. Observing that “the law is clear that federal enclaves do not cease to be a geographical part of a state,” an appellate court rejected the MVAIC’s contention as “an extremely narrow construction which flies in the face of the obvious intent of the . . . [statute].”¹¹⁰

F. Insolvency of the Tortfeasor’s Insurer

In the case of serious accidents, insolvencies of liability insurers lead to grave consequences. The accident victim will try to sue the negligent motorist whom the insolvent insurer is unable to protect against liability. Where the

¹⁰⁴. N.Y. INS. LAW §§ 608(a)-(c), 618. (McKinney 1966).
¹⁰⁶. N.Y. GEN. CONSTR. LAW § 37-a (McKinney 1951).
¹⁰⁹. Id. at 956, 268 N.Y.S.2d at 836.
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tortfeasor lacks adequate assets, as is usually the case, it is his victim who must bear all or part of the loss. Recognizing the social evil involved, New York has required insurers subject to its regulation to contribute to a fund that will honor the claims against an insolvent insurer. It is symptomatic of insurance regulation in the United States that New York has remained one of the few jurisdictions in making such provision.\textsuperscript{111} New York's fund, however, does not protect against insolvencies of foreign insurers. At an early moment in the MVAIC's history the question arose whether a motorist's foreign insurer, which turned out to be insolvent, "disclaimed liability or denied coverage" by its failure to pay. If this is the case, the motorist's victims could claim under the terms of the endorsement\textsuperscript{112} or the statute.\textsuperscript{113} It would seem obvious that as far as they are concerned the effect of insolvency is precisely the same as a disclaimer or denial of coverage. As elsewhere, the MVAIC opted for a literal interpretation of the statute against the victim; it prevailed.

In a 1961 opinion, which confused statutory and endorsement coverage, a trial court denied recovery \textsuperscript{114} after stressing the need for strict interpretation of a statute which created a right unknown to the common law. It held that the insurer's insolvency is not one of the situations contemplated by the statute in which the insurer "disclaims liability or denies coverage." Seven years later, in two cases involving not the MVAIC but private endorsement-insurers, a contrary result was reached. In one of these, the Third Department repudiated the 1961 decision without even mentioning it. It refused to "interpret the statute so narrowly as to be contrary to what is the apparent intent and purpose of its enactment.\textsuperscript{115}

In the meantime, scandalous insolvencies of insurers elsewhere in the United States had lead to widespread criticism and to pleas for federal regulation.\textsuperscript{116} In many states, statutes were enacted that expressly provided that insurers' insolvencies were to be treated as the equivalent of disclaimers so as to enable innocent victims to make claims under their endorsement.\textsuperscript{117} In others, judicial interpretations of the parallel provisions of the 1956 national endorsement reached the same result.\textsuperscript{118} In a late response to the tide of criticism, the insurance industry, in 1967, amended the nationwide endorsement by broaden-

\begin{itemize}
\item 111. N.Y. Ins. Law § 333 (McKinney 1966). The "Motor Vehicle Liability Security Fund" was established in 1947.
\item 112. While the 1959 endorsement did not contain these terms, they were added to the 1965 version. See CROSSLEY, App. B, at 51.
\item 113. N.Y. Ins. Law § 600(2) (McKinney 1966).
\item 114. Uline v. MVAIC, 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961).
\item 116. For a reaction by insurance counsel to current federal activities, see O'Brein, Report of Regulation of Insurance Committee, 19 FEDERATION INS. COUNSEL Q. 39, 40, 42 (1968).
\item 117. For references to 29 states see WIDISS at 140.
\item 118. For references to ten such jurisdictions see WIDISS at 68-69, n.147. This list erroneously includes Vanguard Ins. Co. v. Polchlopek, 18 N.Y.2d 376, 222 N.E.2d 383, 275 N.Y.S.2d 513 (1966), a disclaimer case arising under the national endorsement.
\end{itemize}

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ing its definition of uninsured automobile so as to include explicitly the situation where the insurer issuing the underlying policy had become insolvent.\textsuperscript{119}

In the face of these nationwide developments, and despite the recent decisions in New York adverse to its view, the MVAIC litigation policy remained unchanged. As late as 1969, the MVAIC insisted that the insurer’s post-accident insolvency cannot be interpreted as a disclaimer of liability and/or denial of coverage. Its view was sanctioned by a trial court but reversed by the First Department which observed, “[t]o hold otherwise would be to shut our eyes to the need which prompted the enactment of the [MVAIC] Law...”\textsuperscript{120}

G. Under-Insurance as No Insurance

In a number of jurisdictions, endorsement-insurers have claimed that motorists who carry less than the prescribed minimum coverage are not “uninsured” within the meaning of the endorsement and hence, victims could not claim under it. Since it seems obvious that these motorists are at least partially uninsured most courts have rejected this contention.\textsuperscript{121} In New York, the MVAIC statute itself declares motor vehicles to be “uninsured” if they do not meet New York’s test of an “insured motor vehicle,” defined by interlocking provisions as motor vehicles that carry a minimum of $10,000/$20,000 for bodily injury as prescribed by New York’s Superintendent of Insurance.\textsuperscript{122} While this definition alone would seem to dispose of the issue, the MVAIC endorsement, in addition, defines uninsured automobile as “one that does not carry insurance in the amounts specified in the New York Motor Vehicle Financial Security Act.”\textsuperscript{123}

In the face of these provisions, the MVAIC has insisted on litigating the issue on at least two occasions when it sought to block arbitration where the offending motorist carried only $5,000/$10,000 coverage: one under a Rhode Island registration,\textsuperscript{124} the other, quite recently, under a North Carolina registration.\textsuperscript{125} Unfortunately, the appellate opinion in the later case summarily rejected the MVAIC’s view, failing to mention the arguments advanced by the MVAIC against what appear to be quite explicit provisions.

H. Notice and Reporting Requirements

The detailed notice and reporting requirements set out in the statute and the endorsement were evidently designed to protect the MVAIC against fraudulent and stale claims. By virtue of the statute and the judicial interpretation of the endorsement, compliance with these requirements is a condition prece-
dent to recovery. Many of them have become prolific sources of litigation and frequently have led to final denials of otherwise meritorious claims. In particular, at the MVAIC’s insistence, the courts have applied the time limits prescribed for qualified claimants so vigorously that the legislature had to intervene twice, first in 1963 and again in 1969 to make them less drastic.

1. Hit-Run Accident Reports

Compliance with the requirement of reporting a hit-run accident to the authorities within 24 hours is a threshold issue in the case of an insured and a statutory condition precedent for the qualified claimant. Although early decisions agreed with the MVAIC that the victim must report the accident as a hit-run episode, later appellate holdings expressly dispense with the requirement, insisted upon by the MVAIC, that a physical contact between the victim and the hit-run vehicle be reported. Indeed, it now appears that, depending on the circumstances, notification of the police concerning an accident may be sufficient.

From the outset, the MVAIC also claimed that a failure of the police records to show that the victim characterized the accident as a hit-run episode bars him from compensation. This interpretation would have placed the risk of accurate police reporting squarely on the victim. Both trial and appellate courts rejected it as early as 1960 on the ground that a discrepancy between a victim’s report and police files simply raised an issue of fact to be determined by a hearing. Nevertheless, the MVAIC has continued to advance the argument unsuccessfully in numerous cases.

126. N.Y. Ins. Law § 608(c) (McKinney 1966) was amended by Laws of 1963, ch. 943, to permit a qualified claimant to apply to a court for permission to file a late affidavit within one year in lieu of the previous time limit of 120 days.
127. N.Y. Ins. Law § 608(b) (McKinney 1966) was amended by Laws of 1969, ch. 585, § 1, permitting, after September 1, 1969, the MVAIC to accept a late filing of the affidavit without time limit if proof “satisfactory” to the MVAIC is presented that it was “not reasonably possible” to file it earlier. Leave to file late may, upon like proof, be granted by the court.
129. N.Y. Ins. Law § 608(c) (McKinney 1966); Ithier v. MVAIC, 31 A.D.2d 616, 295 N.Y.S.2d 878 (1st Dep’t 1968).
2. **Insured's Report to the MVAIC**

An insured claimant is required to give notice to the MVAIC "[w]ithin 90 days or as soon as practicable, . . ."135 The added phrase permits the MVAIC or a court to exercise its discretion to admit a notice filed after 90 days. In fact, the cases show numerous efforts on the part of the MVAIC to challenge the exercise of judicial discretion in favor of a claimant.136

When a claimant's lawyer, frustrated by conflicting and inadequate data and governmental delays in answering inquiries could not file within 90 days, the MVAIC refused to arbitrate. It argued that the statutory 90-day limit imposed on filing by qualified victims—which did not contain the phrase "or as soon as practicable"—was equally applicable to claims under the endorsement. The court rejected this argument as ignoring the basic statutory separation between the two classes of claimants.137 Similarly, when filing for a four-year old hit-run victim was delayed for a year, largely because of difficulties in investigating the accident, the MVAIC refused to arbitrate. It argued that the endorsement's hit-run provision required a statement to be filed with the MVAIC within 90 days, and not as soon as practicable and hence the lapse of time was fatal. The court noted that the Insurance Law permitted all notices due under a liability policy to be given as soon as possible and that this provision must be read into the endorsement.138 On another occasion, when the offending motorist's insurer disclaimed, the MVAIC insisted that the 90-day filing period be reckoned from the date of the accident rather than from the date of the disclaimer. The appellate court rejected this contention because it obviously meant that the 90-day period could expire before the insurer disclaimed, leaving the victim without a remedy.139 Finally, to show that a filing was too late, the MVAIC argued in yet another case that the endorsement-insured is required to give notice to the MVAIC as soon as he has "doubts" or "suspicions" about the offending motorist's insurance status, rather than when it definitely appears that he is uninsured. The argument was rejected as unwarranted by the terms of the endorsement.140

3. **The Qualified Claimant's Report to the MVAIC**

Perhaps the issue most litigated during the first decade of New York's scheme deals with the 90-day limit for the filing of the qualified victim's affidavit to the MVAIC.141 In the past, liability insurance policies used to fix

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141. N.Y. INS. LAW § 608(a), (b) (McKinney 1966).
rigid and often short time limits for notices to be given to the company by its insureds. Barring an insured's rights under such a policy because of a late notice often seemed inequitable, especially where the delay had not prejudiced the insurer. Hence, the New York legislature prescribed that notices could be validly given although late, if the insured could show that they were given as soon as reasonably possible. While the phrase, slightly modified, also appears in the New York endorsement, it was omitted from the statutory provisions governing the affidavit of qualified claimants. Twelve years passed before the Legislature corrected what turned out to be one of the gravest flaws of the scheme by adding the phrase to the statutory time limits prescribed for the affidavits.

Although this amendment appears to have ended a serious discrimination against qualified claimants, the innumerable cases litigated under the original wording remain relevant, because they illuminate the policies pursued by the MVAIC and the reception given them by the courts. Throughout the period preceding the 1969 amendment, the MVAIC urged, and most courts accepted, the argument that the statutory time limits must be strictly construed and that the lapse of the prescribed time was fatal to the claim. Heavy emphasis was placed on a supposed analogy with section 50(e) of the General Municipal Law which sets a time for asserting tort claims against municipalities. The analogy was hardly compelling. First of all, tort claims against municipalities are free from any monetary ceiling; second, few claims against municipalities involve the legal and factual complications so typical of uninsured motorists claims. Finally, and most importantly, the financial resources of municipalities are intended to serve primarily public purposes, not as funds to indemnify individ-

142. Id. § 167(1)(d).
143. CORBLEY, App. B, at 49, provides that notice and proof of claim must be given "[w]ithin 90 days or as soon as practicable. . . ."

   . . . [N]otice . . . shall be given within ninety days after the [tort] claim arises.

   The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified . . . (1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice . . . .
uals; the MVAIC's sole raison d'être is the compensation of victims of uninsured motorists.

As a result, once the fixed period had passed, many qualified victims were left without remedy. It made no difference that they had encountered the gravest difficulties in discovering the offending car's insurance coverage or that New York's or other states' motor vehicle departments had delayed or erred (or both) in informing them of existing insurance.\textsuperscript{147} Nor was any special consideration held permissible for young, disabled or deceased victims unless it could be justified under the terms of the statute which made some narrow allowances for these categories of victims.

Two early appellate decisions had agreed with the MVAIC that a claim, although filed within the additional grace period provided, must be rejected unless the delay was shown to be due to infancy, mental or physical incapacity, or death.\textsuperscript{148} In one of these the victim vainly pleaded that, because of the accident, he was hospitalized during the 90-day stay period, that he was unaware of the notice requirement, and that the delay was caused by the time consuming investigation of the accident. Since he was not disabled and had been able to retain a lawyer on the 85th day of the 90-day period, his claim, filed three days before the end of the grace period was rejected at the MVAIC's insistence.\textsuperscript{149}

Consistently with its attitude toward late filing by endorsement-insureds, the MVAIC often rejected claims and appealed a judicial exercise of discretion in a qualified victim's favor although the delay was excusable because of death, disability, or infancy.\textsuperscript{150}

Thus, the MVAIC lost a case because it was unable to prove that it had in fact rejected an infant's claim which, as it insisted, had been filed two days too late.\textsuperscript{151} The court observed that, in any event, the MVAIC's calculation of the asserted two-day delay was based on its "conjecture . . . as to the date of mailing by the insurer of the disclaimer letter and the date of its receipt by the parents of the injured infant . . . ."\textsuperscript{152} In another instance, an 83 year old victim was hospitalized for nine months as a result of the accident. He had lost 60 of the 90 days allowed him for filing because of his physical and mental condition before a lawyer friend came to his aid. When his claim was filed on the

\textsuperscript{147} See Jones v. MVAIC, 19 N.Y.2d 132, 224 N.E.2d 880, 278 N.Y.S.2d 382 (1967) for the underlying litigation history. See infra p. 504. For further case law see note 145, supra.

\textsuperscript{148} Rosante v. MVAIC, 15 A.D.2d 825, 225 N.Y.S.2d 664 (2d Dep't 1962); Grys v. MVAIC, 14 A.D.2d 821, 220 N.Y.S.2d 653 (4th Dep't 1961).

\textsuperscript{149} Grys v. MVAIC, 14 A.D.2d 821, 220 N.Y.S.2d 653 (4th Dep't 1961).

\textsuperscript{150} Challenges in cases of infants are numerous, e.g., Raiford v. MVAIC, 29 A.D.2d 883, 288 N.Y.S.2d 577 (2d Dep't 1968); Gibson v. MVAIC, 23 A.D.2d 562, 256 N.Y.S.2d 500 (2d Dep't 1965); Ackey v. Bruneau, 14 A.D.2d 628, 218 N.Y.S.2d 863 (3d Dep't 1961); Frey v. MVAIC, 11 A.D.2d 693, 204 N.Y.S.2d 959 (2d Dep't 1960), aff'd, 9 N.Y.2d 849, 175 N.E.2d 461, 216 N.Y.S.2d 94 (1961).

\textsuperscript{151} Berkowitz v. MVAIC, 29 A.D.2d 859, 288 N.Y.S.2d 488 (1st Dep't 1968).

\textsuperscript{152} Id.
95th day, the MVAIC rejected it because the delay was not caused by disability but by his friend’s failure to discover promptly the tortfeasor’s lack of insurance. The MVAIC’s argument, characterized as “sophistry,” was rejected by both the trial and appellate courts.163

I. Further Obstacles to Arbitration

The MVAIC is not always able to prevent arbitration by raising one or more of the issues relating to coverage or notice. Instead, it may argue that for other reasons arbitration must be delayed or denied. The argument takes different forms.

One variant is based on one of the exclusions set out in the endorsement: for instance, it bars any claim to compensation if the victim, without the MVAIC’s written consent, “settles with or prosecutes to judgment any action against the offending motorist or those liable for his negligence.”154 The requirement of the MVAIC’s consent is plainly intended to protect it against collusive or otherwise unjustified settlements and judgments which could improperly create or inflate the MVAIC’s liability to a claimant.155 It also safeguards the MVAIC’s right to subrogation against the tortfeasor.

That this exclusion was not meant to bar a claimant from pursuing the offending motorist is clearly shown by another provision which requires the claimant to notify the MVAIC of such a suit.156 Yet in one case, a claimant discovered five months after suing the offending motorist that he was uninsured and thereupon simply stipulated with him to discontinue the action. The MVAIC unsuccessfully insisted that this discontinuance was tantamount to a settlement or judgment within the exclusionary provision quoted above.157 The MVAIC reiterated this contention repeatedly. On one occasion, claimant, without the MVAIC’s written consent, had obtained a verdict but no judgment against the offending motorist. Equating the verdict with a judgment, the MVAIC claimed that the victim had lost his remedy.158 The same argument was made, again unsuccessfully, where the judge informally decided in favor of the victim but never entered a judgment.159

In two other cases, the MVAIC apparently tried to persuade the trial court to accept its broad contention that no claimant has a right to arbitrate as long as an action against the motorist is pending.160 Again, the endorsement seems clearly to the contrary. As nearly as can be determined, this argument was simply based on certain provisions of the MVAIC statute which, on their face,

156. CORBEEY, App. B, at 52.
are solely applicable to claimants who are qualified, but not to those entitled to arbitration under the endorsement.

A third variant relies on precedents from commercial arbitration. The MVAIC claimed repeatedly that the victim waived any right to arbitration by filing suit against the motorist. The argument is clearly untenable. It is true that a party entitled to commercial arbitration may intentionally abandon its right to arbitration by proceeding in a judicial forum against its adversary. However, this waiver or election doctrine is inapplicable to a suit against the motorist. First of all the endorsement itself implies that the victim may press both his action against the offending motorist and his demand for arbitration. Second, even if it were applicable, a victim who sues the offending motorist without being aware that he is uninsured has not made a conscious election to waive his right of arbitration against the MVAIC.

In light of these circumstances, it is surprising that from time to time the courts have forced the victim to abandon his suit against the motorist. It should be apparent that where the MVAIC seeks to defeat arbitration permanently, it tries to clear the way for the further argument that it is not liable at all since, vis-à-vis the endorsement-insured, its statutory capacity is limited to arbitration. In that event, the theory of the victim's election or waiver in suing the tortfeasor frustrates the very purpose of the statute.

J. The Burden of Proof

The evidentiary burdens created by the statute or the endorsement have prompted the MVAIC to pursue two different, but interrelated efforts: to reduce the burden resting on it in seeking to stay arbitration, and to increase the burden resting on the claimant when he tries to establish his version of a requisite threshold fact under the endorsement or his compliance with a condition precedent under the statute. In appraising the cases illustrating these efforts, it must be remembered that a claimant's demand for arbitration or suit against the MVAIC usually marks the end of protracted negotiations toward settlement in the light of the available evidence.

1. Reducing the MVAIC's Burden of Proof

Under the CPA, the MVAIC must produce "evidentiary facts . . . raising a substantial issue" to obtain a stay of arbitration and a hearing on the threshold issue. This involves rather vague notions and not infrequently,


163. Supra note 53; the corresponding provision in the CPLR is § 7503.
trial and appellate courts disagree.\textsuperscript{164} In a number of cases, however, the MVAIC tried, without success, to obtain a stay of arbitration even where it was unable to offer any facts. Thus, e.g., without any substantial supporting evidence it advanced a claim that the victim was not an endorsement-insured\textsuperscript{165} or that the claimant was barred because he was covered by workmen’s compensation.\textsuperscript{166} In another case, it urged on a court “a conclusory presentation” that the victim was intentionally run down.\textsuperscript{167} It claimed in a third case on the basis of an affidavit “contain[ing] nothing but hearsay information and conclusory statements” that the victim, a guest passenger, was intoxicated and thus ineligible for compensation.\textsuperscript{168} Following general notions about burden of proof, the courts recognized as early as 1962 that even a slight degree of proof offered by the MVAIC was sufficient to raise the requisite substantial issue when the facts were peculiarly within the claimant’s knowledge, as e.g., his contact with a hit-run vehicle.\textsuperscript{169} Yet the MVAIC, without success, insisted before appellate courts that its burden of proof must be lightened further. Thus, without having investigated a hit-run claim and, without offering any evidence, it insisted that whenever the facts are peculiarly within the victim’s knowledge it “cannot be bound to accept, without a hearing, the version as alleged by the claimant.”\textsuperscript{170} The MVAIC recently took a similar position in connection with a victim’s sworn allegation that the other vehicle was uninsured. Without having investigated his claim, it insisted on being entitled to a stay of arbitration, since the victim’s sworn allegation was insufficient to meet the burden resting on him. Arbitration was granted.\textsuperscript{171}

2. Increasing the Claimant’s Burden of Proof

Once the MVAIC has been successful in obtaining a hearing, the claimant must prove the threshold facts for arbitration. Similarly, the qualified victim must prove the conditions precedent in his suit against the MVAIC. The claimant often finds it difficult to establish facts that he cannot be expected to know, such as the validity of an insurer’s disclaimer of the offending motorist’s policy. This is especially true where the “foreign” facts are needed to establish a negative, such as the lack of registration or of insurance coverage for an out-of-state car.\textsuperscript{172} Yet, neither statute nor endorsement, nor for that matter the

\textsuperscript{165} MVAIC v. Curtis, 37 Misc. 2d 97, 232 N.Y.S.2d 443 (Sup. Ct. 1962).
\textsuperscript{166} Prato v. MVAIC, 49 Misc. 2d 955, 956, 268 N.Y.S.2d 834, 836 (Sup. Ct. 1966) (MVAIC failed “to disclose evidentiary proof”).
\textsuperscript{167} Fuscaldo v. MVAIC, 24 A.D.2d 744, 745, 263 N.Y.S.2d 919, 922 (1st Dep’t 1965).
\textsuperscript{170} Beakbane v. MVAIC, 20 A.D.2d 736, 246 N.Y.S.2d 843, 844 (3d Dep’t 1964).
\textsuperscript{172} For judicial recognition of the difficulties involved see Foster v. MVAIC, 55 Misc. 2d 784, 785, 286 N.Y.S.2d 775, 777 (Sup. Ct. 1967) and cases cited therein.
courts, have come to the victim’s aid in discharging that burden. No presumption of lack of insurance aids him; the general rules of evidence are applied. “The difficulty of the [claimant] in establishing the facts is irrelevant.” Although a victim may have difficulty in showing that the offending car was driven without permission “[it] must be obvious that where there is no proof either way as to whether the automobile is insured, there is no right to arbitration.” In the same vein, a court agreed with the MVAIC that the offending motorist’s default in an action brought against him in Utah does not create a presumption that he was uninsured.

Yet even where the claimant manages to present favorable evidence, the MVAIC frequently seeks to challenge its weight. An administrator sought permission to sue the MVAIC after the 76-year old victim had been taken to the hospital and, thirteen days later, had died from his injuries. The administrator submitted a “police-aided” card showing that the deceased was taken to a hospital. He claimed that it proved impossible to identify the offending automobile. The MVAIC, without producing evidence, urged upon the court “generally the highly speculative possibility of fraud and mistake entering into ‘hit-and-run’ situations.” The court characterized the contention in this case as “conjecture and hypothesis.” In another case, despite contrary information supplied by the Motor Vehicle Department, the offending motorist’s insurer advised that it had cancelled the policy before the accident. The MVAIC insisted that there was “no shred of evidence” of lack of insurance.

On another occasion a claimant proved that the New York Department of Motor Vehicles had revoked the owner’s non-resident motor vehicle privilege because he failed to prove insurance coverage at the time of the accident. In addition, he produced a letter from the Pennsylvania Bureau of Motor Vehicles that it did not record insurance coverage and finally, the offending driver’s report to the Bureau of Motor Vehicles that he was not insured. The MVAIC asserted without success that all this was no proof of lack of insurance; it especially denied the revocation order any evidentiary standing whatsoever. It did so despite “its complete failure . . . to in any way controvert [the victim’s] showing, despite its mandatory investigatory obligation and the machinery available therefor . . . .”

In another instance, a six-year old child, while alone, was hit by an

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177. Id. at 695, 197 N.Y.S.2d at 275.
179. Foster v. MVAIC, 55 Misc. 2d 784, 787-88, 286 N.Y.S.2d 775, 780. “[It] would certainly be incumbent upon [the MVAIC] to come forward with evidence to the contrary, if any such evidence exists, rather than with conjecture and hypothesis.” Horwitt v. MVAIC, 21 Misc. 2d 694, 695, 197 N.Y.S.2d 273, 275 (Sup. Ct. 1959).
unidentified driver who took him to a hospital and then disappeared. The police-aided card showed that neither driver nor owner were identified. The MVAIC resisted the application of the qualified infant for permission to sue on the ground that not “all reasonable efforts have been made to ascertain the identity of the motor vehicle and its owner or operator.” In a third case, the offending driver of a California car could not be located “despite extensive efforts.” Since California keeps no records of automobile insurance, the victim’s only evidence was his counsel’s testimony that shortly after the accident the driver of the California car had admitted the lack of insurance. Rejecting this proof, the MVAIC unsuccessfully advanced the argument that only substantial evidence of non-insurance permits arbitration. Finally, in a quite recent case the offending motorist found in the woods a scooter without license plates and apparently abandoned. He rode on the scooter and injured the “insured” infant. When the scooter’s owner could not be identified, the police impounded it as “found property.” The MVAIC unsuccessfully opposed the infant’s demand for arbitration on the ground that he had not established the lack of insurance for the scooter.

K. Infant Victims and Arbitration

Ever since New York overcame the common law’s well-known aversion to arbitration, New York’s procedure has required a court order before an infant’s or an incompetent’s controversy could be submitted to arbitration. The reason for this rule is plainly the public interest in protecting infants or judicially incompetent persons against the potential risks of arbitration which lacks some of the traditional safeguards of the judicial process.

The MVAIC discovered in this requirement additional opportunities for defeating or at least delaying arbitration with infant victims. In light of the purpose of the required court order, it would seem that an infant cannot be compelled to arbitrate since his guardian ad litem is free to choose whether to seek the court’s permission to arbitrate. Before the endorsement became compulsory, New York’s appellate courts expressly conceded the infant the choice of arbitrating or suing the insurer. A fortiori, the statutory purpose of pro-

183. CPLR § 7503(a).
tecting infants would appear to be served by permitting the infant to sue where he has been compelled to stipulate for arbitration pursuant to the MVAIC statute. Yet, the MVAIC was able to persuade a number of lower courts that it cannot be sued by an insured infant, that the infant is restricted to arbitration, and, in order to arbitrate, it must first obtain a court order.\footnote{185}

This interpretation leaves the infant's guardian, and indeed the court, with Hobson's choice of arbitration or no compensation at all. The judicial leave demanded by the MVAIC thus becomes an empty formality, simply adding to an infant claimant's burden and costs in asserting his claim. Nevertheless, the court order is an established ritual.\footnote{186} In light of the statutory purpose, it would seem that the granting of the order, designed as it is to safeguard the minor's interests, is solely a matter between the infant and the court. The MVAIC's presence would seem neither required nor desirable. Recently, the MVAIC has developed a further refinement. It opposes the infant's motion for the court's leave to arbitrate if the "substantive facts" underlying his claim have not been established.\footnote{187} This approach seems to pervert whatever little is left of the purpose of the order. It imposes on the infant at this early stage the burden of proving the merits of his claim. It adds, without any statutory or rational basis, further complexities to an already complex situation. As if this were not enough, judicial glosses have further increased the infant's burden. It was held that a court must note \textit{sua sponte} the absence of judicial leave to arbitrate and that the order should not be granted until all threshold issues have been finally determined in the infant's favor.\footnote{188}

The foregoing does not exhaust the catalogue of procedural difficulties that can be created for the infant claimant. On at least two occasions claims were filed on behalf of infant victims who died as a result of accidents involving uninsured motorists. The MVAIC insisted that the representative of the infant's estate must first obtain judicial leave to arbitrate the dead infant's claim.\footnote{189} Unless it is only designed to delay matters, the logic of the argument would seem to be that the claimants (perhaps because of the infant's death) could not obtain the requisite permission, and thus the MVAIC would be freed of its obligations.

Finally, in a case in which the offending motorist was an infant, the victims had duly obtained court permission to arbitrate. The MVAIC successfully resisted arbitration on the ground that the infant tortfeasor against whom

\footnotesize{\begin{itemize}
\item \footnote{186.} See, e.g., cases listed supra note 185.
\item \footnote{187.} See Early v. MVAIC, 32 A.D.2d 1042, 303 N.Y.S.2d 709 (2d Dep't 1969).
\item \footnote{188.} Klein v. MVAIC, 82 Misc. 2d 268, 264 N.Y.S.2d 268 (Sup. Ct. 1965).
\item \footnote{189.} Lawson v. MVAIC, 237 N.Y.S.2d 2(Sup. Ct. 1963); Doyle v. MVAIC, 41 Misc. 2d. 871, 246 N.Y.S.2d 740 (Sup. Ct. 1962).
\end{itemize}}
NEW YORK'S MVAIC—1959-1969

the victims had filed suit also needed court permission to arbitrate. The MVAIC did not indicate in what sense the infant tortfeasor was a party to the arbitration proceedings. Surprisingly, the court not only accepted this argument, but added that it had "no power to direct [the infant tortfeasor] to [seek a court order through a guardian] but may only permit him to do so upon proper application." Why the infant tortfeasor should be willing to rescue his victims from the legal limbo to which this ruling confined them remains unexplained.

L. Due Process for the Uninsured Motorist

It seems appropriate to end these illustrations by noting two cases in which the MVAIC purported to guard, as against their victims, the statutory and constitutional right of uninsured motorists to be served by traditional methods of service.

To appreciate the flavor of these cases, several basic facts concerning the uninsured motorist problem must be recalled. Almost half a century ago the difficulties experienced in obtaining jurisdiction over non-resident motorists had been recognized as a major social evil. To alleviate the plight of resident victims, non-resident motorist statutes were widely enacted. They enabled the victim to obtain local jurisdiction over the non-resident motorist by service on the Secretary of State. Their constitutionality had been upheld by the Supreme Court of the United States as early as 1927. For a variety of reasons, uninsured motorists, as a class, are notoriously difficult to serve whether by traditional methods or under a non-resident motorist statute. Even if they can be served, suing them is usually an exercise in futility: whether or not they default, judgments against them are usually not collectible. It is significant that the MVAIC itself, despite its energy, expertise, and resources, has been unable to collect from uninsured motorists less than three percent of the amounts it paid to their victims. In partial recognition of the facts of life, the MVAIC endorsement does not require the victim to sue the uninsured motorist before he may recover from the MVAIC. It is, of course, otherwise in the

191. Id. at 580, 243 N.Y.S.2d at 293 (emphasis added).
195. For the reasons why the endorsement does not require an unsatisfied judgment against the uninsured motorist before a claim against the MVAIC can be asserted, see supra p. 141 and infra note 198.
196. The MVAIC attempted to collect using either subrogation or assignment of the rights of the compensated victims.
197. Between January 1, 1959 and December 31, 1968 the MVAIC paid to accident victims a total of $39.6 million, of which it recovered $995,000. 1969 MVAIC ANN. REP. OF SECRETARY & MANAGER, Schedules F & H (mimeo).
198. The insurers may have mainly feared liability based on default judgments, Wduss at 13 n.27. Cf. the ban on the payment by the MVAIC of default and consent judgment
case of the "qualified" victim who must first obtain a judgment in a New York court against the uninsured motorist and then petition the court for an order directing the MVAIC to pay it.¹⁹⁹

In at least two recent instances, one involving a wrongful death action, the "qualified" victims of non-resident uninsured motorists were unable to serve the offending motorists as they had given false addresses.²⁰⁰ The claimants thereupon obtained court permission to serve them by mail pursuant to a novel provision of the CPLR²⁰¹ which was designed to meet just such situations. Thereupon the MVAIC invoked its statutory power²⁰² to appear on behalf of the absent uninsured motorists and asserted that the methods of service used were not authorized by the CPLR and, even if authorized, violated due process vis-à-vis the absentee motorists. The MVAIC pursued these contentions through the trial and appellate courts to the Court of Appeals. With the exception of two judges in the Second Department, all lower court judges and a unanimous Court of Appeals rejected the MVAIC's arguments as without merit.

There is no occasion here to examine the statutory and constitutional contentions advanced by the MVAIC. Even if they were more meritorious than the several majority opinions were willing to concede, a paradox remains. Why does an agency, created for the sole purpose of aiding innocent victims of uninsured motorists, display such litigious zeal in guarding the rights of absentee motorists to be served by traditional methods after they had deliberately and indeed fraudulently, eluded service? It is difficult to discern in the MVAIC's efforts in pressing these cases anything but a resolve to deny victims the right to compensation, not from the unknown and surely irresponsible defendants, but from the MVAIC itself.²⁰³

IV. OFFICIAL MISINFORMATION AND SELF-DEFEATING CONDUCT OF CLAIMANTS

The peculiar quality of uninsured motorist litigation cannot be fully appreciated without a realization that often a victim's compensation has been jeopardized by circumstances beyond the control of the MVAIC although it usually

¹⁹⁹. See text supra p. 476.
²⁰¹. CPLR § 308(4) (McKinney 1963).
²⁰². N.Y. Ins. Law § 609(b) (McKinney 1966).
²⁰³. Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968), was decided 7½ years after the accident; Sellars v. Raye, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968), was decided 5 years and 8 months after the victim, a mother of two minor children had been killed in the accident. Originally, the victim's mother had failed, after appellate litigation, to compel the MVAIC to accept filing of a late notice because she had not qualified as the decedent's administratrix. See Sellars v. MVAIC, 20 A.D.2d 330, 246 N.Y.S.2d 937 (1st Dep't 1964).
sought to place the resulting risk on the claimant. First of all, in numerous instances, official information which the victim urgently needed to assert his claim was unavailable, delayed or outright erroneous. Secondly, the reports show many occasions in which the victim, in person or through counsel, has engaged in self-defeating conduct.

A. Official Misinformation

As shown in the hit-run cases, police conduct in reacting to asserted hit-run accidents is not always helpful to the establishment of a victim's claim. Policemen may fail to investigate or police records do not bear out a victim's assertion that a hit-run case was involved. The resulting discrepancies between official records and a claimant's allegation cannot invariably be classified as instances of fraud attempted against the MVAIC. Hence, the courts, contrary to the MVAIC's contentions, have treated these discrepancies as simply raising issues of fact to be determined as all other threshold facts or conditions precedent.204

Often, however, a claimant will run into other official obstacles which tend to impair or frustrate the purpose of the legislative scheme. As already noted, no victim of an uninsured motorist can recover from the MVAIC unless he proves the negative fact that the offending motorist is uninsured. This often turns out to be an almost impossible task. Naturally, New York's uninsured motorists are not anxious to admit that they are uninsured because it is a criminal offense leading to a revocation of their license. Thus, information supplied by them may turn out to be false.205 Hence, a victim's lawyer will, as a matter of routine, seek to obtain from the Department of Motor Vehicles a certified copy of the accident report (MV-104) which every motorist involved in a major accident is required to file, and an official document issued by the Department of Motor Vehicles (FS-25) that will certify a motorist's insurance status as it appears on its records. Needless to say prompt and correct information is essential to the proper pursuit of a claimant's rights. Regrettably, a substantial number of litigated cases show excessive delay by the department in answering inquiries206 and certification of insurance where none exists.207

204. See text supra p. 489.
207. See, e.g., Jones v. MVAIC, 19 N.Y.2d 132, 224 N.E.2d 880, 278 N.Y.S.2d 382 (1967) (misinformation supplied twice, the second time more than four months after inquiry—never corrected); DeJesus v. MVAIC, 31 A.D.2d 917, 298 N.Y.S.2d 458 (1st Dep't 1969); Merchants Mut. Ins. Co. v. Schmid, 56 Misc. 2d 360, 285 N.Y.S.2d 822 (Sup. Ct. 1968) (misinformation corrected after almost six months); Roeder v. MVAIC, 42 Misc. 2d 519, 248 N.Y.S.2d 512 (Sup. Ct. 1964) (misinformation corrected after six and a half
While the delays, and at least some of the misleading certificates, are the result of administrative failures, much of the misinformation appears to be due to a shocking anomaly in the law: save for premium-financed insurance policies, an insurer may validly terminate an insurance policy without bothering to notify the Department of Motor Vehicles although the notice is prescribed by statute. Thus, unaware of the termination of the policy, the Department will not only permit the uninsured motorist to continue roaming New York’s highways, it will also incorrectly certify to a victim of his uninsured driving that insurance coverage exists. Until a few months ago, the results of this situation were often fatal to compensation claims of qualified victims.

As we have seen above, the qualified victim was permitted to file late only if he could establish physical or mental incapacity, infancy, or death as causes for delay. Official delay or misinformation did not rank among the acceptable excuses. In light of the statutory language, the courts declared themselves powerless to intervene.

Thus, throughout the MVAIC’s first decade of operations, numerous claimants, whose notices to the MVAIC were delayed because of official delays or misinformation, were declared ineligible for compensation. Fortunately, it was otherwise with respect to insured claimants. When the MVAIC initially rejected their claims as belatedly filed, they were able to persuade the courts, in light of the delayed or misleading information received from officials, that they proceeded with the required diligence in establishing the facts. Even so, additional funds, time and energy had to be expended in trial and appellate courts to overcome the inadequacies of the official notice and recording systems.

B. Self-Defeating Conduct of Claimants

The difficulties in obtaining compensation under New York’s scheme are finally increased by what may be appropriately characterized as self-defeating conduct of claimants. The reported cases show numerous instances of inaction on the part of the victim or his lawyer, misconception of the appropriate

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208. N.Y. BANKING LAW § 576(g) (McKinney 1950).
210. See text supra p. 492.
remedy and finally, failures to take advantage of a procedural opportunity which the law of arbitration affords. This conduct may make additional costly and time-consuming procedural efforts necessary; at worst it results in the outright and permanent frustration of the victim's claim. There are several reasons for these self-defeating modes of behavior. First, a continuing lack of familiarity of both claimants and counsel with New York's complex compensation scheme; second, a marked disparity between law office routines for handling automobile accident cases and the stringent procedural demands made by the scheme, especially by its time limits for the several notices that must be given and finally unfamiliarity of lawyers with the special procedures for commercial arbitration which, under Rosenbaum, were made applicable to the novel context of automobile accidents.

It makes no difference whether it is the victim's or his counsel's conduct which leads to outright rejection or additional efforts and delays in adjudicating claims. With very few exceptions the courts tend to identify the victim with his attorney.213 Most of the reported cases fall into one or more distinctive patterns which deserve notice.

1. Failure to Determine the Offending Vehicle's Insurance Status

Until the claimant has established the fact that the offending motorist is uninsured, he does not know whether the appropriate course of action for him is to send the usual claim letter followed by a summons to the offending motorist, or instead, a notice to the MVAIC of intent to make claim on it. This notice must be usually filed within 90 days of the accident or within 10 days of an insurer's disclaimer. Yet, many months are often permitted to elapse before inquiries are made whether the tortfeasor had filed the prescribed accident report (MV-104) with the Department of Motor Vehicles. Under these circumstances, the MVAIC will be granted a permanent stay of arbitration.214

2. Lapse of 90-day Filing Period

Delayed determination of the offending motorist's insurance status may lead to a lapse of the 90-day period within which the notice to the MVAIC or the insurer is given. In that event courts have latitude to permit late filing by insured claimants if they gave notice "as soon as possible." This means that the insured must show that the notice was given within a reasonable time. The reasonableness of the delay, in turn, depends upon the claimant's diligence in


ascertaining the insurance status of the other operator and giving notice once his lack of insurance status is discovered. In the absence of reasonable efforts to comply, the MVAIC again will be granted a permanent stay.215

3. Choice of Inappropriate Remedy and Informal Demands for Arbitration

Many claimants have filed suit against the MVAIC because they were unaware that as insured claimants under an endorsement they can only proceed against it by way of arbitration.216 While this form of misunderstanding has abated in recent years, many claimants appear to be unfamiliar with the preclusive opportunities provided by section 753(c) of the CPLR. This provision permits the insured to serve notice on the MVAIC of intention to arbitrate. If this is done in the prescribed form and the MVAIC fails to move for a stay of arbitration within ten days, it is precluded from asserting the invalidity of the arbitration agreement; the failure to comply with it; and the bar of a limitation of time. Compliance with the prescribed formalities would seem to be a simple matter. It appears, however, that claimants do not include the prescribed caveat or serve the demand by ordinary mail with the result that the MVAIC is free to assert any objection to arbitration it may have even though it has failed to move for a stay within ten days.217

V. SEVEN LITIGATION PROFILES

A. Jones v. MVAIC

On May 30, 1961, a qualified victim was struck by a motorist. Since the motorist had claimed to be insured, the victim served a summons and complaint on him in August 1961. In October, 1961, claimant sent an official form (FS-25) to the Motor Vehicle Department to inquire about the motorist’s insurance status. The Department, in reply, described him as insured. This reply was reaffirmed in another department notice in March, 1962. When the motorist failed to answer the complaint, claimant contacted the motorist’s alleged insurer. It requested claimant to submit to a physical examination and advised that it had assigned an appraiser to handle the matter. A month later, the insurer sent claimant a copy of a registered letter it had addressed to the motorist advising him that his insurance had been cancelled over a month before the


accident. Within four days thereafter, claimant filed a claim with the MVAIC. The latter rejected it as untimely. When claimant filed suit to compel the MVAIC to accept the late claim the special term so ordered. Upon appeal, the second department unanimously affirmed the special term’s order. On the MVAIC’s further appeal to the Court of Appeals the claimant urged that he could not have complied with the 90-day period established under section 608(a) because he could not have discovered the lack of insurance until considerably after that period had expired. The Court reversed (two judges dissenting) on February 16, 1967.218 While compliance with the time limits prescribed by section 608 “was difficult if not impossible, courts are powerless to engraft judicial exceptions to periods of limitation prescribed by the Legislature.” The victim then obtained a judgment against the uninsured motorist, but was unable to have it satisfied. He then sued the motorist’s insurer claiming, *inter alia*, that the notice of cancellation had been ineffective because the insurer had not filed it with the Commissioner of Motor Vehicle as prescribed by section 313 of the Vehicle and Traffic Law. The court rejected this contention because the validity of the cancellation did not depend on the filing of that notice. The rule is otherwise with respect to policies for which premium-financing has been arranged which was not the case here. The Court suggested an appropriate amendment of section 313 of the Vehicle and Traffic Law, which it considered all the more urgent since the Department of Motor Vehicles takes six weeks to supply information concerning a motorist’s insurer. The victim’s complaint was dismissed on May 9, 1969, almost eight years after the accident.219

**B. MVAIC v. Malone**

In December, 1959, the victim, an insured under his wife’s endorsement, was hit by a motorist. The motorist’s West Virginia insurer had not, as was shown by a letter from the New York Department of Motor Vehicles, been authorized to do business in New York. The insurer disclaimed the policy as of the date of the accident because the motorist had assertedly committed fraud in applying for his policy. The MVAIC refused to arbitrate because the victim had not shown that the motorist was in fact uninsured. In August 1962, a trial court ordered the MVAIC to arbitrate because it thought the mere fact of the disclaimer entitled the victim to arbitration.220 Upon the MVAIC’s appeal, the appellate division affirmed in May of 1963.221 In November 1965, six years after the accident, upon a further appeal by the MVAIC, the Court of Appeals in a memorandum opinion reversed the lower courts.222 It held that the MVAIC need not arbitrate since it is entitled to have the courts determine the question of the validity of the disclaimer.

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221. 19 A.D.2d 542, 240 N.Y.S.2d 879 (2nd Dep’t 1963).
In October 1959, the victim was hit by a motorist whose insurer later disclaimed the liability policy. The victim sought arbitration under an endorsement issued to his mother-in-law whose household he shared. The MVAIC refused because the claimant was not an insured. When he sought an order directing the MVAIC to arbitrate the court denied his application because the issue of his status had to be judicially determined first.\(^2\) This, however, could not be done by the court because "it may not, over the objection of [the MVAIC] do other than deny this application without determining that dispute on the merits."\(^2\) Thereupon the claimant brought a declaratory judgment action against the MVAIC to establish his status as an insured.\(^2\) The MVAIC "thoroughly examined [claimant and his mother-in-law] before trial"\(^2\) but continued to refuse arbitration because the relation of the claimant and his mother-in-law "and their place and manner of residence are peculiarly within the [claimant's] knowledge;"\(^2\) in any event, it insisted that a son-in-law is not a relative within the meaning of the policy; accordingly, plaintiff should seek relief as a qualified rather than as an insured claimant. The court noted that the MVAIC "has not been able to offer even one shred of evidence tending to disprove plaintiff's claims..."\(^2\) and that 50 years earlier the Court of Appeals had held that even a brother-in-law of an insured's deceased wife was a relative of the insured within the terms of a policy. Accordingly, it granted summary judgment for the insured. The MVAIC served notice of appeal in August 1962, but did not perfect its appeal until December 1962, after a court order directed it to act. On appeal, the MVAIC admitted that ambiguous terms in insurance policies are to be construed in favor of coverage and that the term relative had indeed been so construed but insisted that this principle is not applicable here because the language of the endorsement is the product of legislation and thus does not represent the choice of the company. Nine months after the trial court's decision, summary judgment for claimant was affirmed.\(^2\) Thereupon, the MVAIC sought leave to appeal but it was denied. On August 16, 1963, the victim again demanded arbitration. Again, the MVAIC sought to stay arbitration, this time permanently, on the ground that the three-year statute of limitations against the tortfeasor had run and hence the victim's claim against the MVAIC based on the endorsement should be equally barred. Pointing out that it had been repeatedly held that the MVAIC's obligation toward the victim arose out of a contract and not a tort, the trial court on October 3, 1963, four years after the accident, denied further stay of arbit-

\(^{224}\) Id. at 955, 225 N.Y.S.2d at 367.
\(^{226}\) Id. at 828, 231 N.Y.S.2d at 797.
\(^{227}\) Id. at 828, 231 N.Y.S.2d at 796.
\(^{228}\) Id. at 828, 231 N.Y.S.2d at 797.
\(^{229}\) McGuiness v. MVAIC, 18 A.D.2d 1100, 239 N.Y.S.2d 920 (2d Dep't 1963).
It observed: "The conduct of the [MVAIC] in this matter leaves grave doubts in this court's mind as to whether this body is faithfully fulfilling the job for which it was created." 231

D. MVAIC v. Coccaro

Claimant was injured on August 29, 1959. On September 29, 1959, his counsel wrote to the Motor Vehicle Bureau to ascertain the offending motorist's insurance status. He received no reply; he again wrote on December 22, 1959. This letter was answered on March 2, 1960, apparently indicating a lack of insurance. The MVAIC refused to arbitrate. When the victim formally demanded arbitration, the MVAIC sought a stay in Nassau County although the accident occurred in Queens County and the victim resided in New York County where the MVAIC's offices were located. The MVAIC chose Nassau County claiming that it was "doing business" throughout the state and hence was authorized to file petitions in any county. It admitted that in doing so it was forum shopping to avoid the wide interpretation the first department was then giving the arbitration clause. The court dismissed the petition with leave to renew it in the proper venue. 232 It observed: "this practice is to be discouraged, particularly when it can cause hardship and injustice to claimants who reside great distances from the chosen forum." 233 The MVAIC then sought a stay in Kings County, on the ground that the claimant had failed to give written notice of claim within 90 days or as soon thereafter as practicable. The court determined that an issue of fact as to timely notice had been raised which could not be left to the arbitrators. It rejected the victim's claim that the MVAIC's objections had not been raised within ten days of service of his demand for arbitration. That claim failed because the victim had served notice of intention to arbitrate by mail and not personally nor in proper form. Accordingly, the issue of timely notice was referred to an official referee to hear and report, or, if the parties agreed, to hear and determine, unless either side demanded jury trial. 234 The court's decision was dated March 29, 1962. On April 11, 1962, an order was entered sending the issue to an official referee to hear and determine, unless a jury trial was demanded, in which event it was set down for trial at the trial term. Nine months later the order was resettled (following the abolition of official referees) setting the issue down for hearing and determination at the trial term on March 13, 1963. Finally, on October 7, 1963, evidence was taken at trial term. The proceedings lasted 15 minutes. The judge presiding at the trial term found that in light of the facts, the victim's attorney had proceeded as soon as practicable in giving the MVAIC notice, the latter having offered no testimony on its behalf nor having suffered

231. Id. at 776, 243 N.Y.S.2d at 765.
233. Id.
E. Washington v. MVAIC

An infant claimant was struck by a motorist on January 19, 1963. The motorist’s insurer claimed to have cancelled his liability policy on its office records as of November 27, 1962, because of non-payment of premiums. Upon the MVAIC’s refusal to accept the claim, the infant brought a special proceeding under section 608(c) of the Insurance Law to compel the MVAIC to accept a notice of claim. On June 10, 1964, the Supreme Court granted the infant’s application. On April 19, 1965, upon the MVAIC’s appeal, the appellate division found the record inadequate and remitted the infant’s application to Special Term. It was to hear and determine as to whether the motorist was in fact uninsured at the time of the accident, as the MVAIC insisted in order to show that the application was made too late, or whether the motorist was insured at the time but his insurer had, by letter of September 30, 1963, disclaimed or denied liability; the latter finding would have made the infant’s application timely. On October 7, 1965, the Special Term of the Supreme Court concluded that the motorist was insured at the time of the accident because the insurer had neither mailed the motorist an unconditional notice of cancellation nor filed that notice with the Motor Vehicle Commissioner as prescribed by statute. Since the attempted termination was ineffective and the motorist was insured at the time of accident, the insurer’s letter to the motorist of September 30, 1963, was in fact a disclaimer. Upon a second appeal by the MVAIC the appellate division agreed with the trial court’s conclusions; nevertheless, it found the case not to be within section 608(c) of the Insurance Law because the insurer’s letter of disclaimer was solely based on its purported prior cancellation (which the trial court had found to be ineffectual). Accordingly, the appellate division on May 16, 1966, reversed the lower court. It observed:

235. MVAIC v. Coccaro, 40 Misc. 2d 1038, 244 N.Y.S.2d 972 (Sup. Ct. 1963).
236. The Judge described the procedure followed in Coccaro in these terms: Instead of this matter being disposed of in Special Term, Part I in 15 minutes on January 10, 1962, it was not submitted for disposition until October 7, 1963 at Trial Term, Part XII and then, according to the terms of the order decision upon the motion for a stay final submission must still be made in Special Term, Part I. As a result the referral caused the necessity of settling orders on notice for reference to an Official Referee, a subsequent motion for resettlement of the order when the office of the Official Referee was eliminated, the resettlement of the orders thereon, the payment of a calendar fee by an attorney for the trial of a simple issue raised on a motion, the necessity of attendance by attorneys in Trial Term, Part I for several days before the matter could be sent to a Trial Term, a Trial Term and finally the submission of the decision of Trial Term to Special Term, Part I for ultimate disposition. Id. at 1040, 244 N.Y.S.2d at 974.
[I]f it should subsequently develop in such proceedings as the parties affected hereby may be advised to institute, that such factual findings and conclusion of insurance coverage was not justified, the instant applicants would not be precluded from then making an application under the statute [§ 608(c)] to compel the acceptance of the timely-filed claim.

Presumably, the infant could now have filed a declaratory judgment action against the motorist's insurer in which the latter would have been free to assert that it had effectively terminated the underlying policy.

F. Hulsey v. MVAIC

On November 11, 1960, claimant, a qualified victim, was struck by a motorist while riding in a taxicab. Claimant sued both the motorist and the cab company. When the motorist failed to cooperate with his insurer, the latter disclaimed and the MVAIC undertook to defend the uninsured motorist against claimant's action. When the cab driver testified at the trial that his cab stood still when the uninsured motorist struck it, claimant settled with the cab company for $750. The jury in the trial against the absent motorist (defended by the MVAIC) was instructed to take the settlement into consideration in entering its verdict. It brought in a verdict for plaintiff for $1,250. In May 1967, a judgment was entered against the motorist and duly served on his counsel (i.e., the MVAIC). When the time for appeal had expired, claimant sought an order directing the MVAIC to pay the judgment, pursuant to section 611. The MVAIC refused because its consent to the $750 settlement had not been obtained, a failure which disabled the claimant from proving compliance with section 611(f), a prerequisite for judgment against the MVAIC. In substance, that provision requires a claimant to prove that the MVAIC's payment of the judgment against the uninsured motorist will not inure to an insurer's benefit or relieve it from the payment of an applicable liability policy. The supreme court rejected the MVAIC's contention with the observation that the provision did not preclude a settlement between the victim and another tortfeasor. The court did not advert to the fact that it was the MVAIC itself which had conducted the motorist's defense following the settlement with the cab company. It simply noted that the MVAIC's consent to the settlement was not needed and, on September 7, 1967, seven years after the accident, ordered it to pay the judgment.

G. Hanavan v. MVAIC

On January 30, 1966, claimant, an insured, drove her car on the New York Thruway during a severe snow storm. Visibility was changing from fair to zero resulting in extremely hazardous driving conditions. She was struck from the

239. Id. at 876, 270 N.Y.S.2d at 75.
rear by an unidentified car and suffered severe injuries, rendering her temporarily unconscious. Upon regaining consciousness, she spoke to a state trooper who was at the scene. She was again interviewed about the accident the next day by a trooper who came to the hospital. She was hospitalized for over two and a half months. During the afternoon of the accident, more than 100 cars were involved in other collisions in the general area. The trooper's report indicated that, along with claimant's car, 34 others were involved in accidents in the immediate vicinity. Claimant was unable to describe the vehicle which hit her, except she believed it was a truck. Her counsel interviewed some of the other persons listed on the trooper's report as involved in accidents and he also examined the accident reports of other drivers but was unable to identify the offending vehicle, its driver, or any witnesses. He did find, however, that she was not injured in a pile up which involved 35 cars, but in one of the numerous accidents that occurred about that time. When the MVAIC rejected her claim and refused to arbitrate, she served a demand for arbitration. The MVAIC sought a stay, inter alia, on the ground that the accident was not covered by the endorsement, that no hit-run vehicle was involved, that claimant had failed to exercise reasonable efforts or to pursue diligently the offending parties and that the accident was not properly reported to the police within 24 hours. Since neither side demanded a hearing, the court, on May 13, 1969, determined the case on the affidavits filed by the parties. It rejected every contention of the MVAIC and especially its "too literal interpretation of the definition of 'hit and run,' that is, if the offending vehicle did not leave the scene of the accident, there was no 'hit and run.'"241 On appeal, the trial court's opinion was unanimously affirmed.242 The memorandum opinion especially rejected the MVAIC's renewed insistence that the claimant had failed to report the accident properly as a hit-run accident. Since claimant had notified the State Police that she had been struck by an unknown vehicle, she had complied with the statutory requirement.

VI. MVAIC Litigation—In Whose Interest?

MVAIC litigation evidently is sui generis. Above all, the MVAIC emerges as a persistent and resourceful advocate of a restrictive interpretation of its statutory and endorsement obligations toward the victims of uninsured motorists. In the pursuit of this objective, an insensitive substantive approach to compensation claims is accompanied by an adversarial stance that spares few procedural efforts to block a claimant's path to recovery.

The conception of the MVAIC of its task as litigant is in part reflected in a statement first formulated in 1965 and reiterated since in every annual report of the MVAIC's Manager.

Experience has proven that the defense of an MVAIC case differs materially in comparison with the defense of an automobile liability case conducted by an insurance company. The unique defenses available to the Corporation, which are in addition to liability defenses, are not usually applicable in the defense of a case in behalf of an insurance carrier. These unique defenses mandate that they be interposed in all litigation involving the Corporation.

For example, in a 'hit-and-run' case it is a statutory requirement that the accident be reported to the Police within twenty-four hours of the occurrence and there must be actual physical contact of the motor vehicle causing such bodily injury with the claimant or with the motor vehicle which the claimant was occupying at the time.

If these conditions precedent to recovery are not unequivocally proven, the Corporation must demand a separate trial wherein it is the claimant's burden to prove compliance with the statutory requirements.243

This statement does not distinguish the claims of a qualified victim who must rely on the terms of the statute itself from those of the insured whose rights are said to flow from the "contractual endorsement." It shows no awareness that, by its central position in the compensation scheme, the MVAIC itself bears a major responsibility for interpreting statutory and endorsement provisions which admit of doubt. Nor does it acknowledge the MVAIC's statutory power to settle claims, i.e., to forego litigation where either the facts or the law or both are in dispute. Instead, it appears to insist on litigation unless the "conditions precedent are... unequivocally proven," presumably to those within the MVAIC's hierarchy who decide when to litigate and when to settle. The cases noted strongly suggest that the quoted statement is not mere rhetoric but a considered reflection of the MVAIC's approach to its task.

The influence of this approach on the interpretation of New York's compensation scheme during its first decade can not be exaggerated. Of course, New York's judges have the final say about the soundness or unsoundness of the MVAIC's contentions, but whatever the judicial reaction, the very fact that they were advanced in court had profound effects. When the judges agreed with the MVAIC's interpretation of a provision of the statute or the endorsement, a restrictive gloss was placed on the compensation scheme. That gloss would never have been added but for the MVAIC's initiative. When its forensic strategy proved successful, claims were defeated, temporarily or permanently. When, on the other hand, the courts rejected the MVAIC's contentions or its tactics they usually did so only after expensive and time consuming exertions of claimants' counsel.

This litigious policy operated in a context which tended to shift the adversarial balance of strength substantially against the claimant.

Litigation has been carried on by a single, highly expert adversary, usually

represented by one of a small number of law firms specializing in this field, against thousands of individual claimants, each represented by counsel for whom litigation with the MVAIC is a rather unique and often trying experience. While this is true, to some extent, of insurance litigation, generally, the disparity is intensified here: in contrast to individual insurers the MVAIC was able to proceed without evident regard for the need to preserve the good will of customers and the public at large. Moreover, the complex structure of the statutory scheme in this rather limited field tends to enhance the advantages of specialization.

The compensation which claimants and their counsel may expect in the end is limited; a victim will recover at most $10,000. In fact, the average claim paid by the MVAIC in 1968 was $2,392.\(^{244}\) Moreover, at least one third of the amount recovered must be set aside for counsel fees. Thus, neither claimant nor counsel have much incentive to engage in complex forensic battles with the MVAIC.

The readiness of the MVAIC to challenge claimants by motions to stay arbitration under the *Rosenbaum* doctrine created an additional threat of inordinate delays. These are due to congested court calendars and the complex internal structure of the trial courts, especially in New York City.

In the light of these circumstances a further result was inevitable. The foregoing illustrations of MVAIC litigation—which could readily be multiplied—were selected from a plethora of published reports. Since the enactment of the MVAIC statute, more than 550 trial and appellate opinions have been reported, including at least twenty opinions of the Court of Appeals. These figures provide a hint of the volume of additional litigation carried on which never finds its way into the published reports. This new field of litigation opened precisely at a time when New York courts were staggering under the case-loads generated by other disputes. Doubtless, much of the litigation is due to the confusing awkwardness of the statutory scheme. It has fragmented the claimants into two classes, one of which must rely on a complex insurance policy, the other on a no less complex statute. A major cause, however, is the MVAIC’s conception of its task which results in litigation of any issue that may possibly lead to the defeat of compensation claims.

Finally, the opinions examined above demonstrate that the forensic policies of the MVAIC cannot be viewed in isolation. They evidently reflect a broad view which the MVAIC has of its purpose. Subject to the minimum requirements of the statutory scheme, the MVAIC appears to consider itself primarily as the guardian of the funds entrusted to it by its constituents, New York’s insurance companies.

The MVAIC’s own figures seem to bear out the foregoing observations.

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244. This is the average cost per claim paid, excluding allocated claims expense. The average claim cost between January 1, 1959, and December 31, 1968, was only $1687. 1969 MVAIC ANN. REP. OF SECRETARY & MANAGER at 5 (mimeo).
The operations of the MVAIC (both administrative and forensic) in the three year span from 1962 to 1964 produced for New York's insurers a surplus of about seventeen million dollars out of some 43.5 million dollars in premiums collected for uninsured motorist coverage. These figures may be compared with actual total pay-outs to victims during that period of about 13.3 million dollars. To be sure, this achievement came at a price. The MVAIC spent six million dollars on the handling of the claims (allocated and unallocated claim expenses) it honored. This amount is the equivalent of nearly fourteen cents for every premium dollar collected and should be contrasted with a 10½ cent claims' handling rate for automobile liability insurance which the American Insurance Association has computed. The heavy, if indeterminate additional cost to the tax-paying public which has to maintain the judges, juries, staff, and buildings in order to permit this litigation to proceed, has, of course, not been considered.

There is grave doubt that litigation carried on under these circumstances serves the public interest. In any event, it is fanciful to assume that the New York legislature, in enacting the 1958 statute, anticipated that it would be implemented in the manner described here.

245. These figures appear from the MVAIC's financial statements. 1962-64 MVAIC ANN. REP. OF SECRETARY & MANAGER, Schedule B (Mimeo). As of December 31, 1964, nearly 13,000 claims were pending against which the MVAIC set up reserves in excess of 25 million dollars. In light of actual experience, both with respect to claims disposed of without any payment and the average claims cost, the reserve figure appears inflated. See also Laufer, Insurance Against Lack of Insurance? A Dissent from the Uninsured Motorist Endorsement, 1969 DUKE L.J. 227, 265-70.

246. American Insurance Association, Rep. of Special Committee to Study and Evaluate the Keeton-O'Connell Basic Protection Plan and Automobile Accident Reparations, Sept. 9, 1968, Exhibit I, Sheets 2, 3. See also R. E. KEETON, COMPENSATION SYSTEMS 33 n.15 (1969). Actual percentage figures for the industry at large are in dispute. Id. at 33-34.