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# Insurance Law—MVAIC—Uninsured Drivers Endorsement Calling for Reduction of Workmen's Compensation Payment from "Insured" Claimant's Award Is Not Contrary to Legislative Intent

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INSURANCE LAW—MVAIC—UNINSURED DRIVERS ENDORSEMENT CALLING FOR REDUCTION OF WORKMEN'S COMPENSATION PAYMENTS FROM "INSURED" CLAIMANT'S AWARD IS NOT CONTRARY TO LEGISLATIVE INTENT

Petitioner, while a passenger on his employer's motor scooter, was involved in an accident with an uninsured automobile. As a result of the accident petitioner received a workmen's compensation award of $6,710.95. Petitioner was covered by the uninsured drivers endorsement contained in his employer's vehicle liability insurance policy and hence was an "insured" under Motor Vehicle Accident Indemnification Corporation[1] (MVAIC) Law. Under MVAIC Law an "insured" claimant is limited in his recovery to 10,000 dollars which according to a clause in the endorsement, drafted by the insurance carriers and approved by the Superintendent of Insurance, shall be reduced by any workmen's compensation payments because of the same accident.[2] "Insured," unable to agree with the corporation as to the amount due him, filed for arbitration of his claim as prescribed by MVAIC law. The arbitrator found "insured's" damages to exceed 18,000 dollars and awarded the maximum 10,000 dollars. The arbitrator refused to reduce the award by the workmen's compensation benefits received by the "insured" claimant. "Insured" moved in Supreme Court to confirm the award and have judgment rendered upon it. MVAIC opposed the motion and moved under the New York Civil Practice Act section 1462-a,[3] then in effect, to reduce the award by the amount of workmen's compensation received by "insured." Special Term *held* the arbitrator had exceeded his powers and granted MVAIC's motion to modify the award. The Appellate Division reinstated the arbitrator's full award.[4] MVAIC appealed to the Court of Appeals which reversed the order of the Appellate Division. *Held:* the rider attached to the MVAIC endorsement calling for the deduction of workmen's compensation from any award made by MVAIC to an "insured" claimant was valid and not contrary to legislative intent, two judges dissenting. *Matter of Durant* (MVAIC), 15 N.Y.2d 408, 207 N.E.2d 600, 260 N.Y.S.2d 1 (1965).

By the early 1920s the automobile was no longer a novelty and was rapidly becoming a part of the American way of life. The price of this con-

1. N.Y. Ins. Law § 602 creates a nonprofit corporation known as "MVAIC" to which every insurer authorized to write vehicle liability insurance within the state is required to belong. Members of the corporation are assessed for operation expenses (N.Y. Ins. Law § 607). The corporation investigates claims of injured victims of uninsured and hit and run vehicles and renders awards to "insured" claimants (N.Y. Ins. Law § 605(a)(3)) or to "qualified" claimants, those not covered by an insurance policy (N.Y. Ins. Law § 605(c)), where the accident occurred within the state.

2. The liability endorsement required by the N.Y. Ins. Law § 167(2-a) to be drafted by the insurance industry and approved by the Superintendent of Insurance provides in part in the standard liability insurance policy in New York State: "5. Limits of Liability . . . (b) Any amount payable under the terms of this endorsement, . . . shall be reduced by . . . (3) the amount paid and the present value of all amounts payable on account of such bodily injury under any workmen's compensation law . . . ."

3. N.Y. CPLR § 7511(c).

4. Durant v. Motor Vehicle Acc. Indemnification Corp., 20 A.D.2d 242, 246 N.Y.S.2d 548 (2d Dep't 1964).

venience was high. Between 1921 and 1930 alone 239,353 persons were killed in motor vehicle accidents.[5] Yet, with close to twenty-seven million cars registered in 1929, liability insurance covered only twenty-seven percent of all private and commercial vehicles in America.[6] The need to protect innocent victims of uninsured negligent motorists was reflected in early state legislation calling for either compulsory insurance[7] or proof of financial responsibility.[8] Since then every state[9] and many foreign countries[10] have adopted either compulsory insurance or proof of financial responsibility statutes. There remained, however, in New York, a large group of innocent victims of financially irresponsible uninsured drivers or hit and run drivers who had no recourse for their injuries. With the interest of these victims in mind and because of their dislike for state imposed compulsory insurance laws[11] and public unsatisfied judgment funds[12] the liability insurance carriers first proposed uninsured motorist coverage. Plans requiring all motor vehicle liability policies issued within the state to contain an uninsured motorist endorsement were brought into effect in many states.[13] Similar acts proposed in New York, on two separate occasions, failed to become law[14] despite the support of the governor.[15] Instead in 1957 the New York legislature passed the Compulsory Insurance Act.[16] It was not until 1958[17] that New York passed legislation to plug the gaps still remaining in its vehicle insurance protection and created MVAIC, a nonprofit corporation. The purpose of MVAIC was to secure for innocent victims of motor vehicle accidents recompense for injury and financial loss flowing from accidents caused by uninsured motor vehicles from foreign states, hit and run vehicles, stolen vehicles, insured motor vehicles where the insured disclaims liability[18] and unregistered motor vehicles.[19] The ultimate goal of the legislature

5. See Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 Buffalo L. Rev. 215, 217, n.3 (1958).

6. *Id.* at 217 n.4.

7. *E.g.*, Mass. Ann. Laws ch. 90, § 34A-J; ch. 175 § 113A-G (1946).

8. *E.g.*, Conn. Pub. Act ch. 183 (1925).

9. See Ward, *supra* note 5, at 218, n.8 for a complete alphabetical list of citations to state statutes to which add Alaska Com. Laws Ann. ch. 8, §§ 50-8-1 through 50-8-65 (Cum. Supp. 1959).

10. See Ward, *"The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity."* 9 Buffalo L. Rev. 283, 296-306 (1959) for problems in Canadian Provinces, England, France, Switzerland, Australia, Japan and New Zealand.

11. *E.g.*, Massachusetts (Mass. Ann. Laws ch. 90, § 113A-G (1946)); New York (N.Y. Vehicle and Traffic Law §§ 93-93K (now §§ 310-21)).

12. *E.g.*, North Dakota (N.D. Cent. Code §§ 39-1701-10 (Supp. 1957)); New Jersey (N.J. Rev. Stat. § 3A: 6-61-91 (Supp. 1958)); and Maryland (Md. Ann. Code art. 66½, §§ 150-79 (1957)).

13. *E.g.*, N.H. Rev. Stat. Ann. § 268:15 (1957); Va. Code Ann. §§ 38.1-381 (Supp. 1964); Cal. Ins. Code § 11580.2 (Deering 1963) (Unique in that insurer and insured may contract to waive coverage from uninsured. See Cal. Ins. Code § 11580.2(a) (Deering 1963)).

14. N.Y. State Leg. Doc. (1957) no. 1; and N.Y. State Leg. Doc. (1958) no. 6.

15. N.Y. State Leg. Doc. (1957) no. 36.

16. N.Y. Vehicle and Traffic Law §§ 93-93K (now §§ 310-21).

17. N.Y. Ins. Law §§ 167(2-a), 183(1)(f), 600-26; N.Y. Vehicle and Traffic Law §§ 93(f), 93(h)(11). (12) (now §§ 316, 318).

18. Matter of Kaiser, 35 Misc. 2d 636, 231 N.Y.S.2d 178 (Sup. Ct. 1962) (MVAIC coverage existed where driver was insured but insurer denied coverage); *but see*, Uline v.

was to afford to the injured victim the same protection as he would have had if he were hit by a tortfeasor covered by the minimum statutory liability policy of 10,000 dollars for injury or death to one person and 20,000 dollars for injury or death to all persons involved in a single accident.[20] The statute was held constitutional.[21]

Unlike any other jurisdiction, New York invoked two separate procedures for two distinct classes of MVAIC claimants.[22] In all cases, claimant must establish the occurrence of negligently caused[23] physical contact with an uninsured vehicle or hit and run vehicle as a condition precedent to his claim against MVAIC.[24] One class, "Insured"[25] claimants, either own a vehicle liability policy or are covered by another's "omnibus clause."[26] Their rights flow from the MVAIC endorsement, drafted by the corporation and approved by the Superintendent of Insurance, which is attached to every vehicle liability policy issued within the state.[27] "Insured" claimants, if unable to settle with the corporation, have recourse only to an arbitration proceeding[28] where they must prove liability and damages.[29] A second class of claimants are termed "qualified."[30] These are persons who do not have automobile liability insurance of

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Motor Vehicle Acc. Indemnification Corp., 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961) (No MVAIC coverage existed where insurer did not deny coverage but later became defunct and unable to satisfy claim covered by the policy).

19. N.Y. Ins. Law § 600(2).

20. See N.Y. Legis. Annual 1958, pp. 244, 299, 436, 473; N.Y. Ins. Law § 600 (Declaration of legislative purpose); McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38, 224 N.Y.S.2d 909, 916 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *supra* note 4, at 239.

21. Hellem v. Motor Vehicle Acc. Indemnification Corp., 18 Misc. 2d 901, 166 N.E.2d 192, 194 N.Y.S.2d 59 (Sup. Ct. 1959) (without discussion held the Motor Vehicle Accident Indemnity Corporation Law (N.Y. Sess. Laws 1958, ch. 759) to be constitutional).

22. N.Y. Ins. Law §§ 167(2-a), 601(1).

23. Motor Vehicle Acc. Indemnification Corp. v. Brinson, 18 A.D.2d 809, 236 N.Y.S.2d 567 (2d Dep't 1963); McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 224 N.Y.S.2d 909 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963) (In no case is MVAIC responsible for intentional vehicular assaults).

24. Motor Vehicle Acc. Indemnification Corp. v. Lupo, 18 A.D.2d 717, 236 N.Y.S.2d 464 (2d Dep't 1962), *motion for leave to appeal denied*, 13 N.Y.2d 756, 192 N.E.2d 28, 242 N.Y.S.2d 60 (1963); Motor Vehicle Acc. Indemnification Corp. v. Harrington, 39 Misc. 2d 79, 239 N.Y.S.2d 934 (Sup. Ct. 1963); Bellavia v. Motor Vehicle Acc. Indemnification Corp., 28 Misc. 2d 420, 211 N.Y.S.2d 356 (Sup. Ct. 1961) (Petitioner denied recovery from MVAIC when struck by a parked car shoved onto the sidewalk by a hit and run vehicle; no actual contact with uninsured vehicle).

25. N.Y. Ins. Law § 601(i).

26. White v. Motor Vehicle Acc. Indemnification Corp., 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Supp. Ct. 1963); Marbly v. Motor Vehicle Acc. Indemnification Corp., 40 Misc. 2d 973, 244 N.Y.S.2d 92 (Sup. Ct. 1963). See Nyman v. Montelone-Iberville Garage, Inc., 211 La. 375, 380, 30 So.2d 123, 125 (1947). "Omnibus clause" of an automobile liability policy is for the purpose of giving additional insureds other than persons named in the policy the benefit of coverage under the policy.

27. N.Y. Ins. Law § 167(2-a).

28. Rosenbaum v. American Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

29. N.Y. Ins. Law § 617; Rosenbaum v. American Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962) (Petitioner by agreement to the terms of the endorsement limits the terms of arbitration to those prescribed in the endorsement (*i.e.*, damage and fault)); 15 Buffalo L. Rev. 228 (1965).

30. N.Y. Ins. Law § 601(b).

any kind and whose claim against MVAIC will never reach an arbitrator but must be decided in court.[31] The "qualified" claimant's rights flow from the statute[32] rather than the uninsured motorist endorsement. A pedestrian who is not "insured" and is struck by a hit and run driver is entitled to recovery as a "qualified" claimant.[33] Awards made to "qualified" claimants do not call for the reduction of the award by workmen's compensation[34] whereas MVAIC awards to "insured" claimants are so reduced pursuant to the Insurance Commissioner's regulations.[35] When faced with such ostensible discrimination the courts have held that legislatures need not achieve "abstract symmetry" in their treatment of two distinct classes of claimants to assure both equal protection under the law.[36] It is only necessary that such classifications be reasonable and based upon some real and substantial distinction.[37] Here the distinction seems clear. The purpose of the uninsured motorist endorsement is to protect compulsory vehicle insurance owners, their families and guests via a self insurance contract for which legal consideration has been paid. The purpose of the statutory scheme, however, is to protect non-car owning families[38] who have no contract for such self insurance but are gratuitous donees of our automobile society. Where a compulsory uninsured motorist endorsement exists, legislatures have not set out just what the endorsement should contain but have left the Insurance Commissioner with broad legislative guidelines.[39] Such a practice appears to be common procedure for drafting insurance policy endorsements.[40] This custom, coupled with amendments to the original California[41] and South Carolina[42] statutes calling for the deduction of workmen's compensation, seems to indicate the acceptance of such a deduction in this form of endorsement. It should be pointed out that the Workmen's Compensation Law does not prohibit

31. Moore v. Motor Vehicle Acc. Indemnification Corp., 18 A.D.2d 1006, 238 N.Y.S.2d 616 (2d Dep't 1963).

32. N.Y. Ins. Law §§ 600-26.

33. N.Y. Ins. Law § 601(b); also see McNair v. Motor Vehicle Acc. Indemnification Corp., 13 A.D.2d 339, 216 N.Y.S.2d 840 (1st Dep't 1961), *aff'd*, 11 N.Y.2d 701, 180 N.E.2d 919, 225 N.Y.S.2d 767 (1962) (Where the pedestrian is the owner of an uninsured vehicle he may be a "qualified" claimant).

34. N.Y. Ins. Law §§ 601(b), 610.

35. See note 2 *supra*.

36. See Patsone v. Pennsylvania, 232 U.S. 138, 144 (1914); People v. Friedman, 302 N.Y. 75, 80, 96 N.E.2d 184, 186 (1950).

37. See Truax v. Corrigan, 257 U.S. 312, 317 (1921); Four Maple Drive Realty Corp. v. Abrams, 2 A.D.2d 753, 755, 153 N.Y.S.2d 747, 751 (2d Dep't 1956).

38. McKinney's N.Y. Sess. Laws 1962, p. 1530; N.Y. Ins. Law §§ 167(2-a), 608.

39. See, *e.g.*, Fla. Stat. Ann. § 627.0857 (1960); Ill. Ann. Stat. ch. 73, § 755(a) (Smith-Hurd 1965); La. Rev. Stat. § 22:1406D (Supp. 1964); N.H. Rev. Stat. Ann. § 736.317 (1964); S.C. Code Ann. § 46-750.11 (1962).

40. See, *e.g.*, Red Hook Cold Storage Co. v. Department of Labor, 295 N.Y. 1, 64 N.E.2d 265 (1945); Marburg v. Cole, 286 N.Y. 202, 212, 36 N.E.2d 113, 117 (1941); Darweger v. Staats, 267 N.Y. 290, 306, 196 N.E. 61, 66 (1935).

41. See 1959 Cal. Stats., ch. 817, § 1, p. 2835 (no language permitting the deduction of workmen's compensation); 35 Ops. A.G. Cal. 71, 75-76 (1960) (1959 statute could properly call for workmen's compensation deduction); 1961 Cal. Stats., ch. 1189, § 2, p. 2921 [expressly providing for the deduction of workmen's compensation (*cf.*, Cal. Ins. Code § 1158.2(2g))].

42. See S.C. Code Ann. § 46-750.33(9) (1963) (express provision for the deduction of workmen's compensation where a similar 1959 statute made no mention of the deduction).

the MVAIC endorsement from calling for the deduction of workmen's compensation payments. Nor does the fact that the compensation carrier is entitled to a lien, to the extent of previous compensation payments on proceeds accruing to the claimant from a third party tortfeasor[43] affect "insured" petitioner's recovery from MVAIC. Since the Workmen's Compensation Law[44] speaks of a lien against a third party tortfeasor[45] MVAIC is not subject to such a lien. The relation between an "insured" claimant and MVAIC is not one of victim and tortfeasor but one of insured and insurer.[46] The claim of "insured" is one based on an insurance contract and not a tort.[47] This accounts for the fact that a six year statute of limitations, applicable to contract actions, and not a three year statute of limitations, as found in tort actions, has been applied in certain cases involving the MVAIC endorsement.[48] The fact that the workmen's compensation carrier is not reimbursed for its original outlay from the benefits of claimant's self insurance is neither in violation of the New York Workmen's Compensation Law[49] or the case law.[50] The problem remains that where petitioner is an "insured," his recovery is limited to 10,000 dollars less the workmen's compensation award he previously received. However, where the claimant is deemed "qualified" his recovery seems to be expanded. The "qualified" claimant is entitled to the compensation award and the MVAIC award without the reduction.[51] Thus it would appear that the "qualified" claimant is entitled to greater compensation than one who has contracted for the same protection. The equalizing factor may lie in the proposition that the immunity of the "insured" claimant's MVAIC award from a third party workmen's compensation

43. N.Y. Workmen's Comp. Law § 29(1).

44. N.Y. Workmen's Comp. Law § 29(1),(2).

45. N.Y. Workmen's Comp. Law § 29(1), "If an employee . . . be injured . . . by *another* not in the same employ, such injured employee . . . need not elect whether to take compensation . . . or to pursue his remedy against such *other* but may take such compensation . . . and . . . pursue his remedy against such *other* subject to . . . this Chapter. . . . [I]n such case, the state insurance fund, . . . or insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of any recovery from such *other* . . . ." (Emphasis added).

46. See Commissioner of State Ins. Fund v. Miller, 4 A.D.2d 481, 482, 166 N.Y.S.2d 777, 779 (1st Dep't 1957); Meil v. Syracuse Constr. Inc., 42 Misc. 2d 39, 45, 247 N.Y.S.2d 541, 545 (Sup. Ct. 1964).

47. Commissioner of State Ins. Fund v. Miller, 4 A.D.2d 481, 482, 166 N.Y.S.2d 777, 779 (1st Dep't 1957): "Defendant's insurer cannot, however, be deemed the *alter ego* of the tort-feasor. It does not insure the tort-feasor against liability; it insures its policyholder against the risk of inadequate compensation for his compensable injuries. Its liability to defendant is contractual, although premised in part upon the contingency of a third party's tort liability."

48. McGuinness v. Motor Vehicle Acc. Indemnification Corp., 40 Misc. 2d 775, 243 N.Y.S.2d 764 (Sup. Ct. 1963).

49. See, N.Y. Workmen's Comp. Law §§ 29(1),(2) (workmen's compensation reimbursed from tortfeasor only); N.Y. Workmen's Comp. Law § 30.

50. Commissioner of State Ins. Fund v. Miller, 4 A.D.2d 481, 166 N.Y.S.2d 777 (1st Dep't 1957); Pilger v. County of Westchester, 284 App. Div. 242, 131 N.Y.S.2d 795 (3d Dep't 1954), *appeal denied*, 284 App. Div. 855, 134 N.Y.S.2d 175 (3d Dep't 1954), *aff'd*, 308 N.Y. 1014, 127 N.E.2d 858 (1955).

51. N.Y. Ins. Law §§ 601(b), 610.

lien flows from a contractual relationship between the "insured" and MVAIC.[52] In the case of a qualified claimant, the contractual relationship of insured and insurer is non-existent and therefore the MVAIC award receives no immunity from a lien effectuated by the compensation carrier. Thus the "qualified" claimant's award from MVAIC would be reduced by the compensation lien[53] and claimant would not reap the harvest of a double recovery.[54]

In the instant case the Court found petitioner was an "insured" claimant under his employer's motor vehicle liability policy which contained a MVAIC endorsement pursuant to New York Insurance Law section 167(2-a). The Court further found this section gives the MVAIC board of directors authority to prescribe conditions of coverage under the uninsured motorist endorsement, *i.e.*, reduction of the award by previous compensation payments, where such conditions are approved by the Superintendent of Insurance and not contrary to legislative intent. The ramifications of these findings are that the portion of the endorsement calling for the reduction of the MVAIC award by any compensation award received by "insured" was a valid exercise of administrative power and not contrary to legislative intent or purpose. The "insured" claimant has contracted for, be it voluntary or involuntary, protection involving both arbitration and a workmen's compensation deduction. The fact that the statutory method of recompensing the "qualified" claimant contains neither should in no way invalidate the "insured" claimant's contract. The Court seems to say that the "insured" claimant in accepting and entering into the insurance contract became subject to the rights (reimbursement for certain injuries) and conditions (arbitration and the deduction of workmen's compensation from the final award) of that contract. "Insured" thus has no justification in now denying the terms of the contract to which he subscribed or to which another subscribed for his protection. Nor can "insured" equate himself with the "qualified" claimant who neither contracts for protection nor finds protection within the boundaries of another's insurance contract. The distinction between the two classes is clear and neither the legislature nor MVAIC is obligated to treat both classes of claimants on a par. The Court concluded that the "insured" was entitled to the 10,000 dollars found by the arbitrator less the previous workmen's compensation award he had received.[55]

The purpose of MVAIC law is to afford innocent victims of uninsured or hit and run vehicles the same protection as if the wrongdoer were covered by

52. Commissioner of State Ins. Fund v. Miller, 4 A.D.2d 481, 482, 166 N.Y.S.2d 777, 779 (1st Dep't 1957).

53. N.Y. Workmen's Comp. Law § 29(1).

54. Note, if the courts refused to levy the third party compensation lien on the "qualified" claimant's MVAIC award the "qualified" claimant's "in pocket" cash award would be greatly increased (*i.e.*, see chart II where award would almost double) thus manifesting a serious inequality.

55. Instant case at 411, 207 N.E.2d at 600, 260 N.Y.S.2d at 2 (Claimant was also awarded interest from the date of the award under sections 480 and 1464 of the New York CPA (present N.Y. CPLR §§ 5002 and 8101 respectively)); also see Matter of East India Trading Co., 280 App. Div. 420, 114 N.Y.S.2d 93 (1st Dep't 1952), *aff'd*, 305 N.Y. 866, 114 N.E.2d 213 (1953).

a compulsory 10,000 dollar vehicle liability policy.[56] If this is so, it would seem that the Court should have looked directly to the statutory purpose in determining whether the rider attached to New York State vehicle liability policies achieved such a purpose. To ascertain whether the legislative purpose is in reality achieved two charts are presented within the text. The first, chart I, demonstrates the cash flow of monies accruing to three distinct classes of victims and the compensation carrier[57] through suit or settlement involving MVAIC in two instances and an insured tortfeasor in the third. It should be noted in chart I that the contingent fee for an attorney's services is not reflected. The second chart, chart II, demonstrates the same cash flow as chart I except that in chart II an attorney's services are procured by the victim under a one-third contingency fee contract. The facts surrounding the accidents giving rise to the MVAIC award or court judgment reflected in charts I and II are as follows: Column 1 represents the facts in the instant case. Column 2 represents a "qualified" claimant injured while a pedestrian on his job and through the negligence of an uninsured driver. Column 3 represents the normal plaintiff injured on the job and suing the insured tortfeasor.

In chart I the injured parties, final cash recovery is not affected by whether the compensation award is applied as a limitation of recovery[58] as in the case of "insured" or is returned to the compensation carrier via a third party compensation lien.[59] In either case the "insured" claimant, the "qualified" claimant and the normal plaintiff receive the same "in pocket" cash award.[60] Therefore where restitution is made to each party without an attorney the purpose of MVAIC law is satisfied.[61] However in Chart II the equalities in form seen in chart I become inequalities in substance where an attorney's services become necessary.

In chart II the fact that the compensation award is immediately deducted

56. N.Y. Legis. Annual, 1958 pp. 244, 299, 436, 473; N.Y. Ins. Law § 600 (legislative declaration of purpose); McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38, 224 N.Y.S.2d 909, 916 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 Buffalo L. Rev. 215, 239 (1958).

57. N.Y. Workmen's Comp. Law § 29(1),(2); Moeller v. Associated Hosp. Serv. of Capital Dist., 304 N.Y. 73, 106 N.E.2d 16 (1952). See charts I and II, row F.

58. Note: the compensation award is deducted in computing "insured" claimant's total cash award from MVAIC. The actual MVAIC award equals "insured" claimant's physical injuries, not in excess of $10,000, less previous compensation payments accruing to "insured" from the same accident. The deduction of the compensation award by MVAIC is merely a paper computation and MVAIC does not reimburse workmen's compensation to the extent of such deduction.

59. N.Y. Workmen's Comp. Law § 29(1),(2); Moeller v. Associated Hosp. Serv. of Capital Dist., 304 N.Y. 73, 106 N.E.2d 16 (1952). See charts I and II, row F.

60. See footnotes 50-54 *supra*, and text therein.

61. See N.Y. Legis. Annual 1958, pp. 244, 299, 436, 473; N.Y. Ins. Law § 600 (legislative declaration of purpose); McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38, 224 N.Y.S.2d 909, 916 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *supra* note 56 (*i.e.*, purpose to treat claimants the same as if injured by an insured tortfeasor covered by the minimum statutory $10,000/$20,000 vehicle liability policy.).

CHART I
No Attorney Required

| | "Insured" | "Qualified" | Plaintiff v. Insured Tortfeasor |
|---|---|---|---|
| A | $10,000 | $10,000 | $10,000 |
| B | ( 6,700) | not applicable | not applicable |
| C | $ 3,300 | $10,000 | $10,000 |
| D | not applicable | not applicable | not applicable |
| E | $ 3,300 | $10,000 | $10,000 |
| F | not applicable | ( 6,700) | ( 6,700) |
| G | $ 3,300 | $ 3,300 | $ 3,300 |
| Cash Award from: | | | |
| 1. Tortfeasor | $ 3,300 | $ 3,300 | $ 3,300 |
| 2. MVAIC | | | |
| 3. Workmen's Compensation | 6,700 | 6,700 | 6,700 |
| Total | $10,000 | $10,000 | $10,000 |

CHART II
Attorney's Services Required

| | "Insured" | "Qualified" | Plaintiff v. Insured Tortfeasor |
|---|---|---|---|
| A | $10,000 | $10,000 | $10,000 |
| B | ( 6,700) | not applicable | not applicable |
| C | $ 3,300 | $10,000 | $10,000 |
| D | ( 1,100) | ( 3,333)* | ( 3,333)* |
| E | $ 2,200 | $ 6,667 | $ 6,667 |
| F | not applicable | ( 6,700) | ( 6,700) |
| G | $ 2,200 | $ 0 | $ 0 |
| Actual cash award from: | | | |
| 1. Tortfeasor | $ 2,200 | $ 0 | $ 0 |
| 2. MVAIC | | | |
| 3. Workmen's Compensation | 6,700 | 6,700 | 6,700 |
| Total | $ 8,900 | $ 6,700 | $ 6,700 |

* Rounded to the nearest dollar.

KEY TO CHARTS I AND II:

The key to charts I and II is presented below.

(A) Represents the amount of the judgment or MVAIC award prior to any deductions or limitations.

(B) Represents the amount of the previous compensation award received by "insured" and deducted from his maximum MVAIC award pursuant to the uninsured drivers endorsement called for in Section 167 (2-a) of the New York Insurance Law.

(C) Represents the cash award from MVAIC or the insured tortfeasor. This is the amount from which the attorney's one-third contingency fee will be determined.

(D) Represents the amount of the attorney's one-third contingency fee.

(E) Represents the amount of the MVAIC award or judgment from the insured tortfeasor on which the compensation carrier can levy a third party lien to the extent of its previous compensation payments. (See New York Workmen's Compensation Law section 29(1) and (2))

(F) Represents the compensation carrier's lien pursuant to section 29 (1) and (2) of the New York Workmen's Compensation Law.

(G) Represents the total "in pocket" cash award accruing to "insured" claimant, to "qualified" claimant and to the normal plaintiff.

from the "insured" claimant's MVAIC award[62] before claimant's attorney can effectuate a lien[63] on his one-third interest gives "insured" a financial edge over the "qualified" claimant and normal plaintiff where similar awards or judgments are received by each. In the case of the "qualified" claimant and normal plaintiff the interest of the compensation carrier is subordinate to[64] the lien of the attorney.[65] That is, the attorney would receive approximately 3,333 dollars plus expenses following a 10,000 dollar award before the compensation carrier could levy his lien on the proceeds.[66] In the case of the "insured" claimant, the attorney would have a one-third contractual interest in the net MVAIC award, 10,000 dollars less the previous compensation award, or 1,100 dollars. Consequently at least two and possibly three inequalities which are subtle in form (*i.e.*, chart I) become real in substance (*i.e.*, chart II). A basic inequality exists in that workmen's compensation is never reimbursed for its previous award to an "insured" claimant. The second inequality is that the fee received by the attorney for the "qualified" claimant and the normal plaintiff is greater than that received by the "insured" claimant's attorney. The third inequality is that the "insured" claimant's final "in pocket" cash award exceeds that of the "qualified" claimant and normal plaintiff. The first inequality, common to both charts I and II, arises from the failure of the compensation carrier to be reimbursed for its previous award to an "insured" claimant. Since MVAIC does not return to the compensation carrier the amount of the workmen's compensation benefits it deducted from the "insured" claimant's MVAIC award, and the "insured" is protected by a contractual immunity from a third party compensation lien,[67] the compensation carrier is left without a means of recovery. This first inequality may be justified since "insured's" recovery is from his own insurance carrier and the result of his own payments. The "qualified" claimant or normal plaintiff, on the other hand, are not recovering from an insurance carrier with which they themselves, or someone else for their benefit, contracted for their protection. Rather they are recovering from either the insured tortfeasor or MVAIC, who chooses to stand in the shoes of a tortfeasor. The second inequality is the difference in fees flowing to the "insured" claimant's attorney[68] and that received by the attorney representing the "qualified" claimant and normal plaintiff.[69] This might induce the attorney to choose either a "qualified" claimant or normal plaintiff over an "insured" claimant in

62. See chart II row B.
63. See chart II row D.
64. See chart II row F.
65. Jackson v. City of New York, 182 Misc. 686, 45 N.Y.S.2d 505 (Sup. Ct. 1943). See chart II row D.
66. Sarancza v. Roberts & Grancelli Inc., 41 Misc. 2d 415, 245 N.Y.S.2d 403 (Sup. Ct. 1963); Matter of Applebaum, 180 Misc. 881, 41 N.Y.S.2d 227 (Surr. Ct. 1943); chart II row F.
67. See text following footnote 45 up to and including footnote 48 for discussion on the contractual immunity of "insured" claimant's MVAIC award from a third party compensation lien.
68. See chart II, col. 1, row D.
69. See chart II, cols. 2 and 3, row D.

order to increase his own monetary return. In practice however this seems doubtful. This inequality is offset by the fact that "insured" claimant's attorney need only face an arbitration proceeding[70] whereas the attorney for the "qualified" claimant or normal plaintiff may face an expensive and lengthy courtroom trial. The third inequality is that "insured" claimant's actual "in pocket" cash recovery[71] exceeds the "in pocket" cash recovery of both the "qualified" claimant and the normal plaintiff.[72] This results from the fact that the previous workmen's compensation benefit is deducted from the "insured" claimant's MVAIC award thus reducing the actual cash award upon which the attorney can levy his one-third contingency fee. In the case of the "qualified" claimant and the normal plaintiff the compensation lien[73] is subordinate to the lien of the client's attorney.[74] The inequality is justified by the fact that "insured" has given legal consideration, via additional premiums, for self insurance, be it voluntary or involuntary, against injury from an uninsured or hit and run vehicle. That is to say the "insured" claimant has paid his own way and is entitled to the slight excess he receives over the "qualified" claimant or normal plaintiff. The "qualified" claimant has paid nothing for this additional coverage and is no more than a gratuitous donee of an affluent automobile society. The normal plaintiff, on the other hand, is not recovering from MVAIC but rather from an insured tortfeasor. He sets the standard which the statute strives to achieve.[75] As to this normal plaintiff the inequalities are often outweighed by his chance to recover property damages[76] and a possible chance for reimbursement in excess of 10,000 dollars from the tortfeasor himself. Again the "insured" claimant seems entitled to his financial edge since he himself and not the tortfeasor has funded the insurance carrier from which his recovery flows. The possibility of any harm accruing from this last inequality seems slight. The probability of a knowledgeable victim of an automobile accident failing to pursue a known insured tortfeasor where workmen's compensation is involved and instead fraudulently claiming to have been injured by a hit and run vehicle to increase his own award is almost too remote to conceive. Since the above inequalities arise only when workmen's compensation is present and since the inequalities are jutifiable and will be reduced in direct relation to a reduction in the amount of the compensation award,[77] a conclusion that the legislative

70. Matter of Rosenbaum (American Sur. Co., N.Y.), 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962).

71. See chart II, col. 1, row G.

72. See chart II, cols. 2 and 3, row G.

73. See chart II, row F.

74. See chart II, row D; Jackson v. City of New York, 182 Misc. 686, 45 N.Y.S.2d 505 (Sup. Ct. 1943).

75. See N.Y. Legis. Annual 1958, pp. 244, 299, 436, 473; N.Y. Ins. Law § 600; McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38, 224 N.Y.S.2d 909, 916 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *supra* at note 56.

76. N.Y. Ins. Law §§ 600, 167(2-a) do not allow recovery for property damage.

77. Note: where the workmen's compensation award is reduced from $4,000 to $2,000 (assuming equal awards and judgments of $10,000 for "insured," "qualified," and normal

purpose appears fulfilled by the endorsement requiring the deduction of the workmen's compensation benefits from "insured's" MVAIC award seems sound.

If the validity of this clause of the New York uninsured drivers endorsement should be challenged again in the future it would seem that the court might do well to justify its decision on the purpose of the MVAIC law[78] rather than the fact that the Commissioner of Insurance has the authority to call for such a clause and that therefore the clause is not contrary to legislative intent. That is to say reflection on the end result of such a clause as well as on the means of reaching such an end might cast a greater light on the numerous shadows presently surrounding MVAIC law.

Although the Court could not hold otherwise[79] in the instant case, in the light of present statutory and case law in this field a legislative amendment to the current New York Workmen's Compensation Law[80] might give the courts the impetus to break the shield of contractual immunity surrounding the "insured" claimant's recovery and thus completely eliminate any inequalities which tend to reduce the effectiveness of the statute[81] in achieving the legislative purpose of MVAIC law.[82] An amendment to the New York Workmen's Compensation Law section 29(1) expressly granting to compensation carriers the authority to exercise a lien on the proceeds of any judgment or award accruing from MVAIC to the extent of a prior compensation award arising from the same accident would serve such a purpose. Since the presence of such a lien would negate the possibility of "insured" reaping the benefit of a double recovery (*i.e.*, once from the compensation carrier and once from MVAIC) the amendment would dissolve the reasoning behind and the need for the clause in the present MVAIC endorsement calling for the paper deduction of any prior compensation award to "insured" in determining the "insured" claimant's maximum MVAIC award. Such an amendment coupled with a fixed schedule

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plaintiff) the difference between the final "in pocket" cash recovery of "insured" and that of the "qualified" claimant or normal plaintiff is cut in half. The difference in the amounts received by the different attorneys is likewise reduced.

78. N.Y. Legis. Annual 1958, pp. 244, 299, 436, 473; N.Y. Ins. Law § 600; McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38, 224 N.Y.S.2d 909, 916 (4th Dep't 1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *supra* note 56.

79. Note, to hold otherwise, *i.e.*, that the clause calling for the deduction of workmen's compensation is contrary to legislative intent, would not serve to bring the endorsement in line with the legislative intent by eliminating any slight inequality existing in the case of "insured"; but tend to increase the difference now existing between the "insured's" award and that of the "qualified" claimant and normal plaintiff. Rather the "insured" would recover both the MVAIC award and the compensation award and thus reap the double harvest. Even if the court could find that "insured" claimant's contract, being involuntary in nature, did not create a contractual immunity from a third party compensation lien they would still have to set aside the specific statutory language of § 29(1) of New York's Workmen's Compensation Law in order to allow workmen's compensation to effectuate its lien on "insured's" award to prevent any great inequity from arising.

80. N.Y. Workmen's Comp. Law § 29(1).

81. N.Y. Ins. Law § 167(2-a).

82. N.Y. Legis. Annual 1958, pp. 244, 299, 436, 473; N.Y. Ins. Law § 600; McCarthy v. Motor Vehicle Acc. Indemnification Corp., 16 A.D.2d 35, 38 224 N.Y.S.2d 909, 916 (4th Dept' 1962), *aff'd*, 12 N.Y.2d 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963); Ward, *supra* note 56.

of attorney fees, where as in the case of "insured" arbitration rather than trial is the mode of recovery, would tend to bring the MVAIC law directly in line with the legislative intent that motivated its creation. A fixed fee schedule would return less than the customary 33 1/3 per cent to the attorney whose services were required for arbitration but could be computed in such a way as to fairly compensate him for the time involved in such a proceeding. That such an amendment would eliminate the inequalities now present in the MVAIC law and the need for complex reasoning to offset them is without question. The only factor mitigating against such an amendment is the increased cost to MVAIC which would result if MVAIC were required to reimburse the compensation carrier for its prior award to claimant. Such an increase in cost, although eventually passed on to the liability insurance policy holder, in the form of increased premiums, would seem a small price to pay considering the limited claims against MVAIC involving workmen's compensation, when balanced against the reduction in the cost of funding workmen's compensation and the improvements in the operational ease of MVAIC law.

FREDERICK A. WOLF

LABOR LAW—WHERE DISPUTING GENERAL CONTRACTOR AT COMMON SITUS IN CONSTRUCTION INDUSTRY RESERVES GATE FOR EXCLUSIVE USE OF HIS EMPLOYEES, UNION MAY PICKET THAT GATE ONLY.

Markwell & Hartz, Inc. (hereinafter designated as M & H) was the general contractor on a project being conducted for and on the premises of the East Jefferson Water Works, of Jefferson Parish, Louisiana. As general contractor M & H subcontracted the work which it decided not to perform itself. Consequently, all electrical work was awarded to subcontractor Barnes, while all the pile-driving operations were awarded to subcontractor Binnings. M & H was involved in a labor dispute with the Building and Construction Trades Council of New Orleans, AFL-CIO (hereinafter designated Respondent). Both subcontractors employed members of craft unions affiliated with Respondent. The premises of the Water Works were completely surrounded by a chain-link fence, so that all ingoing and outgoing traffic had to pass through the four gates provided. Two of the gates (hereinafter designated as A and B), were located on the northern boundary of the Works and the remaining two (hereinafter designated as C and D), were located on the eastern boundary of the premises. Respondent union commenced picketing all four gates during normal working hours, bearing signs informing the public and those persons who used the