Bill as Introduced

SB 459 - AS INTRODUCED

2000 SESSION

00-2787.0
05/10

SENATE BILL *459*

AN ACT relative to underinsured motorists.

SPONSORS: Sen. Russman, Dist 19; Rep. Craig, Hills 38; Rep. Konys, Hills 33; Rep. Bradley Carr 8

COMMITTEE: Insurance

ANALYSIS

This bill requires that automobile insurers denying underinsured coverage to an insured motorist for accepting a settlement offer from a negligent driver defendant's insurance company without obtaining its written consent first must prove negligence on the part of the insured for failing to do so, and that such failure has prejudiced the insurer.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 459 - AS INTRODUCED

00-2787 0
05/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand

AN ACT relative to underinsured motorists.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Uninsured or Hit and Run Motor Vehicle Coverage; Settlement Offers. Amend RSA 264:15, I to read as follows:

I. No policy shall be issued under the provisions of RSA 264:14, with respect to a vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto at least in amounts or limits prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and run vehicles because of bodily injury, sickness or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, ~~[his]~~ ***the*** uninsured motorist coverage shall automatically be equal to the liability coverage elected. For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61, shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage. ***An automobile insurance company may deny to its own insured the underinsured motorist insurance coverage which he or she has paid for in respect to bodily injury or death if, and only if, the insurer can prove, by a preponderance of the evidence, that its insured (1) negligently failed to obtain its written consent to any settlement with the negligent driver defendant's insurance company for full policy limits, and (2) such failure has resulted in prejudice to the underinsured motorist insurance company, in that an otherwise viable opportunity to recover anything paid to its own insured by way of underinsured motorist insurance benefits might reasonably have been obtained in a subrogation claim against the negligent driver defendant from his, her, or its personal assets.***

2 Effective Date. This act shall take effect 60 days after its passage.

Committee Minutes

Date: **March 21, 2000**
Time: **11:18 a.m.**
Room: **103 - State House**

The Senate Committee on **Insurance** held a hearing on the following:

SB 459 **(New Title) relative to uninsured or underinsured motorist insurance coverage.**

Members of Committee present:

Senator Wheeler
Senator Francoeur
Senator Eaton
Senator Fraser
Sen. J. King
Sen. McCarley
Senator Squires

The Chair, **Senator Katie Wheeler,** opened the hearing by calling on one of the co-sponsors of the bill, Representative Craig, as the first speaker.

Representative James Craig, District 38: If you wouldn't mind, Senator, I would like to defer to **Attorney Nixon** to introduce the bill.

Attorney David Nixon, Bow, NH: I drafted this bill and asked **Senator Russman** to sponsor it if he would – which he was kind enough to do.

If you go home tonight and read your automobile insurance policy.... *(tape malfunction)*.....or, an insured motorist with lower limits than you have elected to purchase, then you would have the right to proceed against your own insurance company to whom you have paid your premiums for fair and reasonable compensation under **New Hampshire** law – to the extent that your injuries or that of any member of your family exceed the limits of the

driver who wrongly caused the injuries - in the case of the driver who had insurance. Or, all the way with your own insurance company through an arbitration procedure if that driver had no insurance. That's what **New Hampshire** law has been dating back to, I believe, the 50's.

In **1969**, the law was amended to give you the right to elect to buy uninsured motorist insurance to the same limits as you elected to buy liability insurance for purposes of protecting others.

In **1981**, it was amended again to automatically provide that if you bought, for instance....and, I always recommend that people have no less than **$250,000** per personal liability insurance. You would automatically have **$250,000** of uninsured/underinsured motorist insurance to protect you and your own family against the uninsured or the under insured driver.

That's the law at present.

The law at present also provides – in your policy, that if you have a chance to resolve your claims or that of your family member against an under insured motorist – one who has lower limits than you have elected to purchase, before doing so, you must obtain a written consent of your own insurance company or you will automatically forfeit your rights against your own insurance company – in total.

The rationale of that required advanced written consent provision is generally a good one. If you release the underlying negligent, uninsured or underinsured motorist, then in that case, you will forfeit – without the written consent – the right of your own insurance company to get back from the wrongdoer out of his/her personal assets, what it paid to you under its subrogation rights. When you resolve your claims with your own insurance company, you assign to them the right to (in effect) go after the wrongdoer and get any money back they possibly could.

That's a good provision. The problem is that the law as it now is written, requires that advanced written consent – whether or not that underlying underinsured motorist had any assets at all. Now, the reason for this amendment is to insure that as to your own insurance company, you have the right to collect what is due to you – even if you don't get that advanced written consent. Unless, your insurance company can show that it was prejudiced by virtue of your having released the underlying wrong doers

insurance company for the full policy limits. And, the reason for that is if there is no chance to recover from the personal assets of the uninsured/under insured motorist, then your company has not forfeited anything or lost anything by virtue of your releasing its subrogation rights along with your plate.

This particular provision in the law – unless amended, has resulted, in my observation and that of (I think) any lawyer and every lawyer that has had to do with it, any justice. It results in automobile drivers and insured persons like yourselves being deprived the right to recover fully for their or their families injuries and other losses and damages, because of a written requirement – written consent requirement that's no more or less than a technicality and an obstacle to justice.

What this amendment would do very simply again is require that before your insurance company could deny you the coverage you purchased when you desire to settle with the underinsured wrongdoers insurance policy or its full limits, they would have to show that they were prejudiced by your failure to obtain consent and that you were negligent and not obtainable. In other words, that they were deprived of a right to recover assets.

The fact of the matter is that you don't settle with the wrongdoers' insurance company for the full policy limits if that insured is a million dollar corporation and has plenty of assets or something like that. You pursue the corporation. But, 99 times out of a 100, all the wrongdoers have for assets – out of which to compensate you or your family's injuries or damages, is his liability insurance.

Thus, your motivation is that once that policy is offered, to accept it. I'll bet that there aren't one in a thousand people in **New Hampshire** – except those affiliated with the insurance business, who are aware of the danger they are involved in settling for the full policy that's been offered of the uninsured/underinsured motorist – who wrongly went through the red light, was drunk or whatever, and caused their injuries and damages.

In other words, what this bill tries to do is level the playing field without harm to any insurance company except to the extent that it would have to pay what you had bought and paid for – the limit you had purchased – unless it could show that by releasing the underinsured motorist for the full policy

limit, you have deprived your company of the right to recover back from the wrongdoer, what it pays you or some party under a subrogation.

I have a situation right now involving a state trooper – injured in the course of his employment by a driver while he was attempting to assist a lady on the turnpike. He was just getting out of his car when it was slammed into by a kid from **Massachusetts** – a reckless driver, who had a **$100,000** policy with insurance company (A). At that time, the law in **New Hampshire** – as it is written in statute – provided that if he recovered and received worker's compensation benefits, he would not have the right to pursue his own uninsured motorist insurance as provided by his employer. In this case, that is the **State of New Hampshire.**

He had an insurance policy in the same limit - **$100,000** on his own policy, as that of the defendant. In ordinary circumstances, there would be no uninsured/underinsured motorist insurance claim. He had an opportunity to settle with the wrongdoer for the full policy limits - **$100,000** – and, he exercised it.

At that time, he did not have the right to pursue the additional **$150,000** against his employer – the **State of New Hampshire's** underinsured motorist's insurance policy – because the statute reads that you have no right to pursue your employer or your employer's insurance carrier in a workers' compensation situation – which this was.

Of course, out of the recovery, he obtained from the wrongdoer's insurance policy, he had to pay back pro rata – the workers' compensation insurance company, which paid him workers' comp benefits – the minimum that they pay.

After that happened, and after his settlement with the underlying defendants insurance company, the **New Hampshire Supreme Court** decided the case of **Powell(?)** versus the **Town of Plymouth, March 2, 1999**. That said – for the first time, notwithstanding, the uninsured/underinsured motorist insurance that fellow had with the **State of New Hampshire**, his employer, he could proceed against that policy nonetheless. That opened the door for a recovery against his own insurance company and that is in the works and being negotiated.

However, since he had previously settled for the full policy limits of **$100,000** with the wrongdoers underlying insurance policy, that company – a different company - said, "Nope, you can't recover from us. You did not obtain written consent prior to the settlement you made." That deprives him of a **$100,000** worth of potential recovery. Now, this particular trooper had his back broken in this collision. He has had two surgeries and is disabled for life and will no longer be a trooper. He was an outstanding trooper, by the way. Nobody questions it.

So, in effect, if the insurance company is right – and, under the existing law, he would be deprived of **$100,000** of entitlement for his injuries and damages – including, permanent loss of income, that would otherwise be obtained.

This amendment will not affect his case. However, it will affect cases like that which occur in the future – including cases (God forbid) that you and relatives of yours and friends of yours might be subject to or involved in. In this day and age – with cars going at the rate they're going, it doesn't take that great an impact or collision to disable somebody for life.

The purpose of this bill is just to level the playing field, so that insurers – such as you and me and all of us who drive cars in **New Hampshire** – will have the foresight to buy enough insurance to protect themselves and their families against the catastrophic injuries caused by negligent, uninsured or underinsured motorists, will have the benefit of the protection they purchased and paid for.

Thank you.

Senator Leo W. Fraser, Jr., D. 4: Why do you suppose that condition is written into the uninsured/under insured contract requiring notice before you settle.....

Attorney Nixon: It applies not only to notice, **Leo**, but written consent. The purpose of it is, as I said at the offset, to protect your insurance company in the event that the individual involved – the wrongdoer – has personal assets against which your company can recover back what it pays you out of your policy paid for with it. It's moot. It's – as in **99.9%** occasions – the wrongdoer has no other assets than his liability insurance policy. So, as I say, it's almost invariably an academic question.

Nonetheless, the **Supreme Court** – in its wisdom, has said again and again, that that provision is in the policy and even though your insurance company would not be prejudiced by the lack of written consent, we're going to uphold that provision and deny to you the benefits that you purchased.

Senator Leo W. Fraser, Jr., D. 4: No one in this state knows that coverage better than you do, okay? In all the times that you had notified your clients' carrier about the possibility of (inaudible), requesting consent to allow you to settle with the third party on an uninsured claim, has any company ever refused that?

Attorney Nixon: Well, they have refused it until they have determined – to their own investigation – that the wrongdoing driver has no other assets to speak of than his liability insurance. So, there is a delay sometimes in getting that consent.

Has the consent ever been flatly denied? No, because that would be in violation (I believe) of the law. But, that's the point. That's exactly the point. There's no real necessity for the consent in advance unless the defendant – the wrongdoing driver, has other assets that your company can go after – after it pays me what it agreed to pay me for suing to its policy and my premium.

See, it's only in those rare situations where the wrongdoer has a lot of assets over and above his personal automobile liability insurance company that that prejudice could exist or could result to my company if I didn't get the written consent requested before I settled for the "peanuts" that the underlying driver – usually, a policy of **$20,000** or something like that...

Senator Leo W. Fraser, Jr., D. 4: I guess one of the other things.....One of the reasons that I always thought.....Your client's insurer....It gives them a heads up – a notice, that there is potential claim for uninsured motorist coverage coming down the road. I think that's important – that the carrier...Would you agree with me that this does give your clients' carrier a notice that there could be a potential claim.....

Attorney Nixon: Yes, but that's important, Senator. Only if the wrongdoing driver has assets over and above his policy limits. If you settle with the underlying driver and he has no other assets than his insurance, then

your company is not prejudiced in any way by not having the advanced notice or extending its advanced written consent – as is now required by all of our policies.

The only purpose of that advanced written consent requirement is to protect your company against losing its right to recover back from the wrongdoer – from his personal assets.....

Like I said, this bill was not filed at the request of any organization. This bill was drafted by me.....I mean, in the old days, when we didn't have all this high priced help in the **Senate**, we drafted a lot of our own bills. That's why (maybe) so much bad law was enacted, but I don't know. It seems to me it was simpler in those days.

Senator Leo W. Fraser, Jr., D. 4: I guess I have just one more question.

The sooner that your clients' insurance company knows about a potential uninsured motorist claim, the better off everyone is so far as being able to investigate the proprieties of an additional claim. And, I'm not sure I understand why that language is there. This is only my impression. I'm sorry. I'm starting to make a statement here.

Attorney Nixon: Let me analogize. There's another situation involved where, for instance, you are insured for liability. Somebody gets hurt and allegedly, it's your fault. You are obliged to give your insurance company prompt notice of that potential claim so they can do the investigation.

Yet, on **November 30th, 1999** – in the case of Dover Mills Partnership – the Commercial Union Insurance Company – American Boise Insurance Company(?).....The supreme court held that a delay in notice of 2 years did not defeat the insurer's right to insurance protection unless the insurance company could show that it was prejudiced by the delay. That is to say, that its investigation efforts would be hampered and/or its exposure would be increased – because of the nearly 2 years delay in its being notified or for potential claim or the interim.

It's only in the uninsured/underinsured motorist law situation that the insurance company can deny....your insurance company can deny to you the coverage you've purchased if you hadn't given them advanced written notice and obtained advanced written consent of your proposed settlement

with the underlying wrongdoers minimal limits insurance policy – regardless of whether your company is hurt by that settlement or not.

All this bill would do is say that you still have the same right (insurance company) to deny the coverage if you can show that the consent was not obtained because of negligence and that you – the insurance company – would be hurt or was hurt by the settlement.

What I am saying is that our law should provide for that eventuality. That insurance company should be protected, yes. But, if and only it can show that otherwise it would lose money by not having been asked to give its advanced written consent.

As far as notice goes, all insurance companies – even your own – is aware of the (inaudible) plan at the outset, because there is another provision in your policy – as you know better than I – called, "medical expense reimbursement insurance." You seek – from your own company – the coverage you have purchased in that respect – for the payment of your hospital medical bills which is applicable regardless of fault in the case.

I always advocate to people that I know and I advocate to you that you read the policies and if you don't have liability coverage or at least **$250,000** per person – which means that your uninsured motor protection would be the same.....And, if you don't have medical expense reimbursement of at least **$10,000** if not **$25,000**, you should get it. You can offset any increased premiums fairly well by increasing the deductibles on what I call "junk coverage."

I should say, increase your deductible from **$100** or **$250** up to **$500** or **$1,000**. Increase your comprehensive coverage deductible.....That covers vandalism, theft and so forth.....Increase that from **$100** to **$500** or up to **$1,000**. That's the kind of loss that you can afford to pay, but what you can't afford to pay for is (God forbid) the catastrophic injury situation such as the state trooper that I spoke of earlier.

Senator Gary R. Francoeur, D. 14: Has anything like this legislation been introduced before?

Attorney Nixon: Not to my knowledge, sir. I've been thinking of it for years, but trying to find time to draft this stuff and get up here and cancel

appointments and all that.....I should have done this in **1969** when I introduced the amendment to the law which allows you to purchase uninsured motorist with the same limits as your liability. In those days, a lot of people might purchase **$50,000** or **$100,000** in liability and then automatically – by their insurance agent – begin a **$10,000** or **$20,000** uninsured motorist. That's ridiculous because they're buying insurance to protect others and not getting the insurance to protect themselves.

Then, in 1981, I was a sponsor and draftsman of the amendment which provided that your UN{sic} insurance automatically is at the same limit level as your liability. So, you now automatically.....You buy **$100,000** to protect others. You get **$100,000** to protect yourself.

But, no. I did not – at that time, do this. But, I should have back when I had some influence.

Senator Katherine W. Wheeler, D. 21: We had a bill last year of so called "stacking" bill....That is not this, correct?

Attorney Nixon: No, ma'am. But, that's a good bill, too. What that would have provided would be that if you bought **$100,000** of insurance and you had it on 3 or 4 cars and other members of your family did. Then, if you were hurt, then you could "stack" each of those uninsured motorist coverage's on top of the one that you would get anyhow until all of your damages were compensated. But, that went down in flames.

Senator Katherine W. Wheeler, D. 21: Well, I wanted to say that the committee took a dim view of that bill, so I wanted to make sure that this bill does not have those provisions in it.

Attorney Nixon: No, it doesn't, unfortunately.

Senator Leo W. Fraser, Jr., D. 4: Dave, would you rather have your client come into your office within the first month after he has had a motor vehicle accident versus walking in two years down the road?

Attorney Nixon: I would rather have him come in as soon as possible to determine whether or not he needed.....I just had a lady come in yesterday and I said, "go back to the adjuster and tell him that you've been in to see me and that I think you ought to get (X) than settle for (X) minus (Y), but it

isn't worth it to you to hire a lawyer in this case." Actually, it was a "coffee spill case." There was some liability there.

But, yes – that's generally true. But, if you are thinking about the law, as long as they come in before 3 years from the date of the injury, there's time to file a suit.

Senator Katherine W. Wheeler, D. 21: Thank you.

Michael McLaughlin?

Attorney Michael McLaughlin, Representing the National Association of Independent Insurers (NAII): This is a trade association of over 600 casualty and property companies. We have signed up to testify in opposition to this bill.

One of the things that I think is continually used is the complexity of insurance policies as opposed to consumer. Before I came over this morning, I decided to pull out my insurance policy and point out some of the language in it and this is the uninsured motorist coverage endorsement for my insurance policy. It basically has several sections. One, is coverage – which says, "we will pay all sums the insurer's legally entitled to recover, etc."

But, the thing that is interesting to me is, "who is insured?" The answer is, you! "If you are an individual, any family member."

It goes on to say, "anyone else occupying covered auto."

Then, "Exclusions. This insurance does not apply to any of the following:

Any claim settled without our consent." Now, I don't find that complex language.

In the coverage description, it says, "any judgement for damages arising out of a suit brought without our written consent, is not binding on us." This is the contract that is handed.....The obligations of the insured under this coverage is to tell the insurance company there may be a claim against them. That is exactly what **Senator Fraser** –in the dialogue with **Attorney Nixon**- asked. He has far greater experience than I do, but the firm that I'm

with now and several firms before, one of the first things you do when a person comes in is – with a checklist – is, "please tell us what all the coverage's you have on."

Not only are you hoping that there is adequate coverage on the other side, but you're looking for the coverage in that household that that person may have, so that you can then put the company on notice that this is a potential claim. The reason you want early notice is because of subrogation rights – the insured/uninsured carrier wants to participate in the investigation of the incident to either verify that there is liability in damages or to verify that there is not.

Most of these claims are handled – not between the individual and an adjuster, but through an attorney and a company and it's really the obligation of the professional league – the person pursuing the claim for you, to put the company on notice. It's not a very onerous obligation.

It's pretty black and white language. It's pretty simple. Rarely do you find an individual who – when you get to an under and uninsured issue, isn't sitting with a professional who should be doing that for him.

It's pretty black and white to us.

Senator Katherine W. Wheeler, D. 21: Thank you.

Attorney Martin Gross?

Attorney Martin Gross, Representing the American Insurance Association: This is a trade association – property and casualty insurance companies – whose members write a lot of automobile insurance in **New Hampshire** and a lot of uninsured motorists insurance in **New Hampshire.**

The **AIA** is opposed to the bill because the **AIA** believes that this bill is a "hydrogen bomb" response to a problem which, if exists at all, can be dealt with in a variety of existing ways without the need to upset the current system.

I'm going to quickly go through with you what I believe uninsured motorist coverage is and I simply say to you that I disagree with **Attorney Nixon's** testimony only in his recommendation that we pass this bill. In terms of

what we think uninsured motorist coverage is all about and what is going on right now, I have no issue with.

What uninsured motorist coverage is, it's a way that if you are injured in an automobile accident and aren't to blame, it's a way for you to recover additional money from your own insurance company – if the money available from the wrongdoer's liability insurance is insufficient to cover your injuries. It's not "first dollar coverage." It's essentially "last dollar coverage." It becomes available only if the wrongdoer's insurance is insufficient.

Just as importantly, your own insurance company is entitled to step into your shoes to go after the wrongdoer's assets to get back whatever it can in the event it pays you uninsured or underinsured motorist benefits. So, ultimately, the purpose of that is to make the loss fall where it belongs – on the shoulders of the wrongdoer. That mechanism is called, "subrogation" and it is clearly recognized in the present law.

If I may, I would just like to hand to you a copy of the present law with in bold face, the present part of the statute – which recognizes the subrogation right that **Attorney Nixon** mentioned and I am talking to you about right now. ***(SEE ATTACHMENT #1).***

That is the right of your uninsured motorist insurance company to go after the wrongdoer. Sometimes it happens that a person with lots of assets just hasn't bothered to buy much insurance or hasn't bought any. And, that person could well afford to pay something on the claim and should not escape unscathed.

The subrogation right is important not only to put the loss where it belongs, it's important from an economic standpoint. If your uninsured motorist carrier has the right to go after the wrongdoer, it helps keep the cost of uninsured motorist coverage lower.

Now, we say that if the law starts to impair the right to subrogation's, two things are going to happen. One, it will be made more likely that the real wrongdoer will get off scot-free and number two, that your cost of uninsured and under insured motorist insurance will go up.

Now, why does your own insurance company require you to get its consent before you settle your claim against the wrongdoer? Well, just as **Attorney Nixon** said, because if you settle your claim against the wrongdoer, your insurance company's right to subrogation disappears. You hand a release to the wrongdoer, you no longer have any rights against the wrongdoer and you've got none left to hand along to your own uninsured motorist company.

What this bill would do against that background, is turn the whole uninsured motorist system on its ear. It essentially denies your insurance company the power to protect its subrogation rights against the wrongdoer. It leaves a claimant free to settle with the wrongdoer for any amount and then turn to his own insurance company for additional dollars.

The subrogation right is essentially defeated and the only way the insurance company can protect its position, is to wind up suing its own insured to establish that the insured did harm by settling the claim against the wrongdoer. I suggest that that's not what you want to encourage.

Why isn't this bill necessary? First, from the testimony that you've had before you today, there is no evidence that the right to demand consent is being abused. In fact, what I think **Attorney Nixon** said to you was that insurance companies, in his experience, want to check out whether there are assets on the part of the wrongdoer and once they do that, the consent is forthcoming.

That doesn't sound like abuse to me. It sounds like reasonable conduct on the part of the insurance industry.

I suggest to you that the competitive market – and, we have a very competitive market for motor vehicle insurance these days – helps see to that. We're talking about dealings here between an insurance company and its own customer. In today's market environment, no insurance company can afford to be abusing its own customers. They will simply go away – go to another company.

Also, in that competitive market, there are insurance companies who don't require consent or who don't withhold consent because their policies provide the different way for them to protect their own subrogation rights. One of my organization's members – a company called **Commercial Union of New York(?)**, has a policy provision under its underinsured motorist coverage

that says that they would like the notice from you and once they get it, they have 30 days to hand you the number of dollars that are available from the wrongdoer's liability insurance and then they just stand right in your shoes and they will then go ahead and work out with you what kind of underinsured motorist benefits you're entitled to and they have protected themselves. So, the competitive market – by producing different products on this very issue, is protecting the consumer.

I think what **Attorney Nixon** said was right. Insurance companies simply want reasonable time to check out the assets of the wrongdoer before giving consent to settle. So, you've got no showing that there's abuse if there is a problem going on and if there were, then there are plenty of provisions of current law that protect the insured from behavior that would amount to bad faith – in the event that the insurance company is unreasonably withholding consent.

There are plenty of remedies for bad faith without changing the law – including the complaint against the insurance company, the **New Hampshire Insurance Department**. I believe that the **New Hampshire Insurance Department** has not had any degree of substantial complaints about insurance company unreasonable behavior in requiring consent before settling with the wrongdoer.

So, to conclude, we think this bill would destabilize an insurance mechanism that is working pretty well right now, to deal with a problem that can be solved by other remedies.

So, for that reason, we urge you to report this bill out, inexpedient to legislate.

Senator Katherine W. Wheeler, D. 21: Thank you.

Attorney George Roussos?

Attorney George Roussos, Representing the New Hampshire Association of Domestic Insurance Companies: Their members include companies who are formed and organized under the laws **of New Hampshire**, such as the **Concord Group, Hanover Insurance, Jefferson Pilot, Grange Mutual, National Grange Peerless** and a number of other companies.

We, too, oppose this bill and I will be brief in explaining why. That's one of the problems of following **Martin Gross** on these bills is that he pretty much covers the bases and he has this morning and has expressed our views and the reasons for them to a great degree.

I would add to what has been said this morning.....For your information, the supreme court has faced the issue of the use of these consents on several occasions. The first case is that of *Charest*(?) against *Union Mutual Insurance Company* in **1973** – in which there was a challenge to the consent to settle provision. The supreme court noted that the purposes of the clause are designed to confer on the insurer to the extent of any payment made by the subrogation right to all recovery from the uninsured motorist until the company has been reimbursed.

The court said, no consideration of public policy has been advanced and we know of none – which should or does preclude the parties to an insurance company from so (inaudible). In other words, upholding – from a public policy standpoint, the use of these consent provisions.

The court also referred to the opportunity for action in the event of fraud or waiver or unreasonably withholding of consent or otherwise under existing law. So, I suggest to you that that possibility – which has not been the subject of any testimony this morning, but if it were to occur, that existing law is adequate to remedy that and provide redress to an injured party.

As I say, there has been no suggestion that there is abuse. In fact, I think that **Dave Nixon** – in his experience – has said, that no insurer has refused to give this consent.

There are a couple of other decisions.....I didn't make copies, but I can leave what I've brought with me that are more recent, in which of the **New Hampshire Supreme Court**.....For example, in **1992,** the court reviewing again these contracts said, "an underinsured motorist carrier has a legitimate interest in making sure that an insured gets the greatest amount possible from other tort (inaudible) and is therefore, entitled to protect itself from an unreasonable settlement agreement."

The policies "consent to settle" and "exhaustion clauses" relied upon by the plaintiff in this case are acceptable means of protecting this interest.

Again, upholding the policy that is in existing law.

That case **is Prudential** against **Dumont** and there is another case, again, similarly discussing the valid interests of insurers including these provisions in their contracts.....That case is **Stevens** against **Merchants Mutual** – a **1991** case.

We have had expressions of concern that include what.....You mentioned, **Senator Fraser**.....That was indirectly raised by this bill, but I have heard from a couple of insurance adjusters directly that say that they want to encourage prompt notice of complaints when there are such claims for lots of reasons including the ability to investigate more quickly than later on and that the consent to settle provision encourages prompt notification.

So, it serves a lot of useful purposes, we believe, and we would ask you not to move in this direction.

Senator John A. King, D. 18: Whose responsibility is it when the action occurs? The insurance company has said that the person's insurance company or is it the attorney they get to work on it or whatever?

Attorney Roussos: Ordinarily, the first thing that would happen would be that the person would make a claim against the person that was at fault in the accident and then their insurance company would contact that person. Some cases are handled without lawyers, but by in large, people go to lawyers and certainly, in any serious case, they do.

So, while that case is proceeding, ordinarily what would happen is, when the lawyer or the person himself would recognize that the insurance coverage of the person who was at fault....the limits aren't high enough to pay the damages, would provide notice to his or her own insurance company saying that they may have an uninsured motorist claim. That notice – which I think usually comes from lawyers because you're talking about more serious cases. That notice would go to the injured person's own insurance company and they would start their investigation from there. That's the ordinary way that that proceeds.

Senator John A. King, D. 18: If I get in an accident, the first person I would notify would be my insurance company.

Attorney Roussos: That's true, too. Yes.

Senator John A. King, D. 18: So, they're aware of it.

Attorney Roussos: If you do that, they would be aware of it.

Senator John A. King, D. 18: Well, isn't that part of the thing you would have to do? Wouldn't that be a better way of putting it that they should notify their insurance company first?

Attorney Roussos: Yes.

Senator John A. King, D. 18: Then, they are aware of the whole situation. Then, you can hire yourself a lawyer or you would have a lawyer beforehand……

Attorney Roussos: That's true. Of course, what they would know about is that there's been an accident and they have a potential claim. Not that there might be an uninsured motorist claim at that point. All they would know is that there has been an accident and to give them a rental car or deal with a collision loss, etc. – which is a different coverage from uninsured motorists.

So, while you're right, there would be a notice that there had been an accident. There would not be, at that point, a notice that it would potentially be an uninsured situation.

Senator John A. King, D. 18: Wouldn't this be a simplified way of doing it? The investigators are already aware of it and I would think that the insurance company that I have my policy with should be interested to find out…..They should have the staff with the know-how of how to find out what's going on and check on the other person. They would have the facts and that would eliminate this……..

Attorney Roussos: Don't forget, this bill would affect and in a large part, negate the consent provision that exists in current law. Not only is there the notice that we've been talking about here, but that the uninsured motorist company would have to consent before there's a settlement. That isn't going to change regardless of who has to give notice and whose investigation it is.

We believe that the current law – which requires consent, is consistent with public policy and it's fair and we shouldn't disturb it.

Senator John A. King, D. 18: Consent by whom?

Attorney Roussos: By the uninsured motorist carriers……It's otherwise going to have to pay money. See, what happens in these cases…..and they don't occur that often, but they occur. When someone is underinsured, they have assets and under current law, the uninsured motorist is a procedure with the **Department of Motor Vehicles** and if there is liability and inadequate insurance to cover it, that person has several choices or may lose his or her license.

So, there's an enforcement mechanism in the current law that helps to encourage collections from people who are caught – the drunk driver or the other motorist who is at fault and doesn't have adequate insurance, is covered under current law. There's some "teeth" to being able to pursue that person and collect the money for the damages that he caused.

So, under this bill, you take away the decision which currently is on the part of the uninsured motorist company – whether there are assets on the part of the wrongdoer or not, and you substitute that for the judgement of the injured person to decide whether there are assets on the part of the wrongdoer or not.

And, that judgement is properly made by the person who is paying the bill – which is the uninsured motorist company. There really is not an incentive on the part of the injured person in many cases to collect every dollar that's available from the injured person because he or she has the uninsured motorist coverage that will come in and pay the difference.

(SENATOR FRANCOEUR HAS NOW ASSUMED THE ROLE AS CHAIR).

Senator Gary R. Francoeur, D. 14: Thank you. Is there anyone else who wishes to speak to this bill? Seeing none, I will close this hearing. **Hearing adjourned at 12:05 p.m.**

Respectfully submitted,
Linda Brosseau, Secretary – Rosalie Brooks Patch, Transcriber

#1

CHAPTER 264
Accidents And Financial Responsibility
Motor Vehicles
SECTION 264:15

§ 264:15 Uninsured or Hit-and-Run Motor Vehicle Coverage. – I. No policy shall be issued under the provisions of RSA 264:14, with respect to a vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto at least in amounts or limits prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, his uninsured motorist coverage shall automatically be equal to the liability coverage elected. For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61, shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage.

II. In the event of insolvency on the part of the liability insurer which prevents such insurer from paying the legal liability of its insured within the limits of the coverage provided, if no other insurance applies, uninsured motorist coverage shall provide for no less than $25,000 coverage for injury to or destruction of property in any one accident.

III. An insurer's extension of coverage, as provided in paragraph II, shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motor vehicle coverage is in effect and where the liability insurer of the tort-feasor has been declared to be insolvent by a court of competent jurisdiction as of the accident date, or has been declared to be insolvent by a court of competent jurisdiction within 3 years after the accident date. Nothing herein contained shall be construed to prevent any insurer from extending coverage under terms and conditions more favorable to its insureds than is provided hereunder.

IV. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the extension of coverage described in paragraphs II and III, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

Source. RSA 268:15-a. 1967, 284:2. 1969, 418:1; 485:1, 2. 1970, 37:11. 1981, 146:1; 507:7. 1988, 77:2. 1991, 330:2,
eff. Jan. 1, 1992.

Speakers

SENATE INSURARNCE COMMITTEE

Date **March 21, 2000** Time **11:10am** Public Hearing on **SB459**

Appearing in FAVOR: *(Please print)* *Please check box at left to speak.*

Speaking?	*Name*	*Address*	*Representing*
☐	Robert Blaisdell	31 B So. Main St Concord	NH Trial Lawyers Association
☐	DAVE NIXON	MANCHESTER	Self
☑	Jim CRAIG	84 [illegible] ST [illegible]	REP
Rep	JIM CRAIG		
☐			
☐			
☐			
☐			
☐			
☐			

Appearing in OPPOSITION: *(Please Print)* *Please check box at left to speak.*

☑	Michael McLaughlin	NAII
☐	Jim Hatem	State Farm
☐	PETER McARDLE	ACADIA INS CO
☑	Martin Gross	AIA
☑	George Rousos	NH Assoc. of Domestic Insurance Cos
☐		
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☐		
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Committee Report

Date: March 21, 2000 Time: 11:18 a.m.

The Senate Committee on Insurance held its hearing in Room 103-SH, Concord, New Hampshire.

BILL NO.: SB 459 TITLE: (New Title) relative to uninsured or underinsured motorist insurance coverage.

Members of the Committee present: Senator Wheeler
Senator Francoeur
Senator Fraser
Sen. J. King
Senator Squires

Those appearing in favor:

Name and Address	Representing
See Attached.	

Those appearing in opposition:

Name and Address	Representing
See Attached.	

REPORT OF THE COMMITTEE

- ☒ Ought to Pass
- ☐ Ought to Pass w/ Amendment
- ☒ Inexpedient to Legislate
- ☐ Rereferred

(MAJORITY/MINORITY REPORT)

- ☐ Interim Study
- ☐ Continued Hearing
- ☐ Postponed Hearing

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date:

THE COMMITTEE ON Insurance

to which was referred Senate Bill 459

AN ACT relative to underinsured motorists.

VOTE: 5-2 – Majority

Having considered the same, report the same with the following resolution:
Resolved, that it is: **INEXPEDIENT TO LEGISLATE.**

Senator Leo W. Fraser, Jr.
For the Majority

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: {Type FLOOR DATE}

THE COMMITTEE ON Insurance

to which was referred Senate Bill 459

AN ACT relative to underinsured motorists.

VOTE: 2-5 - Minority

Having considered the same, report the same without amendment and recommend that the bill: **OUGHT TO PASS.**

Senator John A. King
For the Minority