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Uninsured Motorist Coverage for Hit-and-Run Vehicles: The Requirement of Physical Contact

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UNINSURED MOTORIST COVERAGE FOR HIT-AND-RUN VEHICLES: THE REQUIREMENT OF PHYSICAL CONTACT

INTRODUCTION

Although virtually every state regulates uninsured motorist coverage, a significant amount of nonconformity exists regarding the statutory requirements of uninsured motorist coverage and the interpretation of these requirements. This is true particularly in cases involving hit-and-run vehicles. Most automobile insurance policies provide coverage for victims of hit-and-run drivers. The policies, however, require the insured to prove physical contact between the insured's vehicle and the hit-and-run vehicle. Because of this requirement, the policies do not provide coverage for victims of negligent miss-and-run drivers. This comment focuses on the purpose, validity, and interpretation of the physical contact requirement in Louisiana, as well as the problems that arise out of its enforcement. In addition, the comment explores the positions taken by several other jurisdictions on the validity of the physical contact requirement. Finally, a solution is offered to some of the difficulties caused by the requirement.

STATUTORY REQUIREMENT

Louisiana, by statute, requires insurers to make uninsured motorist coverage available to purchasers of automobile liability insurance. Louisiana Revised Statutes 22:1406(D)(1)(a)(i) provides:

> No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state . . . unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this Subsection shall not be applicable where any insured named in the

policy shall reject in writing, as provided herein, the coverage or selects lower limits.[1]

By requiring the insurer to afford protection to victims of the negligence of uninsured motorists, the statute serves two general purposes. First of all, the statute helps to ensure that the innocent victims of negligent drivers receive some compensation. A second and related purpose is the preservation of public resources, for uncompensated victims may easily become wards of the state.[2]

The statute requires insurers who issue automobile liability policies to provide coverage for personal injuries caused by negligent uninsured motorists. It does not expressly require coverage for hit-and-run, miss-and-run, or unidentified motor vehicles. The question becomes whether the statute applies only to situations in which the identity of the negligent motorist is known and that motorist is actually uninsured, or whether it also affords protection when the identity of the negligent motorist is unknown. The courts of other states with similar statutes have required protection even when the offending vehicle is unknown,[3] Louisiana courts have so far limited mandatory coverage to instances where an identified negligent motorist has no insurance.[4] Despite Louisiana's interpretation of the statute, most automobile policies do provide coverage for hit-and-run accidents, but only in cases where there is physical contact between the hit-and-run vehicle and the insured or his vehicle.

POLICY REQUIREMENT OF PHYSICAL CONTACT

Coverage under most uninsured motorist provisions requires that an "uninsured motor vehicle" cause the accident. Policies typically include hit-and-run vehicles within the definition of "uninsured motor vehicle" if there is physical contact between the hit-and-run vehicle and the insured or a vehicle occupied by the insured.[5] The purpose behind this physical contact requirement "is the prevention of fraudulent claims in which the insured may claim the one-car accident was caused by some phantom automobile."[6]

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1. La. R.S. 22:1406(D)(1)(a)(i) (Supp. 1988).

2. Booth v. Fireman's Fund Ins. Co., 253 La. 521, 527, 218 So. 2d 580, 583 (1969). See also Bosch v. Cummings, 520 So. 2d 721 (La. 1988).

3. Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971).

4. Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270 (La. App. 4th Cir.), writ denied, 256 La. 375, 236 So. 2d 503 (1970).

5. The 1988 Traveler's Car Insurance Policy defines an uninsured motor vehicle as including "a hit-and-run highway vehicle, if neither the driver nor the owner can be identified, which causes bodily injury to an insured by physical contact with the insured or a vehicle occupied by the insured."

6. Harrison v. Commercial Union Ins. Co., 471 So. 2d 922, 924 (La. App. 2d Cir. 1985). See also St. Amant v. Aetna Casualty and Sur. Co., 499 So. 2d 322, 325 (La. App. 1st Cir. 1986); Springer v. Government Employees Ins. Co., 311 So. 2d 36 (La. App. 4th Cir.), writ denied, 313 So. 2d 598 (1975).

The assumption underlying the policy requirement is that if the insured can prove physical contact, his claim is more likely to be genuine. If there was physical contact, then some evidence that another vehicle was involved in the accident is almost certain to be available. By contrast, the lack of tangible evidence in cases with no physical contact increases the likelihood of fraudulent claims. To a certain extent these assumptions are sound, because the added burden of proof imposed on the insured by the contact requirement makes fabrication of a claim more difficult.

Further examination reveals serious problems with the rule and the assumptions it is based upon. First of all, the rule is not foolproof. As the first circuit noted in *St. Amant v. Aetna Casualty and Surety Co.*,[7] a motorist involved in a single car accident could damage his own car so as to leave apparent proof that 'physical contact' occurred with a non-existent phantom vehicle."[8] Although the rule may make fraudulent claims more difficult to bring, it does not prevent them.

Second, this inexact method of preventing fraud imposes costs on society as a whole. Certainly prevention of fraud benefits both the insurance company, and, through reduced rates, the insured public. There are, however, certainly situations in which negligent motorists cause accidents without physical contact. In these situations the contact requirement has the effect of denying coverage for a genuine claim, leaving accident victims uncompensated and burdening the state. In short, the societal interest in compensating accident victims and in preventing those victims from becoming public burdens undercuts the insurer's and the insured public's interest in preventing fraud.

Finally, the physical contact rule is necessary only in those cases in which the risk of fraud is great. The necessity of the physical contact requirement becomes questionable when there is little or no risk of fraudulent claims. For instance, suppose an unidentified vehicle forces the insured's car off the road without making contact, and there are credible witnesses to the incident. The clear proof that an accident actually occurred as claimed minimizes the danger that the claim is fraudulent. The assumptions that underlie the physical contact requirement are rebutted in this case, and the interests that justify the requirement are not advanced. Given the policies behind the uninsured motorists statute, it seems that coverage should be compelled in these sorts of cases.[9] Louisiana courts, however, have taken a different view.

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7. 499 So. 2d 322 (La. App. 1st Cir. 1986).

8. Id. at 325.

9. See J. Appleman, Insurance Law and Practice § 5095 (1981). "Furthermore, if the social purposes is to compensate persons injured in automobile accidents and avoid them becoming public charges, then the most functional form of coverage would be a true accident policy—not some purported coverage enmeshed in a bundle of restrictions." Id.

Interpretation of the Statute

The fourth circuit's decision in *Collins v. New Orleans Public Service, Inc.*[10] is the leading authority on the enforceability of the physical contact requirement in cases involving unidentified vehicles. In the case, an unidentified automobile pulled out in front of a bus in which the plaintiff, Mrs. Collins, was a passenger. The bus stopped abruptly, causing Mrs. Collins to fall and suffer injuries. The plaintiff did not allege that the unidentified vehicle came into physical contact with the bus. Because of this, argued the defense, the plaintiff had not proven an essential element of uninsured motorist coverage. The trial court agreed and granted summary judgment in favor of the insurance company. The plaintiffs appealed, arguing that the unidentified vehicle was an uninsured motorist within the meaning of the statute, and, therefore, that the physical contact requirement went beyond the provisions of La. R.S. 22:1406(D)(1)(a)(i).

The fourth circuit upheld the validity of the physical contact requirement. The court began with the proposition that "[t]he burden is upon the plaintiffs to prove that the automobile which was a proximate cause of the injuries in suit was in fact an uninsured automobile."[11] The court further indicated that when the claimant could not prove that the offending vehicle was in fact uninsured, which would always be the case in an accident involving an unidentified motor vehicle, the statute did not mandate coverage. Therefore, the hit-and-run provisions of the policy were a voluntary extension of coverage by the insurance company. Because no statute compelled coverage, the court went on to say, the insurer could modify its contractual obligations freely.[12] The physical contact requirement was only an exercise of that contractual freedom.

Although the *Collins* approach is plausible given the language of the statute, the facts of the case illustrate the problem created by the physical contact requirement. The insurance company conceded that the accident happened as alleged by the plaintiff. There was no danger of fraud, so the purpose behind the contact requirement was inapplicable. Moreover, the policies behind the uninsured motorist statute, protecting innocent accident victims and preventing them from becoming public

10. 234 So. 2d 270 (La. App. 4th Cir.), writ denied, 256 La. 375, 236 So. 2d 503 (1970).

11. Id. at 272 (citing Vitrano v. State Farm Mut. Auto. Ins. Co., 198 So. 2d 922 (La. App. 4th Cir. 1967); Roloff v. Liberty Mut. Ins. Co., 191 So. 2d 901 (La. App. 4th Cir. 1966)).

12. Id. at 273.

burdens, would seem to mandate coverage in such a case. But the court refused to interpret the language of the statute in such a way that coverage was required. The Louisiana Supreme Court refused writs, finding "no error of law."[13]

The *Collins* decision rests on the premise that the term "uninsured motor vehicle" in the statute is limited to vehicles that actually have no insurance coverage. The term could, however, just as easily include all vehicles that do not have insurance coverage available for the injured person. When the identity of the offending driver and vehicle is unknown, there is no insurance available for the benefit of the injured plaintiff. Under this interpretation, contrary to *Collins*, the statute would mandate coverage for hit-and-run accidents. Despite this equally acceptable reading, Louisiana courts have consistently upheld the *Collins* interpretation.[14]

The policies behind the uninsured motorist statute indicate that there should be coverage when the insured is injured by an unidentified driver. The interest in protecting accident victims is no less compelling when the negligent motorist is unidentified than it is when his identity is known and he does not have insurance. In fact, the interest is more compelling. As far as victims are concerned, unidentified drivers have no assets. The victim of negligent, unidentified drivers have no possibility of recovering from the person who caused the harm.

Although the supreme court refused to review the *Collins* decision, it has not spoken directly to the issue. Thus, the question whether the uninsured motorist statute requires coverage against the negligence of unidentified drivers when there is no physical contact is not settled. If the case does come before the court, the court should reject the *Collins* approach.

Relaxation of the Physical Contact Requirement

The courts have limited *Collins* in certain situations. For example, the requirement of physical contact has sometimes been relaxed in cases involving contact with intervening vehicles. Courts have held that when an unidentified vehicle makes contact with an intervening vehicle, which in turn makes contact with the insured's vehicle, the physical contact requirement has been met. In *Springer v. Government Employees Insurance Co.*[15] an unidentified vehicle struck an intervening vehicle, caus-

13. *Collins*, 256 La. 375, 236 So. 2d 503 (1970).

14. Howes v. Allstate Ins. Co., 480 So. 2d 991 (La. App. 4th Cir. 1985), writ denied, 484 So. 2d 672 (1986); Lemieux v. Prudential Ins. Co., 416 So. 2d 1347 (La. App. 1st Cir.), writ denied, 420 So. 2d 454 (1982); Gex v. Doe, 391 So. 2d 69 (La. App. 4th Cir. 1980), writ denied, 396 So. 2d 899 (1981); Oliver v. Jones, 370 So. 2d 638 (La. App. 4th Cir.), aff'd, 376 So. 2d 1256 (1979).

15. 311 So. 2d 36 (La. App. 4th Cir.), writ denied, 313 So. 2d 598 (1975).

ing it to cross the median of a divided highway and to strike the insured's oncoming vehicle. The fourth circuit, which had handed down the *Collins* decision, held that:

> the "physical contact of such vehicle" includes the physical contact of that vehicle with an intermediate vehicle or other object which, in the same mechanism of the accident, strikes the assured's vehicle. We limit this to the type of factual situation existent here. Specifically, the injury causing impact must have a complete, proximate, direct and timely relationship with the first impact between the hit-and-run vehicle and the intermediate vehicle. In effect, the impact must be the result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence.[16]

The basis for the court's holding is unclear, especially given its earlier position in *Collins*.[17] The insurance policy clearly required contact between the hit-and-run vehicle and either the insured or an automobile occupied by the insured.[18] This requirement was not met in this case, for the intervening vehicle, not the hit-and-run vehicle, struck the insured's car. The unknown vehicle did not touch either the insured or the vehicle of the insured. The court concluded that the words meant something they did not say.[19] The position taken by the fourth circuit in *Springer* is inconsistent with its freedom of insurance contract pronouncements in *Collins*.[20]

Perhaps the fact that several independent witnesses corroborated the occurrence of the accident's influenced the *Springer* court. There was no danger of fraud. Moreover, since the intervening driver was found not negligent, the plaintiff's only chance for recovery was against his insurer.[21] While later courts rationalized *Springer* on the "unbroken chain of events" theory,[22] it seems to indicate some discomfort with the *Collins* court's steadfast enforcement of the contact requirement.

Despite the relaxation, Louisiana courts have not yet completely abandoned the contact requirement. A first circuit decision, *Hensley v.*

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16. Id. at 39.

17. The only authority cited was a Michigan Court of Appeal case, Lord v. Auto Owners Ins. Co., 22 Mich. App. 669, 177 N.W.2d 653 (1970).

18. *Springer*, 311 So. 2d at 39.

19. See id. at 42 (Schott, J., dissenting).

20. *Collins* held that coverage for hit-and-run accidents could be restricted in any way. 234 So. 2d at 273.

21. In *Collins*, the insured sued New Orleans Public Service, Inc. as well as her insurance company. The insured was apparently able to recover from New Orleans Public Service, Inc. Therefore, the court had little difficulty in denying uninsured motorist coverage. Id. at 271.

22. The fourth circuit again embraced the "unbroken chain of events" rationale in Ray v. DeMaggio, 313 So. 2d 251 (La. App. 4th Cir. 1975).

Government Employee Insurance Co.,[23] illustrates this point. In that case, an unidentified vehicle caused a collision without making contact with any of the involved vehicles. The unidentified vehicle made a sudden stop at an intersection. An intervening vehicle was forced to come to an abrupt halt behind the unidentified vehicle, but did not collide with it. The insured, on a motorcycle, was unable to stop and struck the rear end of the intervening vehicle.

The first circuit chose not to follow *Springer*, for there was no "unbroken chain of events." The court reluctantly followed the *Collins* opinion.[24] Judge Lottinger wrote both the opinion of the court and a concurring opinion. In the concurrence, he denounced the *Collins* interpretation.

> I cannot agree that it was the intention of the legislature in enacting the uninsured motorist law to limit the application of this statute to only those situations where you can identify the driver of the automobile or you can identify the automobile. To place such a restriction on the statute defeats its purpose. Those individuals who have no insurance are not going to be inclined to sit around and wait for the traffic accident investigation after the accident has occurred.[25]

Nevertheless, the refusal by the supreme court to review the *Collins* decision persuaded the *Hensley* court to follow the stringent rule of that case.

The physical contact requirement has been relaxed in another area-where the insured strikes an object falling off of an unidentified vehicle. In the recent case of *Fore v. Traveler's Insurance Co.*[26] the plaintiff, Fore, was driving behind a truck along Interstate 10 in Louisiana. The truck's tailgate opened and a load of dirt fell onto Fore's windshield and hood, causing him to lose control of the vehicle and swerve off the highway. The court followed *Springer*, holding that this was an "unbroken chain of events," and that the physical contact requirement had been met.[27] The court emphasized the fact that "there was no delay at all between the fall and the impact with Fore's car."[28] Again, it is unclear how the *Fore* court distinguished this case from *Collins*. There was no contact between the hit-and-run *vehicle* and the insured's vehicle, and under the literal reading of the policy, which the *Collins* court had required, there would have been no coverage.

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23. 340 So. 2d 603 (La. App. 1st Cir. 1976), writ denied, 342 So. 2d 224 (1977).
24. Id.
25. Id. at 608.
26. 528 So. 2d 1091 (La. App. 4th Cir. 1988).
27. Id. at 1092.
28. Id. at 1093.

As was the case with intervening vehicles, the courts have strictly enforced the physical contact requirement in some cases. *Harrison v. Commercial Union Insurance Co.*[29] illustrates the point. In that case the insured's vehicle collided with phosphate bags lying in the highway. Although the bags apparently had fallen off the back of an unidentified truck, the second circuit refused to find coverage. This was not, said the court, a "chain of events" situation.

Implications of the Jurisprudence

Reading these two cases together lends support to the hypothesis that courts will deem the physical contact requirement satisfied when there is strong corroborating evidence. In *Harrison*, there was no clear proof that phosphate bags came from another vehicle, and the court was not fully satisfied that another vehicle was involved.[30] In *Fore*, the accident left nearly unmistakable evidence of another vehicle. The court pointed out that when Fore's windshield was replaced, there was still dirt and debris on his car. The court went on to note that in accidents caused by intervening objects or vehicles, tangible evidence is as likely to remain as when direct contact between the vehicles occurs.[31] The point of these cases seems to be that when there is no greater danger of fraud than when the plaintiff proves actual physical contact, then the contact requirement should be relaxed to allow coverage.[32]

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29. 471 So. 2d 922 (La. App. 2d Cir. 1985).

30. "The trial court granted the defendant's motion finding that the plaintiffs had not established that the bags with which they had collided fell from any vehicle whatsoever . . . ." *Harrison*, 471 So. 2d at 923. In *Chapman*, the court noted that it was not known how the sugarcane came to be on the road. 517 So. 2d at 332.

31. *Fore*, 528 So. 2d at 1093.

32. Another category of cases in which the interpretation of the physical contact requirement is unclear is accidents caused by contact between the insured's vehicle and some appurtenance to another vehicle lying in the road. Suppose that the insured's vehicle came into contact with some appurtenance to another vehicle, such as a tire assembly, and the insured could prove that the appurtenance fell off a vehicle onto the highway. It would be clear that the accident was caused by another vehicle. There is little danger of fraud in this situation. The interest advanced by the physical contact requirement is served by the circumstances of the accident. The court could possibly come to the conclusion that the physical contact requirement has been met. It could rationalize on the basis that a "hit-and-run vehicle" includes its appurtenances, and therefore contact with an appurtenance of a hit-and-run vehicle is contact with the hit-and-run vehicle as required by the policy. Although this rationale does not strictly comply with the language of the policy requirement of physical contact, it allows recovery when the purpose of the physical contact requirement, prevention of fraudulent claims, is fulfilled by the circumstances of the accident. See Adams v. Zajac, 110 Mich. App. 522, 313 N.W.2d 347 (1981). "[W]e hold that the 'physical contact' takes place when a vehicle or an integral part of it comes into physical contact with another vehicle." Id. at 528, 313 N.W.2d at 349.

The courts in *Springer* and *Fore* seemed to realize that the interest served by the physical contact requirement, prevention of fraud, was equally well served by the other conditions of the accidents in those cases. The contact of intervening vehicles in *Springer* and the dirt on the car in *Fore* left no doubt that the accident had occurred as each plaintiff claimed. The courts reached the equitable result by ruling that physical contact between the hit-and-run vehicle and the insured's vehicle includes indirect contact when there is a "clearly definable beginning and ending."[33] Although equitable, this interpretation is inconsistent with the *Collins* opinion and the language of the policy. In *Hensley*,[34] the court was left without such a mechanism to rationalize that the contact requirement had been met.

Hensley is a good example of the inequity created by the physical contact requirement. The risk of fraud was no greater in *Hensley*, but the physical contact requirement precluded coverage. The only difference between *Springer* and *Hensley* was that in *Hensley* there was no initial contact with the unidentified vehicle. Yet the *Hensley* court's blind adherence to *Collins* prevented it from reaching the best result, thus disserving the polices behind the uninsured motorist statute.

In a case of an unidentified vehicle running the insured off the road without making contact, the physical contact requirement would preclude coverage. This would be the result whether there were one witness or one hundred witnesses to the accident. Certainly there are ways to prevent fraudulent claims other than this seemingly all or nothing physical contact requirement.

OTHER JURISDICTIONS

In determing how to solve the problems created by the physical contact requirement in Louisiana it is helpful to examine some positions taken by other jurisdictions. A significant amount of non-conformity exists among the state as to the statutory requirement of physical contact. Some statutes, similar to Louisiana's, do not mention hit-and-run vehicles.[35] Other statutes require coverage for hit-and-run vehicles, but provide no definition of a hit-and-run vehicle.[36] Some statutes expressly

33. *Springer*, 311 So. 2d at 40.

34. 340 So. 2d 603 (La. App. 1st Cir. 1976), writ denied, 342 So. 2d 224 (1977).

35. See, e.g., Fla. Stat. Ann. § 627.727 (West 1984).

36. See, e.g., Me. Rev. Stat. Ann. tit. 24-A, § 2902(1) (Supp. 1987); Ill. Ann. Stat. ch. 73, para. 755a (Smith-Hurd 1988); Iowa Code Ann. § 516A.1 (West 1988); Mass Ann. Laws ch. 175, § 113L (Law. Co-op. 1987); Neb. Rev. Stat. § 60-509.01 (1984); N.J. Stat. Ann. § 17:28-1.1 (West 1985); N.C. Gen. Stat. § 20-279.21(b)(3) (1983).

require that the insured prove physical contact to obtain recovery.[37] Other statutes essentially state that physical contact is not necessary for recovery.[38] Three states in particular that limit the enforceability of the physical contact requirement but take different approaches, are Florida, Maine, and Georgia.

The Florida Supreme Court has articulated an interpretation contrary to that put forth in *Collins*. The Florida uninsured motorist statute, like that of Louisiana, makes no mention of hit-and-run vehicles, but only requires that insurance companies insure personal injuries caused by "uninsured motor vehicles."[39] Virtually the same question the *Collins* court had faced, whether the uninsured motorist statute affected the enforceability of the physical contact restriction, was presented to the Florida Supreme Court in *Brown v. Progressive Mutual Insurance Co.*[40] In *Brown*, an unidentified vehicle ran the insured off the highway. It was not known whether there had been physical contact between the vehicles. The lower court enforced the policy requirement of physical contact and concluded that the insured was not entitled to recovery.[41]

The Florida Supreme Court reversed the decision of the lower court. The supreme court first stated the purpose of uninsured motorist statute's: "The purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party."[42] The court noted that the decision of the lower court had the effect of placing "on the injured person in every case the burden of proving that the offending party was without insurance regardless of the circumstances, the equities or the difficulties."[43] In any hit-and-run accident, meeting this burden would be impossible, resulting in nonrecovery, defeating the purpose of the uninsured motorist statute. This could result in adverse consequences to the general public, for "in some cases at least, injured persons then become the burden of society or of the state, despite their attempt to protect themselves by purchase of insurance intended to shield them against damages inflicted by a party from whom recovery cannot be made in person or through his insurance."[44] The court determined

37. See, e.g., Alaska Stat. § 28.20.445(f) (1984); Cal. Ins. Code § 11580.2(b)(1) (West 1988); Kan. Stat. Ann. § 40-284(c)(3) (1986); Miss. Code Ann. § 83-11-103 (1973); Nev. Rev. Stat. § 690B.020 (1985); N.Y. Ins. Law § 3420(f)(3) (McKinney 1985); Tenn. Code Ann. § 56-7-1201 (1980).

38. Del. Code Ann. tit. 18, § 3902 (Supp. 1988); Mo. Ann. Stat. § 379.203 (Vernon 1988); Va. Code Ann. § 38.2-2206 (1986).

39. Fla. Stat. Ann. § 627.727 (West 1984).

40. 249 So. 2d 429 (Fla. 1971).

41. Progressive Mut. Ins. Co. v. Brown, 229 So. 2d 645 (Fla. Dist. Ct. App. 1969).

42. *Brown*, 249 So. 2d at 430.

43. Id.

44. Id.

that for a motorist to be protected under the state's uninsured motorist statute, the test is not whether he can prove that the offending motorist was uninsured, but "whether the offending motorist has insurance available for the protection of the injured party, for whose benefit the statute was written."[45] Whenever the offending motorist flees the scene, the test has been met. An unknown motorist does not have insurance "available for the benefit of the injured party." Therefore, "[i]f the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover, regardless of the actuality of physical contact."[46]

The Florida Supreme Court recognized the inequity that can result from the physical contact requirement and took measures to correct it. The court effectively invalidated the physical contact requirement by holding that its uninsured motorist statute, similar to Louisiana's required coverage whenever the negligent driver is unidentified.[47] This position does serve the interest of protecting innocent accident victims, the interests of compensating injured victims, and preventing these persons from becoming a "burden of society." It fails, however, to serve the interest of preventing fraudulent claims. If the injured victim is the only witness to his one-car accident, he can easily claim that the accident was caused by a "phantom vehicle." The insurance company can do little to refute this testimony absent evidence of untruthful character on the part of the insured. The jury will, of course, make the final determination of the genuineness of the claim, but existing procedural safeguards such as the proof by preponderance of the evidence rule may not be enough to prevent fraudulent claims. The proper balance of interests does not appear to have been struck in Florida. There is no requirement of any amount of proof greater than the insured's testimony as a method of preventing fraudulent claims, such as requiring eyewitness testimony or clear and convincing evidence in the absence of a showing of physical contact. The Louisiana courts or legislature, if either attempts to solve the problems created by the physical contact requirement, should proceed more cautiously than Florida has. While accident victims should be compensated, the interest in protecting against fraudulent claims must not be abandoned.

The uninsured motorist statute in Maine requires coverage for persons "legally entitled to recover damages from owners or operators of . . . hit-and-run motor vehicles."[48] The statute does not, however, define a "hit-and-run motor vehicle," so the identical issue regarding the

45. Id.
46. Id.
47. Id.
48. Me. Rev. Stat. Ann. tit. 24-A, § 2902(1) (Supp. 1987).

physical contact rule arises. In *Lanzo v. State Farm Mutual Automobile Insurance Co.*,[49] the Supreme Judicial Court of Maine addressed the issue of whether the phrase "hit-and-run" requires actual physical contact. The court noted the split in authority on the interpretation of this phrase[50] and determined that "[t]he short hand expression 'hit-and-run' as used in the statute, serves to describe an accident involving an unknown driver and does not create a requirement that the accident involve physical contact."[51] Because the policy requirement of physical contact excluded coverage required by the statute, the statute prevailed.[52] The physical contact requirement was not enforced and recovery was granted.[53]

The *Lanzo* opinion leaves the same problem as Florida's *Brown* opinion in terms of striking the proper balance of interests. There is still no mechanism for the prevention of fraudulent claims. If the only evidence is the testimony of the insured, there is a significant risk of fraud. This risk can be reduced by requiring more proof when the offending vehicle is unknown. This type of requirement could be set forth by the courts, or perhaps more appropriately by statute.

Georgia's uninsured motorist statute expressly requires physical contact for recovery when the offending vehicle is unknown, but with an exception: "[Proof of] physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant."[54] This requirement of corroboration seems to protect insurance companies from fraudulent claims adequately.[55] At the same time it provides coverage for most genuine miss-and-run accidents provided there is eyewitness testimony. Of course, some actual but unverifiable accidents would not be covered even under the Georgia statute. For example, an

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49. 524 A.2d 47 (Me. 1987).

50. The court cited Ferega v. State Farm Mutual Automobile Insurance Co., 58 Ill. 2d 109, 317 N.E.2d 550 (1974) and Ely v. State Farm Mutual Automobile Insurance Co., 148 Ind. App. 586, 268 N.E.2d 316 (1971) as cases that uphold the policy provisions requiring physical contact. The court then cited several cases which have voided similar policy provisions, including Surrey v. Lumbermens Mutual Casualty Co., 384 Mass. 171, 424 N.E.2d 234 (1981); State Farm Mutual Automobile Insurance Co. v. Abramowicz, 386 A.2d 670 (Del. 1978); Soule v. Stuyvesant Insurance Co., 116 N.H. 595, 364 A.2d 883 (1976); and Hartford Accident and Indemnity Co. v. Novak, 83 Wash. 2d 576, 520 P.2d 1368 (1974).

51. *Lanzo*, 524 A.2d at 50.

52. See State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co., 513 A.2d 283, 285 (Me. 1986).

53. *Lanzo*, 524 A.2d at 50.

54. Ga. Code Ann. § 33-7-11(b)(2) (Supp. 1988).

55. See Universal Security Insurance Co. v. Lowery, 257 Ga. 363, 359 S.E.2d 898 (1987), which holds that the corroborating witness need not be a disinterested witness.

accident victim driving alone with no witnesses to the accident when there is no contact would not be covered under this approach. But this seems necessary to prevent fraudulent claims. Georgia's approach strikes a compromise between competing interests and is a reasonable solution to the problem.[56]

A statute that requires uninsured motorist coverage for hit-and-run accidents whenever there is physical contact or corroboration by an eyewitness would not affect the approach taken by Louisiana courts in cases involving contact with intervening vehicles or other objects. Courts probably would continue to hold that contact with an intervening vehicle or object meets the physical contact requirement if there is an unbroken chain of events.[57] As discussed earlier, this rationale, however equitable it may be, is inconsistent with the clear language of the policy provision since the unknown vehicle does not come into direct physical contact with the insured or his vehicle.[58]

POSSIBLE SOLUTIONS: JUDICIAL OR LEGISLATIVE

If Louisiana courts continue to follow the *Collins* rule, only a legislative act will alleviate the problems created by that interpretation. In cases in which there is clear proof of the facts of the accident and little danger of fraud, there needs to be a way to provide coverage, despite the physical contact requirement imposed by insurance companies. In these cases, allowing recovery would fulfill the general purpose of uninsured motorist coverage. To find a reasonable solution to this problem a balance must be struck between protecting insurance companies from fraudulent claims and protecting innocent victims and society from hit-and-run and miss-and-run motorists.

It is suggested that when the insured cannot prove physical contact, some higher burden of proof be mandated. For example, in the absence of a showing of physical contact, the insured could recover if the accident is corroborated by at least one independent eyewitness. This would give the insured an alternative means of recovery when there is no physical contact but little risk of fraud. If the claim is fraudulent, it will be more difficult for the insured to assert a claim if he must procure the testimony of an eyewitness. However, a victim of a genuine miss-and-run accident would still not recover where there are no witnesses. This is the cost of striking a balance between preventing fraudulent claims and compensating innocent accident victims. Simply invalidating the

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56. See also Or. Rev. Stat. § 743.792 (1981).

57. See, e.g., Fore v. Travelers Ins. Co., 528 So. 2d 1091, 1092 (La. App. 4th Cir. 1988) and Springer v. Gov't Employees Ins. Co., 311 So. 2d 36, 39 (La. App. 4th Cir. 1975).

58. See supra text accompanying notes 17-20 and 33.

contact requirement will leave insurance companies completely exposed to the fraudulent claims of one-car accident victims. If there are no witnesses to the accident other than the insured and the jury believes the testimony of the insured, the insurance company will have no way to rebut his claim that he was driven off the road by an unidentified negligent driver.

Another alternative in the absence of physical contact or eyewitnesses would be to allow the insured to recover if he proves by clear and convincing evidence that the accident occurred as claimed. Evidence that could be used to meet this standard would include skid marks or the presence of an intervening vehicle or other object that could be positively linked to an unidentified vehicle. If the insured must either prove physical contact or prove by clear and convincing evidence that the accident occurred, then both of the competing interests would be adequately served. The insured would have a remedy even without physical contact, while the insurance companies would be protected against fraudulent claims.

Although cases involving contact with intervening vehicles and objects have been treated inconsistently with the language of the policies, they have been treated equitably. In cases when there is an unbroken chain of events, the courts allow recovery because there is little danger of fraud. The reasoning has been questionable, but the results have been fair. If the legislature attempts to solve the physical contact problem, for example, by providing coverage only in cases involving physical contact or corroboration by an eyewitness, the courts could still rely on these cases to reach fair results.

This solution, however, may create more problems than it solves. It may be difficult for a plaintiff to determine whether the given situation provides proof by clear and convincing evidence that the accident was caused by the fault of an unidentified driver. It is likely that plaintiffs will attempt to enforce their claims even when there is no clear proof of the accident. In other words, this new standard may tend to encourage litigation. A bright-line test may be desirable to determine whether recovery should be granted.

CONCLUSION

Louisiana's solution to the inequities created by the physical contact requirement can be obtained through the courts or by the legislature. Should the legislature maintain the status quo, Louisiana courts, when faced with a clearly genuine accident victim, may continue to relax the physical contact requirement whenever it can find adequate justification.[59]

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59. The court relaxed the contact requirement in *Springer* and *Fore*. See supra notes 15 and 26.

Otherwise, the courts are likely to follow *Collins* and deny recovery. It is urged, however, that the courts take a different approach. Louisiana's uninsured motorist statute could be interpreted to mandate coverage whenever the negligent driver is unknown. The courts could apply this interpretation to totally invalidate the physical contact requirement. However, this would not strike the proper balance of interests. The court should instead apply the interpretation to limit the physical contact requirement to only those situations in which there is no corroborating eyewitness. This would more closely maintain the proper balance between the interests of preventing fraudulent claims and compensating innocent accident victims. If the courts continue to follow the *Collins* interpretation, the solution is left in the hands of the legislature.

It is urged that the Legislature take some steps to follow the lead of Georgia to a more reasonable and equitable approach to the issue. This can be done by amending La. R.S. 22:1406(D)(1)(a)(i) to require uninsured motorist coverage for "hit-and-run" accidents when there is either physical contact or corroboration by an eyewitness.

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