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The Requirement of a "Hit" for Coverage Against Hit-and-Run Drivers Under Uninsured Motorists Statutes and Policy Endorsements

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THE REQUIREMENT OF A "HIT" FOR COVERAGE AGAINST HIT-AND-RUN DRIVERS UNDER UNINSURED MOTORISTS STATUTES AND POLICY ENDORSEMENTS

I. INTRODUCTION

The ever expanding use of the automobile brought about the need for the use of state police power to set and enforce standards of reasonable road conduct. The slaughter that still takes place daily on the nation's highways demonstrated the need for some mode of compensating the innocent victims of this brutal tragedy, because far too often the tortfeasor was not able to respond financially for the damages he caused. Financial responsibility laws were the first major attempt toward a partial solution of this problem, the first being enacted by Connecticut in 1925.[1] All fifty states have now adopted some form of legislation directed toward the financial responsibility of motorists.[2]

These laws provide a system for proof of financial responsibility after an accident has occurred as a condition precedent to allowing the driver at fault to continue the privilege of driving. Such proof usually takes the form of liability insurance coverage for any future accidents. However, the one weakness in most of this type of legislation is that it looks only toward insuring financial responsibility for the *second* accident (and thus at least partial recompense for the *second* victim), this being reminiscent of the old common law rule allowing a dog one "free bite." Some states strengthened their financial responsibility laws in this respect by withholding the driving privilege, even after proof of future financial responsibility, until the driver had either provided proof that the claim of the original victim had been settled or the judgement satisfied or that the case was tried resulting in a verdict for the defendant.

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1. Law of January 1, 1926, ch. 183 (1925), Conn. Public Acts 3958 (repealed 1927).

2. For a listing of these statutes see Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present, and Future*, 8 BUFFALO L. REV. 215, 218 n.8 (1959). The one state not listed in the above article, Alaska, has since enacted such a law. ALASKA STAT. § 28.20.010-.640 (Supp. 1962).

While such financial responsibility legislation did further the cause of the "first-bite" victim, it still did not provide the protection desired. Massachusetts,[3] New York,[4] and North Carolina[5] enacted compulsory insurance programs in an effort to relieve this shortcoming of financial responsibility laws. However, while these compulsory insurance plans protected the first victim when the accident involved a resident wrongdoer, there still remained loopholes in cases involving nonresident drivers and hit-and-run drivers and in those situations in which the insurance company disclaimed liability for want of co-operation or absence of permission to drive.

Several other states took a different approach toward protecting the first-accident victim by enacting unsatisfied claim and judgement funds under state control.[6] These statutes allow a resident, injured in the state by a financially irresponsible motorist, to recover limited compensation. These programs are so limited in scope and amount of award that they do not satisfactorily compensate the victim of the "first bite."

The insurance industry, fearful of the spread of compulsory insurance and attendant state regulation of coverage and rates, and because of its dislike of unsatisfied claim and judgment funds, created the uninsured motorist endorsement.[7] Under

3. MASS. ANN. LAWS ch. 90, § 34 A-J (1957), *as amended*, (Supp. 1966); *id.* ch. 175, § 113 A-G (1959), *as amended*, (Supp. 1966).

4. Law of April 16, 1956, ch. 655, 393, (1956), McKinny's Session Laws of New York 758 (repealed 1959).

5. N.C. GEN. STAT. § 20-309 to -319 (1965).

6. MD. ANN. CODE, art. 66½, § 150-79 (1967); N.J. STAT. ANN. § 39:6-61 to -91 (1961), *as amended*, (Supp. 1966); N.D. CENT. CODE § 39-17-01 to -10 (1960), *as amended*, (Supp. 1967). *See generally* Loiseaux, *Innocent Victims 1959*, 39 TEXAS L. REV. 154 (1959); Plummer, *The Uncompensated Automobile Accident Victims*, 24 INS. COUNSEL J. 78 (1957); Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960).

7. *See generally* 7 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4331 (1962); Annot., 79 A.L.R.2d 1252 (1961); Chadwick & Poché, *California's Insured Motorist Statute: Scope and Problems*, 13 HASTINGS L.J. 194 (1961); Court, *Virginia's Experience with the Uninsured Motorist Act*, 3 WM. & MARY L. REV. 237 (1962); Doar & Richardson, *The South Carolina Uninsured Motorist Law*, 15 S.C.L. REV. 739 (1963); Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUNSEL J. 57 (1967); Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 1968 INS. L.J. 22; Patterson, *The South Carolina Uninsured Motorist Act*, 13 S.C.L.Q. 528 (1961); Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 BUFFALO L. REV. 215 (1959); Widiss, *Perspective on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497 (1967); Note, *MVAIC Six Years Later—A Practical Appraisal* 39 ST. JOHN'S L. REV. 321 (1965); Note, *Uninsured Coverage in Florida*, 14 U. FLA. L. REV. 455 (1962); Note, *Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145 (1961); Comment, *The Uninsured Motorist Endorsement—Some Problems of Construction*, 42 TUL. L. REV. 352 (1968).

this endorsement the insured can recover from his own insurer damages he was legally entitled to recover from an uninsured motorist. New Hampshire was the first state to enact a statute requiring that this endorsement be included in all policies issued or delivered in that state.[8] Virginia followed in 1958,[9] California in 1959,[10] and today a substantial number of states have legislation requiring insurance companies to make such coverage available.[11] In most states the insured has the right to reject such coverage, but nine states make the coverage mandatory.[12]

II. THE CONTACT REQUIREMENT IN HIT-AND-RUN SITUATIONS

With wide acceptance of the uninsured motorist coverage as at least a partial answer to the problem of protecting motorists from irresponsible tortfeasors, there have arisen numerous areas leading to litigation. One such area involves the hit-and-run driver who is considered to be an uninsured motorist because his victim is in as much need of compensation as is the victim of the wrongdoer who is known but uninsured. More specifically, the area of conflict involves the requirement set out in some state statutes that there be physical contact between a hit-and-run vehicle and the injured party (the insured) who is seeking to recover from his own insurance carrier. The Standard Policy endorsement,[13] which is the most frequently encountered expression of this requirement, defines a hit-and-run automobile as follows:

> "Hit-and-run automobile" means an automobile which causes bodily injury to an insured *arising out*

8. N.H. REV. STAT. ANN. § 268.15 (Supp. 1966).
9. VA. CODE ANN. § 38.1-381 (Supp. 1968).
10. CAL. INS. CODE § 11580.2 (West Supp. 1967).
11. Those states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin. *See* Widiss, *Prospective on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497 n. 10 (1967). South Carolina's Uninsured Motorist Statute was passed in 1959 as an amendment to the Motor Vehicle Safety Responsibility Act. It was extensively amended to its present form in 1963.
12. Those states are: Connecticut, Illinois, Maine, New Hampshire, New York, Oregon, South Carolina, Virginia and West Virginia.
13. National Bureau of Casualty Underwriter Family Protection Coverage (Automobile Bodily Injury Liability) No. A 6156, January 1, 1963 (1963 Standard Form).

of physical contact of such automobile with the insured or with an automobile which is insured at the time of the accident provided:

(a) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run automobile;"

(b) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace, or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof, and

(c) at the company's request, the insured or legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.[14]

Exactly what degree of contact is necessary to satisfy the policy requirements will be discussed later, but the general rule is that there must be either direct or indirect contact between the hit-and-run automobile and the insured or the car in which the insured is riding in order for the insured to recover on his uninsured motorist endorsement.

As controversies emerged under these policy endorsements and statutes, some states recognized a need for clarification and amplification in their uninsured motorist statutes and responded by amending or drafting their statutes to specify contact as a prerequisite to recovery from one's insurer for the misconduct of a hit-and-run driver.[15] A typical expression of this contact requirement is found in the South Carolina statute which provides:

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, there shall be no right of action

14. *Id.* (emphasis added).

15. *E.g.*, CAL. INS. CODE § 1180.2 (West Supp. 1967); GA. CODE ANN. § 56-407.1(b) (Supp. 1967); MISS. CODE ANN. § 8285-52 (Supp. 1966); N.Y. INS. CODE ANN. § 617 (McKinney Supp. 1968); S.C. CODE ANN. § 46-750.34 (Supp. 1967).

> or recovery under the uninsured motorist provision, unless
>
> (1) the insured or someone in his behalf shall have reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence and unless
>
> (2) *the injury or damage was caused by physical contact with the unknown vehicle* and
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.[16]

It is apparent that the statute has done no more than set out the basic requirements of the standard form endorsement. These statutory provisions did, however, make it clear that the requirement of contact was valid and considered necessary. The intended purpose of requiring a showing of contact between the hit-and-run vehicle and the insured was to lessen the possibility of spurious claims. The contact requirement is supposed to eliminate the claims of the driver who, through his own negligence, causes injury to himself without the involvement of another vehicle and then seeks to recover on the ground that the accident was caused by a hit-and-run driver[17]—for example, when a driver falls asleep at the wheel, leaves the road, hits a pole, and claims he had to swerve off the road to avoid being struck by an unidentified driver. In discussing the purpose of the contact requirement, the leading case of *Motor Vehicle Accident Indemnification Corp. v. Eisenberg*[18] states:

> The assertion of a hit and run accident is a proposition easy to allege and difficult to disprove. Absent protective legislation, it opens the door to abuses including fraud and collusion . . . . The problem, however, virtually disappears with the requirement of "physical contact." Proof that a hit and run vehicle did in fact exist is then clearly available for, as "physical contact" almost invariably produces visible evi-

16. S.C. CODE ANN. § 46-750.34 (Supp. 1967) (emphasis added).
17. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Spinola, 374 F.2d 873 (5th Cir. 1967); Inter-Insurance Exchange v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834, 835 (1965); Comment, *The Uninsured Motorist Endorsement—Some Problems of Construction*, 42 TUL. L. REV. 352, 364 (1968).
18. 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966).

dence of impact, the possibility of a "phantom" hit and run driver becomes minimal.[19]

As the *Eisenberg* court pointed out, the contact requirement stems from a valid concern that without such a prerequisite to coverage, fraud and collusion may be practiced against the insurer. However, not all states have deemed it necessary to impose or permit such a requirement. Virginia's uninsured motorist statute does not require any contact or collision with an unknown driver.[20] This is, however, the minority position since most states either require contact by statute or permit the policy endorsement to make it a condition precedent to coverage as a matter of contract.

III. WHAT IS "PHYSICAL CONTACT?"

Having established the general rule that contact is required, the crux of the inquiry then becomes the construction that courts have given the words "physical contact." This can best be examined by use of several hypotheticals illustrative of factual situations in which questions arise as to whether the requirement of physical contact has been satisfied. At one end of the spectrum there is the clear-cut no-contact situation in which car *B* is forced off the road by car *X* which fails to stop, damage ensuing to car *B* or its occupants. Here, clearly, car *B* could not collect under its uninsured motorist coverage.[21] At the other end of the spectrum there is the direct contact situation, in which car *B* is struck and forced off the road by an unknown car *X*, damage again being caused to car *B* or its occupants. Once again the result is clear: car *B* and its occupants may collect under the uninsured motorist endorsement because the necessary physical

19. *Id.* at 3, 218 N.E.2d at 526, 271 N.Y.S.2d at 643 (1966). *See also* Inter-Insurance Exchange v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1965); Coker v. Nationwide Ins. Co., 161 S.E.2d 175 (S.C. 1968); Note, *Uninsured Motorist Coverage in Florida*, 14 U. FLA. L. REV. 455, 459 (1962); Comment, *The Uninsured Motorist Endorsement—Some Problems of Construction*, 42 TUL. L. REV. 352, 364 (1968).

20. *See* Doe v. Simmers, 207 Va. 956, 154 S.E.2d 146 (1967); Nationwide Mut. Ins. Co. v. Sours, 205 Va. 602, 139 S.E.2d 51 (1964); Doe v. Faulkner, 203 Va. 522, 125 S.E.2d 169 (1962); Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962); Court, *Virginia Experience With the Uninsured Motorist Act*, 3 WM. & MARY L. REV. 237 (1962); Note, *Uninsured Motorist Coverage in Virginia*, 47 VA. L. REV. 145, 164 (1961).

21. *See, e.g.*, Cruger v. Allstate Ins. Co., 162 So. 2d 690 (Fla. 1964); Prosk v. Allstate Ins. Co., 82 Ill. App. 2d 457, 226 N.E.2d 498 (1967); Roloff v. Liberty Mut. Ins. Co., 191 So. 2d 901 (La. 1966). However, the result would differ in Virginia where contact is not required. *See* Note 20, *supra* and accompanying text.

contact was present.[22] In between these two extremes lie the areas which give rise to an increasing amount of litigation.

A situation being litigated with increasing frequency is that involving a third party in addition to the insured and the unidentified motorist. This is best illustrated by the leading case of *Inter-Insurance Exchange v. Lopez.*[23] In *Lopez* car *X* crossed the center line and hit car *B,* propelling it into contact with car *C,* the insured. Car *X* fled the scene of the accident and his identity remained unknown. The court had before it the sole issue of whether there was physical contact between car *X* and car *C* so as to bring the accident within the coverage of the policy. The insurer resisted on the grounds that there had been no physical *touching* between the hit-and-run vehicle and the insured automobile. In determining whether a *literal* touching was required, the court found satisfaction in the analogy of the common-law concept of battery and the related action of trespass on the case.[24] Common-law battery involved a willful and direct touching of the person of another, including any forcible contact brought about by an object or thing set in motion by the defendant. Indirect contacts—that is, those not satisfying the above described directness—were classified merely as actionable wrongs rather than batteries and gave rise to an action for trespass on the case rather than an action of trespass *vi et armis.* The *Lopez* court stated its conclusions as follows:

> We think when the legislature established the requirement of physical contact in the present law, it intended to make a distinction between a direct and an indirect application of force similar to that which the common law had earlier found useful in distinguishing between trespass and case. In our view a direct application of force, as by Car X striking Car B and forcing it to hit Car C, qualifies as physical contact within the meaning of the statute.[25]

The New York case of *Motor Vehicle Accident Indemnification Corp. v. Eisenberg,*[26] decided shortly after *Lopez,* in-

22. *E.g.,* Basore v. Allstate Ins. Co., 374 S.W.2d 626 (Mo. 1963).
23. 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1965).
24. *See generally* W. Prosser, HANDBOOK OF THE LAW OF TORTS 28-29 (3d ed. 1964).
25. 238 Cal. App. 2d at 443-44, 47 Cal. Rptr. at 836-37.
26. 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966).

volved a similar factual situation. Car *C* was struck by car *B* which had been struck and pushed across the center-divider by car *X*, a hit-and-run vehicle. The court held that the New York Legislature did not intend to impose the burden of requiring *direct* physical contact without the intervention of another automobile. It held that under the circumstances, the physical contact sustained was sufficient to satisfy the requirements of the New York Insurance Law.[27] The court reasoned that while the physical contact requirement was intended to prevent fraud and collusion, the policy of the entire statute was to compensate the innocent victim of a negligent uninsured motorist and this policy should be furthered rather than defeated whenever possible. The court concluded that since contact did take place indirectly, by way of an intervening automobile, the possibility of fraud had diminished. By construing the physical contact requirement of the statute as being satisfied by *less* than physical contact, the underlying policy of compensation to the innocent victim was furthered.

In *Johnson v. State Farm Mutual Automobile Insurance Co.*[28] an unknown hit-and-run vehicle struck car *B* causing it to strike car *C* (the insured vehicle). The court, following the view of *Lopez*, held that there was "physical contact" between the unknown vehicle and the insured vehicle within the meaning of the standard policy clause defining hit-and-run automobiles and requiring physical contact.[29]

The United States Court of Appeals for the Fifth Circuit followed *Lopez* and *Eisenberg* in the recent Florida case of *State Farm Mutual Automobile Insurance Co. v. Spinola.*[30] Here, as in those two cases, the insured's vehicle was struck by a vehicle which had been knocked into it by an unknown hit-and-run motorist.

One argument advanced by some claimants, but thus far rejected by the courts, is that if the hit-and-run vehicle was the proximate cause of the injury to the insured, this would satisfy the contact requirement of the statute or policy. In the *Lopez* case, in which the hit-and-run vehicle struck a second car, forcing it into the insured, the claimant advanced

27. N.Y. INS. CODE ANN. § 617 (McKinney Supp. 1968).
28. 70 Wash.2d, 424 P.2d 648 (1967).
29. *See* notes 13 & 14 *supra* & accompanying text.
30. 374 F.2d 873 (5th Cir. 1967).

the proximate cause argument. He contended that since the hit-and-run vehicle set in motion the sequence of events ending in contact with the insured, proof of proximate causation should satisfy the contact requirement. While the claimant in *Lopez* did recover, it was on the ground that there was indirect contact and not on the basis of proximate causation. Indeed, the court expressly rejected the proximate cause argument, pointing out that to follow such reasoning would largely write out of the statute the contact requirement and reopen the door to the abuses it was intended to prevent. The court illustrated the inappropriateness of applying the proximate cause rationale with the following example: If car *X* swerved in front of car *B*, causing it to swerve and strike car *C*, the act of car *X* would have been the proximate cause of the accident without the slightest touching of car *B* or car *C* by car *X*. The court concluded by stating that "the question of proximate cause is largely irrelevant to the determination whether or not physical contact occurred."[31]

The proximate cause argument was again advanced in the recent California case of *Page v. Insurance Co. of North America*.[32] The hypothetical used by the court in *Lopez* actually occurred in *Page*; that is, car *X* crossed the center line of the highway, causing car *B* to swerve to avoid collision which resulted in car *B* striking car *C* (the insured). There was no contact between car *X* and either car *B* or car *C*, but clearly car *X* had proximately caused the collision. Relying on the arguments in *Lopez*, the court rejected the idea that the proximate cause rationale might serve as a substitute for physical contact and denied recovery under the uninsured motorist provisions.

In the recent South Carolina case of *Coker v. Nationwide Insurance Co.*[33] one of the grounds for recovery relied on by the plaintiff and sustained by the lower court was that the acts of the unknown driver caused car *B* to strike car *C* (the plaintiff). In *Coker* car *X* and car *B* were racing, car *X* occupying the proper lane and car *B* ultimately occupying the lane intended for traffic proceeding in the opposite direction. Car *C* was proceeding in the proper lane, meeting the racers when car *B* collided head-on with car *C* and car *X* continued

31. Inter-Insurance Exchange v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834, 836 (1965).
32. 256 Cal. App. 2d 408, 64 Cal. Rptr. 89 (Ct. App. 1967).
33. 161 S.E.2d 175 (S.C. 1968).

on unidentified. The court stated that the statute[34] neither specifies nor implies that the contact requirement may be met by proof that the unknown vehicle caused the accident. The court made it clear that neither a showing nor even an admission that the hit-and-run vehicle was the proximate cause of the accident would serve as a substitute for a showing of physical contact.

It should be noted that in *Coker* there was no contact between car *X* and car *B* and the court reserved the question of whether the contact requirement would have been satisfied if contact between the hit-and-run and the intervening vehicle were present. It would seem likely that the South Carolina Supreme Court would follow the weight of authority represented by the *Lopez* and *Eisenberg* decisions, especially in view of the similarity of the state statutory requirements of physical contact. The reasoning and logic of these decisions are unassailable and the equity of the situation would command such a result. Considering the purpose of the safety responsibility legislation as a whole, as well as the purpose of the requirement for physical contact, the result reached in *Lopez* and *Eisenberg* is desirable.

Before leaving the *Coker* decision another argument of the plaintiff deserves consideration. The plaintiff resourcefully contended that since the unknown vehicle and the vehicle with which the plaintiff collided were racing and thereby jointly liable for the consequences of their unlawful acts,[35] it was just as if the unknown driver was driving the car of his racing companion which actually did come in physical contact with the insured. Thus, the plaintiff asserted, in effect, that the unknown driver came into constructive contact with the insured in that he was responsible for the conduct of the vehicle which did in fact make contact. While this argument appeals to one's sense of justice, it is submitted that to allow the contact requirements to be circumvented by such a strained construction would be amending the statute rather than construing it to give effect to its plain meaning. The court, feeling that such an interpretation would do violence to the

34. S.C. CODE ANN. § 46-750.34 (Supp. 1967).

35. Racing motor vehicles on the public highway is negligence and unlawful under S.C. CODE ANN. § 46-356 (1962), and all who engage in the race do so at their peril and are liable for injury sustained by third persons as a result thereof. This is true even though only one of the vehicles engaged in the race actually inflicts the injury. Skipper v. Hartley, 242 S.C. 221, 130 S.E.2d 486 (1963).

language of the statute, rejected the plaintiff's arguments and reversed the lower court. The court concluded by stating that

> [t]he statute makes proof of physical contact a condition precedent in every case for the recovery of damages caused by an unknown driver and vehicle. There are no exceptions. If it is advisable that the statute be changed, the solution lies within the province of the Legislature. We have no right to legislate the provisions from the statute or to modify its application under the guise of judicial interpretation.[36]

IV. ALTERNATIVES TO THE CONTACT REQUIREMENT

With the exception of the concession allowing indirect physical contact to suffice in some situations, courts have generally withstood attempts to erode or do away with the statutory or contractual requirement of physical contact in order for one to recover under uninsured motorist coverage in hit-and-run situations. One cannot dispute the purpose for which the physical contact requirement was instituted. The physical contact provision of the statute "was undoubtedly adopted to curb fraud, collusion and other abuses arising from the assertion of claims that phantom vehicles had caused accidents."[37] It is an easy matter to allege than an unknown vehicle caused an accident but it is almost impossible to disprove such allegations. The imposition of the contact requirement, however, leaves unprotected those who *are* actually forced off of the road by the unknown driver. It is reflexive for a driver to jerk the steering wheel to avoid collision when a passing motorist cuts back in too quickly or when an approaching car is straddling the center line. This jerk of the wheel often avoids collision with the negligent motorist, but it can easily result in loss of control and severe damage. Yet the law, in effect, requires the motorist to follow his natural reflexes at his peril—that is, by taking the chance that either he will not be injured in avoiding contact or that if he is injured the negligent driver will stop to accept his liability. Put another way, the statute or policy endorsement is saying to the insured that he had better at least "get in a lick" if

36. 161 S.E.2d at 178.
37. *Id.* at 177. *See also* notes 17 & 18 *supra* and accompanying text.

he is to be assured that someone will respond in damages for any injuries that follow.

The potential absurdity of the physical contact requirement as a fraud-preventing measure may be seen in the following example: *X*, an uninsured motorist driving a stolen car while intoxicated swerves across the center line of a highway and *B*, traveling in the opposite direction, swerves to avoid a head-on collision with *X*. *B*'s car leaves the road and overturns, causing severe injury to *B* and his passenger. Thirty honorable bishops observe the entire accident but none of them recall the license number of *X*'s car. Because there was no contact with the hit-and-run vehicle, neither *B* nor his passenger may recover under the uninsured motorist clause.[38]

Another slightly exaggerated hypothetical situation illustrates the potentially harsh and unrealistic result that could flow from the requirement of physical contact: A pedestrian (insured) observes an automobile out of control and coming up over the curb in his direction. In dashing to get out of the way, the pedestrian crashes through a plate glass window as the only means of escape from the errant automobile which leaves the scene and remains unknown. As his "reward" for the avoidance of collision with the automobile, the insured incurs severe wounds, the most painful being the denial of recovery under his uninsured motorist coverage.[39]

The above two examples serve simply to illustrate the situations in which bona fide, grevious injuries can be incurred as a result of the negligence of the unknown vehicle but without physical contact. Notwithstanding the unimpeachable testimony of the thirty honorable bishops in the first example, recovery is denied the injured insured because the technical requirement of contact is absent. Despite the availability of numerous reliable and disinterested witnesses, the insured pedestrian of the second example may not rely upon his uninsured motorist coverage to compensate him for the injuries caused by the hit-and-run automobile which did not actually come in contact with its victim.

Once the absurdity of these situations is acknowledged the problem then becomes one of finding some way to accomplish

38. The illustration paraphrases one from Chadwick & Poché, *California Uninsured Motorist Statute: Scope and Problems*, 13 HASTINGS L.J. 194, 198 (1961).

39. The illustration paraphrases one from Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 1968 INS. L.J. 22, 28.

the prevention of fraud while at the same time allowing coverage to those bona fide no-contact cases of "hit-and-run." One possible solution is to provide some alternative to impact such as the sworn statements of disinterested witnesses. While this would not reach the no-contact accident that occurred unwitnessed on a deserted road, it would at least reduce the number of instances where the absence of physical contact actually works a forfeiture of coverage when coverage should be afforded. To this suggestion would surely come the reply that this would only give the insured a means of perpetrating a fraud by going out and finding himself some "witnesses" when in reality there were no witnesses to the accident and no "hit-and-run" vehicle. While this is a possibility, it would appear not to be any more serious in this situation than it is in any other situation in which the testimony of witnesses is used to supply the needed proof. Notice, too, that the suggestion is that *disinterested* witnesses supply the needed evidence of the unknown vehicle's causal role. This means that someone other than the insured[40] or one interested in the outcome of the litigation would be required to offer the necessary testimony corroborating that of the claimant.

Another suggestion advanced is the requirement that in the absence of physical contact, the plaintiff must prove his claim by clear, cogent and convincing evidence rather than by the greater weight or preponderance of evidence. There is some authority supporting the requirement that the plaintiff in an action easily open to fraud or deception must prove his claim by this higher standard of persuasion.[41] There is no apparent reason why such a standard could not be used in "John Doe" actions in which there is no contact. There could be created a statutory presumption of no liability in the no-contact situations, which presumption could be rebutted only by clear, cogent and convincing evidence that the accident was indeed caused by the no-contact "hit-and-run" driver. This evidence would usually take the form of statements from disinterested witnesses referred to above, but perhaps it might

40. The term "insured" includes the named insured and any relative, and any other person while occupying an insured automobile. Note 13 *supra*.

41. Professor McCormick states that: "Among the classes of cases to which this standard of persuasion [clear and convincing proof] has been applied are . . . . miscellaneous types of claims and defenses, varying from state to state, where there is thought to be a special danger of deception . . . ." C. MCCORMICK, EVIDENCE § 320 (1954 ed.).

also include other evidence such as physical signs at the scene of the accident. The point is that rather than having the door of recovery closed automatically and arbitrarily when there is no physical contact between the unknown car and the insured, the claimant will at least be given a chance to convince a jury, albeit by the highest degree of persuasion used in civil litigation, that there was a "John Doe" motorist whose negligence caused the accident. This does not seem to be opening the door wide to fraudulent and collusive claims, although it must be conceded that there is a possibility that such claims will occasionally prevail. This slight crack in the door would be justified by the recovery allowed to the bona fide victims of no-contact "hit-and-run" drivers. It would seem that such a concession would have a much greater effect in the direction of equity than it would in the direction of fraud.

V. CONCLUSION

In the ten years since the introduction of uninsured motorist coverage, it has shown itself to be at least a step in the direction of alleviating some of the woes of innocent victims of financially irresponsible motorists. However, it is no panacea, and often the path to a just reward is lined with pitfalls such as the physical contact requirement just discussed. While precautions are necessary in order to prevent fraud and collusion, it would seem highly desirable that the possible alternatives to physical contact be considered by the legislatures. Until such changes are made in the statutes, it is hoped that the courts will continue to follow the lead of the California and New York courts in giving the physical contact requirement as liberal an interpretation as is consistent with sound methods of statutory construction.

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