MISS-AND-RUN ACCIDENTS AND THE PHYSICAL CONTACT REQUIREMENT: AN UNFAIR ADVANTAGE FOR INSURANCE COMPANIES IN THE INSURANCE CAPITAL OF THE HEARTLAND

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I. THE LATEST DEVELOPMENT IN IOWA CONCERNING MISS-AND-RUN VEHICLES

On May 12, 2004, the Iowa Supreme Court handed down its decision in *Claude v. Guaranty National Insurance Co.*[1] This lone decision demonstrates the vast inequity that arises from a strict interpretation of the "physical contact" requirement contained within Iowa's uninsured motorist (UM) statute.[2] Part I of this Note provides the current status of the UM statute in Iowa. Part II discusses why UM statutes and insurance provisions exist, while Part III focuses on the history and creation of the UM safeguards. Part IV of this Note explores how other states have tackled the problem of hit-and-run and miss-and-run accidents. Part V discusses the implications of the *Claude* decision on the people of Iowa and how the Iowa Supreme Court decision violates Iowa's public policy behind enacting a UM statute. Part V determines that Iowa does not utilize a statutory construction that strikes the most favorable balance between the insurance companies' needs and the insureds' needs, and recommends, as necessary, a reevaluation by the Iowa legislature to best serve the people and economy of Iowa. Part V argues that Iowa should join the ranks of other states that provide the greatest protection to insureds against uninsured motorists. If the Iowa legislature continues to refuse to refashion section 516A.1, the Iowa Supreme Court should provide justice for the disadvantaged insureds of Iowa.

In *Claude*, Mr. and Mrs. Mahoney were driving along a two-lane highway when an oncoming vehicle began to pass a semitrailer.[3] To avoid

1. Claude v. Guar. Nat'l Ins. Co., 679 N.W.2d 659 (Iowa 2004).

2. IOWA CODE § 516A.1 (2005) (providing that physical contact between the unidentified vehicle and the insured's vehicle must occur for the insured to collect UM benefits); *Claude*, 679 N.W.2d at 665–66 (finding that an insured may not recover UM benefits even when independent and disinterested witnesses corroborate the insured's statement that an unidentified vehicle caused the accident).

3. *Claude*, 679 N.W.2d at 661.

an accident, the Mahoneys swerved, which caused them to lose control of their vehicle and in turn intercept the path of the semitrailer in the left lane.[4] The Mahoneys' vehicle came into contact with the semitrailer and finally came to rest along the highway.[5] Mr. and Mrs. Mahoney were both killed.[6] The executor of the Mahoneys' estates brought suit against Guaranty National Insurance Company in order to recover Mr. and Mrs. Mahoneys' UM benefits.[7] The Iowa Supreme Court found that because the Mahoneys' vehicle did not make physical contact with the unidentified vehicle, they were precluded from recovering their UM benefits.[8]

Iowa's statutory physical contact requirement mandates that an insured make physical contact with another vehicle in an accident where the insured is making a claim for UM benefits.[9] Additionally, the Iowa UM statute does not explicitly allow for any exceptions to the physical contact requirement.[10] Thus, as in *Claude*, even if there is no risk of fraud because independent witnesses corroborate the insured's story, the insured cannot recover any UM benefits.[11] In *Claude*, the Iowa Supreme Court refused to use its powers to prevent injustice and rather deferred to what it deemed was the presumed intent of the Iowa legislature by stating that preventing fraud was a higher priority of the Iowa legislature than preventing the few injustices that might occur by strictly interpreting section 516A.1.[12]

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4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 666. The Iowa Supreme Court found that the Iowa legislature intended a strict interpretation of Iowa Code section 516A.1 and that even though injustices might occur, as in *Claude*, this reading would best promote nonfraudulent practices. *Id.* at 665–66.

9. IOWA CODE § 516A.1 (2005).

10. *See Claude*, 679 N.W.2d at 665.

11. *See id.*; *see also id.* at 663–64 (finding that because "the 'legislature has weighed in on the issue,'" it would not expand the scope of the statute to include UM coverage for situations where there is no doubt as to whether a phantom vehicle caused the accident (quoting Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 686 (Iowa 2001))).

12. *See id.* at 665 ("The requirement of physical contact furthers the general assembly's objective to reduce the possibility of claims based on accidents that were not caused by another motorist."). The Iowa legislature does not publish legislative committee notes; thus, the Iowa Supreme Court can interpret the intent of the legislature by whatever manner it chooses.

II. UNINSURED VEHICLES AND WHY STATES AIM TO PROTECT INSUREDS

In general, "an 'uninsured vehicle' is a vehicle for which there is no liability policy in the minimum amount required by the financial responsibility law, or a vehicle for which the required bond has not been posted."[13] Thus, UM statutes and insurance provisions provide coverage for insureds involved in accidents with individuals without insurance.[14]

The purpose behind UM statutes and UM insurance provisions is to afford the insured "the same protection he would have had were the offending driver covered adequately with liability insurance."[15] Therefore, the UM statutory mandate or insurance provision theoretically places the insured in the same position he would have occupied had the offending driver been properly insured.[16] The Insurance Research Council estimated that between 1995 and 1997, ten percent of all Iowa drivers were uninsured.[17] Logic dictates that without either mandated UM statutory coverage or policy coverage, insureds assume the immense risk of having to pay for accidents out-of-pocket even when they are not at fault.

III. THE HISTORY AND CREATION OF THE UM SAFEGUARD

UM protection has not always been a part of the American insurance standard.[18] UM insurance provisions developed in the 1950s in response to the growing number of people failing to insure themselves.[19] Insurance companies, despite being sympathetic toward innocent victims of uninsured motorists, were not big proponents of "state-imposed programs and public Unsatisfied Judgment Funds."[20] Due to the governmental encroachment upon the insurance industry, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted and

13. ERIC MILLS HOLMES, APPLEMAN ON INSURANCE § 147.4 (2d ed. 2004) (footnote omitted).

14. *See* IOWA CODE § 516A.1 (providing "protection [for] persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle").

15. James T. Rivera, Note, State Farm Mutual Automobile Insurance Co. v. Azhar: *Protecting the New Victims of "Hit & Run" in Underinsured Motorist Coverage—Insurance Companies*, 54 LA. L. REV. 1743, 1747 (1994).

16. *Id.*

17. Insurance Research Council, IRC Study Estimates 14% of Drivers Are Uninsured, http://www.ircweb.org/news/2001-02-01.htm (last visited Jan. 17, 2006).

18. *See* Rivera, *supra* note 15, at 1747.

19. *Id.*

20. *Id.*

incorporated an uninsured motorist endorsement into the family automobile policy.[21] By approaching the problem of governmental intervention with regard to uninsured motorists in this manner, the insurance industry retained control over the scope of UM coverage and could make it optional as additional coverage for which insureds paid.[22] After the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted the UM endorsement, there was "rapid adoption and public acceptance of uninsured motorist coverage in the insurance industry [which] resulted in its implementation throughout the nation on a broad scale."[23]

IV. UM STATUTES IN GENERAL: FOUR VARIANTS

In general, there are four types of UM statutes: (1) statutes that do not address the hit-and-run situation and do not specify whether physical contact is required for insureds to recover their UM benefits;[24] (2) statutes that mention hit-and-run situations but do not define the term "hit-and-run";[25] (3) statutes requiring corroborative evidence substantiating an insured's standpoint that there was an unidentified driver who caused the accident;[26] and (4) statutes that require physical contact for recovery of UM benefits.[27]

A. *Statutes Not Addressing Hit-and-Run Situations*

1. *States Liberally Construing Their UM Statute to Require Coverage for Hit-and-Run Accidents Where There Is Not Physical Contact*

In a number of cases courts have determined that even though the state statutes lack any express reference to hit-and-run accidents or physical contact requirements, insurance policies that contain a physical contact requirement are void as contrary to the public policy underlying UM statutes.[28] The Idaho UM statute is demonstrative of the language

21. *Id.*

22. *See id.* (noting that insurance companies took this approach "[t]o avoid further 'socialization of insurance' and government intervention").

23. *Id.*

24. *See, e.g.*, IDAHO CODE ANN. § 41-2502 (2003).

25. *See, e.g.*, OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 2006).

26. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-259.01M (2002 & Supp. 2005).

27. *See, e.g.*, IOWA CODE § 516A.1 (2005) (requiring physical contact as a prerequisite to recovering UM benefits).

28. *See, e.g.*, Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337, 1339–42

contained within a UM statute not directly addressing hit-and-run accidents.

> No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any natural person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death as set forth in section 49-117, Idaho Code, as amended from time to time, under provisions approved by the director of the department of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The named insured shall have the right to reject such coverage, which rejection must be in writing; and provided further, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.[29]

In light of the above statutory language, which is similar to many other states' UM statutes not specifically addressing hit-and-run accidents,[30] many insurance companies within these states have included physical contact requirements within UM insurance provisions in order to protect themselves from potentially fraudulent claims.[31] Some courts,

(D.N.M. 1975) (mem.) (finding that the physical contact requirement was contrary to the public policy of "protect[ing] the injured party from the . . . unknown motorist" and holding that the public policy was not "to protect the insurance company from the injured party"); Lowing v. Allstate Ins. Co., 859 P.2d 724, 729–30 (Ariz. 1993) (en banc) (finding that the physical contact requirement frustrated the Arizona UM statute's purpose of "allow[ing] a prudent person to protect himself or herself against the universe of risks"); Farmers Ins. Exch. v. McDermott, 527 P.2d 918, 919–20 (Colo. Ct. App. 1974) (holding that the purpose underlying Colorado's UM statute was "the need to compensate the innocent driver for injuries received at the hands of one from whom damages cannot be recovered" and that the UM statute does not require physical contact).

29. IDAHO CODE ANN. § 41-2502.

30. *See, e.g.*, CONN. GEN. STAT. ANN. § 38a-336 (West 2000); HAW. REV. STAT. § 431:10c-301 (Supp. 2004); KAN. STAT. ANN. § 40-284 (2000); MONT. CODE ANN. § 33-23-201 (2005); 40 PA. CONS. STAT. ANN. § 2000 (West 1999).

31. *See, e.g.*, *Montoya*, 394 F. Supp. at 1338 (discussing an insurance policy that "included provisions allowing coverage when the insured is involved in an accident with a 'hit-and-run' vehicle *provided* there is in fact *physical contact* between the

however, have determined that despite the need for fraud prevention, the state has an obligation to protect innocent and injured insureds, consistent with the original intent of the UM statutes.[32]

The original intent of UM statutes, as discussed in Part III, was to expand insurance protection to the public so as to provide greater safeguards for damage or injury caused by other uninsured motorists who are unable to make the injured party whole.[33] Yet, because of the required coverage for financially irresponsible drivers, insurance companies must take on the burden of worrying about the possibility of fraudulent claims.[34] One approach to interpreting these particular UM statutes in favor of insurance companies is "that the statute was intended to apply only when the negligent party actually has no insurance coverage."[35] This viewpoint makes the assumption that when insurance companies provide hit-and-run coverage, the coverage actually goes beyond what the UM statute requires because the UM statute only requires insurance companies to provide coverage for uninsured motorists, and an unidentified motorist is not necessarily uninsured; thus, the physical contact requirement cannot be seen as an undue restriction.[36]

Opponents of the physical contact requirement have taken a different stance concerning statutes silent on the subject of hit-and-run accidents.[37]

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insured and the 'hit-and-run' vehicle").

32. *See generally id.* at 1342 (holding the physical contact requirement invalid as contrary to the remedial purpose of the statute); *Lowing*, 859 P.2d at 731–32 (deciding "that the unidentified accident-causing drivers are uninsured within the meaning of A.R.S. § 20-259.01" and "[p]hysical contact requirements, by restricting coverage to only those unidentified drivers who actually hit the insured, are in conflict with the statute and are void"); *Farmers Ins. Exch.*, 527 P.2d at 920 (holding the physical contact requirement in the uninsured motorist "policy is an impermissible restriction upon the broad coverage required under the uninsured motorist statute").

33. *See Montoya*, 394 F. Supp. at 1340 ("The public was to be protected from damage or injury caused by other motorists who were not insured and could not make the injured party whole.").

34. *See* Allied Fid. Ins. Co. v. Lamb, 361 N.E.2d 174, 178 n.2 (Ind. Ct. App. 1977) (stating that the reason for the physical contact requirement is to prevent fraudulent actions (citing Ely v. State Farm Mut. Auto. Ins. Co., 268 N.E.2d 316 (1971))).

35. *Farmers Ins. Exch.*, 527 P.2d at 919–20 (finding that the cases upholding physical contact requirements "are based on the premise that the statute was intended to apply only when the negligent party actually has no insurance coverage").

36. *See id.* (deducing this line of reasoning from a number of cases upholding the physical contact requirement and finding it unpersuasive).

37. *See Lowing*, 859 P.2d at 729 (determining physical contact requirements to be contrary to the intent of the statute and, therefore, void).

Adversaries have concluded that "[e]xclusions and limitations on coverage are generally invalid unless contemplated by the statute,"[38] contrary to the insurance companies' position that, by omitting hit-and-run accidents in UM statutes, the legislature did not intend for their coverage.

The *Lowing v. Allstate Insurance Co.*[39] court addressed the idea that miss-and-run motorists could not be determined as uninsured and were therefore precluded from coverage by UM statutes: "[U]nidentified motorists are functionally uninsured as to the persons they injure because they have no insurance that is in fact available and collectible. . . . But an insured will never know, and can never prove, whether an unidentified negligent motorist is insured."[40]

The New Mexico UM statute was interpreted by the United States District Court for the District of New Mexico as allowing recovery of UM benefits even without a finding of physical contact between the unidentified vehicle and the insured's vehicle.[41] In fact, the court explicitly stated that "[t]he statutes are not designed to protect the insurance company from the injured party."[42] The court recognized that other jurisdictions had found the physical contact requirement to be valid, but reasoned that "[t]he only reason for such a requirement is to prove that the accident actually did occur as a claimant may say it did. This is a question of fact to be determined by the jury, or the judge if demand for jury trial is not made."[43] Therefore, the court determined that even though the New Mexico UM statute did not directly address hit-and-run accidents and that

38. *Id.* at 727 (citing Calvert v. Farmers Ins. Co., 697 P.2d 684, 687 (Ariz. 1985)). In 1998, the Arizona legislature adopted section 20-259.01(M), which states that when an insured makes a claim of bodily injury or death based on an accident involving an unidentified motor vehicle under either uninsured or underinsured motorist coverage, the insured shall provide corroboration that an unidentified motor vehicle caused the accident when there is no physical contact between the vehicles involved. Act of May 29, 1998, ch. 288, § 2, 1998 Ariz. Sess. Laws 1970, 1973; ARIZ. REV. STAT. ANN. § 20-259.01M (2002 & Supp. 2005). As for the quality of corroboration, Arizona only requires "any additional and convincing testimony, fact or evidence that strengthens and adds weight or credibility to the insured's representation of the accident." ARIZ. REV. STAT. ANN. § 20-259.01M. The Arizona Court of Appeals has determined that this does not require the insured to prove the claim. Scruggs v. State Farm Mut. Auto. Ins. Co., 62 P.3d 989, 994 (Ariz. Ct. App. 2003).

39. Lowing v. Allstate Ins. Co., 859 P.2d 724 (Ariz. 1993) (en banc).

40. *Id.* at 728 (citation omitted).

41. *See* Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337, 1342 (D.N.M. 1975) (mem.).

42. *Id.* at 1340.

43. *Id.*

the fundamental reasoning underlying physical contact requirement (to prevent fraud) was logical, it was inappropriate for the insurance companies to create criteria for determining whether an accident occurred.[44] This, instead, is the job of the factfinder.[45]

Furthermore, despite the prevention of fraud being the overarching goal of physical contact requirements, Professor Widiss provided the following criticisms highlighting the irony in the rule:

> It seems unreasonable to establish a rule under which recovery is possible if there is a minute scratch on the insured's car, but no impartial witnesses—and to deny all rights where there was no contact, even though there are many witnesses and there is no reason to suspect collusion or fraud. Some standard assuring adequate evidence in support of a claim that the injuries (for which indemnification is sought) are the result of an evasive action executed to avoid a collision with an unidentified negligent driver is certainly warranted.[46]

Why should UM benefits be contingent upon physical contact? A persons's knowledge of whether a vehicle is insured is no better for a hit-and-run vehicle than it is for a miss-and-run vehicle. In both situations, the motorist at fault is uninsured from the viewpoint of the insured. As the *Lowing* court stated, "[t]he whole purpose of uninsured and underinsured motorist coverage is to allow a prudent person to protect himself or herself against the universe of risks."[47]

Insureds buy insurance and pay the corresponding premiums every month with the expectation of being protected in the event of an accident. It is not the typical insureds' reasonable expectation that, upon the occurrence of an accident that is another vehicle's fault, they will be forced to pay for the damages, property and bodily, out of their own pockets. Therefore, refusing to enforce physical contact requirements contained within insurance policies in states where the UM statute does not address hit-and-run accidents or physical contact requirements comports more closely with public views and automobile insurance expectations.

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44. *See id.* (noting that the only purpose for the physical contact requirement is to force the claimant to prove the accident happened as claimed).

45. *Id.*

46. ALAN I. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.41 (1969), *quoted in Montoya*, 394 F. Supp. at 1340.

47. Lowing v. Allstate Ins. Co., 859 P.2d 724, 729 (Ariz. 1993) (en banc).

2. *States Narrowly Construing Their UM Statute to Only Require Coverage for Hit-and-Run Accidents Where There Is Actual Physical Contact*

As discussed in Part IV.A.1, not all states possessing statutes silent on the issue of hit-and-run accidents allow for the recovery of UM benefits without a finding of physical contact.[48] Indiana courts have interpreted Indiana Code section 27-7-5-2 in a very literal sense, stating that "in order to comply with the [Indiana UM] Act, an insurer must provide coverage when an insured is legally entitled to recover from an individual who can be identified as being either: 1) without liability insurance; or 2) having insurance with an insolvent insurer."[49] The court determined that the statute neither mandated nor prohibited an insurer from offering coverage for additional risks, including hit-and-run and miss-and-run accidents.[50] The purpose of the Indiana UM statute, according to the Indiana Court of Appeals, is to provide the most basic coverage, not comprehensive coverage.[51] In *Hammon v. Farmers Insurance Co. of Idaho*,[52] the Idaho Supreme Court similarly found that the insurance company had actually gone above and beyond statutory mandates.[53] Therefore, the court

48. *See supra* Part IV.A.1 (discussing opponents' reasoning for not providing UM coverage for accidents lacking physical contact between the vehicles); *see also* Ward v. Consol. Underwriters, 535 S.W.2d 830, 832 (Ark. 1976) (holding the physical impact provision in the policy at issue to be valid because the statute only requires coverage for uninsured vehicles; therefore, the policy is already a liberalization of the statute); Ward v. Allstate Ins. Co., 514 S.W.2d 576, 578 (Mo. 1974) (en banc) (holding that without "physical contact, there can be no recovery under the 'hit-and-run'" provision in an uninsured motorist insurance policy), *superseded by statute*, Act of June 17, 1982, 1982 Mo. Laws 602, *as recognized in* Kramer v. Ins. Co. of N. Am., 54 S.W.3d 613, 622 (Mo. Ct. App. 2001). *See generally* Ely v. State Farm Mut. Auto. Ins. Co., 268 N.E.2d 316, 322 (Ind. App. 1971) (holding the physical contact requirement to be valid); Huelsman v. Nat'l Emblem Ins. Co., 551 S.W.2d 579, 582 (Ky. Ct. App. 1977) (same); Collins v. New Orleans Pub. Serv., Inc., 234 So. 2d 270, 272 (La. Ct. App. 1970) (same); Citizens Mut. Ins. Co. v. Jenks, 194 N.W.2d 728, 731 (Mich. Ct. App. 1971) (same); Buckeye Union Ins. Co. v. Cooperman, 293 N.E.2d 293, 298 (Ohio Ct. App. 1972) (same); Smith v. Allstate Ins. Co., 456 S.W.2d 654, 656–57 (Tenn. 1970) (same); Phelps v. Twin City Fire Ins. Co., 476 S.W.2d 419, 421 (Tex. Civ. App. 1972) (same).

49. Ind. Ins. Co. v. Allis, 628 N.E.2d 1251, 1253 (Ind. Ct. App. 1994).

50. *Id.* at 1254; *see also* State Farm Mut. Auto. Ins. Co. v. Pate, 275 F.3d 666, 670 (7th Cir. 2001) (holding that Indiana does not require insurance policies to cover miss-and-run accidents, but it does not prohibit coverage either).

51. *See Allis*, 628 N.E.2d at 1253–54 (stating that the purpose of the Act is to provide basic coverage, not to mandate or regulate greater coverage).

52. Hammon v. Farmers Ins. Co. of Idaho, 707 P.2d 397 (Idaho 1985).

53. *Id*. at 400.

reasoned that the physical contact requirement is a contractual issue between the insurer and the insured.[54]

Additionally, several courts interpreting statutes not addressing hit-and-run accidents have quoted the *Hammon* court, which stated the following:

> An "uninsured" vehicle is clearly not the same as an "unidentified" vehicle. The statute directs that coverage be made available for the protection of persons insured thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles. This language obviously contemplates that there is proof of the identity of the owner or operator of the vehicle; otherwise it could not be ascertained that the vehicle was uninsured. Normally, when the vehicle is a hit-and-run automobile, such identity cannot be ascertained. Thus, we conclude that hit-and-run coverage is neither mandated nor prohibited under the Idaho uninsured motorist statute.[55]

These courts reason that because an unidentified vehicle cannot be determined to be uninsured, UM benefits should not be recovered by the insured.[56] Moreover, courts in some states with UM statutes that do not directly address hit-and-run accidents require the insurance policy forms be approved by the state insurance directors, and that approval is given substantial weight when determining the validity of physical contact requirements contained within those policies.[57]

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54. *See id*. Classifying the physical contact requirement as a contractual issue raises various difficulties because the insured is placed at a bargaining disadvantage. An insured does not, in most instances, possess the power within the bargaining relationship to negotiate the terms of the automobile insurance because the insurance options are in a standardized form. This leaves the insured in a "take-it-or-leave-it" position. The option of "leaving it" and finding another insurance company always exists but chances are if one insurance company in the state incorporates a physical contact requirement into its automobile insurance policy, most, if not all, insurance companies within the state will too. *Forms & Procedures Under the Uniform Commercial Code* [2005] 5 U.C.C. Serv. (MB) ¶ 21.03, at 2-25 (discussing how a contract clause in a credit card application may be unconscionable if there is an "absence of a meaningful choice on the part of one of the contracting parties, and the contract terms unreasonably favor the other party" (citation omitted)).

55. *Hammon*, 707 P.2d at 399–400, *quoted in* Stamper v. Allstate Ins. Co., 766 P.2d 707, 708–09 (Idaho 1988), *and Allis*, 628 N.E.2d at 1254–55.

56. *See id.* at 399 (refusing to construe the phrase "uninsured motor vehicle" to include an "unidentified motor vehicle"); *Stamper*, 766 P.2d at 708–09 (same); *Allis*, 628 N.E.2d at 1254–55 (same).

57. *E.g.*, *Stamper*, 766 P.2d at 709; *see also* Ely v. State Farm Mut. Auto. Ins. Co., 268 N.E.2d 316, 320 (Ind. App. 1971) (relying, in part, on a state insurance

B. *Statutes Providing for Hit-and-Run Situations but Not Defining "Hit-and-Run"*

UM statutes in some states provide coverage for hit-and-run accidents, yet, the term "hit-and-run" is not defined within the statute.[58] Many insurance companies in these states, however, place a condition precedent within their policies stating that there must be physical contact with the unidentified vehicle before an insured can recover UM benefits.[59] Thus, the role of these state courts has been to interpret the legislative meaning of the term "hit-and-run" so as to define the appropriate boundaries insurance policies can meet, but not cross.[60] There are two differing viewpoints within the group of states with this particular style of UM statute. Some states take the stance that the term "hit-and-run" should be interpreted broadly and should allow recovery for damages caused by a miss-and-run accident.[61] Conversely, other states take the position that the term "hit-and-run" should be interpreted literally and

commissioner's approval of automobile liability policies containing physical contact requirements in holding that the physical contact requirements were not incompatible with a statute mandating coverage for injuries caused by UM vehicles); Jones v. Heymann, 318 A.2d 43, 44–45 (N.J. Super. Ct. App. Div. 1974) (holding physical contact requirements not to be invalid as against public policy in part because of their approval by the state insurance commissioner); Smith v. Allstate Ins. Co., 456 S.W.2d 654, 656 (Tenn. 1970) (holding the physical contact requirement contained in the UM provision of the applicable automobile liability policy precluded coverage in part because of the state insurance commissioner's approval of the policy).

58. *See, e.g.*, MASS. GEN. LAWS ch. 175, § 113L (1998); OKLA. STAT. ANN. tit. 36, § 3636(b) (West Supp. 2006); R.I. GEN. LAWS § 27-7-2.1 (2002).

59. *See, e.g.*, Hartford Accident & Indem. Co. v. Novak, 520 P.2d 1368, 1369–70 (Wash. 1974) (en banc) (finding that the UM provision defined a "hit-and-run automobile" as "an automobile which causes bodily injury to an insured *arising out of physical contact of such automobile with the insured* or with an automobile which the insured is occupying at the time of the accident").

60. *See, e.g.*, Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47, 49–50 (Me. 1987) (finding the need to interpret the meaning of "hit-and-run" to determine whether or not coverage existed for hit-and-run accidents lacking physical contact); Biggs v. State Farm Mut. Auto. Ins. Co., 569 P.2d 430, 432 (Okla. 1977) (same); Su v. Kemper Ins. Cos., 431 A.2d 416, 417–19 (R.I. 1981) (same).

61. *See, e.g.*, *Lanzo*, 524 A.2d at 50 (concluding "that the uninsured motorist provision in the defendant's policy impermissibly limits uninsured motorist coverage"; therefore, insurance companies must provide UM coverage for hit-and-run accidents lacking physical contact); *Biggs*, 569 P.2d at 433 (stating that the statute's purpose of extending protection to those injured by both insured and uninsured drivers would be thwarted if insurance coverage required physical impact); *Su*, 431 A.2d at 419 (holding the policy requirement of physical contact to be void and against the public policy behind uninsured motorist statutes).

only allow recovery of UM benefits if there is evidence of physical contact between the insured's vehicle and the vehicle of the unidentified driver.[62]

1. *States Adopting a More Expansive Reading of the Definition of "Hit-and-Run," Therefore Allowing Recovery for Instances Where There Is Not Necessarily Actual Physical Contact*

The states finding "hit-and-run" to mean more than actual physical contact have taken the position that the term was used by the legislature as an easier way to relay its intent as opposed to listing every specific instance to which it thought UM coverage should apply.[63] The reasoning of courts in states with UM statutes that remain silent regarding the definition of "hit-and-run" accidents and in turn upholding physical contact requirements contained within automobile insurance policies engage in a strict interpretation of the statute: they contemplate interpretation to involve attributing only the literal meaning of a term to the language of a statute.[64] This notion of interpretation does not contemplate the idea that words, in almost all instances, are not interpreted within a vacuum but rather are determined by examining history and context with the overall goal of combining the words together. Justice Bistline's *Hammon* dissent focused on this very issue and proclaimed that "dwell[ing] on the face value of the words of the statute" is contrary to the manner in which a court interprets statutes.[65]

> "In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, such as the context, *the object in view, the evils to be remedied, the history of the times and the legislation upon the same subject, public policy*, contemporaneous

62. *See* Ferega v. State Farm Mut. Auto. Ins. Co., 317 N.E.2d 550, 552 (Ill. 1974) ("'[T]he uninsured or hit-and-run motor vehicle coverage required by [the statute], was not intended to include unidentified cars that may be present at the scene of an occurrence of bodily injury without a physical contact of the unidentified motor vehicle with the insured or an automobile occupied by the insured.'" (quoting Prosk v. Allstate Ins. Co., 226 N.E.2d 498, 500 (Ill. App. Ct. 1967))); Mayfield v. Allied Mut. Ins. Co., 436 N.W.2d 164, 167 (Neb. 1989) (holding "that the [l]egislature did not intend to broaden the then accepted insurance concept of a hit-and-run motor vehicle").

63. *See Su*, 431 A.2d at 419 (referring to the term as "merely a shorthand colloquial expression").

64. *See, e.g.*, *Ferega*, 317 N.E.2d at 551–52.

65. Hammon v. Farmers Ins. Co. of Idaho, 707 P.2d 397, 402 (Idaho 1985) (Bistline, J., dissenting).

construction, and the like."[66]

The Supreme Court of Rhode Island stated that "the term [hit-and-run] is merely a shorthand colloquial expression that is designed to describe a motorist who has caused, or contributed by his negligence to, an accident and flees the scene without being identified. Thus, there is no inherent connotation that physical contact is an essential part of its definition."[67] Interpreting hit-and-run as synonymous with physical contact is too rigid. The term, as used in the UM statutes, simply "describe[s] an accident involving an unknown driver and does not create a requirement that the accident involve physical contact."[68]

Additionally, the term "hit" possesses many constructions that do not demand physical contact.[69]

> In baseball parlance, the term [hit-and-run] denotes a play in which a base runner starts for the next base as the pitcher starts to pitch and the batter attempts to hit the ball; in military operations, the term is ascribed to small military units or troops which take quick, specific action rather than permanent engagement; and in the field of commerce, the term is used to describe a type of merchandising.[70]

In each instance, the term is still applicable even if the play or transaction is unsuccessful.[71] Thus, courts have reasoned that the same ideology should apply to hit-and-run accidents.[72] Simply because the vehicles did not make contact does not mean the accident did not occur.[73]

Additionally, courts adopting this stance have interpreted the statutory language in light of the overarching goal attributed to UM statutes: minimizing the financial loss for victims of automobile accidents

66. *Id*. (quoting Local 1494 of International Association of Firefighters v. City of Coeur d'Alene, 586 P.2d 1346, 1355 (Idaho 1978) (internal quotations omitted)).

67. *Su*, 431 A.2d at 419.

68. Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47, 50 (Me. 1987).

69. Marakis v. State Farm Fire & Cas. Co., 765 P.2d 882, 884 (Utah 1988).

70. *Id.*

71. *Id*.

72. *See id*. ("[T]he term 'hit-and-run' aptly includes characterization of an accident which is caused without physical contact by one who leaves the accident scene without identifying him- or herself.").

73. *See, e.g.*, *id.* at 884–85 (noting that as long as the insured is able to convince the factfinder that the accident occurred, physical contact is not required for recovery).

caused by the negligence of uninsured motorists.[74] In light of this objective, these courts have found that the physical contact requirement frustrates this goal and thus is invalid as against public policy.[75]

2. *States Adhering to the Literal Meaning of "Hit-and-Run," Therefore Only Allowing Recovery When There Is Actual Physical Contact*

States holding the opposing viewpoint take a more literal position when interpreting UM statutes. By employing a literal definition of "hit-and-run," these states only allow for recovery of UM benefits when there is actual physical contact between the insured and the unidentified vehicle.[76] These particular states have determined that the legislative purpose behind the physical contact requirement is to prevent fraud;[77] therefore, this objective takes precedent over the adverse consequences that might befall a few innocent insureds.

The literal interpretation does effectuate the prevention of fraudulent claims; what it does not contemplate, however, is that the function of the courts is to give meaning to statutes where there is ambiguity and to provide justice where justice is due. It is common in the English language to attach multiple meanings to words and to require "reading between the lines" in writings. Legislators are no different. In the absence of clear legislative history delineating the intent and meaning of a statute, including both what it does and does not mean, the courts have a great deal of flexibility in interpreting the language of a UM statute.[78] Several courts do not adopt this view and instead have drawn on the definitions from various dictionaries to determine the legislature's meaning of "hit-and-run" within the states' respective UM statutes.[79]

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74. *E.g.*, Commerce Ins. Co. v. Mendonca, 784 N.E.2d 43, 46 (Mass. App. Ct. 2003) (citing Hartford Ins. Co. v. Hertz Corp., 572 N.E.2d 1 (Mass. 1991)).

75. *See, e.g.*, *id*.

76. *See, e.g.*, Swan v. Country Mut. Ins. Co., 715 N.E.2d 688, 689 (Ill. App. Ct. 1999); Mayfield v. Allied Mut. Ins. Co., 436 N.W.2d 164, 166–67 (Neb. 1989) (citing Grace v. State Farm Mut. Auto. Ins. Co., 246 N.W.2d 874, 876–77 (Neb. 1976)).

77. *See, e.g.*, *Swan*, 715 N.E.2d at 689 (finding that the legislative policy is to avoid fraudulent claims even in situations where there is no risk of fraud); *Mayfield*, 436 N.W.2d at 167 (determining that the prevention of fraud is a legitimate legislative purpose) (citing *Grace*, 246 N.W.2d at 876–77).

78. *See, e.g.*, City of Emmetsburg v. Gunn, 86 N.W.2d 829, 831 (Iowa 1957) (finding that courts have broad guidelines for interpreting statutes, which includes using all available aids).

79. *See, e.g.*, Hayne v. Progressive N. Ins. Co., 339 N.W.2d 588, 590 (Wis. 1983).

For example, Illinois has dealt with the issue of defining "hit-and-run" several times. The original Illinois Supreme Court case was *Ferega v. State Farm Mutual Automobile Insurance Co.*,[80] decided in 1974. In *Ferega*, the court determined that the uninsured or hit-and-run coverage required by state statute "'was not intended to include unidentified cars that may be present at the scene of an occurrence of bodily injury without a physical contact of the unidentified motor vehicle with the insured or an automobile occupied by the insured.'"[81] Furthermore, the court held that the policy provision requiring physical contact was not void as against public policy because there was no inconsistency between the insurance policy and the requirements of the state's uninsured hit-and-run motorist statute.[82]

Since 1974, Illinois courts have decided several cases in a manner consistent with the court in *Ferega*.[83] One such case upheld the propositions in *Ferega* and further stated the following:

> Absent evidence to the contrary . . . we presume that legislative inaction subsequent to *Ferega* indicates approval of the reasoning and holding in that case. "The construction this court has placed upon [the uninsured/hit-and-run statute] has in effect become part of the [statute], and a change in that construction by this court would amount to amending the statute. The power to accomplish this does not lie in the courts."[84]

The *Ferega* court espoused the idea that the legislature is the appropriate body to determine the meaning of the uninsured hit-and-run

80. Ferega v. State Farm Mut. Auto. Ins. Co., 317 N.E.2d 550 (Ill. 1974).

81. *Id.* at 552 (quoting Prosk v. Allstate Ins. Co., 226 N.E.2d 498, 500 (Ill. App. Ct. 1967)).

82. *Id*. (finding support in that, although the general assembly had amended or taken action concerning the very statute in question several times since *Prosk*, it had neither clarified its intended meaning of "hit-and-run" nor corrected the court's interpretation).

83. *See, e.g.*, Lemke v. Kenilworth Ins. Co., 487 N.E.2d 943, 945 (Ill. 1985) (upholding the validity of physical contact requirements found within insurance policies); Groshans v. Dairyland Ins. Co., 726 N.E.2d 138, 141 (Ill. App. Ct. 2000) (same); Swan v. Country Mut. Ins. Co., 715 N.E.2d 688, 689 (Ill. App. Ct. 1999) (same). The *Groshans* court, however, also interpreted *Ferega* to mean that an insurance company may require actual physical contact, but that actual physical contact is not required by law, thereby opening the door for further litigation concerning the ambiguity of the term "hit-and-run." *Groshans*, 726 N.E.2d at 141.

84. *Lemke*, 487 N.E.2d at 945 (quoting Union Elec. Co. v. Ill. Commerce Comm'n, 396 N.E.2d 510, 518 (Ill. 1979) (citations omitted)).

statute.[85] The *Ferega* court's suggestion that the legislature is the best body to interpret the statute incorporates the belief that the legislature must be clear in its intentions in order to allow for a more liberal reading of the statute.[86]

Nebraska, North Carolina, and Wisconsin have reached conclusions similar to those of the Illinois courts.[87] Additionally, the Nebraska courts focus on the insurance director's approval of the insurance policy provision requiring actual physical contact, thereby giving it credence.[88] These courts also decided the hit-and-run and miss-and-run cases by deducing that if the legislature had intended a more liberal interpretation of "hit-and-run," it would have specified that, and until it directs otherwise, physical contact requirements will be upheld.[89]

The Wisconsin Supreme Court relied on several popular dictionaries to interpret the legislature's intended meaning of "hit-and-run."[90] It determined that the term "hit-and-run" is not ambiguous and therefore does not require judicial interpretation. The court stated, "When statutory language is clear and unambiguous, we must arrive at the legislature's

85. *See Ferega*, 317 N.E.2d at 551–52 (noting the plain language of the statute and the legislature's lack of clarification or correction in the amendments following the *Prosk* decision).

86. *See id.* (indicating that the statute's language "'is clear and unambiguous, and the legislative intent can be ascertained'" without additional aids for construction (quoting *Prosk*, 226 N.E.2d at 500)).

87. *See, e.g.*, Mayfield v. Allied Mut. Ins. Co., 436 N.W.2d 164, 167 (Neb. 1989) (upholding a literal interpretation of "hit-and-run" that excludes miss-and-run accidents); Grace v. State Farm Mut. Auto. Ins. Co., 246 N.W.2d 874, 877 (Neb. 1976) (finding physical contact requirements to be valid in miss-and-run accident situations); Andersen v. Baccus, 439 S.E.2d 136, 138 (N.C. 1994) (upholding the literal interpretation of "hit-and-run"); Hayne v. Progressive N. Ins. Co., 339 N.W.2d 588, 590–91 (Wis. 1983) (employing the dictionary definition of "hit-and-run" to preclude coverage for miss-and-run accidents).

88. *Grace*, 246 N.W.2d at 877. Despite openly basing a portion of its decision upon the approval of the policy by the director of insurance, the court admitted, "While the basis for the conclusion may be ephemeral, we are convinced that the Legislature did not intend to broaden the then accepted insurance concept of a hit-and-run motor vehicle." *Id.*

89. *See id*. (concluding "that the legislature did not intend to broaden the then accepted insurance concept of a hit-and-run motor vehicle").

90. *See Hayne*, 339 N.W.2d at 590 (relying on several dictionaries, which all defined "hit-and-run" as requiring one to *hit* another and defining "hit" as "to strike" (citing AMERICAN HERITAGE DICTIONARY 625 (1979); FUNK & WAGNALL'S STANDARD COLLEGE DICTIONARY 636 (1968); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1074 (1961))).

intention by according the language its ordinary and accepted meaning."[91] The *Hayne v. Progressive Northern Insurance Co.*[92] court disregarded two other dictionary definitions that did not define the term as synonymous with actual physical contact, but instead stated that the legislative intent was clear.[93] One aspect of a miss-and-run case that the *Hayne* court did not address is that of public policy concerns. The Wisconsin Supreme Court appears to have sidestepped an issue that had the potential to create great ripples within the insurance industry and instead took the easy way out by citing select dictionaries.

The North Carolina Supreme Court has employed reasoning similar to that used by the Illinois and Wisconsin courts.[94] In *Andersen v. Baccus*,[95] the court relied on and affirmed the North Carolina Court of Appeals's reasoning.[96] The court of appeals found that the statute did not "provide for uninsured motorist coverage where a phantom vehicle allegedly caused a collision between two other automobiles, but made no physical contact with either."[97] The court of appeals stated the following:

> Our interpretation of [the uninsured hit-and-run statute] is further supported by the fact that the legislature has undertaken to amend the uninsured motorist statute subsequent to this Court's first interpreting it as requiring physical contact between the insured and the hit-and-run driver. To date, it has not chosen to amend the statute to indicate that the physical contact is not required. When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law; and where it chooses not to amend a statutory provision that has been interpreted in a specific, consistent way by our courts, we may

91. *Id.* (citing State v. Engler, 259 N.W.2d 97 (Wis. 1977)).

92. *Hayne*, 339 N.W.2d 588 (Wis. 1983).

93. *See id.* at 591 n.3. Hayne, the plaintiff, offered definitions from the *Random House Dictionary*, which defined "hit-and-run" as "guilty of leaving the scene of an accident caused by a vehicle driven by oneself." RANDOM HOUSE DICTIONARY 426 (Concise ed. 1980). *Webster's New Collegiate Dictionary* defined the term "hit-and-run" as "[t]hat hits and runs away . . . orig. and esp. used of motor-vehicle drivers who flee after being involved in an accident." WEBSTER'S NEW COLLEGIATE DICTIONARY 392 (2d ed. 1958).

94. *See* Andersen v. Baccus, 439 S.E.2d 136, 138 (N.C. 1994) (basing its decision in part on the fact that the legislature had amended the statute in question—subsequent to judicial interpretation—and had not chosen to amend the statute to state that physical contact was not required).

95. Andersen v. Baccus, 439 S.E.2d 136 (N.C. 1994).

96. *Id.* at 138.

97. Andersen v. Baccus, 426 S.E.2d 105, 107 (N.C. Ct. App. 1993), *aff'd in part, rev'd in part*, 439 S.E.2d 136 (N.C. 1994).

assume that it is satisfied with that interpretation.[98]

Thus, the North Carolina Supreme Court affirmed the reasoning of the court of appeals, upholding physical contact requirements.[99]

Jurisdictions differ in their approaches toward miss-and-run accidents and the above courts have taken the literal approach when interpreting the term "hit-and-run" within uninsured hit-and-run motorist statutes. Interestingly, Illinois, a state that has been quite firm in the past regarding enforcing actual physical contact requirements, might be on the verge of a miss-and-run accident revolution. In *Groshans v. Dairyland Insurance Co.*,[100] the court followed the ruling in *Ferega* but stated that "[a] careful reading of *Ferega* reveals that the court, while determining that a provision in an insurance policy requiring physical contact is permissible under Illinois law, did not say that physical contact is always required in order to recover under an uninsured motorist provision."[101] *Groshans* may represent a new era for states currently requiring actual physical contact when the uninsured hit-and-run motorist statute provides coverage for hit-and-run accidents.

C. *Statutes Requiring Physical Contact as a Prerequisite to Recovering UM Benefits*

1. *Physical Contact Requirement Held Valid Even When There Is Corroborating Evidence Proving the Existence of an Unidentified, Accident-Causing Vehicle*

Some states have no statutory ambiguity and have written the requirement of actual physical contact as a prerequisite to recovery.[102] Iowa's UM statute exemplifies this statutory language:

> No automobile liability or motor vehicle liability insurance policy insuring against liability for bodily injury or death arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this

98. *Id.* at 108 (citing State v. Benton, 174 S.E.2d 793, 804–05 (N.C. 1970)).

99. *Id.* at 108–09.

100. Groshans v. Dairyland Ins. Co., 726 N.E.2d 138 (Ill. App. Ct. 2000).

101. *Id.* at 140.

102. *See, e.g.*, IOWA CODE § 516A.1 (2005); MICH. COMP. LAWS ANN. § 257.1112 (West 2001); TEX. INS. CODE ANN. § 5.06-1(2)(d) (Vernon Supp. 2005).

> state, unless coverage is provided in such policy or supplemental thereto, for the protection of persons insured under such policy who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or a hit-and-run motor vehicle or an underinsured motor vehicle because of bodily injury, sickness, or disease, including death resulting therefrom, caused by accident and arising out of the ownership, maintenance, or use of such uninsured or underinsured motor vehicle, or arising out of physical contact of such hit-and-run motor vehicle with the person insured or with a motor vehicle which the person insured is occupying at the time of the accident.[103]

Iowa's statute does not allow recovery of UM benefits even if corroborating evidence demonstrates that another vehicle caused the accident.[104] As was demonstrated in the *Claude* case, which began this discussion about UM benefits in relation to miss-and-run and hit-and-run accidents,[105] the Iowa Supreme Court has endorsed physical contact requirements in every situation, even if it is clear that a phantom vehicle was the cause of the accident.[106]

Other jurisdictions also have determined that the prevention of fraud is a top priority for insurance companies and the state, which justifies the inclusion of physical contact requirements in UM statutes.[107] In *Mayer v. State Farm Mutual Automobile Insurance Co.*,[108] the Texas Court of

103. IOWA CODE § 516A.1.

104. *See id*. (providing that recovery is allowed only when the accident arose out of physical contact with the hit-and-run vehicle).

105. *See supra* notes 1–8 and accompanying text.

106. *See* Claude v. Guar. Nat'l Ins. Co., 679 N.W.2d 659, 665–66 (Iowa 2004) (holding the physical contact requirement found within section 516A.1 of the Iowa Code requires physical contact in every hit-and-run and miss-and-run situation, even when inequity may result).

107. *See, e.g.*, Auto Club Ins. Ass'n v. Methner, 339 N.W.2d 234, 238 (Mich. Ct. App. 1983) (finding a legitimate purpose in physical contact requirements); Coker v. Nationwide Ins. Co., 161 S.E.2d 175, 178 (S.C. 1968) (stating that the statutory language clearly requires proof of physical contact in every case where one desires to recover UM benefits, and if "the statute be changed, the solution lies within the province of the Legislature," not the courts); Mayer v. State Farm Mut. Auto. Ins. Co., 870 S.W.2d 623, 625 (Tex. App. 1994) (holding the statutory physical contact requirement valid in every hit-and-run and miss-and-run situation).

108. Mayer v. State Farm Mut. Auto. Ins. Co., 870 S.W.2d 623 (Tex. App. 1994).

Appeals discussed the validity of the "indirect contact rule."[109] The indirect contact rule refers to situations where *A*, the uninsured hit-and-run vehicle, hits vehicle *B*, which in turn hits car *C*, the insured.[110] Thus, no direct physical contact exists between the insured and the hit-and-run vehicle initiating the collision. The appellant argued that the indirect contact rule should satisfy the physical contact requirement in miss-and-run situations.[111] The court found that the indirect contact rule for UM coverage only applies "when the unidentified vehicle hits some vehicle. Absent such contact, the rule does not apply."[112] Furthermore, in *Goen v. Trinity Universal Insurance Co.*,[113] the court addressed the public policy issues surrounding physical contact requirements by finding that neither public policy nor legislative intent support extending UM protection to situations involving accidents caused by an unknown driver but not involving physical contact.[114]

Michigan courts also have determined that statutory language requiring actual physical contact to apply to all hit-and-run situations is not contrary to public policy.[115] The *Auto Club Insurance Ass'n v. Methner*[116] court stated that "'[t]he physical contact provision is designed to reduce the possibility of fraud. The purpose of the language is to prevent phantom vehicle claims—the possibility that a motorist who negligently lost control of his own vehicle would recover by alleging that an unknown vehicle caused him to lose control.'"[117] The court further stated, "this Court found a legitimate purpose in such requirement even before the legislative imposition of the requirement . . . . The Legislature's codification of the requirement clearly refutes the claim that it violates public policy."[118]

109. *Id.* at 625.

110. *Id*. (citing Latham v. Mountain States Mut. Cas. Co., 482 S.W.2d 655, 656 (Tex. Civ. App. 1972)).

111. *Id.*

112. *Id*.

113. Goen v. Trinity Universal Ins. Co., 715 S.W.2d 124 (Tex. App. 1986).

114. *Id.* at 125.

115. *See* Auto Club Ins. Ass'n v. Methner, 339 N.W.2d 234, 238 (Mich. Ct. App. 1983) (finding legitimate public policy reasons for the physical contact requirement); Basilla v. Aetna Ins. Corp., 195 N.W.2d 893, 893 (Mich. Ct. App. 1972) (mem.) (finding that the legislature's act of requiring physical contact "clearly establishe[d] that such provisions [were] not contrary to the public policy of the stat[e]").

116. Auto Club Ins. Ass'n v. Methner, 339 N.W.2d 234 (Mich. Ct. App. 1983).

117. *Id.* at 238 (quoting Kersten v. DAIIE, 267 N.W.2d 425 (Mich. Ct. App. 1978)).

118. *Id.*

Therefore, the court stated, even if indirectly, that the prevention of fraud and the interests of the insurance companies take precedence over the possibility that innocent people might be denied UM benefits even when no risk of fraud exists.

2. *Corroboration: Statutes Requiring Corroborative Evidence and Courts Allowing Corroborative Evidence*

Some states have balanced the need for preventing fraud with the rights of the insureds by incorporating into the UM statute, either judicially or statutorily, language indicating that when no physical contact occurs, the insured must present sufficient corroborating evidence to prove that another phantom vehicle caused the accident as a condition precedent to recovering UM benefits.[119] West Virginia's UM statute exemplifies this type of statutorily mandated language:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, the insured, or someone in his or her behalf, in order for the insured to recover under the uninsured motorist endorsement or provision, shall: . . . [u]pon trial establish that the motor vehicle, which caused the bodily injury or property damage, whose operator is unknown, was a "hit and run" motor vehicle, meaning a motor vehicle which causes damage to the property of the insured arising out of physical contact of such motor vehicle therewith, or which causes bodily injury to the insured arising out of physical contact of such motor vehicle with the insured or with a motor vehicle which the insured was occupying at the time of the accident.[120]

The West Virginia Supreme Court of Appeals determined that to satisfy the statutory physical contact requirement, the insured must "'establish a close and substantial physical nexus between an unidentified hit-and-run vehicle and the insured vehicle.'"[121] The court further stated that it recognized that one purpose of the physical contact requirement was to prevent fraud or collusion; however, it also determined that the West

119. *See, e.g.*, Dunn v. Doe, 527 S.E.2d 795, 801 (W. Va. 1999) (adhering to the "corroborative evidence test"); Hamric v. Doe, 499 S.E.2d 619, 624–25 (W. Va. 1997) (allowing recovery of UM benefits when sufficient evidence demonstrated that another vehicle caused the accident).

120. W. VA. CODE ANN. § 33-6-31(e) (LexisNexis 2003).

121. *Hamric*, 499 S.E.2d at 623 (emphasis omitted) (quoting State Farm Mut. Auto. Ins. Co. v. Norman, 446 S.E.2d 720, 729 (W. Va. 1994)).

Virginia UM statute was remedial in nature and should be interpreted liberally in order to effectuate its purpose.[122] Thus, if there is no risk of fraud, the main purpose for the physical contact requirement, there is no need to preclude benefits simply because actual physical contact did not occur.[123]

The court also consulted the Ohio Supreme Court's decision on this issue.[124] The Ohio Supreme Court also found the physical contact requirement to be contrary to public policy and stated the following:

> We are persuaded that some of the rationale underlying the physical contact requirement is unjustified and that this absolute standard for recovery should be abandoned. Instead, we hold that the test that ought to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident.[125]

This reasoning, outlined by the Ohio Supreme Court and adopted by the West Virginia Supreme Court of Appeals, demonstrates that a balance can be struck between the needs of insurance companies and insureds. As the Ohio Supreme Court stated, "[w]e consider the danger of possible fraud acceptable compared with the current situation where insureds with legitimate claims are prevented, as a matter of law, from recovering. Further, we are confident that the jury system will be able to distinguish between legitimate cases and fraudulent ones."[126] This corroborative evidence test would not eliminate all possible fraudulent claims nor would it allow recovery in all innocent insured situations; however, it would lessen the gap between the two extreme ends. Moreover, the Ohio Supreme Court introduced the fact that the jury should be the factfinder in deciding whether a phantom vehicle did in fact contribute to the accident,[127] as opposed to state legislatures creating blanket rules that do not take into

122. *Id.* at 623–24.

123. *See id.* at 624 (finding that absolute enforcement of the physical contact requirement was contrary to public policy when sufficient evidence existed that established that a phantom vehicle initiated the events causing the accident).

124. *Id.* (citing Girgis v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 280, 282 (Ohio 1996)).

125. *Girgis*, 662 N.E.2d at 282, *quoted in Hamric*, 499 S.E.2d at 624.

126. *Id.* at 284.

127. *Id*.

consideration any facts of the particular accidents.

If there is a factual dispute, it is a good question why the issue of whether a phantom vehicle existed should not be submitted to the jury. Insurance companies might argue that society at large is biased against insurance companies and would rule in favor of an insured simply because of their own individual feelings about insurance companies. The opposing argument is that the role of the jury is to be an impartial factfinder and that even if people have individual biases, jurors are supposed to put them aside and make a decision solely based on the controlling law.

V. WHY IOWA SHOULD FORMULATE THE UM STATUTE AND POLICIES TO ALLOW FOR RECOVERY OF UM BENEFITS WHEN THE EVIDENCE SATISFIES THE CORROBORATIVE EVIDENCE TEST

In *Claude*, the insureds swerved on the road to avoid a head-on collision with another unidentified vehicle.[128] By paying out on the corresponding UM claim, the insurance company would suffer financial harm; coverage for legitimate claims, however, is the reason insureds pay premiums. Thus, the insurance company might be suffering a financial harm, but it would not be an unjust and unwarranted expense. What sense does it make that if the insureds had not taken evasive action and made contact with the unidentified vehicle they could have recovered UM benefits, but by being conscientious drivers and attempting to prevent an accident they are punished and not allowed to recover their UM benefits even though no risk of fraud is present? The logic of the Iowa Supreme Court and the Iowa legislature is not empathetic to the individuals paying insurance premiums and driving on the state's highways.

Insurance is a major force in Iowa's economy,[129] and it is easy to see that if miss-and-run accidents were covered by the UM statute, insurance companies would have to pay more claims than they currently pay. This, in turn, might adversely affect Iowa's economy. This Note argues that Iowa's current UM statutory scheme is greatly unfair and balanced in favor of the insurance companies. The solution to this injustice is to formulate a UM statute that allows recovery for miss-and-run claims when sufficient corroborative evidence exists for a factfinder (either a claims

128. Claude v. Guar. Nat'l Ins. Co., 679 N.W.2d 659, 661 (Iowa 2004).

129. IOWA LIFE CHANGING, MAJOR INDUSTRIES IN IOWA 4 (2005), http://www.iowalifechanging.com/downloads/iaindustries.pdf (stating that Iowa is the home office state for 2,630 insurance and related firms and Iowa insurance companies have more than 40,000 workers).

representative of the insurance company or the jury, depending on the level of litigation) to make a determination that a phantom vehicle caused the accident.

Ohio and West Virginia court decisions demonstrate how a UM statute can allow recovery of benefits when corroborative evidence exists while still effectively protecting insurance companies from fraudulent claims.[130] If Iowa modeled its UM statute after Ohio and West Virginia court decisions, it could create a more balanced UM statute that would result in a greater number of just and fair outcomes. Thus, the new and improved UM statute would not only protect an important economic interest but would also protect citizens—the same citizens who pay the premiums every month for UM coverage, and the same citizens who are the force behind the Iowa insurance industry.

Insurance lobbyists have a job to do up on Capitol Hill; the Iowa Supreme Court and the Iowa legislature, however, need to keep the best interests of Iowa citizens as their top priority. The Iowa Supreme Court and Iowa legislature need to remain cognizant that they are in the position and have the capability to provide justice for all, including individuals such as Mr. and Mrs. Mahoney.

*Meredith C. Nerem**

130. *See supra* Part IV.C.2.

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