THE PHYSICAL CONTACT RULE FOR UNINSURED MOTORIST COVERAGE IN ARIZONA: WHERE WE WERE, WHERE WE ARE, AND WHERE WE OUGHT TO BE

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I. INTRODUCTION

Physical contact provisions (hereinafter PCPs)[1] in uninsured motorist polices have been a long-standing source of litigation,[2] legal debate, and commentary.[3] Many jurisdictions have upheld the validity of the provisions,[4] while others have declared the provisions void as being in conflict with the statutory requirements for such insurance.[5] Still other jurisdictions have adopted a middle ground: these jurisdictions have invalidated the provision as a complete bar to recovery but do require the insured to provide corroborating evidence of the existence of the adverse vehicle in the event there is no physical contact.[6]

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1. A physical contact provision is a limitation in an automobile insurance policy which allows an insured to collect uninsured motorist benefits only when there is physical contact between the uninsured tortfeasor and the insured's auto or the insured as a pedestrian. For a more lengthy discussion *see infra* section II(A).

2. *See* 1 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST COVERAGES § 9.2, at 442 (2nd ed. 1985).

3. A number of law review notes have been written on this provision. Note, *Uninsured Motorist Insurance and the Physical Contact Rule,* 18 ARIZ. L. REV. 807 (1976); Ronald Whitney, Comment, *Uninsured Motorist Coverage for Hit-and-Run Vehicles: The Requirement of Physical Contact,* 49 LA. L. REV. 955 (1989); Gregory J. Avery, Comment, *Uninsured Motorists Protection: Hit-and Run Physical Contact Policy Requirement,* 2 S.U. L. REV. 276 (1976); Note, *Requirement of Physical Contact as Condition Precedent to Recovery Under Hit-and-Run Clause of Insurance Policy Held Void. (State Farm Fire & Casualty Co. v. Lambert, 285 So. 2d 917),* 5 CUMB. L. REV. 155 (1974).

4. A.S. Klein, *Uninsured Motorist Indorsement: Validity and Construction of Requirement that there be "Physical Contact" with Unidentified or Hit-and-Run Vehicle,* 25 A.L.R. 3d 1299, 1306 (1969) (citing State Farm Mut. Auto. Ins. Co. v. Spinola 374 F.2d 873 (5th Cir. 1967)); Balestrieri v. Hartford Accident & Indem. Ins. Co. 112 Ariz. 160, 540 P.2d 126 (1975).

5. The provisions, generally speaking, do not contravene the language of the statutes which require uninsured motorist coverage. Most courts which have invalidated the provisions have done so on the grounds that they contravene the purpose of applicable uninsured motorist statutes. For a discussion of the purpose of the provisions, see *infra* section II(A); WIDISS, *supra* note 2, § 9.8, at 485; *e.g.,* State Farm Mut. Auto. Ins. Co. v. Abramowicz, 386 A.2d 670 (Del. 1978).

6. *E.g.,* OR. REV. STAT. §742.504(g)(B) (1981), GA. CODE ANN. § 56.407.1(b)(2) (1986).

Recently, the Arizona Supreme Court decided *Lowing v. Allstate*[7] in which it overruled a long line of decisions holding PCPs valid.[8]

The purpose of a PCP is to reduce the payment of non-meritorious insurance claims. The insurance industry uses PCPs to prevent payment of two types of claims: 1) claims where an insured stages an accident, and 2) claims where the insured causes a collision but reports that it was caused by a phantom vehicle.[9] Unfortunately, a PCP can also prevent an insured from recovering when she is injured by a tortfeasor who does not make contact with the insured.[10] Because PCPs limit tort recovery, they run head-on into the long-standing public policy of compensating tort victims. The competing public policies of fraud prevention and tort victim compensation have resulted in friction and divided courts.

The purpose of this note is to look at the PCP, its purpose, and the different types of statutes which impact its validity. First, the note reviews the background and history of the uninsured motorist coverage physical contact requirement and the public policy surrounding it. Then, the note examines judicial and legislative treatment of the provision both in Arizona and in other jurisdictions. Finally, the note examines the goal maximization and cost associated with: allowing PCPs, completely invalidating PCPs, and invalidating PCPs but requiring the insured to provide corroborating evidence of the phantom vehicle. The note concludes that from a policy perspective, the best rule is one which invalidates PCPs but requires that the insured provide corroborating evidence of the existence of the phantom vehicle in cases where there is no physical contact between the insured and the unidentified tortfeasor.

II. THE RIVALRY

A. The Physical Contact Provision

The physical contact provision in an automobile insurance policy limits the uninsured motorist coverage to accidents where there is physical contact between the uninsured motorist and the insured vehicle or the insured as a pedestrian.[11] The uninsured motorist coverage in a personal automobile insurance policy is designed to protect an insured[12] from bodily injury caused by a negligent uninsured motorist.[13] Generally, this coverage only applies to com-

7. 176 Ariz. 101, 859 P.2d 724 (1993).

8. Balestrieri v. Hartford Accident & Indem. Ins. Co., 112 Ariz. 160, 540 P.2d 126 (1975), State Farm Mut. Auto. Ins. Co. v. Brudnock, 151 Ariz. 268, 727 P.2d 321 (1986); Lawrence v. Beneficial Fire & Casualty Ins. Co., 8 Ariz.App. 155, 444 P.2d 446 (1968).

9. For example, if an insured falls asleep at the wheel, loses control of his vehicle and injures himself, he could very easily claim that he was forced off of the road by another motorist who did not make contact with his automobile and did not stop. Without the contact provision, the insurer would have to entertain the insured's uninsured motorist claim.

10. For example, an insured wrecks when taking evasive action to avoid a car which pulls out in front of the insured.

11. As opposed to an accident caused by an uninsured motorist or an unidentified motorist where there is no contact. For example, running someone off of the road.

12. Three groups are considered insured under the uninsured motorist coverage: 1) The named insured and family members, 2) any other person occupying a covered auto, and 3) any person legally entitled to recover damages because of bodily injury to an insured. J.J. LAUNIE ET AL., PERSONAL INSURANCE 165 (1st ed. 1987). *See also,* STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S POLICY FORM 9803.5 at 9.

13. LAUNIE, *supra* note 12, at 164. Simply speaking, uninsured motorist coverage is

pensation for bodily injury,[14] and is contingent upon liability resting upon the uninsured tortfeasor.[15]

The insurance industry developed uninsured motorist coverage in the 1950's as a means of preventing compulsory liability insurance.[16] Because the industry's experience with compulsory insurance was unfavorable, and it wished to avoid such regulation, the industry developed uninsured motorist coverage as a means of compensating victims of financially irresponsible motorists.[17]

The physical contact requirement can be found within the definition of an uninsured motorist in most policies.[18] Under a strict construction of the provision, an insured is entitled to collect uninsured motorist benefits if hit and injured by a negligent driver who leaves the scene of the accident. The insured is entitled to collect whether the tortfeasor has liability coverage or not as long as the tortfeasor remains unidentified.[19] Arizona courts and the courts in other jurisdictions have construed PCPs broadly to provide coverage even when the impact with the uninsured motorist does not directly cause the injury, but rather gives rise to a subsequent occurrence or impact which in turn causes the injury.[20]

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protection one obtains from her own insurance carrier which compensates for tort damages recoverable against an uninsured tortfeasor. Thus, the policyholder's uninsured motorist coverage takes the place of the liability insurance the tortfeasor was not carrying.

14. *Id.* However, fifteen states have statutory provisions which require coverage for property damage as a part of uninsured motorist coverage: California, Delaware, Georgia, Indiana, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, and the District of Columbia. *Id.* at 165.

15. The coverage applies only if the uninsured motorist is legally liable for the insured's injury. *Id.* A typical insuring agreement states: "We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle.* The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle.*" (emphasis in original) STATE FARM POLICY FORM 9803.5 at 8.

16. ROGER C. HENDERSON, INSURANCE LAW, CASES AND MATERIALS 274 n.1 (1989). Compulsory insurance is a requirement that all vehicles registered in the state must be insured. A state may require that all automobiles be insured for liability, and some require that the owner carry additional coverages such as uninsured motorist coverage.

17. *Id.*

18. There are generally four classes of vehicles which are considered uninsured. LAUNIE, *supra* note 12, at 166. A typical definition of uninsured automobile is as follows:

> An uninsured auto is:
> 1. A motor vehicle which has no bodily injury liability bond or insurance policy in effect at the time of the accident;
> 2. A motor vehicle covered by a bond or insurance policy which doesn't provide at least the minimum financial security requirements of the state in which your insured auto is principally garaged;
> 3. A motor vehicle for which the insurer denies coverage, or the insurer becomes insolvent;
> 4. A hit-and-run motor vehicle which causes bodily injury to a person insured by *physical contact* with the insured or with a vehicle occupied by that person. The identity of the operator and owner of the vehicle must be unknown. The accident must be reported within 24 hours to the proper authorities. We must be notified within 30 days. If the person insured was occupying the vehicle at the time of the accident. we have the right to inspect it.

ALLSTATE AUTOMOBILE POLICY ARIZONA at 18–19 (emphasis added). *See also* LAUNIE, *supra* note 12, at 166.

19. This means that many policies provide uninsured motorist coverage to an insured when they are injured by a negligent driver who is in fact insured, but remains unidentified and is thus functionally uninsured.

20. *See, e.g.,* Basore v. Allstate Ins. Co 374 S.W.2d 626 (Mo. App. 1963) (holding

The contact provision was created by the insurance industry to prevent fraudulent claims. Specifically, the industry hoped to prevent claims where an insured caused injury to herself, through her own negligence, then fabricated a story blaming the accident on a phantom vehicle.[21] Many courts and commentators argue the contact provision is an ineffective means of preventing fraud.[22] Because a party scheming to commit fraud may fabricate evidence of physical contact to overcome the requirement, some commentators argue that the provision is not an effective anti-fraud device.[23] This is not so. While the contact provision may not defeat an insured who knows about the requirement and fabricates physical damage with the intent to defraud, it may very well prevent fraud by a person who does not know about the requirement.

Furthermore, fraud is not the only motive for inventing a phantom vehicle. Consider the following hypotheticals: (1) an insured loses control of his vehicle and tells the insurer that he was run off the road in belief that the insurer will not charge him with an at-fault accident and thereby raise his premiums; and (2) a teenage driver who negligently wrecks his parents' car and lies to avoid the reprimand and other punishment that may otherwise attend culpability. In both hypotheticals, the insurer would be obligated to extend benefits if the respective policies did not contain PCPs. In absence of PCPs, the hypothetical parties would find themselves serendipitously gaining compensation from their own negligence. Although it is true that a knowledgeable insured could fabricate physical evidence to effectuate fraud, it does not follow that because PCPs are not foolproof, that they are of no value.

B. The Social Policy of Closing the Gap.

The automobile is a source of death and destruction. To protect the public from financial loss associated with this destruction, many states enacted compulsory insurance laws.[24] The purpose of compulsory insurance laws is to protect the public from financial loss caused by negligent, financially

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that it was not necessary for plaintiff to show that she sustained her injuries at the very moment of, and by, the physical contact with the hit-and-run auto); State Farm Mut. Ins. Co. v. LaSage, 559 S.W.2d 702 (Ark. 1978) (insured injured in accident while insured was chasing the unidentified motorist who struck the insured's car then ran).

21. *See, e.g.*, Balestrieri v. Hartford Accident & Indem. Ins. Co., 22 Ariz. App. 255, 258, 526 P.2d 779, 782, (1974); Anderson v. State Farm Mut. Auto. Ins. Co., 133 Ariz. 464, 466, 652 P.2d 537, 539, (1982); Lowing v. Allstate, 176 Ariz. 101, 106, 859 P.2d 724, 729 (1993); Prosk v. Allstate Ins. Co., 226 N.E.2d 498 (Ill. App. 1967); State Farm Mut. Auto. Ins. Co. v. Spinola, 374 F.2d 873 (5th Cir. 1967); Lawrence v. Beneficial Fire & Casualty Ins. Co., 8 Ariz.App 155, 444 P.2d 446 (1968); Frager v. Pennsylvania General Ins. Co., 231 A.2d 531 (Conn. 1967); Cruger v. Allstate Ins. Co., 162 So. 2d 690 (Fla. Dist. Ct. App. 1964).

22. For example, the Chief Justice of the Arizona Supreme Court, Stanley Feldman, has stated:

> [I]t is extremely doubtful that the physical contact requirement has much efficacy in that regard. Someone dishonest and sophisticated enough to invent a phantom vehicle in order to support a claim under the hit-and-run provision of his uninsured motorist coverage will hardly be deterred by the necessity of having to use a hammer or screwdriver to create some evidence of physical contact on his car.

Anderson v. State Farm Mut. Auto. Ins. Co., 133 Ariz. 464, 470, 652 P.2d 537, 543 (1982) (Feldman J., concurring) (citing WIDISS, *supra* note 2, §2.41, at 141–43 (supp. 1981)). *See also*, Whitney, *supra* note 3, at 957 n.8.

23. *Anderson*, 133 Ariz. at 470, 652 P.2d at 543.

24. Over half of the states have some sort of compulsory insurance law. A compulsory insurance law requires that motorist carry insurance equal to a specified limit before the vehicle can be licensed or registered. LAUNIE, *supra* note 12, at 210.

irresponsible, drivers. It furthers this goal, but does not accomplish it, by requiring that all motorists either carry liability insurance or post a liability bond.[25]

The genesis of uninsured motorist statutes stems from the failure of the compulsory insurance laws.[26] Despite the compulsory insurance laws, many automobiles were being driven on our highways by persons who neither purchased insurance nor possessed sufficient personal financial resources to enable them to pay damages resulting from their negligence. Accordingly, several state legislatures passed uninsured motorist statutes to "fill this gap."[27] There are generally three categories of uninsured motorist statutes.[28] The first type only requires that the insurer offer to sell the coverage with every automobile insurance policy sold in the state. The second type requires that the coverage be included in the policy unless the insured refuses it in writing, and the third requires that the insured carry the coverage.[29]

Generally speaking, uninsured motorist statutes effect the physical contact requirement in four different ways.[30] Some state statutes are silent on the issue of *phantom vehicles*[31] or *hit-and-run*[32] accidents [hereinafter silent statutes].[33] In some of these jurisdictions the courts have interpreted their silent statute such that they do not require coverage for accidents where the tortfeasor remains unidentified, and thus is not known to be uninsured. In these jurisdictions, the statutory requirement is narrower than the coverage most carriers offer.[34] The courts in an increasing number of jurisdictions with silent

25. Transamerica Ins. Co. v. McKee, 27 Ariz.App 158, 551 P.2d 1324 (1976). Financially irresponsible as used in this context means anyone who is unable to satisfy a judgment or readily pay indemnity cost to the victims of his negligence. While this term sounds somewhat derogatory, it includes the vast majority of motorists. Even those who are able to pay such a judgment are more likely than not unwilling to assume the risk and instead seek to distribute it through an insurance organization.

26. *See* HENDERSON, *supra* note 16, at 274. Compulsory insurance laws failed because they have serious defects. For example, some drivers simply do not license or register their vehicles. Others will buy insurance for a one month period, license their vehicle, then let the policy lapse. *See* LAUNIE, *supra* note 12, at 210–11.

27. *Transamerica Ins. Co.*, 27 Ariz. App. 158, 161, 551 P.2d 1324, 1327 (1976).

28. HENDERSON, *supra* note 16, at 275.

29. *Id.*

30. WIDISS, *supra* note 2, §9.8, at 485. Professor Widiss has categorized and given a detailed explanation of statutory regulation of the coverage and the physical impact requirement.

31. The term "phantom vehicle" is a term used to describe a vehicle which causes an accident without making physical contact with the insured vehicle and then leaves without leaving evidence of its existence. It appears out of nowhere and vanishes without a trace. This writer did not find the origin of the term, but it is widely used. *See, e.g.*, OR. REV. STAT. §742.504(2)(g) (1993), reprinted *infra* note 137.

32. A hit-and-run accident involves a car which makes physical contact with the insured or his vehicle then flees and successfully remains unidentified.

33. See, for example: ARIZ. REV. STAT. ANN. §20–259.01 (supp. 1993); ARK. CODE ANN. § 23–89–403 (1992); CONN. GEN. STAT. ANN. § 38a–334 (supp. 1993); IDAHO CODE §41–2502 (1988); IND. CODE § 27–7–5–2 (1988).

34. *E.g.*, Balestrieri v. Hartford Accident & Indemnity Insurance, Co., 112 Ariz. 160, 540 P.2d 126 (1975) (overruled in Lowing v. Allstate, 176 Ariz. 101, 859 P.2d 724 (1993)); Ward v. Consolidated Underwriters, 535 S.W.2d 830 (Ark 1976); Rosnick v. Aetna Casualty & Sur. Co., 374 A.2d 1076 (Conn. 1977); Collins v. New Orleans Pub. Serv. Inc., 234 So. 2d 270 (La. App.), *writ denied*, 236 So. 2d 503 (La. 1970). The argument is that the statutes require coverage for damages caused by uninsured motorists. Motorists who hit-and-run or miss-and-run could be insured or uninsured; therefore, they are not necessarily uninsured motorists. Because the statute does not refer to unidentified drivers, the statute does not mandate coverage for unidentified drivers, whether they make physical contact with the insured or not.

statutes have, however, come out with opposite results.[35]

The second statutory approach specifically requires that the carrier provide uninsured motorist coverage for hit-and-run accidents.[36] In many of these jurisdictions, the courts have found that their respective legislatures intended to mandate coverage for miss-and-run accidents even though they specifically used the word "hit".[37] The insurance industry, however, often argues that the physical contact requirement was considered when the legislature choose the word "hit".[38]

The third type of statute expressly incorporates the physical contact requirement.[39] In these jurisdictions the only issue left is what constitutes physical contact.[40] This seems to be an area of litigation where the courts are whittling away at the statute.[41]

An increasing number of states have elected to adopt a compromise

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This being the case, insurers are providing coverage broader than that mandated by the statute when they cover damages caused by a hit-and-run driver who remains unidentified. Thus, in such a jurisdiction an insurance company could sell a policy which would only cover an uninsured motorist loss when the insured could identify the tortfeasor and prove that she is uninsured.

35. WIDISS, *supra* note 2, at 485–86. These courts have held that their silent statutes require insurers to provide coverage for accidents cause by uninsured motorists. The arguments tend to go something like this: The purpose of the uninsured motorist statute is to ensure that the innocent victims of negligent drivers receive compensation and thus reduce the likelihood that they will become public wards. The physical contact requirement leaves some members of the protected group without compensation. Therefore, the contract provision, if allowed, will in some situations defeat the purpose of the statute and thus should be declared void as against public policy. *E.g.*, DeMello v. First Ins. Co. of Hawaii, 523 P.2d 304 (Haw. 1974); State Farm Fire and Casualty Ins. Co. v. Lambert, 285 So. 2d 917 (Ala. 1973).

36. WIDISS, *supra* note 2, at 486–87.

37. *Id.* at 487 (citing Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47 (Me. 1987); Soule v. Stuyvesant Ins. Co., 364 A.2d 883, 885 (N.H. 1976); and Biggs v State Farm Mut. Auto. Ins. Co., 569 P.2d 430 (Okla. 1977)). While some may argue that the courts have found that black is white, there is a counter-argument. It is plausible that the legislature used the term "hit-and-run" loosely intending to embrace its figurative use, and if the legislature were presented with the physical contact requirement, they would not incorporate it as it runs contrary to the purpose of the statute.

38. WIDISS, *supra* note 2, at 487. Professor Widiss states that this argument constitutes a narrow interpretation of the statutory mandate, when, ordinarily, courts construe coverage terms and insurance statutes liberally to achieve the legislative goals of providing coverage. *Id.*

39. WIDISS, *supra* note 2, at 488 (citing, CAL. INS. CODE §11580.2(b) (1977)).

> The term 'uninsured motor vehicle' means ... the owner or operator thereof be unknown, provided that, with respect to an 'uninsured motor vehicle' whose owner or operator is unknown ... the bodily injury has arisen out of physical contact of such automobile with the insured, or with an automobile which the insured is occupying.

40. Krych v. Mercury Casualty Co., 94 Cal. Rptr. 592, 595 (1971) (Statutory requirement of "physical contact" was "not intended to describe the reception by a vehicle or by an occupant of a vehicle of light emitted, projected, or diffused, from the headlights of another vehicle, but to describe a meeting of three dimensional masses of material having weight, density, and bulk, with dimensions perceptible to the normal naked eye," and thus recovery was denied where plaintiff claimed that he was blinded by high-beam headlight of oncoming automobile and drove off road into telephone pole.). Nationwide Mut. Ins. Co. v. Munoz, 199 Cal. App. 3d 1076 (1988) (bullet fired from shoot-and-run vehicle which struck insured satisfied the physical contact requirement). Oanh Thi Pham v. Allstate Ins. Co., 254 Cal. Rptr. 152 (1988) (rock which fell from dump truck and bounced off of the highway and penetrated insured's windshield satisfied the requirement).

41. *See generally*, A.S. Klein, *Uninsured Motorist Indorsement: Validity and Construction of Requirement that there be "Physical Contact" with Unidentified or Hit-and-Run Vehicle*, 25 A.L.R. 3rd 1299 §3(c) (1969) (discussing the California cases).

statute.[42] These statutes generally invalidate the physical contact requirement, but do not require an insurer to entertain a claim unless the insured provides corroborating evidence.[43] As stated above, despite the diversity in statutes and judicial interpretation, ultimately there are three general rules: 1) to allow the provision, 2) to completely invalidate the provision, or 3) to adopt a hybrid rule as has the State of Washington. Since Arizona has recently completely invalidated the provision an historical restatement of the development leading to this change provides a good backdrop for discussion of the goal maximization and cost associated with each rule.

III. ARIZONA'S STRUGGLE

A. The Cases

Arizona's statute mandates that carriers offer uninsured motorist coverage but does not require that a policyholder purchase the coverage.[44] The legislature is silent regarding its intent to include or exclude coverage for unidentified drivers[45] in the legislative mandate.[46] The purpose of the uninsured motorist legislation is to protect persons from damages which may not be compensable because of financially irresponsible defendants.[47] In the early cases regarding the statute the courts enunciated the public policy behind the statute.[48]

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42. WIDISS, *supra* note 2, at 489.

43. *See, e.g.*, WASH. REV. CODE §48.22.030 (1985) which requires in pertinent part:

> No new policy or renewal...shall be issued...unless coverage is provided...for the protection of persons...who are legally entitled to recover damages from owners or operators of...hit-and-run motor vehicles, and phantom vehicles....
> (8) [A] 'phantom vehicle' shall mean a motor vehicle which...has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:
> (a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and
> (b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

Id.

44. 1993 Ariz. Legis. Serv. vol. 8, s–6 (the uninsured motorist statute was recently changed. Prior to the change it required all policyholders to carry uninsured motorist coverage).

45. The term "unidentified driver" includes hit-and-run drivers as well as miss-and-run drivers.

46. ARIZ. REV. STAT. ANN. §20–259.01 (A) (Supp. 1993) states in part:

> No automobile...policy...shall be delivered...unless coverage is provided...for the protection of persons insured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.... For the purposes of the coverage... "uninsured motor vehicles"...includes any insured motor vehicle if the liability insurer of the vehicle is unable to make payment on the liability of its insured, within the limits of the coverage, because of insolvency.

Id.

47. Transnational Ins. Co. v. Simmons, 19 Ariz. App. 354, 356, 507 P.2d 693, 695 (1973); Evenchik v. State Farm Ins. Co., 139 Ariz. 453, 458, 679 P.2d 99, 104 (Ct. App. 1984).

48. Dairyland Insurance Company v. Lopez, 22 Ariz. App. 309, 526 P.2d 1264 (1974); Transportation Insurance Company v. Wade, 106 Ariz. 269, 475 P.2d 253 (1970). In *Wade*, the court held: The uninsured motorist statute established in this state a public policy that every insured is entitled to recover the damages he or she would have been able to recover if the uninsured motorist had maintained a policy of liability insurance in a solvent company. *Id.* at 273, 475 P.2d at 257 (citing Stephens v. Allied Mut. Ins. Co., 156 N.W. 2d 133 (1968).

In *Balestrieri v. Hartford,*[49] the court addressed the validity of the physical contact requirement in light of the uninsured motorist statute.[50] In *Balestrieri,* an insured motorist struck a street light while attempting to avoid an unidentified vehicle changing lanes directly in front of him. The insured brought a declaratory judgment action against his automobile insurer seeking an interpretation of the coverage which would allow recovery.[51] In looking at the statute the court pointed out that many of the state courts with statutes similar to Arizona's have found legislative intent to compensate the innocent motorist for injuries received at the hands of one from whom damages cannot be recovered. Thus, these courts have held that the physical contact requirement constitutes an impermissible restriction upon the protective purpose of the statute.[52] The *Balestrieri* court rejected this line of thinking and instead found that the statute was "clear and unambiguous"[53] and that it mandated coverage only for accidents where the tortfeasor was identified as being uninsured.[54] Thus, the *Balestrieri* court upheld the physical contact provision in uninsured motorist coverage.

The *Balestrieri* court also addressed a controversy surrounding the original title of the act when introduced into the state senate.[55] The title originally read: "An Act relating to insurance; prescribing an uninsured motorist and unknown motorist clause...."[56] The *Balestrieri* court reasoned that the fact that the deletion of the phrase "unknown motorist" from the bill indicated a conscious effort to exclude unidentified drivers from the act's coverage.[57] The reason for the change of title is not well documented and has been a source of controversy throughout the years.[58] Some courts and commentators argue that we can infer that the deletion of the phrase from the title and the act was a conscious effort to exclude coverage for unidentified drivers.[59] Yet others have argued that the deletion of the entire phrase from both the title of the act and the text of the act was a mere clerical error and that the legislature truly intended to mandate coverage for unidentified motorists.[60]

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49. 112 Ariz. 160, 540 P.2d 126 (1975).
50. ARIZ. REV. STAT. ANN. § 20-259.01 (1974).
51. *Balestrieri,* 112 Ariz. at 160, 540 P.2d at 126.
52. *Id.* at 162, 540 P.2d at 128.
53. *Id.* at 163, 540 P.2d at 129. The court further held that the statute needed no construction as to its meaning. *Id.* In so holding, the court relied on precedent which mandates that the Arizona uninsured motorist statute is to be liberally construed in accordance with its remedial purposes. *Id.* at 162, 540 P.2d at 128 (citing Reserve Insurance Co. v. Staats, 9 Ariz. App. 410, 453 P.2d 239 (1969)).
54. *Id.* at 163, 540 P.2d at 129. The court supported its holding by citing cases from other jurisdictions which have identical statutes and which have held that their respective statutes did not mandate coverage for unidentified drivers. *Id.* at 162, 540 P.2d at 128 (citing Amidzich v. Charter Oak Fire Ins. Co., 170 N.W.2d. 813 (Wis. 1969)); Buckeye Union Ins. Co. v. Cooperman, 293 N.E.2d 293 (Ohio App. 1972); Citizens Mutual Ins. Co. v. Jenks, 194 N.W.2d 728 (Mich. App. 1971).
55. 112 Ariz. at 163, 540 P.2d at 129.
56. *Id.*
57. *Id.*
58. *See, e.g.,* Anderson v. State Farm Mut. Auto. Ins. Co., 133 Ariz. 464, 652 P.2d 537 (1982) (Justice Feldman specially concurring). Note, *Uninsured Motorist Coverage,* 14 ARIZ. L. REV. 600, 604 (1972).
59. *Balestrieri,* 112 Ariz. at 163, 540 P.2d at 129.
60. *Anderson,* 133 Ariz. at 464, 652 P.2d at 541 (Justice Feldman concurring). In this opinion Justice Feldman raised the possibility that the omission of the entire phrase was a "clerical error" and cited Note, *Uninsured Motorist Coverage* 14 ARIZ. L. REV. 600, 604 (1972) (this is an unsigned student note). The student note said nothing about a clerical error. The

After *Balestrieri* the litigation turned toward defining what constitutes physical contact as provided in the policies. In *Gardner v. Aetna Casualty & Surety Company*,[61] the court of appeals, in the spirit of *Balestrieri*, strictly construed the policy language, and held the language of Aetna's policy clear and unambiguous. The policy "clearly requires touching or contact between the vehicle to constitute physical contact."[62]

In *Gardner*, the Plaintiff suffered injuries as a result of a collision with a bale of wire that had fallen off an unidentified flat-bed.[63] The *Gardner* Court, citing *Lawrence v. Beneficial Fire Casualty Insurance Co.*,[64] held that the Court could not expand the language used beyond its plain and ordinary meaning. In addition, the Court should not add something to the contract which the parties did not put there.[65]

The strict construction approach of *Gardner* gave way when the Arizona Supreme Court decided *Anderson v. State Farm Mutual Automobile Insurance Company* in 1982.[66] In *Anderson,* the plaintiffs Paul Anderson and Dusty Ellington were in Ellington's vehicle stopped at a traffic light. A Purolator Courier van was rear-ended and pushed into the back of the Ellington vehicle. The automobile which ran into the back of the van fled the scene and remained unidentified. It was undisputed that the vehicle which hit the van never made contact with the plaintiff's car.[67]

The trial court in *Anderson* granted summary judgment in favor of State Farm, and the court of appeals affirmed.[68] While the Arizona Supreme Court did not address *Gardner*, it did hold in *Anderson* that it was evident that a hit-and-run motorist was the cause of the collision, and under these circumstances indirect contact met the physical contact requirement.[69]

Thus, in *Anderson* the Arizona Supreme Court found "the trend is to construe 'physical contact' broadly in order to effectuate the purposes of uninsured motorist protection."[70] The *Anderson* Court buttressed its decision by pointing out that numerous other jurisdictions, when faced with the issue, have consistently held that a *chain reaction* accident constitutes physical contact.[71] This case represents a small step away from the otherwise strict con-

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student-author did reach the conclusion, however, that the intent of the legislature was to mandate coverage. This conclusion was based upon a telephonic conversation between the student and former State Senator David H. Palmer, who, according to the unidentified author, led the bill through the Senate. *Id.* (attorney David Toone argued this point to the Arizona Supreme Court in Lowing v. Allstate, 176 Ariz. 101, 859 P.2d 724 (1993). Appellee's Answering Brief 13–14).

61. 114 Ariz. 123, 559 P.2d 679 (1977).
62. *Id.* at 124, 559 P.2d at 680.
63. *Id.* at 123 (compare this holding with the cases cited *supra* note 34).
64. 8 Ariz. App. 155, 444 P.2d 446 (1968).
65. 114 Ariz. at 124, 559 P.2d at 680.
66. 133 Ariz. 464, 652 P.2d 537 (1982).
67. *Id.* at 465, 652 P.2d at 538.
68. *Id.* at 465, 652 P.2d at 538 (at the Court of Appeals, Judge Sarah Grant dissented, arguing that when there is indisputable evidence that a third vehicle existed and caused the collision then the physical contact requirement has been met).
69. *Id.* at 467, 652 P.2d 540.
70. *Id.* (citing JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE, §5095.25 (1981); Robert G. Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME LAW 5 (1967); Inter-Insurance Exch. of the Auto. Club of S. Cal. v. Lopez, 47 Cal. Rptr. 834 (1965); Motor Vehicle Accident Indem. Corp. v. Eisenberg, 218 N.E.2d 524 (N.Y. 1966)).
71. Lord v. Auto-Owners Ins. Co., 177 N.W.2d 653 (Mich. 1970); Latham v. Mountain

struction of *Gardner,* a case which can create very harsh results.

Contrary to the *Anderson* majority however, Justice Stanley Feldman[72] was not interested in small steps. He filed a concurring opinion arguing that *Arizona Revised Statutes* § 20–259.01 mandates uninsured motorist coverage be provided for damages caused by an unidentified motorist, and, therefore, the physical contact requirement is void as against public policy.[73]

Feldman's concurrence, no doubt, brought hope to the plaintiff's bar. Four years later that hope dimmed slightly when the "physical contact" requirement was again tested in *State Farm Mutual Automobile Insurance Company v. Brudnock.*[74] The composition of the court had not changed,[75] and again, the court found itself bound by controlling precedent and upheld the validity of the physical contact provision.[76]

However, the facts of *Brudnock* are such that one questions whether equity is served by enforcing the physical contact provision. Janet M. Brudnock was the owner/occupant of a motor vehicle operated by Steve Harrigan. Brudnock and Harrigan were traveling westbound on a two lane highway behind a Mazda RX7. The Mazda attempted to overtake a car in front of it using the eastbound lane. An eastbound Corvette went off the road to avoid a head-on collision with the Mazda. The Corvette driver lost control, reentered the roadway, and struck the Brudnock vehicle causing it to roll over. Neither Brudnock's vehicle nor the Corvette came in contact with the Mazda.[77]

Under these facts it is quite obvious that the insured did not create a "phantom vehicle."[78] The testimony of the Corvette driver did corroborate the insured's account, and, therefore, there should have been little concern about fraud. Thus, the purpose of the physical contact requirement is not relevant to this case; nevertheless, the insurance policy contained a physical contact provision.[79] Accordingly, the policy, by its terms did not provide coverage for this accident.[80]

States Mut. Casualty Co., 482 S.W. 655 (Tex. App. 1972); Ray v. DeMaggio, 313 So. 2d 251 (La. 1975); Johnson v. State Farm Mut. Auto. Ins. Co., 424 P.2d 648 (Wash. 1967).

72. Stanley Feldman is now Chief Justice of the Arizona Supreme Court.

73. 133 Ariz. 464, 652 P.2d 537; (In his specially concurring opinion, Justice Feldman argued that the purpose of the uninsured motorist statute is to close the gap in the Financial Responsibility Act by protecting those who are injured by the negligence of financially irresponsible motorists. If the physical contact requirement is allowed this will be defeated because there will still be a class of people out there who are injured by unidentified motorist who will not receive compensation for their injuries.) *Id.* at 469, 652 P.2d at 542.

74. 151 Ariz. 268, 727 P.2d 321 (1986) (overruled by Lowing v. Allstate Ins. Co., 176 Ariz. 101, 859 P.2d 724 (1993)).

75. The court consisted of Justice Cameron, Justice Hays, Justice Feldman, Vice Chief Justice Gordon, and Chief Justice Holohan.

76. *Brudnock,* 151 Ariz. 268, 727 P.2d 321.

77. 151 Ariz. 268, 269, 727 P.2d 321, 322 (1986).

78. Thus, the purpose of the provision in effect has been met. *See supra* note 75 and accompanying text..

79. The State Farm Policy has common language. *See supra* note 15. The relevant language of the State Farm Policy is as follows: a 'hit-and-run' land motor vehicle whose owner or driver remains unknown and which *strikes*:

a. the *insured* or

b. The vehicle the *insured* is *occupying* and causes *bodily injury* to the *insured.*

STATE FARM CAR POLICY FORM 9803.5 (emphasis in original). *Compare* the Allstate policy with the State Farm policy. The State Farm policy is not as specific as the Allstate policy. *See supra* note 18.

80. The Brudnock fact pattern is the paradigm of the anomaly which opponents of the provision use to argue that the provision is contrary to public policy.

Appellants argued that the physical contact provision was contrary to the public policy as codified in the uninsured motorist statute.[81] The court recognized Justice Feldman's special concurring opinion in *Anderson*[82] to represent the crux of appellant's argument, but refused to accept it and overrule *Balestrieri*.[83]

The *Brudnock* Court further emphasized that since *Balestrieri* the legislature had twice amended the Arizona uninsured motorist statute. The majority held that if the legislature did not agree with the *Balestrieri* Court's interpretation of the statute they would have amended it to reflect Justice Feldman's interpretation.[84] In addition, the *Brudnock* Appellant further argued that *Anderson* mandated coverage because there was no question that the third vehicle existed and there was a causal link between the collision between the two identified vehicles and the third unidentified vehicle.[85] But the *Brudnock* Court distinguished *Anderson* based upon the fact that the unidentified Mazda did not come in contact with any object which then came in contact with the insured vehicle.[86] As with the statutory interpretation argument the court was unpersuaded and again upheld the validity of the physical contact provision.

Since 1986 the composition of the court has changed.[87] With the addition of Justices Zlaket and Martone, Chief Justice Feldman acquired a potential majority which would allow him to overrule *Balestrieri*[88] and *Brudnock*[89]. In the case of *Lowing v. Allstate*[90] this was recently accomplished.

In *Lowing,* Paula Lowing was injured when the car in which she was riding overturned after leaving the roadway to avoid a collision with a vehicle which ran a stop sign. When Lowing sued for coverage under the uninsured motorist coverage, the trial court granted Allstate's motion for summary judgment. The Court of Appeals Division II upheld based on *Balestrieri*.[91] In *Horvath v. Continental Casualty*,[92] the companion case, Lewis Horvath and three of his children were injured when he swerved his car off of the road to avoid another car attempting to pass a truck in a no-passing zone. The Court of Appeals Division I affirmed based on *Balestrieri*.[93] The Arizona Supreme Court granted petition for review on both and consolidated.[94]

In an opinion written by Justice Martone, the *Lowing* court framed the

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81. ARIZ. REV. STAT. ANN. § 20–259.01 (Supp. 1985). The appellants argument appears at 151 Ariz. 269, 727 P.2d 322.

82. Anderson v. State Farm Mut. Auto Ins. Co., 133 Ariz. 464, 652 P.2d 537 (1992).

83. Brudnock v. State Farm Mutual Auto. Ins. Co., 151 Ariz. 268; 269, 727 P.2d 321, 322 (1986); Balestrieri v. Hartford Accident & Indem. Ins. Co., 112 Ariz. 160, 540 P.2d 126 (1975).

84. Since *Brudnock* the statute has been amended four times. It was amended in 1986, 1992, and twice in 1993.

85. 151 Ariz. at 270, 727 P.2d at 323.

86. *Id.*

87. The court currently consist of Chief Justice Stanley G. Feldman, Vice Chief Justice James Moeller, Justice Robert J. Corcoran, Justice Frederick J. Martone, Justice Thomas A. Zlaket. *See supra* note 75, for the former composition.

88. 112 Ariz. 160, 540 P.2d 126.

89. 151 Ariz. 268, 727 P.2d 321 (1986).

90. 176 Ariz. 101, 859 P.2d 724 (1993). This case was consolidated with *Horvath v. Continental Casualty.*

91. *Id.* at 103, 859 P.2d at 726.

92. 176 Ariz. 101, 859 P.2d 724 (1993).

93. *Id.* at 103, 859 P.2d at 726.

94. *Id.* at 101, 859 P.2d at 726.

issue as a two part question.[95] The court first asked whether *Arizona Revised Statutes* § 20–259.01 requires coverage for unidentified drivers.[96] The *Lowing* court recognized that the *Balestrieri* court had held that in interpreting the statute, they were to apply the "plain language" of the statute.[97] In *Lowing*, however, Martone held that it was impossible to apply the "plain language" because it is impossible to know which unidentified drivers are insured and which are uninsured.[98] Thus, Martone reasoned that the court must presume that unidentified drivers are insured or that they are uninsured. Since the statute is silent, the court held that they must consider legislative intent.[99] As stated above, the purpose of the statute is to 'close the gap in protection under the Safety Responsibility Act'[100] by requiring insurance for damages caused by uninsured motorists. Martone held that unidentified drivers are functionally uninsured;[101] accordingly, the statute requires coverage for damage caused by them. Martone further held that interpreting the statute such that it mandates coverage for unidentified drivers is consistent with the general purpose of the statute—namely, to provide protection against damage caused by an uninsured, and according to Martone, functionally uninsured motorist.[102]

In addition, the *Lowing* court noted that since the amendments subsequent to *Balestrieri* were not related to the physical contact requirement, there is no reason to believe that the legislature considered this holding, and, therefore, no reason to believe that they ratified it.[103] In the opinion, Justice Martone then went on to criticize the contact requirement's efficiency.[104]

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95. *Id.*

96. *Id.*

97. Balestrieri v. Hartford Accident & Indem. Ins. Co., 112 Ariz. 160, 163, 540 P.2d 126, 129 (1975).

98. 176 Ariz. at 104, 859 P.2d at 727.

99. *Id.*

100. *Id.* (citing Calvert v. Farmers Ins. Co. of Arizona, 144 Ariz. 291, 294 697 P.2d 684, 687 (1985)); *See also, supra* note 73.

101. *Id.* at 105, 859 P.2d at 728.

102. *Id.*

103. *Id.* at 105–06, 859 P.2d at 728–29. The court cited Cagle v. Butcher, 118 Ariz. 122, 124 n.2, 575 P.2d 321, 323 n.2 (1978); Jackson v. Northland Constr. Co., 111 Ariz. 387, 388, 531 P.2d 144, 145 (1975) ("[W]here a statute which has been construed by a court of last resort is re-enacted in substantially the same terms, the legislature is presumed to have placed its approval on the judicial interpretation given and adopted such construction for the re-enacted statute."). This argument was also considered in Balestrieri v. Hartford Accident & Indem. Ins. Co., 112 Ariz. 160, 540 P.2d 126 (1975) (overruled by Lowing v. Allstate, 176 Ariz. 101, 859 P.2d 724 (1993)). The court choose not to follow these rules. *Lowing*, 176 Ariz. at 105–06, 859 P.2d at 728–29.

104. *Id.* at 176 Ariz. at 106, 859 P.2d at 729. Justice Martone stated the following about the provision as a fraud prevention device:

> The contact requirement...is both too broad and too narrow to accomplish [fraud prevention]. See DeMello v. First Ins. Co. of Hawaii, 523 P.2d 304, 310 (Haw. 1974). As one commentator noted, if twenty witnesses will swear that an accident occurred as claimed by the injured insured, it is simply arbitrary to deny coverage in the absence of physical contact under the rubric of fraud prevention. Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971). Conversely, if there are no witnesses to an insured's own negligence, he or she can easily claim physical contact when there was none, and create the evidence to corroborate such a claim. *See* Anderson v State Farm Mut. Auto. Ins. Co., 133 Ariz. 464, 470, 652 P.2d 537, 543 (1982) (Feldman, J. concurring).

Id. at 106–07, 859 P.2d at 729–30. This writer, however, argues that Justice Martone and Justice Feldman have set up a straw man. In Justice Martone's first hypothetical the insurer would not deny the claim under the "rubric of fraud" when twenty witnesses attest to the

In so holding, the court rewrote Arizona's uninsured motorist statute, and effectively flip-flopped on an issue which has been consistently decided since 1968.

B. Erosion of the Public Policy of Filling The Gap

Arizona's uninsured motorist statute was amended twice in 1993.[105] Both of the amendments severely undermine the proposition that the underlying purpose of the uninsured motorist statute is to "close the gap" in protection.

The first of the 1993 amendments was apparently a prophylactic measure to prevent the Arizona Supreme Court from taking broad liberties and rewriting the statute under the guise of legislative intent. The first amendment of 1993 added subsection (I) which exempts any general commercial liability policy, excess policy, umbrella policy or other policy that does not provide primary motor vehicle insurance for liability from the general underinsured[106] or uninsured motorist insurance requirements of the statute.[107] This change has the effect of creating an entirely new class of people who are now not protected against damages caused by negligent miss-and-run drivers, namely, all drivers of vehicles insured by an exempt type of policy, commercial liability, personal umbrella, etc., injured by an uninsured motorist.

The second amendment changed the uninsured motorist statute to the type requiring insurers to offer uninsured motorist coverage, but does not mandate that it be included in the automobile policy.[108] This is a drastic change which allows Arizona citizens to travel without uninsured motorist coverage. This change creates a potential for a huge number of people to operate without any uninsured motorist protection.[109] The small class of people which the physical

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existence of the phantom vehicle. Rather, they would deny the claim because it is not a covered loss according to the provisions of the insurance contract. This writer seriously doubts that an insurer would argue fraud as a defense in Justice Martone's hypothetical.

Without a physical contact requirement there is high potential for fraud. *See* related discussion, *supra* note 21. Insurers have approached this problem by simply excluding the entire class of miss-and-run accidents (whether corroboration exist or not). Nevertheless, it is fallacious to argue that the insurer believes all accidents in this class are fraudulent claims.

Justice Martone's second hypothetical comes from Justice Feldman's concurring opinion in *Anderson*. This might be a persuasive argument in a world where all crooks are aware of the physical contact requirement and where the sole motivation for fabricating a phantom vehicle is to commit fraud. *See* related discussion, *supra* note 22 and accompanying text. However, this is not our world and therefore, the argument is not sound.

105. *See supra* note 84.

106. Underinsured motorist coverage is different than uninsured motorist coverage. Underinsured motorist coverage is additional coverage in excess of the tortfeasor's liability policy. For example, if the insured victim holding a policy with underinsured motorist coverage has damages in the amount of $75,000, and the tortfeasor has a $25,000 limit on his liability policy, then the victim could make a claim against his own policy for the additional $50,000 (this assumes that the victim's underinsured motorist policy has a limit of $50,000 or more).

107. ARIZ. REV. STAT. ANN. § 20–259.01(I). Prior to this amendment, the Court of Appeals, Div. 2, held in Ormsbee v. Allstate Ins. Co., 170 Ariz. 419, 825 P.2d 944 (1991), *vacated*, 176 Ariz. 109, 859 P.2d 732 (1993), that the statutory provision which requires an insurer to offer underinsured motorist coverage when selling a liability policy did not apply to a personal liability umbrella policy. The Arizona Supreme Court granted certiorari and heard oral arguments. The above amendment was then passed prior to the court issuing an opinion. This amendment had the effect of specifically exempting personal liability umbrella policies from the requirement. Nevertheless, when it reached the Supreme Court, Justice Martone found that the legislature intended that the statute encompass underinsured motorist coverage. *Ormsbee*, 176 Ariz. at 112, 859 P.2d at 735.

108. *See* discussion, *supra* note 13.

109. This includes unidentified drivers as well as identified.

contact requirement removes from coverage is *de minimis* compared to those removed by the recent changes in the uninsured motorist statute.

Justice Feldman in *Anderson*[110] has argued that the physical contact requirement creates the only gap in Arizona's comprehensive scheme to protect the public from hardship caused by financially irresponsible drivers.[111] The Arizona legislature has decided to alter their scheme and in doing so has created some very large gaps. These public policy changes undermine the *Lowing*[112] and *Brudnock*[113] argument that public policy demands filling the gap. Therefore, the public policy foundation upon which these two cases are based has now eroded out from under them.

IV. OTHER JURISDICTIONS

A. Silent Type Statutes

Many states with silent statutes have held that uninsured motorist coverage for the unidentified motorist is not required by the statute.[114] For example, in Idaho, where the uninsured motorist coverage statute is very similar to Arizona's,[115] the Idaho courts have maintained the position that the Idaho uninsured motorist statute does not require coverage for unidentified hit-and-run or miss-and-run drivers.[116]

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110. 133 Ariz. 464, 469, 652 P.2d 537, 542 (1982) (Feldman, J. concurring).

111. Justice Feldman argues:

> Thus, by the interaction of legislation and judicial decision, Arizona has created a scheme of required liability insurance, compulsory uninsured motorist coverage and available underinsured coverage.... The obvious and avowed design in this comprehensive scheme is that a legislatively prescribed minimum source of compensation shall be available to 'protect the public from financial hardship' caused by financially irresponsible drivers. No 'gap' in that scheme exists in Arizona law except for that allowed by *Balestrieri*, which holds that a victim who had the misfortune to have been injured as the result of the negligence of a driver who did not stop to identify himself is not covered. I can conceive of no reason why the legislature would have intended this small class of claims to be excluded from the scheme of compensation.

Id. at 469, 652 P.2d at 542 (citation omitted).

112. 176 Ariz. 101, 859 P.2d 724 (1993).

113. 151 Ariz. 268, 727 P.2d 321 (1986).

114. Of the 19 states with statutes similar to this type, ten have upheld the physical contact requirement. *See* Ward v. Consolidated Underwriters, 535 S.W.2d 830 (Ark. 1976); Hammon v. Farmers Ins. Co. of Idaho, 707 P.2d 397 (Idaho 1985); Ely v. State Farm Mut. Auto. Ins. Co., 268 N.E.2d 316 (Ind. App. 1971); Huelsman v. National Emblem Ins. Co., 551 S.W.2d 579 (Ky. Ct. App. 1977); Collins v. New Orleans Pub. Serv. Inc., 234 So. 2d 270 (La. Ct. App. 1970); Citizens Mut. Ins. Co. v. Jenks 194 N.W.2d 728 (Mich. Ct. App. 1971); Ward v. Allstate Ins. Co., 514 S.W.2d 576 (Mo. 1974); Buckeye Union Ins. Co. v. Cooperman, 293 N.E.2d 293 (Ohio Ct. App. 1972); Smith v. Allstate Ins. Co., 456 S.W.2d 654 (Tenn. 1970); Phelps v. Twin City Fire Ins. Co., 476 S.W.2d 419 (Tex.Civ.App. 1972).

115. IDAHO CODE § 41–2502 (1991) states:

> 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...for the protection of persons ... who are legally entitled to recover damages from owners or operators of uninsured motor vehicles....

Id. Like Arizona's statute there is no mention of unidentified tortfeasors.

116. *Hammon*, 707 P.2d at 399. The court stated:

Arizona is not alone, however, in its liberal reading of its uninsured motorist statute. For example, in *DeMello v. First Ins. Co. of Hawaii,*[117] the Hawaii Supreme Court held that the physical contact requirement was in derogation of Hawaii public policy as codified in state statute.[118] According to Professor Widiss there are a growing number of states which have adopted this type of interpretation.[119]

B. Explicit Statutes

In contrast, the California legislature has codified the physical contact requirement in statute.[120] The statute originally did not include the requirement.[121] The California Court of Appeals then held that it was the legislature's intent that the term uninsured motorist include unidentified motorist.[122] Thus, the legislature, bothered by the court of appeals' interpretation of their intent, amended the statute to abrogate its decision.[123] Therefore, it was settled that the provision would be enforced even where the danger of fraud does not exist.[124]

> 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.

Id.

117. 523 P.2d 304 (Haw. 1974).

118. HAW. REV. STAT. § 431:IOC–103(23)(b) (Supp. 1992). This codifies the holding in DeMello v. First Ins. Co. of Hawaii, 523 P.2d 304 (Haw. 1974).

119. *See* WIDISS *supra* note 2, § 9.8, at 486.

120. CAL. INS. CODE §11580.2 states when defining uninsured motorist:

> [W]ith respect to the owner or operator thereof, or the owner or operator thereof be unknown, provided that, with respect to an "uninsured motor vehicle" whose owner or operator is unknown:
> (1) The bodily injury has arisen out of *physical contact* of the automobile with the insured or with an automobile which the insured is occupying.

CAL. INS. CODE § 11580.2(b)(1) (West Supp. 1994) (emphasis added).

121. Costa v. St. Paul Fire & Marine Ins. Co., 39 Cal. Rptr. 774 (Dist. Ct. App. 1964).

122. *Id.*

123. CAL. INS. CODE §11580.2(b)(1) (West Supp. 1994).

124. In Rodgers v. State Farm Mut. Auto. Ins. Co., 91 Cal. Rptr. 678 (Ct. App. 1970), the court held that the statutory requirement that bodily injury arise out of physical contact of the unidentified automobile with the insured is not satisfied where a so-called phantom car does not come into actual physical contact with either the insured or the vehicle he occupied. Furthermore, the statute will not be extended by judicial decision to permit recovery even where it is *undisputed* that the phantom car caused the accident, and thus no element of fictitious or fraudulent claims are present. *Id.* at 681. Furthermore, in *Orpustan*, the plaintiff argued that since the statute was designed to eliminate fraud, and under the *Orpustan* facts, it was undisputed that no fraud existed, the protective purpose of uninsured motorist coverage in providing compensation for persons injured on the highway through no fault of their own is frustrated. Orpustan v. State Farm Mut. Auto Ins. Co., 500 P.2d 1119 (Cal. 1972). The court stated in response:

> Such argument, however, runs counter to the statute's plain language. 'What the Legislature meant by what it said must be determined from the language used in relation to the subject matter and not from speculation as to what was in the minds of the individual legislators'. (Krych v. Mercury Cas. Co., ... 94 Cal. Rptr. 592, 594 [Ct. App. 1971]). The statute makes proof of 'physical contact' a condition precedent in every case for the recovery of damages caused by an unknown vehicle. There are no exceptions. If it is advisable that the statute be changed, the solution lies within the province of the Legislature. The court has no right to legislate the proviso from the statute or emasculate its application under the guise of judicial interpretation.

Arguably, the California approach — enforcement of the physical contact provision without exception — gives rise to the *Brudnock* anomaly discussed above[125] where a first party claimant for uninsured motorist coverage makes a claim and is denied, whereas if it were a third party liability claim the insurer would have to entertain it. In *Orpustan v. State Farm Mutual Automobile Insurance Company*[126] this anomaly precipitated a constitutional attack on the California statute.

In *Orpustan* the plaintiffs argued that the statute violated the equal protection clause because the physical contact requirement was not imposed on ordinary tort victims.[127] The court rejected this claim. In doing so the *Orpustan* court stated that the purpose of the physical contact requirement is to reduce the possibility that a motorist who loses control of his vehicle through his own negligence will be able to recover under the uninsured motorist coverage by alleging that an unknown vehicle caused the injuries. The court held that this purpose provided a reasonable ground for classification.[128] Thus, the constitutional claim was rejected.[129]

Given that the statute passes constitutional muster, one way to abrogate some of the harsh results is to whittle away at the statute's liberal interpretation the meaning of physical contact. In general, this approach has not been employed in California.[130] The California Supreme Court, however, has taken a less restrictive approach to solving the problem of when an unidentified driver causes a "chain reaction"[131] type accident. The courts have held that where an object is set in motion by an unidentified driver and this object causes injury, there is coverage.[132]

Statutes which explicitly require physical contact provide clear legislative direction. These statutes, however, will not allow a party to recover even when they have demonstrated, through corroborating evidence, that the phantom

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Id. at 1123.

125. *See supra* note 74 and accompanying text.

126. 500 P.2d 1119 (Cal. 1972)

127. *Id.* at 1123. The plaintiff maintained that he should be entitled to equal insurance protection as one whose car has been in a direct collision with another vehicle. *Id.* at 1123.

128. *Id.*

129. *Id.*

130. *See* Page v. Insurance. Co. of N. Am., 83 Cal. Rptr. 44 (Ct. App. 1970). (unidentified vehicle threw up rocks and dust which contacted plaintiff's car, proving to be nothing more than symbolic touching, did not satisfy requirement); Barnes v. Nationwide Mut. Ins. Co., 230 Cal. Rptr. 800 (Ct. App. 1986) (collision with box of dinette chairs lying in road was not physical contact between insured's automobile and unknown vehicle as required by uninsured motorist provision of insured's policy and by the Insurance Code, notwithstanding insured's contention that a box had fallen from an unknown vehicle); Krych v. Mercury Casualty Co., 94 Cal. Rptr. 592 (Ct. App. 1971) (reception of light emitted from phantom vehicle was not sufficient to constitute physical contact). However, one certainly can argue that there has been some erosion of the statute, and that said erosion goes beyond what was intended by the legislature. *See, e.g.,* Nationwide Mut. Ins. Co. v. Munoz, 245 Cal. Rptr. 324 (Ct. App. 1988) (bullet fired from unidentified car striking insured was physical contact); Oanh Thi Pham v. Allstate Ins. Co., 254 Cal. Rptr. 152 (Ct. App. 1988) (rock which fell from unidentified dump truck penetrating windshield striking passenger was physical contact).

131. A chain reaction accident occurs when one car strikes another auto pushing it into a third vehicle. *See* Inter-Insurance Exch. of Auto. Club of S. Cal. v. Lopez, 47 Cal. Rptr. 834 (Dist. Ct. App. 1965).

132. *Id.* In *Inter-Insurance Exch.,* the court held that because there was no possibility of fraud, and the purpose of the statute was met, the physical contact requirement was satisfied. The court pointed out that indirect contact was not present in the case at hand but would satisfy the requirement. *Id.* at 837.

vehicle exits. For this reason, it is, from a tort victim compensation stand-point, undesirable.

C. Hit-and-Run Statutes

There is a category of statutes which require coverage for hit-and-run drivers but the statutes of this type do not define what is meant by hit-and-run.[133] Some of these states have interpreted hit-and-run to include miss-and-run[134] drivers.[135] Given the ambiguity of the term hit-and-run,[136] and the fact that jurisdictions with similarly worded statutes have opposite interpretations, these statutes are similar to the silent statutes. If the word hit-and-run is interpreted to encompass accidents without physical contact, the statute mandates coverage for these losses. If hit-and-run is interpreted literally, then the statute does not mandate coverage for accidents where the physical contact requirement is not met.

Because of their ambiguity, hit-and-run statutes provide little or no guidance on how to address the problem of phantom vehicles. This is evidenced by the varying interpretation of the term hit-and-run.

D. Compromise Statutes

The last category of statutes reflects a compromise or hybrid approach. These statutes abrogate the contact provision, but in cases where there is no physical contact the statutes require that the insured provide *corroborating* evidence of the phantom vehicle.[137]

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133. *See e.g.*, ILL. ANN. STAT. ch. 215, para. 5/143a (Smith-Hurd 1993) and IOWA CODE ANN. § 516A.1 (Supp. 1993).

134. A miss-and-run driver is an at fault motorist who remains unidentified after causing an accident without making physical contact with the insured vehicle.

135. *See* WIDISS, *supra* note 2, § 9.8, at 487 (citing Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47 (Me. 1987); Soule v. Stuyvesant Ins. Co., 364 A.2d 883, 885 (N.H. 1976); Biggs v. State Farm Mut. Auto. Ins. Co., 569 P.2d 430 (Okla. 1977).

136. See *supra* notes 36–38 and accompanying text for explanation of the ambiguity.

137. WIDISS, *supra* note 2, § 9.8, at 489–90 (emphasis added). Professor Widiss has cited several different statutes, however, the following provide a good representation of the hybrid type statutes. For example, GA. CODE. ANN. §33–7–11(b)(2) (1990), was amended to allow recovery with no physical contact. The statute states:

> A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown. In those cases, recovery under the endorsement or provisions shall be subject to the conditions set forth in subsections (c) through (j) of this Code section and, in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured. Such *physical contact* shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant.

Id. (emphasis added)

In comparison, Kansas requires that the corroborating evidence be from a disinterested party:

> (e) Any insurer may provide for the exclusion or limitation of coverage:
> (3) when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy.

KAN. STAT. ANN. §40–284(e)(3) (1993).

Oregon's statute has similar provisions. The Oregon uninsured motorist statute states:

> (A) It shall be a disputable presumption that a vehicle is uninsured in the event the

These statutes aim to strike a compromise between the two competing goals of maximizing the compensation uninsured motorists' victims, and preventing fraud and unjustified payments.[138] However, there are significant differences in the statutes. These differences tend to favor one of these policies over the other. Thus, the compromise that is struck between these goals is different in each state. The source of the difference stems from what each state allows as corroboration.[139]

Most hybrid statutes will not allow testimony of an interested party, such as a passenger in the insured vehicle, as corroborating evidence.[140] However, the Georgia Statute is silent on the matter and the Georgia Supreme Court has interpreted this silence liberally to allow corroboration by an interested party.[141] Given that corroborating testimony of a co-claimant is acceptable, it is safe to assume that the testimony of a person who has a derivative claim[142] or special relationship with the victim will suffice.

Washington, Oregon and Kansas, however, specifically exclude

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insured and the insurer, after reasonable efforts, fail to discover within 90 days from the date of the accident, the existence of a valid and collectible automobile bodily injury liability insurance or bond applicable at the time of accident.
(B) A hit-and-run vehicle as defined in paragraph (f) of this provision.
(C) A *phantom vehicle* as defined in paragraph (g) of his provision.

OR. REV. STAT. §742.504(2)(d)(A)–(C) (1993) (emphasis added). The Oregon statute defines *phantom vehicle* as follows:

> "*Phantom vehicle*" means a vehicle which causes bodily injury to an insured arising out of a motor vehicle accident which is caused by an automobile which has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident, provided:
> (A) There cannot be ascertained the identity of either the operator or the owner of such phantom vehicle;
> (B) The facts of such accident can be corroborated by competent evidence other than the testimony of the insured or any person having an uninsured motorist claim resulting from the accident; and
> (C) The insured or someone on behalf of the insured shall have reported the accident within 72 hours to a police, peace or judicial officer, to the Department of Transportation of the State of Oregon....

OR. REV. STAT. §742.504(2)(g)(A)–(C) (emphasis added). *See also* WASH. REV. CODE, *supra* note 43.

138. By unjustified payments this writer means those who fabricate a phantom vehicle for reasons other than committing insurance fraud, but who end up with uninsured motorist claims nevertheless. *See supra* notes 22–23 and accompanying text.

139. *See supra* notes 43 and 137 and accompanying text. For example, Georgia will allow an interested party to corroborate the insured's account of the accident. *See supra* note 137.

140. *See supra* notes 43 & 137.

141. In *Universal Sec. Ins. Co. v. Lowery*, 359 S.E.2d 898 (Ga. 1987), the court held that the corroborating evidence could be the testimony of an insured driver. The court provided the following justification: "If the General Assembly had intended to require corroboration by a disinterested third party, it could have so specified." *Id.* at 899.

This writer questions the *Lowery* Court's reasoning; the above quote assumes that the Assembly considered this distinction. The purpose of the "corroboration requirement" is to prevent fraud. It is highly questionable that this end is furthered when two injured occupants of the same automobile are allowed to corroborate each others' uninsured motorist claim. It should be noted that the occupants will each have an economic incentive to corroborate the phantom vehicle. The uninsured motorist coverage provides them with an opportunity to collect general damages which would not be collectible under the states no fault coverage (Georgia is a no fault state, so even if the occupants could not bring themselves under the uninsured motorist coverage they would be able to get no fault coverage. This coverage would pay for either part or all of their economic losses only. It would not pay for damages like pain and suffering).

142. A derivative action in this sense is a claim for damages which one suffers as the result of bodily injury to another.

corroboration evidence provided by any person having a claim under the policy.[143] While it appears that the interested person incompetency rule will extend to a derivative claim, it is questionable whether or not it will extend to testimony of a party who has a special relationship with the victim.

It appears an insured could convincingly corroborate the existence of the phantom vehicle with physical evidence alone.[144] This is an area of little case law, but it appears ripe for litigation. On its face, the Georgia statute seems only to allow a claim when there is a witness,[145] while the Washington and Oregon statutes only require "competent evidence."[146] The Kansas statute seems to be ambiguous.[147]

The Georgia statute is unambiguous and does not effectively strike a compromise between the two competing social goals discussed above. The wording of the Georgia statute[148] can lead to anomalous results. Based on a literal reading of the statute, an insured will have to provide testimonial evidence to corroborate his account of the accident even when there is reliable convincing physical evidence.[149] In such a case, unless the insured could produce testimonial evidence, the insurer could deny coverage even though there is no potential for fraud. This does not further either the goal of fraud prevention nor the goal of compensating tort victims. In light of this, it seems perverse, that the Georgia Supreme Court interprets the Georgia statute[150] such that the insurer is obligated to pay claims stemming from a miss-and-run accident when the only corroborating evidence is an interested co-claimant with a pecuniary interest in the coverage determination.[151] It is questionable whether this furthers the goal of fraud prevention.

The Washington and Oregon statutes appear to more effectively further the social goals which the statutes were intended to promote. These statutes protect insurance companies from unmeritorious claims and at the same time minimize the incidences where injured uninsured motorists' victims go uncompensated. These statutes, furthermore, minimize the anomalous results similar to the facts in *Brudnock*.[152]

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143. *See supra* notes 43 & 137.

144. For example, tire marks on the roadway, perhaps impact marks where the miss-and-run vehicle hit a curb, or a lost hub cap.

145. The Georgia statute states: "Such physical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an *eyewitness* to the occurrence other than the claimant." GA. CODE ANN. §33–7–11(b)(2) (1986) (emphasis added).

146. *See* WASH. REV. CODE § 48.22.030(8)(a) (1985), *supra* note 43; OR. REV. STAT. § 742.504 (1981), *supra* note 137. The Oregon Supreme Court defined corroboration as: "Corroboration, as used in the phantom vehicle provision of the statute, means evidence which supplements, strengthens, and confirms the testimony of the injured claimant." Farmers Ins. Exch. v. Colton, 504 P.2d 1041, 1045 (Or. 1972).

147. The Kansas statute states: "... [W]hen there is no evidence of physical contact with the uninsured motor vehicle and when there is no *reliable competent evidence* to prove the facts of the accident *from a disinterested witness* not making a claim under the policy." KAN. STAT. ANN. § 40–284(e) (1987) (emphasis added). It is unclear whether the reliable competent evidence has to be testimonial, or whether it can be physical.

148. *See supra* note 145.

149. For example, it is possible that after negligently running the insured off of the road, the phantom vehicle could also leave the roadway, damaging vegetation and leaving tire marks on the roadway.

150. Universal Security Ins. Co. v. Lowery 359 S.E.2d 898 (Ga. 1987).

151. *Id.*

152. *See supra* note 74 and accompanying text.

The Kansas statute is not clear with regard to what evidence is acceptable to corroborate the phantom vehicle, and the Georgia statute leads to anomalous results. For this reason the Georgia and Kansas statutes are less desirable than the Washington and Oregon statutes.

V. RULE ANALYSIS

There are fundamentally three possible rules.[153] First, a state could fully enforce the physical contact requirement. This rule would further the social goal of fraud prevention. In the alternative, the state could completely invalidate the provision and require that the insurance industry entertain all claims regardless of physical contact. This furthers the goal of compensating injured tort victims. As a third alternative, a state could develop a hybrid rule which seeks to strike a compromise between the two competing social values.

A. The Hole in the Net Rule

When the physical contact provision is held to be valid without exception anomalous results are sure to follow.[154] If this rule is enforced, in the absence of physical contact, the insurer is not obligated to compensate the insured regardless of corroborating evidence.[155] This gap in protection is counterproductive to the reason people seek to purchase insurance - to avoid the risk of suffering a financial loss. Furthermore, it violates the public policy codified in mandatory uninsured motorist statutes which require that motorists carry uninsured motorist coverage.[156] Furthermore, it does violence to an unknowledgeable insured's sense of reliance upon his insurance policy as a means of compensation and protection.

Despite the extreme social cost associated with this rule, it does have some benefits. One benefit of the physical contact rule is its bright line nature. It appears to lend itself to easy cost effective coverage determination. If the physical contact requirement is enforced, there is little left to fight about.[157] Thus, litigation is minimized.

Another benefit of this rule is that it is an effective fraud prevention device.[158] This reduces the total amount paid, which in theory has a positive impact on the cost of insurance for the consumer.

B. The Spendthrift's Rule

The physical contact provision is a tear in the safety net which the uninsured motorist coverage statute seeks to create. While it is desirable to have a

153. *See supra* note 30 and accompanying text..

154. *See e.g.*, State Farm Mutual Auto. Ins. Co. v. Brudnock, 151 Ariz. 268, 727 P.2d 321 (1986). The anomaly arises because it is possible that an insured who is injured in front of hundreds of witness will receive no uninsured motorist compensation. Yet, an insured who has a minor collision with a hit-and-run driver only hits the insured's mirror will be entitled to benefits.

155. *See supra* note 15.

156. Although Arizona has recently abolished mandatory uninsured motorist coverage this argument remains persuasive in other jurisdictions. *See* ARIZ. REV. STAT. ANN. § 20-259.01 (1993), *supra* note 107.

157. *But see supra* note 41. In California, there has been a fair amount of litigation over what constitutes physical contact.

158. Many commentators disagree with this proposition. *See supra* notes 21-22 and accompanying text.

comprehensive statutory insurance scheme this benefit does not come without costs. Whether we as a society are willing to pay the cost of a safety net without this tear is a relevant concern. Protectionist values aside, we should examine the cost associated with mending the net.

1. The cost of added coverage

Statutory invalidation of the physical contact requirement results in an expansion of coverage to include certain losses. Namely, the coverage would be expanded to include miss-and-run accidents. This new coverage will have to be paid for in some way, and, accordingly, insurance carriers will need to increase premiums to cover the loss.

Generally speaking, there is no reason to believe that these accidents will be more or less severe[159] than hit-and-run uninsured motorist claims. However, given that miss-and-run accidents are now covered, if all other factors remain the same, accident frequency for uninsured motorist coverage will go up.[160]

With the increase in actual loss,[161] the industry will also incur added expense for operations. Theoretically speaking, there will be added adjustment expenses as the industry will need to employ more claims personnel and expand facilities to house them.

2. The impact of fraud on adjustment and underwriting practices.

In addition, the increased potential for fraud may result in an increase in the cost of adjusting claims.[162] Investigative requirements for adjusting miss-and-run accidents may require a more thorough investigation. It is not unrealistic to anticipate that the adjustor will have to make a more thorough investigation to rule out fraud. Furthermore, she may need hire a private investigator and/or accident reconstructionist to establish the validity of claims which lack corroborating evidence.

With the removal of this fraud protection device it will be easier to commit insurance fraud. The incidence of fraudulent claims may go up, which in turn would increase fraudulent claim payment, and adjusting expenses.

The increased potential for fraud and an insurer's desire to stay competitive in the market may very well cause insurers to try to prevent fraud by more careful application screening methods and stricter underwriting standards. This will make it harder for everyone to acquire insurance. Instead of focusing efforts toward customer service, the industry may invest capital in developing their underwriting process.[163] These dollars do not go toward indem-

159. Severity in this sense means the average amount of the benefits paid to satisfy the claim. For example, an insurer may find that the average cost of payments for bodily injury claims paid out of third party liability coverage is less than the average cost of uninsured motorist benefits. This difference could result from factors such as method of adjudication. Uninsured motorist claims are commonly adjudicated in binding arbitrations as opposed to jury trials.

160. Accident frequency for uninsured motorist coverage would include both meritorious as well as fraudulent claims.

161. For the purposes of this discussion, actual loss means indemnity payments to the insured and not any kind of adjustment, administrative or operations expense. Under uninsured motorist coverage, the insured would be able to collect for medical bills, lost wages and pain and suffering.

162. The adjustment expense will not necessarily be higher as the carrier may simply instruct its personnel to continue current adjustment practices knowing that they are paying fraudulent claims and that the company will pass this added cost on to the consumer.

163. It is also possible however, that the insurance industry will find efforts to combat fraud fruitless, and decide to simply pass this cost on to the insurance consumer.

nification of losses, but rather toward protection against fraud. With the tightened underwriting standards more people may find it difficult to obtain insurance. This may ultimately be a contributing factor in the creation of an assigned risk pool.[164]

The underlying purpose of a comprehensive statutory insurance scheme is to provide protection and prevent victims from becoming public wards.[165] However, in many states the minimum amount of protection mandated by statute is low.[166] Thus, while the statutes intend to create safety nets to prevent people from become public charges, these nets are generally very weak and will not hold people very long.

3. Consumer expectation and reliance.

From a consumer expectation and reliance standpoint the spendthrift rule is the best. Presumably, the average motorist does not understand the various coverages, and very few understand the physical contact requirement. Assuming that the average insured expects to be "covered" in the event anything bad happens to him while operating her automobile,[167] this rule does the most to protect this expectation. This rule provide the broadest possible coverage for the insurance consumer.

D. The Compromise Approach

The statutes which adopt a hybrid approach attempt to avoid the anomaly which can result from having a physical contact requirement. They also attempt to erect a device to prevent the fraud which occurs in the absence of the provision.[168] Some of these statutes are better than others. For example, the Georgia statute[169] is a less effective barrier to prevent fraud,[170] and it apparently will not allow recovery when there is clear and convincing physical evidence; rather it requires testimonial evidence of an eyewitness.[171]

The Oregon statute requires testimonial evidence from a person who is not an insured or a person who has an uninsured motorist claim resulting from the accident.[172] This reduces the possibility of fraud. In addition, the Oregon Statute also allows an insured to collect if the insured can prove, through physical evidence, that the phantom vehicle exists. This reduces the possibility

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164. It is not this writer's contention that by abrogating the physical contact requirement and not replacing it with any type of fraud control device, that there will necessarily be an assigned risk pool. However, when changing the rules under which an insurer must operate, one should consider the impact of the change. If the environment is already such that fraud is a problem, then it is likely that the underwriting standards are already tough, and the rule change will have little impact.

165. Transamerica Ins. Co. v. McKee, 27 Ariz. App. 158, 551 P.2d 1324 (1976).

166. For example, Arizona mandates that carriers offer 15,000 per person and 30,000 per accident. Ariz. Rev. Stat. Ann. § 28–1170(B)(2) (1993).

167. This is a debatable assumption, one can question whether or not this is true. It is quite possible that the insured does not expect to be covered for uninsured motorist coverage in a miss-and-run occurrence, and yet fewer have even considered the issue.

168. However, some of these statutes are drafted better than others. *See supra* note 3 and accompanying text.

169. GA. CODE ANN. § 33–7–11 (1986).

170. The statute does not expressly state that the corroborating evidence has to be disinterested and thus, it has been interpreted to allow co-claimants to corroborate each others claims.

171. *See supra* note 145 and accompanying text.

172. OR. REV. STAT. § 742.504(2)(g) (1981).

of an insured not being able to collect even where there is no possibility of fraud.[173]

If the hybrid statute is well drafted it removes the possibility of the anomalous results that have led to ridicule of the contact provision.[174] As pointed out above, most of these hybrid statutes will not allow an insurer to deny a claim if there is no danger of fraud.[175]

These hybrid-type statutes, generally speaking, provide insurers adequate protection against non-meritorious phantom vehicle claims. Thus, many of the fraud-preventing expenses will not be incurred. Insurers will not try to prevent fraud by stricter underwriting standards. Adjustment expenses per claim will be lower than they would be without these fraud prevention devices. This is the case because adjustors will not have to incur additional investigation and reconstruction expenses to prevent fraud.[176]

The anti-fraud devices in a hybrid type statute will not, however, prevent an increase in total payout under the uninsured motorist coverage. When the members of a new class of insured are for indemnification, the coverage has been expanded.[177] With the increased coverage comes increased claims payments. But this is really not a problem from a policy-maker's perspective. Assuming the fraud protection device is working, payments are not going toward fraudulent claims, rather they are going toward the compensation of tort victims. Thus, the statutes have mended some, although not all, of the holes in the safety net.[178] Some legitimate claims will be passed over under the hybrid approach, and this will in turn violate the insured's reliance or expectations of coverage. In addition, the policy of compensating tort victims will not be fully met under this approach. In exchange, however, increased operations costs are avoided and fraud is reduced. Many will find this to be an acceptable compromise.

The hybrid approach is not however, without its own problems. One problem with this type of statute is that it does not a bright-line rule. The statutes use words like reliable[179] and competent[180]. These words lend themselves to litigation as they are mud words. If an insured has just a thread of evidence, pursuit of a claim is worth a shot, as an insured making a miss-and-run claim has nothing to lose if the evidence is not reliable or competent.

The hybrid type rule appears to further both the public policy of fraud prevention and victim compensation without completely compromising the

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173. Note, however, that OR. REV. STAT. § 742.504 (1981) does not completely prevent anomalies. The parties in *Brudnock, supra* note 74 and accompanying text, would not have been eligible to bring claims because, assuming they were both injured, they both had an uninsured motorist claim as a result of the accident. Thus, they were not disinterested.

174. The anomaly results when there is clear and convincing evidence that the unidentified motorist was not a fabrication, yet because there is no physical contact with the insured her claim is denied. *See, e.g., supra* note 79.

175. *See supra* note 137 for the previous discussion regarding the hybrid type of statutes.

176. *See supra* notes 162–63.

177. However, it should be noted that the coverage has not been expanded as far as it would be if the physical contact requirement is abrogated and there are no corroboration requirements. In the former case, the insurance industry is covering all miss-and-run accidents whether corroborated or not. In the later case, there is a smaller subset of the former class which is indemnified.

178. Parties who cannot corroborate their hit-and-run accident will not be able to collect uninsured motorist benefits under a hybrid statute.

179. KAN. STAT. ANN. § 40–284(e)(3) (1987).

180. OR. REV. STAT. §742.504(2)(g)(B) (1981).

other policy. Because the Oregon statute will not allow an insured to corroborate his claim with the testimony of an interested party, it seems to better achieve the fraud prevention goal and yet minimizes the anomalous results associated with the contact problem.

The fact that the Oregon statute does not explicitly prohibit corroborating testimony of a family member or other person involved in a special relationship with the insured leaves a small potential for fraud. This potential for fraud could be removed by adding a phrase stating that corroborating evidence from a family member or other person in a special relationship with the insured is not sufficient to establish coverage.[181]

VI. CONCLUSION

Insurers, in an attempt to deter fraud, created the physical contact clauses. These provisions, however, run contrary to the public policy of providing protection against the disastrous results caused on our highways. This conflict has been a long-standing source of litigation and has caused many statutory amendments.

Arizona's departure from the long-standing common law rule allowing the provisions has taken state law on the topic from one extreme to the other. The Arizona Supreme Court's decision to invalidate the rule is based on Arizona public policy which itself appears to be changing.[182]

The compromise approach seems to best promote public policy overall. While the other approaches may do more to protect one particular policy concern, each does so at the expense of another.

To Arizona's misfortune, it appears that under its current uninsured motorist statute,[183] Arizona cannot adopt a compromise approach by judicial decision. It can, however, revise the statute so that it is similar to the Oregon statute. This legislative solution would protect many victims of unidentified motorist and at the same time protect Arizona insurance consumers from the expense associated with paying fraudulent claims.

181. This additional fraud prevention phrase would result in a more limited coverage, and thus more uncompensated victims.

182. One can argue that the recent change in Arizona's mandatory uninsured motorist coverage is indicative of a change in public policy.

183. ARIZ. REV. STAT. ANN. § 20-259.01 (1993).