July 2015

Girgis v. State Farm Mut. Auto. Ins. Co.: Rescinding the Physical Contact Requirement in Ohio Uninsured Motorist Claims

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Girgis v. State Farm Mut. Auto. Ins. Co.*: Rescinding the Physical Contact Requirement in Ohio Uninsured Motorist Claims*

"Representative Reid has told her children to take the ditch instead of hitting another car."[1]

I. Introduction

Despite financial responsibility laws and other state measures, many people without automobile insurance continue to drive on our nation's roads.[2] The affordability (or unaffordability) of automobile insurance and attempts to reform laws applicable to automobile insurance coverage have sparked major debate in several states.[3] Against this backdrop, it is clear that the Ohio Supreme Court's recent decision abrogating the physical contact requirement applicable to uninsured motorist coverage, *Girgis v. State Farm Mut. Auto. Ins. Co.*,[4] will have a significant impact.[5]

Uninsured motorist coverage operates in a unique manner. A typical policy provides first party benefits to the insured for personal injuries or property damage caused by an uninsured third party.[6] In Ohio, insurers are required to offer this coverage to all policyholders, though the policyholder is not required to carry this coverage.[7] The Ohio Supreme Court has held that the purpose of the uninsured motorist scheme is to place the injured party in the same position as if the tortfeasor were insured.[8]

Nearly every state has a requirement concerning uninsured motorist coverage, although state statutes differ in their scope and language.[9] There has been a great volume of literature discussing the applicability of uninsured motorist coverage in cases involving hit and run drivers.[10] This casenote will set out the various state statutory approaches to hit and run vehicles under uninsured motorist coverage,[11] as well as evaluate the Ohio Supreme Court's historical approach to the physical contact doctrine.[12] The casenote will thoroughly address the *Girgis* opinion and its underlying rationale,[13] as well as the repercussions of abrogating the physical contract doctrine.[14] Finally, this note will analyze the potential effectiveness of the corroborative evidence doctrine,[15] and will put forward an alternative approach addressing the issue of how innocent victims of hit and run accidents should have to prove they are entitled to compensation from their uninsured motorist policy.[16]

II. Background

A. Types of Uninsured Motorist Statutes

State statutes governing uninsured motorist coverage vary with respect to when benefits will be paid for damage caused during a "hit and run" accident.[17] The various state statutes can be generally categorized into the following four areas.

1. Statutes Which Fail to Address the Hit and Run Scenario

States whose statutes fail to address the hit and run scenario, such as Ohio,[18] have in some instances taken an expansive reading of their uninsured motorist statutes to require coverage for the insured.[19] One Florida court, for example, circumvented the language of its uninsured motorist statute and its failure to mention hit and run by ascertaining who the statute was intended to benefit.[20] Other state courts have taken a divergent approach and required actual physical contact between the two vehicles, even in instances where independent testimony would have established the existence and negligence of an unidentified driver.[21] Some state legislatures have responded to this judicial expansion by amending their statutes to require corroborative evidence of the unidentified driver's negligence.[22]

2. Statutes Which Mention But Do Not Define "Hit and Run"

Although some state's uninsured motorist statutes mention the hit and run scenario,[23] ambiguity arises when the term "hit and run" is left undefined.[24] The typical uninsured motorist statute will include "hit and run" or "unidentified motor vehicle" along with its definition of an "uninsured motor vehicle".[25] The actual meaning of the term "hit and run," however, has led courts to differ in their approach to the physical contact requirement, with some adhering to a literal meaning and others allowing a more expansive definition.[26]

3. Statutes Requiring Corroborative Evidence

Statutes in a few states allow insured parties to bring forward corroborative evidence as an alternative to the physical contact requirement.[27] The nature of the corroborative evidence allowed differs from state to state. Some states require independent third party testimony,[28] while others allow an interested party to corroborate.[29] A more recent statutory change in Louisiana provides that in the absence of physical contact, coverage will be provided where the insured can produce a statement by an "independent and disinterested witness" about the unknown parties existence and actions.[30]

4. Statutes Requiring Physical Contact

Under an uninsured motorist statute requiring physical contact as a prerequisite for recovery, the insured may not recover uninsured motorist benefits unless there has been an actual, physical collision between the unidentified vehicle and the insured's vehicle.[31] By defining the term "physical contact", legislatures can clarify these statutes.[32] To avoid the harsh
results that may ensue if given a literal interpretation, some courts take a more liberal approach to this type of statute.[33] Other jurisdictionssuch as Californiaare quite strict and require actual physical contact.[34]

B. The Ohio Supreme Court's Traditional Approach to the Physical Contact Doctrine

1. The Definition of "Hit and Run"

The Ohio legislature has not defined the term "hit and run" in its uninsured motorist statute.[35] Accordingly, resolving what exactly constitutes a "hit and run" and how it affects the physical contact requirement has been left to the courts.[36] In the 1974 case of *Travelers Indem. Co. v. Reddick*,[37] the Ohio Supreme Court defined "hit and run" by its "natural and reasonable construction" requiring an actual collision and a subsequent flee by an unknown vehicle.[38] Other state courts have interpreted "hit and run" more expansively to include motorists who, by their own negligence, caused the accident and then fled the scene.[39] In recognition of this discrepancy, some state legislatures amended their statutes to provide a clearer definitions of a hit and run vehicle, although Ohio has not followed suit. [40] Nevertheless, in practice, the Ohio appellate courts have expanded the *Travelers* definition of the term "hit and run" in several cases.[41]

2. Actual Versus Indirect Touching

In some states, the physical contact requirement is met without actual contact between the insured's vehicle and the unidentified vehicle.[42] These instances can be generally categorized into chain reaction accidents and accidents involving an insured who is struck by an object propelled from an unidentified vehicle.[43] In *Yurista v. Nationwide Mut. Ins. Co.,*[44] the Ohio Supreme Court addressed two factual situations involving objects propelled from an unidentified vehicle.[45] Justice Cook, writing for the Court, held that since there was not even minimal contact between the insured's vehicle and the unidentified vehicle, the insured was not entitled to coverage under his uninsured motorist policy.[46]

Some have argued that a strict physical contact requirement is unduly harsh on the innocent motorist.[47] In response to this and like criticism, courts in several states apply a liberal interpretation of the physical contact requirement in chain reaction accidents.[48] Even Ohio appellate courts have given a broad interpretation of the physical contact requirement in some indirect contact cases.[49] Other jurisdictions have held that he physical contact requirement is met even where the unidentified vehicle is not present at the scene of the accident, such as when an object falls from a vehicle and strikes the insured.[50] Not all jurisdictions have taken this extended approach, and some have rejected claims for uninsured motorist benefits in cases where the insured struck an object lying in the road.[51]

3. Scope of Ohio's Uninsured Motorist Statute

Traditionally, insurers were not thought to be required to provide uninsured motorist benefits as a result of a hit and run accident, because Ohio's uninsured motorist statute fails to address the issue.[52] However, insurance carriers have historically included hit and run provisions in their uninsured motorist policies.[53] In *State Auto. Mut. Ins. Co. v. Rowe*,[54] the court found that the insurance policy in question provided protection beyond that required by statute, and therefore, any limitation on this extra coverage was not contrary to public policy or the uninsured motorist statute.[55]

In states with statutes similar to Ohio's, which do not expressly provide for hit and run coverage, courts have invalidated physical contact requirements in some uninsured motorist policies.[56] One legal scholar has concluded that these states have found that statutory intent requires protecting the innocent uninsured motorist.[57]

4. Underlying Purpose of Ohio's Uninsured Motorist Statute

In *State Farm Auto. Ins. Co. v. Alexander,*[58] the Ohio Supreme Court laid out a general rule related to uninsured motorist coverage: "An automobile insurance policy may not eliminate or reduce uninsured or underinsured motorist coverage, required by O.R.C. 3937.18, to persons injured in a motor vehicle accident, where the claim or claims of such persons arise from causes of action that are recognized by Ohio tort law."[59] Although *Alexander* did not involve the physical contact requirement, some question whether the decision is applicable to hit and run accidents.[60] Nevertheless, the *Girgis* Appellate Court found the *Alexander* argument compelling and held that "[s]ince the Ohio tort law of negligence does not require physical contact before liability attaches, it is prohibitive pursuant to O.R.C. 3937.18 to create such requirement by contract of insurance."[61] In two subsequent appellate court cases involving the physical contact doctrine, one found *Alexander* controlling, the other did not. [62] Although there is no language in the *Alexander* decision which limits its scope to any specific type of exclusion,[63] the choice by the *Girgis* Court not to rely on *Alexander* indicates an implicit refusal to adopt the appellate court's approach.[64]

III. Statement of the Case

A. Statement of Facts

On November 3, 1987, Salwa Girgis was traveling on Interstate 90 in Cleveland.[65] Girgis alleged that an unidentified vehicle swerved into her lane of travel and struck her left front fender.[66] As a result of the impact from the unidentified vehicle, Girgis was injured when she lost control of her own vehicle and crashed.[67] At the time of the accident, Girgis held an automobile insurance policy with State Farm Mutual Insurance Company (State Farm), which included uninsured motorist coverage.[68] Because Girgis could not identify the driver of the car that caused the accident, she filed a claim with State Farm under the uninsured provision of her own policy.[69] State Farm took the position that the policy required actual, physical contact before uninsured benefits would be paid, and thus denied coverage.[70]

B. Procedural History

Girgis filed a complaint for declaratory judgment against State Farm in the Cuyahoga County Court of Common Pleas, seeking to have the physical contact requirement declared void as against public policy.[71] The Court of Common Pleas entered judgment in favor of Girgis, specifically finding that under the rationale of *Alexander*, an insurer may not exclude coverage for lack of physical contact.[72]

On appeal by State Farm, the Eight District Court of Appeals of Ohio affirmed the trial court's decision, finding the physical contact requirement void as against public policy because it eliminated coverage to persons with a valid claim under Ohio tort law.[73] The Court of Appeals also certified its decision as being in conflict with its earlier decision in *August v. Lightning Rod Mut. Ins. Co*.,[74] so the case proceeded to the Ohio Supreme Court.

C. Ohio Supreme Court Decision

Justices Wright and Douglas, with Justice Resnick concurring, found that the physical contact requirement "contrary to public policy," and instructed that "[p]ublic policy considerations should and do require the substitution of the corroborative evidence test for the physical contact requirement."[75] Accordingly, the Court reversed and remanded the case to the trial court.[76]

Under the corroborative evidence test, if the insured can produce evidence through the testimony of an independent third party that the accident in question was proximately caused by the negligence of an unidentified third party, the insured will be able to present his or her claim to a finder of fact.[77] According to the Court, this test not only protects against fraud; it also prevents injustice to an insured with a legitimate claim, but who is precluded from recovery due to lack of physical contact. [78]

Justice Pfeifer's separate concurrence agreed with the majority that the abrogation of the physical contact doctrine was appropriate.[79] Pfeifer contended that hit and run accidents should be handled no differently than the typical automobile negligence case.[80]

Justice Cook, joined by Justice Moyer, wrote a concurring opinion agreeing with the decision to reverse, but on separate grounds.[81] Justices Cook and Moyer attacked the majority opinion for failing to set forth a compelling public policy justification for invalidating the long standing physical contact doctrine.[82] They also wrote that neither the Ohio Supreme Court or the Ohio General Assembly has ever construed the term "uninsured motorist" in O.R.C. 3937.18 to include an unidentified motorist.[83] Accordingly, Justices Cook and Moyer surmised that the insurance policy in question provided more protection than the statute required, and any insurer restriction on this additional coverage was not contrary to public policy.[84] Finally, Justices Cook and Moyer argued that the scope of the ruling is beyond the "province of the Court," and any modification to O.R.C. 3937.18's definition of "uninsured motorist" should be left to the legislature.[85]

Justice Sweeney, concurring in part and dissenting in part, wrote that the physical contact doctrine should be declared void as against public policy.[86] Justice Sweeney contended that the majority's corroborative evidence test is also against public policy and contrary to the purpose of the uninsured motorist statute.[87] As an alternative, Justice Sweeney advocates the use of the traditional jury system to weigh the veracity and the strength of evidence, regardless of corroborative evidence limited to third party eyewitnesses.[88]

IV. Analysis

A. Repercussions of Invalidating the Physical Contact Requirement

1. Consistency in the Application of the Law

One of the primary arguments against maintaining the physical contact requirement is that it "invites continuing disputes about the scope of protection affords to insureds."[89] This has led to inconsistency in applying the doctrine across state boundaries.[90] Accordingly, insurers and policyholders are likely to be confused as to the nature of their obligations.[91] This confusion may serve to undermine the clear public policy interest of providing indemnification to innocent victims having a legitimate expectation of coverage.[92] The *Girgis* decision, with its corroborative evidence threshold, is an attempt to provide an objective standard that is both easy to apply and protects the interest of the innocent claimant.[93]

2. Fraud

The underlying purpose of the physical contact requirement is to "curb fraud, collusion, and other abuses from claims arising from phantom cars."[94] The *Girgis* Court addresses this concern with the corroborative evidence test.[95] However, the corroborative evidence test is not always applied uniformly, and the type of corroborative evidence test adopted plays a key role in whether it actually does prevent fraud.[96] For example, a corroborative evidence statute which allows for
evidence to be brought by an interested party, such as a family member,[97] may not meet the goal of fraud prevention, because the likelihood of collusion increases where a party has a personal bias or a fiduciary interest in the eventual result.[98] The *Girgis* standard of "independent third party testimony" seems reasonably well suited to the fraud prevention goal.

Fraud prevention becomes somewhat problematic because of the "permissive public attitudes" concerning fraudulent activities, and because a segment of the public dislikes the insurance industry.[99] According to one legal writer, "fraud is rampant" and insurance companies are not taking the measures necessary to combat it, such as investigating questionable claims.[100] If this is the case, adopting a corroborative evidence test will increase the number of claims made and, accordingly, increase the total amount of fraud.[101] A less permissive approach such as the physical contact requirement might be a reasonably effective means to curb fraud.[102] However, other measures can be taken by state legislatures and insurance companies to prevent fraud within the *Girgis* type corroborative evidence scheme, such as requiring prompt notice of the accident to the police.[103]

3. Insurance Premiums

One Ohio insurance consultant stated that insurance rates may be on the rise because of judicial decisions expanding the scope of Ohio uninsured motorist coverage.[104] If the

Girgis decision results in an increase in the number of claims with a corresponding increase in fraud insurers' cost of doing business will increase and may lead to higher insurance premiums.[105]

Though the effect of the *Girgis* Court's adoption of the corroborative evidence doctrine cannot be conclusively determined at this juncture, a comparison of state insurance premiums where the physical contact doctrine is applied is enlightening.[106] For example, two states with the costliest automobile insurance rates in the country Hawaii and New Jersey also rescinded the physical contact requirement.[107] Certainly, lower insurance rates are not primarily attributable to the physical contact requirement, and it can be argued that there is a minimal correlation at best.[108] Nevertheless, the *Girgis* decision will probably lead to an increase in claims, with a corresponding increase in transaction costthe ultimate result of which will mean an increase in automobile insurance rates for Ohioans.[109] However, even if this occurs, perhaps Ohioans should still consider themselves lucky: a 1994 study by the National Association of Insurance Commissioners revealed that Ohio is ranked number eleven in terms of the cheapest automobile insurance premiums.[110]

4. An Ohio Legislative Shift?

Prior to the *Girgis* decision, there was substantial legislative activity pertaining to the Ohio uninsured motorist statute and the physical contact doctrine.[111] A Bill has been introduced in the Ohio House of Representatives to modify the language of the Ohio uninsured motorist statute by including an express provision requiring physical contact.[112] Companion legislation is pending in the Senate.[113] However, in response to the *Girgis* decision, the Ohio House Insurance Committee modified the language of the proposed new statute to include a provision allowing a claim to be filed in a one car accident without physical contactif there is other corroborative evidence.[114] This attempt to adopt a statute which incorporates both the physical contact requirement and the corroborative evidence test has not yet reached fruition, but it is well within the General Assembly's right to modify the existing statute.

B. Criticisms of the Corroborative Evidence Test

Invalidating the physical contact doctrine cannot be definitively considered the majority view among states, but it is certainly the modern trend.[115] The *Girgis* court's concurrent adoption of the corroborative evidence rule, however, is a novel approach.[116] In fact, in her concurring opinion, Justice Cook attacks the majority for acting outside the judiciary's province by creating this new standard.[117]

One of the primary reasons for replacing the physical contact doctrine with the corroborative evidence test is to avoid injustice to the innocent policy holder.[118] However, the Court fails to recognize the unfairness and inadequacy that may result where no corroborative evidence can be provided.[119] The general disinterest exhibited by accident bystanders,[120] combined with the number of cars on our nations roads with only one driver,[121] may invariably lead to a number of situations where no corroborative

evidence can be provided by an aggrieved insured with a legitimate claim.[122] The preclusion of interested third party testimony, intended to prevent fraud, may also unfairly prohibit recovery for some legitimate claimants.[123]

Although it can be argued that the "independent third party corroborative evidence" standard is clear and will not be the subject of controversy or extension,[124] some criticize the doctrine because it does not provide a "bright line rule" for courts to follow.[125] The independent third party standard may be somewhat easy to apply where the witness is a family member of the insured, because of the increased possibility of fraud and collusion.[126] However, it may be difficult to apply the independent third party ideal in practice, particularly where the witness has some remote interest in the outcome of the litigation.[127] While it is certainly true that the corroborative evidence standard provides an innocent insured some better protection than the physical contact requirement, it may not go far enough to protect the valid claimant who cannot otherwise produce a disinterested witness.[128]

C. Alternative Approach: A Jury Question

The alternative approach, suggested by Justice Sweeney in the *Girgis* decision, is to provide the insured with the opportunity to prove the unidentified driver's negligence under existing tort standards, regardless of the physical contact doctrine or the corroborative evidence rule.[129] A fair number of state courts have adopted this approach.[130] The argument for this approach centers on the legal systems traditional strengths, including the effectiveness of cross examination and the fact finding capability of a jury.[131] However, a sizable percentage of the general public believes our current tort system is in disarray. [132] Accordingly, the alternative "jury question" standard, which involves the possibility of increased litigation, would likely be met with dismay.[133] Nevertheless, our system is committed to bringing redress to every aggrieved citizens by opening the courthouse doors.[134] The physical contact requirement and the corroborative evidence requirement fail to provide every individual this right a right fundamental to our legal system.[135]

It can be argued, however, that without an objective standard the "[p]rotection against phantom-car frauds would be diluted and the door reopened to the abuses which motivated the . . . imposition of the 'physical contact' requirement . . . ."[136] The *Girgis* majority decision stresses that the corroborative evidence rule creates an objective standard for the purpose of fraud prevention.[137] However, the corroborative evidence rule can be circumvented by sham eyewitnesses or manufactured corroborative evidence.[138] Therefore, a compelling argument can be made against the corroborative evidence standard because it "immunizes the witness from the test of cross examination" which may expose this and other types of fraud.[139]

V. Conclusion

While the objective corroborative evidence standard does serve the dual purpose of preventing fraud and allowing legitimate claimants without contact to recover uninsured

motorist benefits, it does not go far enough in protecting the innocent motorists.[140] The only equitable means of preventing fraud is to allow the hit and run victim to present his or her case to a factfinder.[141] For this reason, the *Girgis* decision may not be a long-standing one. It may be some time before Ohio's approach to uninsured motorist coverage to victims of hit and run accidents is conclusively drawn.

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1. Ohio House Ins. Comm. Meeting (Jan. 17, 1996) (available through Hannah On-line, Ohiolink Hannah database at main menu select "legislation" then type "HB527" then select "Bill Actions and Committee Reports") (discussing a house bill to modify the Ohio Uninsured and Underinsured Motorist Statute).

2. *See* Corydon T. Johns, An Introduction to Liability claims adjusting 147 (3rd ed. 1982); s*ee also* John Hopkins, *Law gets Uninsured Motorists off the Roads*, Cinn. Enquirer, April 1, 1996, at A7 (The article states: "A total of 26,281 Ohio drivers have been caught without proof of insurance . . ." since October 30, 1995. Of those caught, "[f]ewer than half, 11,333, could produce proof of insurance later in court appearances.").

3. *See* Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 Ohio St. L.J. 419 (1987); s*ee also* Megan K. Gajewski, Comment, *Automobile Insurance Reform in New Jersey: Could a Pure No Fault System Provide a Final Solution?*, 25 Seton Hall L. Rev. 1219, 1219 (1995) (proposing tort reform to resolve the problem of high insurance rates); Michael Johnson, et al., *Legal Reform Starts with No Fault Car Insurance*, Sacramento Bee, June 8, 1995, at B7 (discussing a recent proposition to reform California's auto insurance system); Bob Quick, *What's Driving Insurance Rates Up*?, Santa Fe New Mexican, Mar. 3, 1996, at F1 (insurers name the "increase in injury claims, liberal courts, accident chasing attorneys, the lack of a no fault law, faulty uninsured motorist statutes, compulsory insurance, phantom vehicles and hail storms" as some of the reasons that state auto insurance costs have risen dramatically.).

4. 662 N.E.2d 280 (Ohio 1996).

5. *Cf.* Jeffrey Sheban, *Liability Coverage Blamed for Insurance Price Hike*, Columbus Dispatch, Feb. 13, 1996, at 1D (reporting the Ohio Insurance Institute as claiming "insurance rates are on the rise" and it is "partly due to the fact the Ohio courts are expanding the scope of liability coverage." The Institute also purportedly claims that "[o]ver 1,000 appellate court decisions in Ohio in the past 10 years have lead to a judicial expansion of uninsured/ underinsured motorist coverage."). *But see* James Bradshaw, *Insurance Case Sheds Little Light*, Columbus Dispatch, Apr. 22, 1996, at 9A ("[N]either trial lawyers nor insurance companies should expect the [Girgis] decision to stand long.").

6. This coverage has been described as insuring against a tortfeasor's lack of insurance. The underlying rationale for this type of coverage is to compensate individuals in the event that they are involved in an accident with a motorist who fails to carry automobile liability insurance. M. Brian Slaughter, Comment, *Khirieh v. State Farm: Have the Floodgates to Uninsured Motorist Claims Been Opened?*, 23 Cumb. L. Rev. 739, 741 (1993).

7. Ohio Rev. Code Ann. § 3937.18 (A) (Baldwin 1996) provides:

No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any 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 both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

(1) Uninsured motorist coverage, which shall be in the amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

. . .

8. Bartlett v. Nationwide Mut. Ins. Co., 294 N.E.2d 665, 666 (Ohio 1973).

9. *See* Ronald Whitney, Comment, *Uninsured Motorist Coverage for Hit and Run Vehicles: The Requirement of Physical Contact*, 49 La. L. Rev. 955, 955 (1989); s*ee also* discussion *infra* at part II. A.

10. *See, e.g.,* Mark A. McLeod, *Yurista v. Nationwide Mutual Insurance Company: Bumper Cars for Recovery*?, 15 Cap. U. L. Rev. 371 (1986); Robert K. Lewis, Comment, *The Physical Contact Rule for Uninsured Motorist Coverage in Arizona: Where We Were, Where We Are, and Where We Ought To Be*, 36 Ariz. L. Rev. 1033 (1994); Slaughter, *supra* note 6; Whitney, *supra* note 9; A.S. Klein, Annotation, *Uninsured Motorist Indorsement: Validity and Construction of the Requirement that there be "Physical Contact" with Unidentified or Hit-and-Run Vehicle*, 25 A.L.R.3d. 1299 (1969).

11. *See infra* Part II. A.

12. *See infra* Part II. B.

13. *See infra* Part III.

14. *See infra* Part IV. A.

15. *See infra* Part IV. B.

16. *See infra* Part IV. C

17. *See* Whitney, *supra* note 9, at 955.

18. *See* Ohio Rev. Code Ann. § 3937.18 (Anderson 1996); s*ee also* Ala. Code § 32-7-23 (1995); Colo. Rev. Stat. § 10-4-609 (1995); Fla. Stat. § 627.727 (1996); Idaho Code § 41-2502 (1996); Ky. Rev. Stat. Ann. § 304.20-020 (Michie 1995).

19. *See* Lewis, *supra* note 10, at 1047 (stating that Arizona courts and others have liberally construed their uninsured motorist statutes).

20. *See* Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971). Here, the Court invalidated the physical contact requirement by determining that the uninsured motorist statute was intended to protect injured persons who purchased insurance, who otherwise would be left uncompensated. *Id.* The dissenting judge argued that "[t]here really would be no such coverage otherwise; that is, without such a provision in the policy, for there could be no showing of whether the vanished other car was insured or not." *Id.* at 432 (Dekle, J., dissenting). In other words, one cannot determine whether a vehicle is uninsured if the driver remains unidentified.

21. *See* Belcher v. Travelers Indem. Co., 740 S.W.2d 952, 953 (Ky. 1987) (citing an insurance company's "legitimate interest in protecting against fraud" in upholding the doctrine. "Without such a requirement, insured's could damage their own car and recover, claiming fault with some third party."); *see also* Hammon v. Farmers Ins. Co. of Idaho, 707 P.2d 397 (Idaho 1985) (uninsured motorist statute does not require coverage for hit-and-run drivers).

22. *See e.g.* Kan. Stat. Ann. § 40-284 (e) (3) (1995) (presenting corroborating evidence from a disinterested party as satisfactory in the absence of physical contact to recover uninsured motorist benefits); *see also* Gerald W. Scott, *Uninsured/Underinsured Motorist Insurance: A Sleeping Giant,* 63 J. Kan. B.A. 28, 34 (1994) (discussing the pre-1993 activity under the statute, where courts "treat[ed] the coverage as mandatory coverage which could not be diminished by 'non-contact' exclusions.").

23. *See, e.g.,* Del. Code Ann. tit. 18 § 3902 (1995); Mass. Ann. Laws ch. 175 § 113L (Law. Co-Op 1996); N.J. Stat. Ann. § 17:28-1.1 (West 1994), Okla. Stat. tit. 36 § 3636 (1995); Wis. Stat. § 632.32 (4) (1995).

24. *See* Lewis, *supra* note 10, at 1049.

25. *See e.g.* R.I. Gen. Laws § 27-7-2.1 (1995) which requires in relevant part:

No policy insuring against loss resulting from liability imposed by law for property damage caused by collision, bodily injury, or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered . . . in this state . . . unless coverage is provided . . . for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles and hit and run motor vehicles because of property damage.

26. For example, in State Farm Mut. Auto. Ins. Co. v. Abramowicz, 386 A.2d 670 (Del. 1978), the Delaware Supreme Court invalidated the physical contact doctrine by refusing to accept the insurance carrier's argument that the statutory phrase "hit and run" is synonymous with the term "hit". The courts primary rationale was that the Delaware legislature chose not to insert an express physical contact requirement in the statute. *Id.* at

672-73. Another reason was that interpreting "hit and run" literally would avoid common usage and unlawfully restrict the scope of insurance coverage. *Id.* Compare to Hayne v. Progressive Northern Ins. Co., 339 N.W.2d 588, 590 (Wisc. 1983) (After looking to the Webster's Dictionary definition of "hit and run", the court stated: "When statutory language is clear and unambiguous, we must arrive at the legislature's intention by according the language its ordinary and accepted meaning.").

27. *See, e.g.,* Kan. Stat. Ann. § 40-284(e) (3) (1995); Ga. Code Ann. 33-7-11 (1996); *see also* Lewis, *supra* note 10, at 1050 (classifying statutes in Washington, Oregon, Kansas and Georgia as "hybrid statutes" that allow for substituting the physical contact requirement with third party testimony).

28. *See, e.g.,* Kan. Stat. Ann. 40-284 (e)(3) (1995) ("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 . . . .").

29. *See, e.g.,* Ga. Code. Ann. 33-7-11 (b)(2) (1996) (stating in relevant part: "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."); *see also* Lewis *supra* note 10, at 1051 (discussing the Georgia Supreme Court case of Universal Sec. Ins. Co. v. Lowery 359 S.E.2d 898 (Ga. 1987), Lewis States: "[I]t seems perverse, that the . . . court interprets the Georgia Statute such that the insurer is obligated to pay claims . . . when the only corroborating evidence is an interested co-claimant. . . .").

30. *See* La. Rev. Stat. Ann. § 22:1406 (f) (West 1995). In interpreting this requirement, one Louisiana Appellate Court found that the insured's own statement and statements of parties the insured telephoned after the accident are not independent and disinterested party statements. The majority defined the terms "independent," "disinterested," and "witness" by their ordinary meanings, and concluded each witness must personally observe the accident, may not be influenced by others, and may not be biased by personal interest. *See* Jackson v. State Farm Mut. Ins. Co. 665 So.2d 661, 664 (La. App. 1995).

31. *See, e.g.,* Michael J. Brady & Marta B. Arriandiaga, *California's Uninsured and Underinsured Motorist Law: An Updated Review and Guide*, 36 Santa Clara L. Rev. 717, 728 (1996) (discussing California physical contact doctrine); *see also* Cal. Ins. Code § 11580.2 (Deering 1977).

32. *See* Lewis, *supra* note 10, at 1048 (arguing that while this approach is easily applied, it leaves the insured, who has independent testimony of the unidentified vehicle's existence and negligence, without a remedy).

33. *See, e.g.,* Bajrami v. General Accident Ins. Co., 593 N.Y.S.2d 405 (Sup. Ct. 1993), where the court found that "direct contact [is] not dispositive" to meeting the physical

contact requirement and collecting uninsured motorist benefits. *Id.* at 406. The Court found the physical contact requirement was met where a load of sand fell off a dump truck, causing a third vehicle to strike the insured. *Id.* at 408; *see also* Jonathan A. Dachs, *Uninsured and Underinsured . . . but not Underlitigated 1993: An Important Year for UM/UIM Coverage*, 66 N.Y. St. B.J. 13 (1994); N.Y. Ins. Law § 5217 (McKinney 1985).

34. *See e.g.* Brady, *supra* note 31, at 729 (citing Boyd v. Inter-Ins. Exch., 136 Cal. App. 3d 761 (1982) for the proposition that California courts have found that actual physical contact between the uninsured vehicle and the insured is an absolute prerequisite to recovery).

35. *See* Ohio Rev. Code Ann. § 3937.18 (Anderson 1996).

36. *See* 1 Alan I. Widiss, Uninsured and Underinsured Motorist Coverage § 9.2 at 443 (2nd ed. 1990) ("[I]nsurers have urged that courts approve a 'literal' reading or application of the limitation. . . .").

37. 308 N.E.2d 454 (Ohio 1974). *Reddick* involved an accident where the insured's vehicle was struck by a vehicle which had swerved to avoid a third vehicle, the third vehicle then fled the scene. *Id.* There was no actual contact between the unidentified third vehicle and the insured. *Id.*

38. Justice Herbert wrote: "The rubric of 'hit and run vehicle' encompasses a 'hit,' as well as a 'run,' further buttressing the express prerequisite of a 'physical contact'." *Id.* at 456. Justice Herbert acknowledged that if the policy or the terms and language are ambiguous, it is clear that the insurance contract should be construed strictly against the drafting insurance company. *Id.*

39. *See*, *e.g.,* Pin Pin H. Su v. Kemper Ins. Co., 431 A.2d 416, 419 (R.I. 1981) (The term "hit and run" has become a "shorthand colloquial expression" that has "no inherent connotation" to physical contact); Marakis v. State Farm Fire and Cas. Co., 765 P.2d 882, 884 (Utah 1988); Royal Ins. Co. of America v. Austin, 558 A.2d 1247, 1250 (Md. App. 1989).

40. *See supra* notes 32-34 and accompanying text.

41. *See, e.g.,* Progressive Cas. Ins. Co. v. Mastin, 446 N.E.2d 817 (Ohio App. 1982), where the court expanded the hit and run scenario to include chain reaction type accidents where the unidentified vehicle strikes a third vehicle, which then strikes the insured. *Id.* at 817. The court distinguished the *Travelers* case by stating that limiting hit and run to instances where actual direct contact occurred between the unidentified vehicle and the insured would lead to an "absurd result." The court also recognized the existence of corroborating evidence which eliminated concerns of fraud. *Id.* at 819; *see also* Physicians Ins. Co of Ohio v. Kunin, No. 3538, 1986 WL 9152 (Ohio Ct. App. 11th Dist. Aug. 22, 1986); Riley v. Swartsell, No. CA90-06-118, 1990 WL 177190 (Ohio Ct. App. 12th Dist. Nov. 13, 1990) (stating the term is ambiguous for this specific chain reaction

scenario and ambiguity must be construed against the drafter); King v. Miller, No. 90-P-2167, 1991 WL 45628 (Ohio Ct. App. 11th Dist. Mar. 29, 1991).

42. *See* W. Shelby McKenzie, Note, *Louisiana Uninsured Motorist Coverage After Twenty Years*, 43 La. L. Rev. 691, 703 (1983) (discussing chain reaction accidents).

43. Professor Widiss describes some of the different type of uninsured accident situations as: 1) accidents where an unidentified vehicle strikes some object setting it in motion to strike the insured; 2) accidents where some part the unidentified vehicle or its cargo has fallen off and has been left in the roadway for the insured to strike; 3) accidents where some person in the unidentified vehicle threw some object which struck the insured. *See* Widiss, *supra* note 36, § 9.2 at 443-44; *see also* 3 Irvin E. Schermer, Automobile Liability Insurance § 43.04 at 43.16 (3d ed. 1995) (discussing intermediate or lesser degrees of contact where the unidentified vehicle strikes an intervening vehicle, which in turn strikes the insured).

44. 481 N.E.2d 584 (Ohio 1985).

45. The decision involved two consolidated cases. In the first case, the insured was injured when his motorcycle struck a railroad tie in the road. *Id.* In the second case, the insured was struck by a bottle thrown from an open window of an unidentified vehicle. *Id.*

46. *Id.* at 587. However, the dissent attacked the holding as "rigid" with "no sound legal justification," and proposed adopting the collateral evidence test. *Id*. at 588 (Brown, J., dissenting). *See also* Part IV, *infra* (discussing the collateral evidence test).

47. *See* McLeod, *supra* note 10, at 381. ("[T]he rigid application of the rule is fundamentally unfair and gives harsh results by denying recovery to non-negligent insured motorist for damages sustained in successfully avoiding physical contact with a hit and run motorist.").

48. *See* Widiss, *supra* note 36, § 9.4 at 451 (discussing the flexible interpretation of the physical contact requirement); *see also* Barry L. Kroll & John M. Edwards, *1986-87 Illinois Law Survey: Insurance Law*, 19 Loy. U. Chi. L. J. 525, 557 (1988) (citing the Illinois Supreme Court decision in Hartford Accident & Indem. Co. v. Lejeune, 499 N.E.2d 464, 466 (Il. 1986)); Slaughter, *supra* note 6, at 746 (discussing the evolution of the contact rule from the strict requirement to a more flexible approach).

49. *See, e.g.,* Grange Mut. Cas. Co. v. Hahler, No H-92-52, 1993 WL 463716 (Ohio Ct. App. 6th Dist. Nov. 22, 1993), where the court found the physical contact doctrine was met where a portion of a leaf spring came off a passing vehicle and struck the insured's vehicle. *Id.* at *4. The Court noted that a "nexus [existed] between the 'object' in contact with the insured's vehicle and the unidentified motor vehicle." *Id.* It concluded that only where the "nexus is attenuated" should a court find no physical contact. *Id.* at *4, *5.

50. *See* Widiss, *supra* note 36, § 9.6 at 466 (discussing the Illinois Appellate Court decision in Illinois Nat. Ins. Co. v. Palmer, 452 N.E.2d 707 (Ill. App. 1983), where the court found that uninsured motorist coverage should apply where a lug nut came off an unidentified vehicle and struck the insured's windshield. Widiss suggests that objects that fall off motor vehicles are not the typical hit and run scenario, but they can be "reasonably viewed as motoring risks that should be covered by uninsured motorist insurance."). *Id.*

51. *See* State Farm Mut. Auto. Ins. Co. v. Norman, 446 S.E.2d 720 (W. Va. 1994) (insured struck a large tire in the road causing her to swerve off the roadway); American States Ins. Co. v. Rubin, 649 N.E.2d 1234 (Ohio Ct. App. 1993) (no physical contact where insured struck metal racks lying in road); *see also* John F. Emerson & Thomas A. Leggette, *Recent Developments in Automobile Law*, 31 Tort & Ins. L.J. 121, 123 (1996) (discussing "object in the road" cases).

52. *See* State Auto. Mut. Ins. Co. v. Rowe, 502 N.E.2d 1008, 1010 (Ohio 1986) ("[W]hile public policy may require that insurers provide coverage to insureds who are injured by hit and run motorists, O.R.C. 3937.18 does not require coverage for injuries caused by unidentified motorists.").

53. Widiss, *supra* note 36, § 9.1 at 441.

54. *See Rowe*, 502 N.E.2d at 1010.

55. The State Automobile Insurance Policy provided coverage "[Where] an automobile which causes bodily injury . . . arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident." *Id.*

The Majority opinion authored by Justice Douglas rejected the insured's claim for uninsured motorist coverage where their car was struck by an automobile swerving to avoid a third unidentified automobile, which subsequently fled the scene. *Id.* at 1013. Justice Douglas refused to extend uninsured motorist coverage, since the insurance contract specifically required physical contact. *Id.* A similar argument was posed by Justice Cook in her *Girgis* concurrence. *See infra* notes 82-84 and accompanying text.

56. *See, e.g.,* Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429 (Fla. 1971); Farmers Ins. Exch. v. McDermott, 527 P.2d 918 (Col. App. 1974); State Farm Fire and Cas. Co. v. Lambert, 285 So. 2d 917 (Ala. 1973).

57. Professor Widiss writes:

[E]ven though there is not specific reference to accidents caused by an unknown or unidentified motorist, the statutory mandate contemplates coverage for such accidents, and . . . provisions in insurance policies restricting coverage to accidents that are caused

by unknown motorists to only those instances in which a 'physical contact' occurred are in derogation of the purpose of the statute.

Widiss, *supra* note 36, § 9.8 at 486.

58. 583 N.E.2d 309 (Ohio 1992).

59. *Id.* at 310. The main issue in *Alexander* involved the enforceability of a 'household exclusion' clause precluding an insured from claiming his vehicle was underinsured for purposes of underinsured motorist coverage. *See id.* at 311; *see also* Shawn Gordon Lisle, Comment, *The Impact of State Farm v. Alexander on Uninsured and Underinsured Motorist Coverage Generally, and in to* [sic] *Relation to the Owned-but-Not Insured Exclusion,* 26 Akron L. Rev. 557, 559 (1993).

60. *See* Lisle, *supra* note 59, at 557 (discussing the uncertain scope of the *Alexander* rule).

61. Girgis v. State Farm Mut. Auto. Ins. Co., No. 66970, 1994 WL 676613, at *2 (Ohio Ct. App. 8th Dist. Dec. 1, 1994), *rev'd* 662 N.E.2d 280 (Ohio 1996). The court opined that car insurance policies cover an individual's negligent acts. "In the law of torts, the degrees of negligence in general, none of which requires physical contact, are: Slight Negligence . . . ; Ordinary Negligence . . . ; and Gross Negligence . . . ." *Id.* (citations omitted).

62. *See* Wilburn v. Allstate Ins. Co., No. CA94-06-135, 1995 WL 103326 (Ohio Ct. App. 12th Dist. Mar. 13, 1995) (finding that because the insurance policy precludes uninsured motorist coverage absent contact between the insured and the unidentified vehicle, it impermissibly prevents the insured from making a claim recognizable in Ohio tort law); Bielecki v. Nationwide Mut. Ins. Co., No. 92-T-4703, 1993 WL 39593 (Ohio Ct. App. 11th Dist. Feb. 5, 1993) (upholding the validity of the physical contact requirement and finding the *Alexander* test unsatisfied, since an insured cannot bring a negligence suit against an unknown driver).

63. *See* Lisle, *supra* note 59, at 560. *But see* Martin v. Midwestern Group Ins. Co., 639 N.E.2d 438, 441 (Ohio 1994) ("The rationale of Alexander is not limited to the analyzed exclusion . . . [it] is a yardstick by which all exclusions of uninsured motorist coverage must be measured.").

64. The majority opinion fails to cite *Alexander* as support for invalidating the physical contact doctrine and chooses only to mention the argument as one of several in the Court's syllabus. *Cf.* Girgis v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 280, 281 (Ohio 1996).

65. *Id*.

66. *Id.*

67. *Id*.

68. The Policy stated:

We (State Farm) 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 [an] accident arising out of the operation, maintenance or use of an uninsured motor vehicle. Uninsured motor vehiclemeans: . . . 2. 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.

Id.

69. *Id.*

70. *Id.*

71. *Id*.

72. *See* Girgis v. State Farm Mut. Auto. Ins. Co., No. 234822, slip op. at 2, (Ohio C.P. Cuyahoga Cty. Feb. 14, 1994), *aff'd* No. 66970, 1994 WL 676613 (Ohio Ct. App. 8th Dist. Dec. 1, 1994), *rev'd* 662 N.E.2d 280 (Ohio 1996).

73. *See* Girgis v. State Farm Mut. Auto. Ins. Co., No. 66970, 1994 WL 676613, at *3 (Ohio Ct. App. 8th Dist. Dec. 1, 1994), *rev'd* 662 N.E.2d 280
(Ohio 1996).

74. 610 N.E. 2d 1180 (Ohio Ct. App. 1992).

75. *Girgis*, 662 N.E.2d 280.

76. *Id.* at 284.

77. *Id*.; *see also* discussion *infra* Part IV. B.

78. *Girgis*, 662 N.E.2d at 283. The Court stated: "The purpose of the [physical contact] requirement is obviousto provide an objective standard of corroboration of the existence of a 'hit and run' vehicle and to prevent the filing of fraudulent claims." *Id.*, *citing* Travelers Indem. Co. v. Reddick, 308 N.E.2d 454 (Ohio 1974)). However, Justice Wright further states: "We do not take lightly the argument that this decision will lead to an increase in the filing of claims." *Id.* at 283-84.

Because Girgis was alone at the time of the accident and never proffered any witnesses, she will not be able to present corroborative evidence of her claim. In effect, the Court's decision will preclude all motorists in unwitnessed single-vehicle accidents from

presenting their claim to a finder of fact. *Cf. Girgis*, 662 N.E.2d at 284 (corroborative evidence requires independent third-party testimony).

80. *Id*. (Pfeiffer J., concurring). Justice Pfeiffer wrote:

The majority opinion and syllabus are a good first step, but I would go further. As I first stated in my concurrence in Hillman v. Hastings Mut. Ins. Co. . . . this court should eliminate entirely the physical contact rule. There is no reason that a case involving an automobile accident should be any different from any other case that depends on the testimony of only one eyewitness. As it does in every other case, the jury should decide the veracity of the witness and accord the testimony its due weight in light of the other evidence presented.

Id. (citation omitted).

80. *Id.*

81. *Id*. (Cook J., concurring in the judgment).

82. *Id*. ("I find no support for the about-face the Court takes in light of twenty-one years of solid case law.").

83. *Id*.

84. *Id*. at 285. Justice Cook also contends that by failing to amend the statute after the previous Ohio Supreme Court decisions upholding the physical contact doctrine, the legislature tacitly approved those Court actions. *See Id.* She writes: "On any of these occasions the General Assembly could have addressed our holding in Reddick. On each occasion it chose not to." *Id.*

85. *Id.* at 284.

86. *Id*. at 285 (Sweeney, J., concurring in part and dissenting in part).

87. *Id*. (Sweeney contends the new standard "undermines the purpose of R.C. 3937.18 by unnecessarily increasing the plaintiff's burden of proof, which will create the harsh result of preventing many insureds with legitimate claims from having any chance of recovery.").

88. *Id*. at 287 (Sweeney attacks the majority statement that the corroborative evidence rule will allow the jury to properly weigh the credibility of witnesses stating that the rule demonstrates a lack of trust in the jury).

89. Widiss, *supra* note 36, § 9.10 at 492.

90. *See supra* part II. A-B (illustrating the uneven application of the physical contact requirement from state to state even among states with similar statutes).

91. *Cf*. Allan D. Windt, Insurance Claims and Disputes § 6.03 at 375, 376 (1995) (Windt discusses the reasonable expectations rule which requires that each insured's expectations in an insurance contract must be given effect. The nature of the rule is that the insured's expectations are not solely governed by the insurance policy or its terms; an element of fairness is involved).

92. Widiss writes that a "jurisdiction by jurisdiction" approach has developed, which leaves the insured uncertain as to whether uninsured motorist coverage applies to a particular setting and forces the insured to check into the enforceability of the provision circumstance by circumstance. *See* Widiss, *supra* note 36, § 9.10 at 492.

93. *See* Girgis v. State Farm Mut. Ins. Co. 662 N.E.2d 280, 283 (Ohio 1996). This author contends that the corroborative evidence standard does not lend itself as easily to alternative applications and extensions like the physical contact doctrine. *See supra* notes 35-64 and accompanying text (illustrating how the physical contact doctrine has been applied unevenly from venue to venue).

94. Brady & Arriandiaga, *supra* note 31, at 717 (suggesting that most of the accidents are from carelessness, such as a driver who falls asleep at the wheel and goes off the road). *See also* Widiss, *supra* note 36, § 9.2 at 443 (coverage which requires physical contact is designed to prevent fraudulent claims).

95. *See Girgis*, 662 N.E.2d at 283, (The Court writes: "[W]e remain committed to the underlying policy of preventing fraud . . . . [T]he corroborative evidence rule . . . prevents fraud and avoids the injustice of prohibiting legitimate claims solely because no physical contact occurred.").

At least one legal writer feels that the corroborative evidence test would be as effective at fraud prevention as the physical contact requirement. *See, e.g.,* McLeod, *supra* note 10, at 384 ("[The] physical impact rule is too broad in that it excludes non-negligent insured motorists . . . [and] too narrow in that it places too great an emphasis upon the apparent physical contact which can be fraudulently induced by the insured to defraud his company.") (footnotes omitted).

96. *See* Lewis, *supra* note 10, at 1051.

97. *See generally* Schermer, *supra* note 43, at 43.12 (stating that in Georgia, interested parties including a husband and wife may offer corroborative evidence).

98. *See* Lewis, *supra* note 10, at 1051 (asserting that an insurer should not be made to pay claims when the corroborating evidence is a party with a pecuniary or personal interest in the coverage determination). One Court, when discussing the corroborative evidence standard, named those witnesses with a personal interest or bias toward the insured a

"suspect class". *See* To v. State Farm Mut. Ins. Co., 873 P.2d 1072, 1077 (Oregon, 1994). This class has a "temptation to collude that is so strong that it is reasonable public policy to prohibit their testimony" to be used as corroborative evidence. *Id.*

99. Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 Miami L. Rev. 907, 912-913 (1992) (stating that many believe the insurance industry is making large profits and that insurance fraud only cuts into that high profit margin; and that "Many consumers believe they benefit from their policies only if and when they collect on an insurance claim.")

100. *Id*. at 916 ("Insurance fraud sets a vicious cycle in motion: insurance companies continue to increase premiums for the entire pool of insureds in order to cover the higher losses, while some consumers file for additional uncovered amounts to make up for the higher premiums charged").

101. *See* Lewis, *supra* note 10, at 1055 (Stating that an increase in the total payout under uninsured motorist coverage will occur where corroborative evidence claims are allowed. However, Lewis states that the anti-fraud devices within the corroborative evidence statutes will hold steady the percentage of fraudulent claims).

102. *See* Belcher v. Travelers Indem. Co. 740 S.W.2d 952, 953 (Ky. 1987) (stating insurance companies have a right to protect themselves against fraudulent claims by the physical contact doctrine).

103. *See* Lewis, *supra* note 10, at 1053 (suggesting this can be done while still striking a balance for the legitimate claimant without physical contact); 1056 (suggesting the legislature prohibit corroborating testimony of family members and of others in a special relationship with the insured as a fraud prevention technique under a corroborative evidence test). *See also* John A. Appleman & Jean Appleman, Insurance Law & Practice § 5094 at 408-409 (1981) ("[T]o minimize the possibility of fraud, either a statute or a [insurance] policy can require the giving of prompt notice to the police of a hit and run accident, thus affording a better opportunity to catch the offender . . . .").

104. *See* Sheban, *supra* note 5, at 1D (explaining that Ohio Insurance Institute representative Daniel J. Kelso blames "[r]ecent Ohio Supreme Court and appellate court decisions and personal-liability lawsuits for the [rising rate] trend." However, a Ohio trial lawyers representative contends that "Ohio's insurers are trying to 'shift the cost of auto losses to other places . . . and are 'manufacturing a crisis'.").

105. *See* Emerson, *supra* note 99, at 913 (Insurers internalize fraud costs by increasing premiums. Accordingly, an increase in claims and a corresponding increase in fraud will lead to higher insurance rates); *see also* Lewis, *supra* note 10, at 1053 ("With an increase in actual loss, 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." (footnotes omitted)). *But see* Leonard C. Elder, *No Fault's Impact on Consumers and Collision Victims*: *Robbing Paul*

to Pay the Piper, 1 Ohio Trial 19, 21 (Summer 1990) ("Far too often the statistics only provide the staggering number of claims paid and the rising premiums without regard to the profitability of the industry. As a business, it is important for insurance companies to earn a profit. All of the data indicates that despite claims of 'crisis,' those profit levels are not in danger." (footnote omitted)).

106. *See* Richard N. Clark et al., *Sources of the Crisis in Liability Insurance: An Economic Analysis*, 5 Yale J. On Reg. 367, 367 (1988) ("Premiums charged for several lines of property-casualty insurance have soared over the past several years."). *But see* Elder, *supra* note 105, at 20 ("It is . . . not possible or fair to blame soaring insurance premiums on the litigation of automobile collision claims.").

107. *See* Demello v. First Ins. Co. of Haw., Ltd., 523 P.2d 304 (Haw. 1974); Commercial Union Assurance Co. v. Kaplan, 377 A.2d 957 (N.J. 1977); *see also* Elder, *supra* note 105, at 20 (contending that the New Jersey's high insurance premiums are attributable to factors other than the tort system).

108. *See* Sheban, *supra* note 5, at 1D (discussing debate between the Ohio Academy of Trial Lawyers and the Ohio Insurance Institute).

109. This author suggests that if the *Girgis* decision is viewed by subsequent courts and insurers as a further extension of the *Alexander* rule, there will be a substantial increase in the number of uninsured motorist claims, both under the physical contact doctrine and other policy exclusions. *See supra* notes 58-64 and accompanying text.

110. Ohio Insurance Institute, *Study Shows Ohio Auto Insurance Lower than Most States* (Press Release, Feb. 13, 1996) at Table 1 (The study reveals the average annual automobile insurance premium in 1994 was $741.63 while Ohioans paid $567.10). *See also* Elder, *supra* note 105, at 20 (contending that Ohio has low insurance rates, and that "The need for further, more sweeping reforms to fix the tort system is even less clear in Ohio.").

111. *See* Oh. H.B. 527, 121st Gen. Assembly (1995)(On November 14, 1995, Representative Hottinger introduced the bill before the Ohio General Assembly); *see also* Oh. S.B. 256, 121st Gen. Assembly (1995).

112. The proposed Bill, H.B. 527, would amend O.R.C. § 3937.18 (D)(2) to read:

For the purpose of this section a motor vehicle shall be deemed uninsured in either of the following circumstances: . . . 2) the identity of the motor vehicle cannot be ascertained and the bodily injury, sickness, disease or death of the insured is caused by actual physical contact of the motor vehicle with the insured or with a motor vehicle operated by the insured.

113. *See* Oh S.B. 256. As of this writing, the legislature has not passed Oh S.B. 256 or Oh H.B. 527.

114. *See* Ohio House Ins. Comm. Meeting (May 29, 1996) (available through Hannah on-line, Ohiolink Hanna database at main menu select "legislation" then type "HB527" then select "Bill action and Committee Reports") (Tom Long, a representative of State Farm Insurance who spoke before the committee, expressed an industry concern for fraud in one car accidents.).

115. *See* Widiss, *supra* note 36, § 9.9 at 491 (finding the trend very significant); *see also* Girgis v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 280, 282 (Ohio 1996). Justice Wright's majority opinion emphasizes that "[i]n taking this step, we join a number of our sister states that have adopted this or even a stricter rule." *Id.* Justice Wright's emphasis on the existence of stricter state rules may indicate that the Court believes its ruling to be incremental by comparison to other states.

116. The states that have adopted some form of the corroborative evidence rule have acted through legislative means and not by judicial mandate. *See supra* notes 27-30 and accompanying text (discussing legislative adoption of corroborative evidence rule); *see also* Widiss, supra note 36, § 9.9 at 491 (pointing out that legislation in a half dozen states requires coverage where corroborative evidence can be provided to verify the insured's claim).

117. *See Girgis* 662 N.E.2d at 284, 285 (Cook, J., concurring in the judgment).

118. Justice Wright opines that the substituting the corroborative evidence test for the physical contact doctrine will "ameliorate the harsh effect of an irrebutable presumption" on the insured that no recovery can be had without showing the "prerequisite" physical contact. *Id*. at 283.

119. Justice Sweeney's opinion points out that the "majority contradicted itself" by recognizing that the statute is designed to protect the insured, then placing a "new barrier to recovery" on the insured. *Id.* at 286 (Sweeney J., concurring in part and dissenting in part). He also states that this was "an unnecessary and unjustified requirement that the plaintiff must provide independent third party testimony to go forward with his or her claim." *Id*. at 286.

120. *See* Jack Wenik, *Forcing Bystander to Get Involved: Case for Statute Requiring Witnesses to Report Crime*, 94 Yale L.J. 1787, 1788 (1985) (Wenik recognizes a "lack of bystander intervention in emergencies" and argues for some criminal statute mandating the reporting of criminal activities).

121. *See* Matthew K. Gagelin, *Employer Trip Reduction Who is Responsible for Organizing a Carpool?*, 1 Envtl. Law. 203, 205 (1994) (acknowledging the existence of "solo commuting habits" that Americans have adapted to and addressing some employer-sponsored car pool plans as possible alternatives).

122. In one post-*Girgis* case, an insured was injured in a one car accident, where she was the sole occupant of the vehicle. *See* Caldwell v. State Auto. Ins. Co., No. 14848, 1996

WL 208332, at *1 (Ohio Ct. App. 2nd Dist. Apr. 26, 1996). The trial court granted the insurance company's motion for summary judgment based on the assertion that since the plaintiff was traveling alone, she could not possibly meet her burden of producing corroborative evidence. *Id.* The appellate court reversed, noting that the insurer had not produced evidence of the *absence* of corroborative evidence. *Id.* Based on this case, it appears thatwithout an admission from the plaintiffa defendant may not obtain summary judgment by merely pointing to the plaintiff's absence of corroborative evidence. *Cf. id.* at *2.

123. *See supra* note 29 (regarding Georgia courts allowance of testimony of interested third parties); *see also* Lewis, *supra* note 10 at 1056 (discussing the Oregon courts allowance of interested family member testimony).

124. *Cf. supra* note 30 (discussing a clear interpretation of the independent witness standard).

125. Lewis, *supra* note 10, at 1055 (arguing that certain corroborative evidence requirements, particularly ones which use the terms "reliable or competent testimony " lend themselves to litigation as they are mud words.").

126. *See* Lewis, *supra* note 10, at 1056. (contending that potential fraud could be reduced by eliminating the family member as a party who could proffer corroborating evidence).

127. For example, in one case, the insured wished to proffer testimony by a passenger in his motor vehicle. The passenger had an uninsured motorist claim which he dismissed prior to the underlying action. The passenger wished to testify as to the existence of a phantom vehicle, to corroborate the insured's claim. The Oregon Supreme Court found this testimony admissible for the purpose of corroboration. *See* To v. State Farm Ins. Co., 873 P.2d 1072 (Oreg. 1994).

128. *See Girgis*, 662 N.E.2d at 286 (Sweeney, J. concurring in part and dissenting in part). *See also* Keystone Ins. Co. v. Raffle, 622 A.2d 564, 570 (Conn. 1993) ("[T]he fact that some claims might be manufactured by unscrupulous individuals cannot justify the wholesale rejection of all the claims in which injury is caused by an unidentified driver, simply because the injured party lacks third party witnesses or physical evidence.").

129. *See Girgis*, 662 N.E.2d at 286 (Sweeney, J. concurring in part and dissenting in part).

130. *See* Pin Pin H. Su v. Kemper Ins. Co. 431 A.2d 416 (R.I. 1981); *Raffle*, 622 A.2d at 564.

131. *See Pin Pin H. Su*, 431 A.2d at 419 ("[The] presence or absence of impartial witnesses, the credibility of the claimant's testimony, the ability of the cross examiner to expose prevarication are all . . . efficient tools of the adversary process to expose fraud in this context.").

132. *See supra* notes 3, 110 and accompanying text.

133. This despite the fact that the "existence or cause of problems in our current system have never been definitively linked to the automobile collision litigation." Elder, *supra* note 105, at 20; *see also* Schwartz, *supra* note 3, at 419; Jeffrey O'Connell and Robert H. Joost, *A Model Bill Allowing Choice Between Auto Insurance Payable with and Without Regard to Fault*, 51 Ohio St. L.J. 947 (1990).

134. Elder, *supra* note 105, at 21. ("Even our civil rules provide for the most liberal of discovery in an effort to ferret out the truth and the most liberal of pleadings so that a wrong does not pass by unredressed due to a technicality.") (footnote omitted).

135. *See id*.

136. Boyd v. Inter-Ins. Exch., 136 Cal. App. 3d 761, 765 (1982) *citing* Orpustan v. State Farm Mut. Auto. Ins. Co., 500 P.2d 1119, 1122 (Cal. 1972).

137. *See Girgis*, 662 N.E.2d at 283.

138. *See* Keystone Ins. Co. v. Raffle, 622 A.2d 564, 570 (Conn. 1993).

139. *See* To v. State Farm Mut. Ins., 873 P.2d 1072, 1079 (Oregon 1994) (discussing that once a disinterested witness has provided a statement, the corroborative evidence is test is met, and the adversary is precluded from cross examining the witness).

140. *See supra* notes 129-39 and accompanying text.

141. *See Girgis*, 662 N.E.2d 280, 287 (Sweeney, J. concurring in part and dissenting in part) (arguing that the most effective means to curb fraud and avoid injustice is to put confidence in the jury system to distinguish legitimate claims from fraudulent ones).