

“MISS-AND-RUN” ACCIDENTS IN ILLINOIS: ALL THE
INSURANCE MONEY CAN BUY WON’T BUY
COVERAGE

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Illinois is a mandatory auto insurance State. All drivers must purchase auto insurance in order to lawfully operate a motor vehicle.¹ In fact, the insurance requirement is so comprehensive that Section 5/143(a) of the Illinois Insurance Code requires that all policies sold in Illinois must contain uninsured motorist coverage² – coverage which ensures that persons injured by uninsured motorists are compensated as though the offending driver were insured.³

Although the statutory mandate is clear, some insurance companies write their policies with an additional “physical contact” requirement - a requirement that there be physical contact between the insured and the uninsured motorist before there is coverage. Under such policies, drivers who have uninsured motorist coverage will not have protection if they are injured in a “miss-and-run” accident (an accident in which an uninsured driver does not hit the insured but causes him to

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¹ 625 ILL. COMP. STAT. ANN. 5/7-601 (West 2009).

² 215 ILL. COMP. STAT. ANN. 5/143(a) (West 2009) (“No policy 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 renewed, delivered, or issued for delivery in this State unless coverage is provided therein . . . for the protection of persons insured there under who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting there from”).

³ See *Luechtefeld v. Allstate Ins. Co.*, 656 N.E.2d 1058, 1061 (1995); *Rosenberg v. Zurich Am. Ins. Co.*, 726 N.E.2d 29, 36 (Ill. App. Ct. 2000); *Shefner v. Ill. Farmers Ins. Co.*, 611 N.E.2d 626, 629 (Ill. App. Ct. 1993); *State Farm Mut. Ins. Co. v. George*, 762 N.E.2d 1163, 1165 (Ill. App. Ct. 2002). *Murphy v. U.S. Fidelity and Guar. Co.*, 458 N.E. 2d 54, 58 (Ill. App. Ct. 1983).

collide with another vehicle or road hazard). These policies can turn careful and conscientious drivers who have insurance into drivers without coverage simply because they successfully avoid an accident with a negligent uninsured driver.

Although it seems counterintuitive that insurance would be denied to an insured who is injured while instinctively avoiding an accident, Illinois courts have repeatedly approved the policy language that creates this loophole.⁴ If the loophole is to be closed, it must come as a result of an amendment to the uninsured motorist statute.

How “Miss-and-Run” Accidents are Excluded from Uninsured Motorist Coverage

Section 5/143a, which mandates uninsured motorist coverage, does not proscribe coverage for miss-and-run accidents. That contention has been rejected. *Groshans v. Dairyland Ins. Co.*⁵ was a “miss-and-run case” in which the insurance company argued that the uninsured motorist statute required the insured to prove physical contact with the uninsured vehicle no matter what its policy said.⁶ The court disagreed with the insurance company, and found that “Illinois law does not require physical contact but merely permits an insurance policy to require such contact.”⁷

As a result, most Illinois policies do require physical contact. The typical Illinois policy uses a definition of “Uninsured Motor Vehicle” to impose the “physical contact requirement.” This definition distinguishes two types of uninsured drivers – the identified and unidentified tortfeasor. An identified uninsured tortfeasor is a known person who is uninsured (e.g. a driver that causes an accident and stops and identifies himself as uninsured). An unidentified uninsured tortfeasor is a motorist whose insurance coverage, if any, is unknown and thus functionally unavailable (e.g. a driver who causes an accident and does not stop and is not identified). Most Illinois policies require the second category of uninsured driver, the unidentified uninsured tortfeasor, to have “physical contact” with the insured.

⁴ See *Ferega v. State Farm Mut. Ins. Co.*, 317 N.E.2d 550 (1974); *Lemke v. Kenilworth Ins. Co.*, 487 N.E.2d 943 (1985).

⁵ *Groshans v. Dairyland ins. Co.*, 726 N.E.2d 138 (Ill. App. Ct. 2000), *appeal denied*, 734 N.E.2d 894 (Ill. 2000).

⁶ *Id.* at 141.

⁷ *Id.* at 140.

The typical policy language is similar to the following:

Uninsured Motor Vehicle means a land motor vehicle:

1. The ownership, maintenance, and use of which is:

a. not insured or bonded for bodily injury liability and property damage liability at the time of the accident; or

.....

2. With respect to bodily injury, 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.

(Emphasis added.)⁸

Policies such as the preceding example simply omit from their definition of “Uninsured Motor Vehicle” an unidentified driver who causes an accident without “striking” the insured, i.e., a miss-and-run tortfeasor. Thus, the policies define out of coverage the miss-and-run accident, creating a category of uninsured accident for which there is no coverage.

Illinois courts have recognized the purpose for the physical contact requirement: “[it] is to reduce the potential for fraud in that otherwise an insured might simply lose control of his automobile and blame it on a nonexistent driver.”⁹

But in application, the justification for the physical contact provision – protection from fraudulent claims – is routinely ignored by courts. As a result, courts inflexibly deny coverage in all miss-and-run situations, no matter the weight or quality of the evidence proving an unidentified uninsured driver was the cause of the accident.

⁸ This is the language of the author’s own State Farm Insurance Auto policy.

⁹ Ill. Nat. Ins. Co. v. Palmer, 452 N.E.2d 707, 708 (Ill. App. Ct. 1983).

The Inflexible “Miss-and-Run” Exclusion in Operation

An example of the inflexibility of denying coverage in a miss-and-run situation is *Swan v. Country Mutual Insurance Co.*¹⁰ In *Swan*, the plaintiff was denied coverage under his policy in a miss-and-run accident even though four independent witnesses corroborated his testimony that an unknown vehicle cut him off and sent him into an abutment.¹¹ Similarly, in *Kannel v. State Farm Mutual Insurance Co.*, the court denied coverage in a case where an unknown vehicle swerved in front of the plaintiff causing her to strike a third vehicle, even though there was “no risk that plaintiff filed a fraudulent claim, since the parties [have] stipulated to the existence of the unidentified vehicle forcing [the plaintiff] off the road.”¹² To be consistent in the perfunctory application of the physical contact requirement, courts have penalized third parties innocently caught up in miss-and-run accidents. For example, a third party driver was denied coverage under his own policy where he was struck by a car forced into his lane of traffic by an unidentified tortfeasor, not because he failed to contact the tortfeasor - but because there was no contact between the unidentified tortfeasor and the vehicle that struck him.¹³

The application of the physical contact requirement has been challenged in a number of cases on a number of theories; none have been successful. The physical contact requirement cannot be “constructively” satisfied by the claimant’s contact with a barrier after being forced off the road by a miss-and-run driver;¹⁴ this conclusion does not violate public policy because the term “hit-and-run” is not defined in the statute, nor does the restrictive definition contravene the remedial purpose of the statute.¹⁵

No set of facts or legal argument has persuaded an Illinois court to find coverage for a miss-and-run accident when the policy contains a physical contact requirement. In fact, it appears

¹⁰ *Swan v. Country Mut. Ins. Co.*, 715 N.E.2d 688 (Ill. App. Ct. 1999).

¹¹ *Swan*, 715 N.E.2d at 688.

¹² *Kannel v. State Farm Mut. Ins. Co.*, 584 N.E.2d 540, 543, 1991 (Ill. App. Ct. 1991), *appeal denied*, 591 N.E. 2d 23.

¹³ *Finch v. Cent. Nat. Ins.*, 319 N.E.2d 468 (1974).

¹⁴ *Ferega*, 317 N.E.2d at 551 (“We do not find this argument persuasive.” The court specifically rejected the argument “that the plain language of the statute and the policy should be judicially modified by altering the meaning of the word “hit” so that the element of physical contact is eliminated.”).

¹⁵ *Lemke*, 487 N.E.2d at 945.

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the Illinois Supreme Court has abandoned its authority to further construe the statute. “The construction this court has placed upon [section 143a] [referring to its opinion in *Ferega*] has in effect become part of the [section], and a change in that construction by this court would amount to amending the statute. The power to accomplish this does not lie in the courts.”¹⁶

Effect of the “Miss-and-Run” Exclusion on Illinois Motorists

There are no readily available data on the number of miss-and-run accidents that occur in Illinois. However, the number of miss-and-run accidents that are denied coverage can be estimated using statistics compiled by the Illinois Department of Transportation and estimates of the number of uninsured drivers in Illinois.

For the year 2007 the Illinois Department of Transportation reported that there were a total of 408,258 traffic crashes in Illinois resulting in 94,021 injuries and 1,043 fatalities.¹⁷ The Insurance Research Council estimates that 15 percent of Illinois drivers were uninsured in 2007.¹⁸ This estimate was recently confirmed by the executive director of the Illinois Insurance Association who was quoted as saying 12 to 15 percent of Illinois drivers are uninsured.¹⁹

It is not clear whether uninsured drivers in Illinois are more or less likely to be involved in accidents than insured drivers. In other words, it is difficult to determine whether 15 percent of uninsured drivers in Illinois were involved in more or less than 15 percent of the accidents in Illinois. Data from other jurisdictions, however, suggest that uninsured drivers are far more likely to be involved in accidents than insured drivers, and

¹⁶ *Id.* (quoting *Union Elec. Co. v. Ill. Commerce Comm’n*, 396 N.E.2d 510, 518 (Ill. 1979)).

¹⁷ ILL. DEP’T OF TRANSP., 2008 ILLINOIS CRASH FACTS AND STATISTICS (2008) available at www.dot.state.il.us/travelstats/2008cfweb.pdf.

¹⁸ Press release, Insurance Research Council, Economic Downturn May Push Percentage of Uninsured Motorists to All-Time High 3 (January 21, 2009), available at http://www.ircweb.org/News/IRC_UM_012109.pdf (The Insurance Research Council is a non-profit division of the American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America and “provides timely and reliable empirical research to all parties involved in public policy issues affecting risk and insurance.”)

¹⁹ Mike Riopell, *Despite Law, Many Still Drive Uninsured*, Pantagraph.com, (July 6, 2009), available at <http://www.pantagraph.com/news/articleaac678b0-69d0-11de-a970001cc4c002e0.html?FORM=zznr4>.

accidents involving uninsured drivers are far more likely to result in injury.²⁰

Using the reported data about Illinois accidents in 2007 and the estimated percentage of uninsured Illinois drivers and making conservative assumptions about the frequency of uninsured accidents (ignoring the probability that uninsured drivers are more likely to be involved in accidents, and assuming they appear in the same percentage of accidents as they are of total drivers), miss-and-run accidents may account for thousands of accidents and hundreds of injuries in Illinois every year. (For example, if the total number of traffic crashes in Illinois in 2007 (408,258) is reduced to the number of vehicle v. vehicle and vehicle v. object crashes (373,392)²¹ and assuming 12 percent of those involved an uninsured driver, and applying the arbitrary assumption that only 10 percent of those accidents were miss-and-run accidents in which the unidentified driver was at fault, then 4,480 accidents in 2007 could involve miss-and-run coverage denials. Similarly, if 91 percent of the 95,064 injuries and fatalities reported in Illinois in 2007 occurred in vehicle v. vehicle or vehicle v. object accidents and 12 percent of those involved an uninsured motorist and a policy requiring physical contact and applying the arbitrary assumption that 10 percent of those were caused by a miss-and-run driver, 1,038 injuries or fatalities may have been denied uninsured motorist insurance.)

Obviously, these are estimates. What is certain is that if a policy has a physical contact requirement, there is no rider or higher limit of coverage that can be purchased by an Illinois driver that will cover him if he is injured as a result of the negligence of a miss-and-run driver.

²⁰ J. Daniel Khazzoom, *What We Know About Uninsured Motorists and How Well We Know What We Know* 23 (Resources for the Future, Discussion Paper No. 98-09-REV), available at <http://www.rff.org/rff/documents/rff-dp-98-09-rev.pdf> ("In 1990, California's percentage of uninsured drivers was less than 28%; yet CHP data for 1988-89 show that 55.1-60.9% of fatal accidents, 44.6% of bodily injury accidents, and 34.1% of traffic citations involved uninsured motorists).

²¹ This is the total crashes less those involving pedestrians (5,671), trains (114), pedicyclists (3,810) and animals (25,271). See Crashes by Type of Collision, *supra* note 17, at 18.

Why "Miss-and-Run" Accidents Should Not Be Excluded from Coverage

Insurance policies that exclude miss-and-run accidents produce odd consequences:

- They penalize vigilant drivers able to avoid a collision but give coverage to the less vigilant driver. Drivers, whose instinctive reaction is to avoid an accident, are turned into persons without uninsured motorist coverage.

- They penalize drivers who are mere bystanders. A driver who has a policy requiring physical contact with an unidentified uninsured driver, who is hit by the agile driver avoiding a miss-and-run driver, is similarly denied coverage – he cannot recover against the driver who struck him because that driver was not "at fault" in the accident and cannot recover under his own policy because he had no physical contact with the uninsured tortfeasor.

- They make uninsured motorist coverage different than, and incompatible with, the parallel provision of Illinois criminal law. Chapter 625, Section 5/11-401 of the Illinois Compiled Statutes, imposes penalties on drivers "involved in a motor vehicle accident resulting in personal injury to or death of any person" who leave the scene without identifying themselves.²² A driver, who causes two other vehicles to collide and fails to stop, even though he did not physically strike either, could be prosecuted under the statute. Physical contact is not required.²³

- They make uninsured motorist recovery dependent on the way the vehicles come together, not on principles of fault. "It will be recalled that in tort law it is certainly not essential that contact be had in order for liability to arise."²⁴ In miss-and-run accidents, ordinary principles of tort liability, breach of a duty and proximate causation, are ignored.

The objective of avoiding fraudulent claims in cases involving unidentified, unapprehended drivers can be

²² 625 ILL. COMP. STAT. ANN. 5/11-4-1 (West 2009).

²³ See 57 Op. Ill. Att'y. Gen. No. S-1430 (1979) (There does not have to be actual physical contact between vehicles before a driver is deemed to be involved); see also *People v. Kerger*, 548 N.E.2d 26, 29 (Ill. App. Ct. 1989) ("In this instance, the opinion of the Attorney General supports our conclusion that there need not be physical contact between a vehicle and, in this case, a pedestrian before a driver is deemed to be 'involved in a motor vehicle accident.'").

²⁴ JOHN ALAN APPLEMAN & JEAN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5095.25 (West, 1981).

accomplished without excluding all miss-and-run accidents from coverage. So long as uninsured motorist coverage remains keyed to the fault of the unidentified, unapprehended tortfeasor – and the claimant has the burden of proof on that issue just as he has on all other elements of his claim - there is no justification to assign a dispositive role to physical contact.

How to Provide “Miss-and-Run” Coverage that is Fair to Drivers and Illinois Insurers

Based on the history of the judicial construction of the physical contact requirement in Illinois, it is unlikely that courts will change their view that, under the present statute, insurers have the right to exclude all miss-and-run accidents from uninsured motorist coverage. More than one court has explicitly stated that any change in the law must come from the legislature.²⁵

A simple amendment to section 5/143a(1), such as the following, would make uninsured motorist insurance available to all drivers who have purchased that protection and protect insurance companies from false claims:

“No policy 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 renewed, delivered, or issued for delivery in this State unless coverage is provided therein . . . for the protection of persons insured thereunder who are proved by the preponderance of the evidence to be legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run or miss-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.”

Such an amendment would give claimants, injured in miss-and-run accidents, the potential to recover the benefits of their uninsured motorist policy. It brings miss-and-run accidents

²⁵ *Lemke*, 487 N.E.2d at 945 (“We believe that the legislature has been and continues to be conversant with *Ferega*. Absent evidence to the contrary, not present on this record, we presume that legislative inaction subsequent to *Ferega* indicates approval of the reasoning and holding in that case.”); *Scanlon v. Md. Cas. Ins. Co.*, 561 N.E.2d 301, 304 (Ill. App. Ct. 1990) (“ . . . if the legislature wished to express its disapproval of the physical contact requirement in hit-and-run occurrences in bodily injury cases expressed in supreme court decisions, it could have done so within section 143a(1), the provision which mandates uninsured motorist policies covering damages from bodily injury.”).

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within coverage if the claimant can sustain his burden of proof just as in any other type of uninsured motorist claim, while also protecting insurers who can refute the allegation of a *prima facie* miss-and-run claim by contrary evidence or evidence of fraud or collusion.