

“PHANTOM CARS” AND UNINSURED MOTORISTS CLAIMS: THE NEED FOR PHYSICAL DAMAGE FOR RECOVERY UNDER THE UNINSURED MOTORIST ACT



THE FACTS:

Under the California Uninsured Motorist Act, if your vehicle or you are injured by another vehicle in which the driver has no insurance or you are injured by a “hit and run” vehicle which escapes, your insurance company’s payment to you is paid out of the uninsured motorist portion of the policy and is not your “fault” for points on insurance rates.

This is critical in that insurance rates can remain higher for years if you make too many claims or have too many violations and could end up costing tens of thousands of dollars.

But...let us assume that a car swerves towards you or makes an illegal change of lane, you take evasive action, damage your car or yourself, but no contact occurred with the offending vehicle which speeds away. You or your car is injured but actual physical contact with the negligent vehicle did not occur.

Can you have an uninsured motorist claim or does this count against your own insurance as a claim caused by you?

This is the “phantom driver” doctrine and under California law it is NOT considered uninsured motorist coverage...it DOES count against your own policy as a claim the same as if you negligently hit a wall.

Why?

Read on.



THE LAW:

Cal. Insurance Code Section 11580.2 is clear, and makes ***proof of "physical contact" a condition precedent in every case for the recovery of damages under the uninsured motorist portion of the policy if caused by an unknown vehicle.***

This code section was enacted to eliminate fraud. The California Supreme Court considered the meaning of the physical contact requirement of the uninsured motorist statute in *Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 Cal.3d 988, 992-994 [103 Cal.Rptr. 919, 500 P.2d 1119], where an accident occurred when the plaintiff swerved his truck to avoid hitting a car that was never identified. No actual physical contact occurred between the plaintiff's car and the unknown car, but plaintiff sued his insurance company when it did not pay his claim. Plaintiff argued that the purpose of the "physical contact" requirement of the statute was to prevent an insured driver from claiming that a phantom car had caused an injury, when it was actually the insured's negligence that had led to the injury; since he proved that the uninsured vehicle had actually caused his injuries by testimony of numerous witnesses, plaintiff claimed that he should be allowed to recover even without actual physical contact.

The Supreme Court disagreed and stated that the "right to recover for the negligence of an unknown motorist is determined, under the plain terms of the statute, by whether or not the 'bodily injury' was caused by **'physical contact.'** 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.**" (*Id.*, at p. 994.) (Emphasis added) Although the case states "bodily" injury, the statute also includes damages to the vehicles, and subsequent cases have held so.

Therefore, under the facts described above, you could ask, "So it would have been better if I had let them hit me?" And the remarkable answer is "yes." There must be some direct physical contact between your car and this other vehicle for there to be recovery, and the court has been adamant in making no exceptions to this rule.

OTHER REQUIREMENTS:

In order to obtain recovery, Cal. Insurance Code Section 11580.2 also requires that the accident be reported to the police within 24 hours.

THE ABSURDITY OF IT ALL...WHY?.

A recent case perhaps exemplifies the extreme unfairness of the current doctrine in certain circumstances. In one case a motorist slammed into a box of dinette chairs that had fallen off the back of someone's truck and which were lying on the road. Even in that case, the court said, well they hit chairs, not a car, so uninsured motorist coverage denied. The court is reading the statute precisely and literally, which leads to some stupid decisions. No amount of extrinsic evidence can get one over the "contact" hump. The law has been on the books for quite some time (35+ years) and the legislature has not deigned to change it in all that time, despite the court's reading of it.



So why is the law like this? Simple-the insurance companies have convinced the courts that absent such a restriction, anyone in any accident will claim that some ghost car must have caused it and unless there is physical damage from another vehicle required to demonstrate that this happened, the insurance companies will be forced to pay out on claims caused by the negligence of their own insureds and not able to raise their rates to reflect bad driving habits of the insured.

In short, the courts will allow some injustice to various consumers to avoid creating a policy that may cause economic damage to the insurance companies.

And that's the law.

Don't like it?

Write the legislature.