Joshua Cohen
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It is time to harmonize the UM Statute with the Three Feet for Safety Act

BICYCLISTS INJURED BY CARS NEED THE SECURITY OF UM COVERAGE, BUT THEY DON'T NEED THE PHYSICAL-CONTACT TEST

Bicycles are gaining popularity as a simple solution to complex problems. On roadways, bicycles offer greater throughput, and impose lower wear-and-tear and maintenance costs than cars. Bike trips can effectively offset many car trips, most of which take place in less than three miles. Bicycles relieve traffic congestion. They use no energy and emit nothing. Bicycle ownership, maintenance and operation is relatively affordable. Bicycles are the most practical solution to the first-mile/last-mile transit problem for those who cannot afford to own, operate and insure a car. They enable low-income commuters to eschew the cost of car ownership, increase their financial margins, and free up capital to send their children to college, pay rent, eat, and obtain medical care. It is no wonder that, according to recent data, millennials are shunning cars.

Federal, State and Municipal governments are encouraging this shift through a combination of legislation, policy and planning. Countless programs at all levels aim to reduce vehicle miles traveled. In 2008, the State legislature passed SB 375, which supports the climate action goals to reduce GHG emissions through coordinated transportation and land use planning with the goal of making communities more sustainable. One way to do this is by encouraging drivers to become cyclists. Many potential cyclists would in fact ride if they felt safe. Protected bike lanes reduce cyclist fatalities by 90 percent. In 2015, the Los Angeles City Council passed Mobility Plan 2035, which proposes to install 900 miles of protected bike lanes throughout Los Angeles.

Three Feet for Safety Act

Implementing this infrastructure faces innumerable challenges and revisions. Cyclists may not benefit for many years. In the meantime, the cheap and easy fix is legislation, which protects cyclists where infrastructure is lacking. For example, Vehicle Code section 21760, the Three Feet for Safety Act, became effective September 26, 2014. Section (c) of the Act prohibits a driver from overtaking or passing a bicycle moving in the same direction at less than three feet. Drivers who injure cyclists as a result of passing closer than three feet are negligent per se, subject to a fine, and liable for the injured cyclists' damages. Knowingly or not, many drivers disregard this law.

Most of my clients are injured bicyclists. I recognize how many negligent drivers are out there and evangelize about uninsured motorist coverage ("UM"). UM protects claimants injured by the negligence of others with no insurance, too little insurance, or who hit and run. Los Angeles County alone averages 20,000 hit-and-runs per year. UM can be a lifesaver, spare an injured person or family from bankruptcy, and keep them from becoming homeless and/or destitute or more. Owning a car is not necessary. Several insurance companies offer non-operators' UM policies.

The Insurance Code discrepancy

Two years ago, a call from a potential client alerted me to a discrepancy in the Insurance Code that fails to protect cyclists with UM. The client had been bicycling on a major thoroughfare with three lanes in each direction. A bus had stopped to pick up passengers in the number three lane (the lane closest to the curb). The bus stop was at the limit line in the intersection. The traffic light was red. A car stopped behind the bus. The bicyclist stopped behind the stopped car.

The client pulled into the number two lane behind the last car stopped. He intended to pass the bus and vehicles stopped behind it in the number one lane once the traffic light turned green. The light turned green. Suddenly the client heard a car accelerate toward him from behind. The driver behind him did not notice him and was bearing down on him. The driver's car came within inches of the client. The client took his last clear chance and veered back into the lane to his right. He got injured when he crashed into the stopped car to his right.

The driver of the car that caused the crash recognized he was at fault. He pulled over, took out his driver's license and insurance card, and waited. An ambulance came and took the client away. The police never came. The offending driver left the scene, rendering the case a hit and run. But not exactly: there was no hit. It was a near-miss and run.

Before retaining me, the client opened a UM claim and gave his insurance company a recorded statement, cementing these facts in the record. The claim was denied on the grounds that the offending vehicle had made no physical contact with the client or his bicycle.

Insurance Code section 11580.2 requires insurers to apply UM coverage in hit-and-run situations only if there is "physical contact" between the vehicle and the bicycle (or cyclist):

> Insurance Code section 11580.2, subdivision (a)(1) commands that uninsured motorist coverage must afford protection against injuries resulting from "hit-and-run" drivers. Specifically, it declares that the term "'uninsured motor vehicle' means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the

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> accident ... 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.

(*Pham v. Allstate Ins. Co.* (2nd Dist. 1988) 206 Cal.App.3d 1193, 1195, citing Ins. Code, § 11580.2, subd. (b)(Emphasis added).

The *Pham* Court held that a rock that fell from a truck and crashed through the claimant's windshield met the physical contact test. The Court noted that the original UM statute did not require physical contact:

> The original [uninsured motorist statute] in 1959 did not specify any requirement for physical contact between vehicles. The law was amended in 1961, however, to impose three limitations on the coverage against a hit-and-run automobile: there must have been physical contact with the unknown vehicle, the accident must have been reported to the police within 24 hours, and a claim must have been filed with the insurer within 30 days. These amendments ... were designed to curb fraud, collusion, and other abuses arising from claims that phantom cars had caused accidents which, in fact, had resulted solely from the carelessness of the insured. ... The provision requiring physical contact with the unknown vehicle was added to the statute in order to eliminate such fictitious claims.

(*Id.* at p. 1196 quoting *Inter-Insurance Exchange* v. *Lopez* (1965) 238 Cal.App.2d 441, 443-444.)

As written, the physical-contact test requires cyclists to choose between two unpalatable outcomes. To ensure coverage, a cyclist can brace himself and let an oncoming vehicle hit him. The UM statute as written incentivizes this outcome. Yet a plaintiff cannot be compensated for damages which he could have avoided by reasonable effort. (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396).

A more realistic outcome is that the cyclist avoids the oncoming vehicle. Maybe this prevents injury. Or, like my client's case above, he ends up injured anyway. If this happens, and the offending driver fails to stop, the cyclist cannot invoke his own UM coverage. Thus the physical-contact test creates perverse incentives and directly conflicts with the Vehicle Code. It should therefore be eliminated.

Let's fix it

Removing the physical contact test from the Insurance Code is a quick and cheap, stop-gap measure to help cyclists hedge against the risk they take, pending implementation of the State's more costly, long-term goal of building infrastructure that promotes multi-modal transport. The potential cost to injured cyclists who are denied coverage significantly outweighs the potential burden on insurers who may have to pay on fraudulent claims and on their shareholders. Insurers are generally corporations and can more easily absorb such losses, while individuals and families who need to access the coverage cannot. Ensuring that cyclists can financially protect themselves regardless of drivers' irresponsibility promotes the necessary policy of reducing the problems that cars cause.

Opponents to eliminating the physical contact test may argue that "phantom car" claims could potentially obligate insurance companies to pay unsubstantiated claims. To assuage those concerns, eyewitness testimony can be required to corroborate the near miss instead of the physical contact test.

Irrespective of that potential, claimants should be presumed truthful. Insurers owe their insured an implied covenant of good faith and fair dealing. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949.) For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it must give at least as much consideration to the latter's interests as it does to its own. (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819.) Insurers owe their insured *fiduciary-like duties* that stem from the insured's special dependence on the insurer's good faith and performance and the unequal bargaining power between them. These "special and heightened duties" arise "because of the unique nature of the insurance contract, not because the insurer is a fiduciary." (*Vu v. Prudential Prop. & Cas. Ins. Co.* (2001) 26 Cal.App.4th 1142, 1151). These special duties "foster the unique purposes of an insurance contract, namely, bringing an insured peace of mind and security from loss." (*Levine v. Blue Shield of Calif.* (2010) 189 Cal.App.4th 1117, 1131). Cyclists are no less deserving of peace of mind and security from loss than drivers. Indeed, their vulnerability on the roads and exposure to greater risk should afford them the benefit of the doubt and greater deference.

The physical-contact test also violates the Legislature's intent to protect UM claimants:

> Insurance Code section 11580.2 is remedial in nature. "By requiring all policies to contain uninsured motorist coverage (or an express waiver) the Legislature attempted to broaden the protection of innocent drivers against negligent and financially irresponsible motorists.

(*Pham*, supra, 206 Cal.App.3d at p. 1198.)

It is time to broaden that protection even further. Between 2010 and 2012, California led the country in cyclist deaths. Taxpayers currently foot the bills for injured people with no health and/or disability insurance. It is better to incorporate that cost into the cost of auto insurance, especially when cyclists are already acting responsibly. Innocent cyclists deserve no less protection against negligent and financially irresponsible motorists than innocent drivers.

Instead, insurers should bear the burden to prove UM claims false. They already bear that burden in defending allegations of bad faith. (See *Spray, Gould & Bowers v. Associated Int'l Ins. Co.* (1999) 71 Cal.App.4th 1260, 1270, fn. 10 (dealing with violation of Department of

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Insurance Regulations promulgated to enforce Unfair Practices Act).) Applying the same burden to UM claims extends that logic as well as the policy considerations imposing on them a duty of good faith and fair dealing.

It is high time to remove the requirement of physical contact from the UM statute. The test is unfair and violates public policy. It defeats the intent behind SB 375 and other measures intended to mitigate climate change. It imposes an undue burden on vulnerable users. Like the bicycle itself, eliminating the test is a cheap solution to a costly problem. To do otherwise constitutes a windfall to insurers.

Josh Cohen is the head of the Tort Group of the Law Offices of Paul F. Cohen. *Before joining his father's practice, Josh was a member of a legal team that represented states, municipalities and water providers in recovering cleanup costs for contaminated groundwater. Later, Josh worked at the Los Angeles City Attorney's Office, where he prosecuted misdemeanors. Josh is a member of the Los Angeles County Bicycle Coalition and MoveLA, a county-wide organization devoted to transportation issues in Los Angeles. Josh graduated from Vermont Law School. Before becoming a lawyer, Josh worked as a teacher with the Los Angeles Unified School District. Prior to that, he was a professional drummer, performing nationally and internationally with countless artists, including the Breakestra.*