

YOU CAN'T BUY INSURANCE FOR DAMAGE CAUSED BY A "PHANTOM"

**By: Jay R. Vaughn
Busald Funk Zevely, P.S.C.**

There are new "gaps" in coverage for a risk of loss which your insurance policy may not cover. For example, when a phantom driver flees the scene either after physical contact or no contact at all, you and your clients are probably not covered.

For uninsured motorist coverage to apply, Kentucky requires that there be physical contact between your client's vehicle and the tortfeasor's vehicle. *Burton v. Kentucky Farm Bureau*, 116 S.W.3d 475 (Ky. 2003). An indirect hit in a situation such as a chain-reaction accident also satisfies the "physical contact" requirement. *Shelter Mut. Ins. Co. v. Arnold*, 169 S.W.3d 855 (Ky. 2005).

The hit and run driver has now created more problems for those injured in these types of collisions. When making a claim for uninsured or underinsured motorist benefits, you are bringing a direct action against your own insurance company. This is a contractual claim based upon the terms in your insurance policy. Despite these types of claims arising out of a tort (auto collision), Kentucky now views them strictly as contractual claims. *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005).

The *Ryan* Court was faced with a situation where plaintiffs were killed when struck by a truck on the interstate. The truck driver alleged that a motorcyclist cut him off causing him to lose control of his truck and strike the plaintiffs. Plaintiffs settled for the truck driver's liability limits and then brought an action for underinsured motorist benefits against their own insurance company, Kentucky Farm Bureau. Farm Bureau was then permitted to file a 3rd Party Complaint against the "unknown motorcyclist" for purposes of apportionment. At trial, the jury apportioned 50% fault to the settling truck driver and 50% fault to the unknown motorcyclist. The trial court reduced the plaintiffs' damages by 50% since they didn't have a claim against the motorcyclist, but they took nothing as the amount remaining was less than what they took from the settling truck driver. On appeal, the Court held that it was proper for the "unknown motorcyclist" to be in the apportionment scheme as KRS 411.182 – Kentucky's comparative fault statute – does not apply to contractual cases and claims for uninsured and underinsured motorist benefits are contract actions. Plaintiffs couldn't recover uninsured motorist benefits as the unknown motorcyclist didn't make physical contact with any vehicle on the road and they couldn't collect underinsured motorist benefits from Kentucky Farm Bureau as the reduced verdict was less than what was recovered against the known settling tortfeasor.

Ryan dealt with no physical contact from a fleeing driver, but what about when there is physical contact from the fleeing driver – the true "hit and run" driver?

On December 21, 2006 the Kentucky Supreme Court issued its decision in *Dowell v. Safe Auto Ins. Co.*, 2006 Ky. Lexis 321, 2005-SC-000153. Plaintiff was rear-ended by another vehicle that fled the scene before police arrived. The "hit and run" tortfeasor was never located. Plaintiff then presented an uninsured motorist claim to her insurance company, Safe Auto, for injuries she sustained in the collision. Safe Auto denied this claim on the

basis that Plaintiff could not prove the “hit and run” driver was uninsured. This appeal ensued. Safe Auto relied upon a provision in their policy that defined an uninsured motor vehicle as a vehicle “to which no bodily injury liability bond or policy applies at the time of the accident.” In finding coverage, the Court held that the above definition was ambiguous and was not contained in Kentucky’s uninsured motorist statute, KRS 304.20-020, and since the hit and run driver could not be located, no insurance policy “applied” at the time of this accident.

However, this was only a victory for Plaintiff Dowell and not future injured Kentucky citizens. KRS 304.20-020 has no requirement for hit and run driver protection. The *Dowell* Court strongly suggests that hit and run driver coverage could be excluded when it commented on Safe Auto’s policy language as follows: “None of those twenty-four exclusions disclose that injury inflicted by a hit and run vehicle is not covered. Safe Auto could have used an unambiguous definition of a hit and run vehicle in its exclusions section, or simply excluded ‘hit and run vehicle,’ but it did not.” These comments by the Court will change the insurance coverage landscape in future hit and run cases. Rather than holding that there is a rebuttable presumption that hit and run drivers are uninsured or that hit and run drivers fall within the intended purpose of Kentucky’s uninsured motorist statute, the Court sent a strong message to all insurance companies doing business in Kentucky to change their policies to specifically exclude coverage for hit and run drivers.

It appears that the Kentucky Supreme Court has now decided to completely do away with almost all claims for uninsured motorist benefits since there must be physical contact to even begin to have such a claim (*Burton v. KFB*) and insurance companies can specifically exclude hit and run coverage (*Dowell v. Safe Auto*). The only uninsured claim remaining is when the uninsured tortfeasor hits you and decides to remain at the scene, which may be the Court’s second message – all uninsured drivers should flee the scene!

The only hope left is for the Kentucky legislature to amend KRS 304.20-020. There needs to be three statutory amendments: (1) adopt the “corroborating evidence” doctrine thereby doing away with the “physical contact” rule, (2) create a rebuttable presumption of no insurance for all phantom/hit and run vehicles, and (3) require coverage for the phantom vehicle/hit and run situation. The Courts are moving tort and insurance law farther and farther away from being a compensation system directed at protection of injured victims and moving closer to a system providing more protection for tortfeasors and the insurance industry.