Slamming the Lid on Pandora's Box: How the Ohio Legislature Compensated the Insurance Industry for Scott-Pontzer at the Expense of Ohio's Drivers

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NOTES

SLAMMING THE LID ON PANDORA’S BOX: HOW THE OHIO LEGISLATURE COMPENSATED THE INSURANCE INDUSTRY FOR SCOTT-PONTZER AT THE EXPENSE OF OHIO’S DRIVERS

I. INTRODUCTION

A. The Potential Impact of Ohio’s New Uninsured Motorist Law (S.B. 97)

Imagine that you are seriously injured in a car accident caused by a drunk driver. You have always driven carefully, never received a traffic ticket, and never before been involved in a car accident. Because you are a prudent driver, you carry what you believe to be full coverage automobile insurance sufficient to protect you, your family, and your property. After you return home from the hospital, the police inform you that the drunk driver who hit you did not have automobile insurance and is indigent.

You then contact your insurance carrier who informs you that, although you have significant liability insurance, the coverage does not apply to bodily injuries caused by uninsured motorists. In order to recover for your bodily injuries, you would require uninsured motorist insurance (“UM”). Before you can ask, your agent informs you that your policy does not contain UM. You think back and cannot recall being offered UM but are sure that you asked for “full protection.” You ask the agent why you were not offered this coverage. She informs you that, in the past, the law required insurers to make a
meaningful offer of UM to every person purchasing automobile insurance. 1 Every automobile insurance policy automatically included the coverage unless rejected in writing by the insured. 2

The law was stringent, she explains. If the insurer failed to make this meaningful offer or obtain a written rejection, the courts would create the coverage as a matter of law even though the customer paid nothing for the additional coverage. 3 She regretfully informs you that the law has changed, no longer requiring insurance companies to offer UM. 4 Displeased with the high transaction costs, low earnings, unpredictable judicial treatment, and overall concept of UM, 5 your insurer chose to discontinue offering the coverage.

You are incredulous. You purchased all the automobile insurance that was made available to you. You were injured in an accident that was not your fault. And now you are unable to recover any compensation for damages 6 resulting from your bodily injuries. You wonder how your government could have allowed this to happen. After some inquiries, you are extremely disappointed to learn that your state government not only acquiesced, but encouraged it through legislation claiming a benefit to Ohio drivers by “'[p]rotect[ing] and preserv[ing] stable markets and reasonable rates for automobile insurance for Ohio consumers.'” 7

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4 See OHIO REV. CODE ANN. § 3937.18 (West Supp. 2004).
5 Insurers are uncomfortable with the manner in which UM pits them against their customers—those insured. Initially, the insurer sides with the uninsured tortfeasor against the insured. The insurer stands in the shoes of the uninsured motorist and may assert any defense that the uninsured could assert against the insured. See Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986); see also Sweeney v. Grange Mut. Cas. Ins. Co., 766 N.E.2d 212, 215 (Ohio Ct. App. 2001) (reciting clause in automobile insurance policy that provides insurer with the right to defend the uninsured motorist on the issue of legal liability and damages); ALAN I. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 7.2, at 254 (1969) (remarking that the insured generally defends by showing that the UM was not negligent or that the insured was negligent).
6 If the insurer and tortfeasor fail in this endeavor, the insurer becomes a turncoat and sides with its insured against the tortfeasor. If the insurer and its insured successfully establish the tortfeasor’s liability, the insurer will pay the insured as appropriate under the UM policy. The insurer then subrogates against the tortfeasor, the party with whom the insurer was previously aligned, to attempt to recover the funds distributed to the insured. See OHIO REV. CODE ANN. § 3937.18(J) (West Supp. 2004) (providing insurers with a statutory right to subrogate).
7 These damages usually include pain and suffering, medical payments, and lost wages. However, because many people carry some sort of medical or disability insurance, the main compensation that UM provides is for pain and suffering. See Gary T. Schwartz, A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans, 48 OHIO ST. L.J. 419, 427 (1987) (noting that UM primarily covers pain and suffering).
The Ohio General Assembly eliminated the UM offer requirement from the statute in response to soaring premiums for commercial automobile and general liability insurance policies. 8 You are puzzled. Why would the legislative changes affect individual automobile policies when the impetus for these changes occurred only in the commercial realm? While the commercial insurance rates were skyrocketing, the individual rates in Ohio experienced increases that were on par with the rest of the U.S. 9 Your skepticism further increases after learning that Ohio drivers have continued to enjoy premiums below the national average. 10 So what were the real reasons Ohio legislators eliminated the requirement that insurers offer UM by enacting Senate Bill 97 ("S.B. 97")? 11

B. The Problem with S.B. 97

The purposes of the Ohio General Assembly in enacting S.B. 97 would have been better stated: Protecting and preserving stable markets and reasonable rates for automobile insurance for Ohio's commercial consumers. 12 As this Note will show, S.B. 97 only benefited the insurance industry and its commercial customers. Huge premium increases for commercial automobile, general liability, and umbrella/excess insurance policies prompted S.B. 97. 13

These premium increases were the direct result of a controversial Ohio Supreme Court decision, 14 Scott-Pontzer v. Liberty Mutual Fire Insurance Co., 15 that imposed UM where neither the insurance provider nor the policyholder contemplated coverage. The Scott-Pontzer court held that an off-duty employee of a company could be an "insured" under the company's commercial general liability insurance policy by construing the ambiguous language of the policy against the insurer. 16 Next, the court found that this commercial liability policy,

10 See id. In 2001, the average expenditure in Ohio for individual auto insurance was $613.75 per year. By comparison, the national average was $719.75 per year. Id.
12 See sources cited supra note 8.
13 See sources cited supra note 8.
14 See sources cited supra note 8.
15 710 N.E.2d 1116 (Ohio 1999), overruled in part by Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256 (Ohio 2003); see discussion infra Part III.B.
16 Scott-Pontzer, 710 N.E.2d at 1119.
which was intended to protect the company's assets, provided sufficient automobile coverage to require an offer of UM pursuant to Ohio's UM law, section 3937.18. The insurer failed to offer UM since it did not consider the commercial policy to be a motor vehicle policy. The courts implied UM as a matter of law at the full liability limits of the policy.

One can imagine the costly effects this decision had upon the insurance industry and, consequently, its commercial customers who paid the ultimate price with premium increases. Since many of these commercial policies were issued with limits in the millions of dollars, the insurers suffered great financial losses when faced with severely injured insureds with claims dating back fifteen years, especially when the insurers failed to account for this additional risk in their premium calculations. The huge premium increases were likely a response to the additional risk associated with the liberal anti-insurance court and were a means for recouping losses sure to follow from future lawsuits based on commercial policies issued prior to Scott-Pontzer.

To avoid the costly effect of UM imposed as a matter of law, S.B. 97 completely eliminated the requirement that insurers offer UM. By doing so, the Ohio General Assembly has effectively cut the courts off at the pass. By making the offer completely optional, the Ohio General Assembly essentially forecloses the court from implying UM as a matter of law into any insurance policy. Now, when an insurer fails to offer UM, it is not an offense punishable by implied UM; it is simply the insurer exercising its statutorily empowered discretion.

UM is vital insurance coverage. It assures at least a modicum of relief for those innocent drivers tragically injured by irresponsible

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17 Id. at 1120.
18 Id. at 1120. Imposing UM as a matter of law for failure by an insurer to offer UM or to obtain a valid rejection from the insured is a standard response by courts of most states. See 1 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 2.7 (2d ed. rev. 1999). It is viewed as the only proper remedy to correct the insured's error. See Abate v. Pioneer Mut. Cas. Co., 258 N.E.2d 429, 431 (Ohio 1970).
20 Scott-Pontzer, 710 N.E.2d at 1120.
21 See infra notes 96-98 and accompanying text.
22 Ohio courts classified these Scott-Pontzer claims as contractual, resulting in a fifteen-year statute of limitations. See infra notes 111, 130-132 and accompanying text.
23 Scott-Pontzer only affected policies that were issued prior to its holding. After Scott-Pontzer, the industry quickly responded by modifying their policies to place them beyond the reach of Scott-Pontzer. See infra notes 111, 130-132 and accompanying text.
drivers. The need for it is even more critical in a state like Ohio whose insurance scheme provides no other paths of recovery for these innocent victims.\textsuperscript{25} Legislation in forty-eight states requiring a mandatory offer or inclusion of UM with every automobile insurance policy demonstrates the importance of UM and highlights the anomalous and precipitous nature of Ohio's approach.\textsuperscript{26}

There are three potentially damaging approaches insurers might take under S.B. 97. In order of increasing severity of harm, they are: (1) making a less-than-meaningful offer of UM;\textsuperscript{27} (2) making UM available only upon request with no offer; or (3) refusing to provide UM even when requested by the insured. All three approaches ultimately result in less drivers carrying UM. This will increase the number of drivers who will be forced to individually bear the burden of uninsured drivers. This is a far less desirable approach to that taken by most other states—preferring that the insurance companies spread the cost among all insured drivers through premiums. This represents a significant step backwards and a cost to Ohio citizens that greatly outweighs the purported benefits derived from S.B. 97.

While it was necessary to address the Scott-Pontzer decision, it was not the legislature that needed to respond. Since insurers had changed their policy language to negate the effect of Scott-Pontzer\textsuperscript{28} and courts had limited Scott-Pontzer's applicability,\textsuperscript{29} prospective legislative change was unnecessary. Furthermore, there were less drastic approaches that the legislature could have taken to simultaneously protect commercial interests and Ohio's drivers.

\textsuperscript{25} See Abate v. Pioneer Mut. Cas. Co., 258 N.E.2d 429, 432 (Ohio 1970) (recognizing that Ohio mandates the UM offer to protect persons who would otherwise go uncompensated). Many of the states requiring that insurers offer UM also provide alternate paths of recovery for victims of uninsured motorists, such as no-fault and unsatisfied judgment funds. See infra notes 53, 208-212 and accompanying text; see, e.g., MASS. GEN. LAWS ANN. ch. 90, § 34M (West 1998) (requiring no-fault insurance in addition to requiring UM in MASS. GEN. LAWS ANN. ch. 175, § 113L (West 1998)); N.J. STAT. ANN. §§ 39:6-61 to -90.1, 39:6A-4 (West Supp. 2003) (establishing an unsatisfied judgment fund and requiring no-fault insurance, respectively, in addition to requiring UM in section 17:28-1.1).

\textsuperscript{26} See 1 WIDISS, supra note 19, §§ 2.1-2.6 (confirming that in 1999 all of the states except for Michigan had a mandatory offer requirement); see infra Appendix (listing each state's UM laws). Michigan repealed its UM law in 1973 when it enacted a comprehensive no-fault system that adequately protects drivers from uninsured motorists. 1 WIDISS, supra note 19, §§ 2.1-2.6.

\textsuperscript{27} A "less-than-meaningful" offer of UM would be an offer by the insurer that fails to adequately inform the insured of the importance of UM and fails to warn the insured of the dangers and risks of driving without UM coverage—in other words, an offer that does not comply with the requirements of a meaningful offer as stated in Linko v. Indemnity Ins. Co., 739 N.E.2d 338 (Ohio 2000). See infra Part III.C.

\textsuperscript{28} See infra text accompanying notes 134-38.
This Note is not only a criticism of the actions taken by the Ohio General Assembly when it enacted S.B. 97, but it is more importantly a recommendation for legislative change. On November 5, 2003, the Supreme Court of Ohio expressly overruled Scott-Pontzer. Simply stated, with the overruling of Scott-Pontzer, the changes brought about with S.B. 97 are no longer necessary. The legislature should simply reenact the pre-S.B. 97 language of section 3937.18.

This Note begins by explaining the birth of UM in the U.S. This is important in order to understand why insurers are statutorily required to play a role in protecting drivers from uninsured motorists. Next, this Note explains the cases in Ohio that led to S.B. 97. Understanding what led to S.B. 97 is helpful in understanding what alternate solutions were available to the Ohio General Assembly for dealing with the insurance "crisis." Then, this Note explains how the legislature could have used more finely tailored drafting to adequately protect all the interests at stake. Finally, this Note explores the other protections the legislature could have implemented to counterbalance the loss in protection that Ohio drivers suffered with the enactment of S.B. 97.

II. THE DEVELOPMENT OF UM: "CLOSING THE GAP"

Due in large part to the efforts of Henry Ford and his Ford Motor Company, automobiles became affordable for people of average and lower income in the early part of the twentieth century. The downside to the innovations and associated reduction in the price of automobiles was that some drivers could afford to purchase automobiles, but could not afford the potential liability associated with ownership. To ensure that those who drove on the roads could cover the cost of injuries and property damage, at least to a minimum degree, caused by their negligent driving, states began enacting financial responsibility laws. These laws required that drivers involved in accidents show proof of financial responsibility. If the driver was unable to do so, the state suspended his or her driving privileges until he or she could produce the proof. This was an imperfect system since it acted only after an accident occurred and did nothing to protect or compensate the person already injured.

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30 Galatis, 797 N.E.2d at 1256.
31 Financial responsibility laws generally require proof of insurance, a government deposit, or a bond. See OHIO REV. CODE ANN. § 4509.45 (West Supp. 2004).
33 Robert G. Notman, A Decennial Study of the Uninsured Motorist Endorsement, 43 NOTRE DAME LAW. 1, 6 (1967) (comparing proof of financial responsibility laws to the first bite doctrine in dog bite cases); see also Duffey, 734 F.2d at 269 (commenting that Ohio's former
The widespread use of UM began in New York. In 1929, New York enacted a Safety-Responsibility Law. Under this law, the state suspended the driving privileges of motorists who were unable to satisfy judgments rendered against them for injury and damages caused by their driving until they could satisfy the judgments. This was refined in 1942 with the “security-type” law. This form of the Safety-Responsibility Law required that the driver show proof of financial responsibility with the reporting of an accident. Failure to do so resulted in a suspension of driving privileges. The “security-type” law had a profound deterrent effect on the number of uninsured motorists driving in New York. During the nine years following the enactment of this law, the number of uninsured drivers declined from 70% to 5%. However, these laws had weaknesses. First, as Senator Hults argued before the New York Senate:

[the Safety-Responsibility Law] does not require a motorist to carry insurance prior to an accident; it is of little comfort to the injured victim that the guilty driver loses his driving privilege; and the law is frequently evaded by the guilty driver obtaining a release which does not truly reflect the extent of the injury. Further, the (Joint Legislative) Committee holds that the fact that the Bureau of Motor Vehicles was required to issue approximately 10,000 suspensions in 1952 indicated a weakness in the law.

In 1952, there still remained between 4-10% uninsured motorists residing in New York, plus many other out-of-state uninsured drivers who were injuring innocent New York drivers. New York’s Governor Dewey sought greater protection for New York drivers. His efforts to further reduce the level of uncompensated damages caused by these uninsured motorists were referred to as “closing the gap.” He stated:

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Financial Responsibility Act ‘embodie[d] a ‘one-bite’ approach . . . by permitting motorists the privilege of driving without any proof of financial responsibility until they incur an accident-related judgment and fail to satisfy it’.

35 Id.
36 Id.
37 Id. at 38.
38 Id.
39 Id. at 44 (citing a 1953 press release by Senator William Hults, Jr.).
40 Id. at 38.
41 Id.
I believe the time has come to challenge the right to drive of that small minority who continue to operate vehicles without insurance or other evidence of ability to recompense the victims of their accidents. This is not a new departure. Under our Safety Responsibility Law, drivers who are involved in accidents must maintain proof of insurance or financial responsibility. The present law does not begin to operate, however, until after the damage is done and victims may be dead or permanently incapacitated.

The objections that have been raised to a mandatory insurance program can easily be overcome through a well-drafted law and sound administration. There is no necessity for the creation of a state fund as part of a mandatory insurance program.

What is required is the willingness and determination to devise a system which will eliminate the irresponsible motorist from the highways and maintain the integrity of the insurance companies doing business in this state. I am unwilling to believe that we lack the resourcefulness or integrity to solve the administrative problems.

The Dewey Administration pushed for a compulsory insurance program similar to that in Massachusetts, modified to address the concerns of the opposition or, in the alternative, a state-operated unsatisfied judgment fund. The insurance industry strongly opposed the compulsory insurance plan. This seems counterintuitive. A scholar described the industry's peculiar opposition as "the voice of the insurance [industry] ... quixotically defending the right of people not to buy insurance." Why would a commercial enterprise oppose the government-mandated purchase of its product or service? One reason was that the industry believed if states required all drivers to buy in-

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43 See Netherton & Nabhan, supra note 34, at 39-40; see infra note 53 (describing the judgment fund).
surance, its customers would view it as a tax and the insurers as tax collectors. The industry believed this would instill a sense of resentment and suspicion against it and could change the entire way the insurance industry operated. The industry also made altruistic arguments that compulsory insurance was an inadequate solution. It argued that the law would only govern New Yorkers and, therefore, did not account for out-of-state drivers and did not protect New Yorkers traveling out-of-state. It also argued that people would drive more recklessly and lawlessly with liability protection.

Ultimately, though, the insurance industry was concerned that it would lose money in New York as it had in Massachusetts. The insurers claimed to have lost $25 million over a six-year period in Massachusetts because of the compulsory liability insurance law. The industry was also opposed to government control and the state forcing it to insure those it did not wish to insure. The industry did not want to bear the burden of injuries caused by poor and dangerous drivers.

The legislative committees and insurers could not agree on how best to address the gap problem. Strong disagreements marked their discussions. Some supported the Massachusetts compulsory plan, others supported a government fund similar to New Jersey's plan, and still others argued for an impoundment plan. In 1954, when the

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46 Id.
47 Id.
50 KEETON & O'CONNELL, supra note 45, at 93 (citing Am. Employers' Ins. Co. v. Comm'r of Ins., 142 N.E.2d 341 (Mass. 1957)). These losses are deceiving, however, when offset with profits earned from other forms of automobile insurance. For example, although insurers lost $3.5 million on compulsory liability insurance in Massachusetts in 1962, profits from other coverages resulted in a net profit of $9.1 million for that year. Id. at 94.
52 The industry enjoyed the freedom of choosing whom to insure. It preferred not insuring dangerous drivers with high accident rates or poor drivers who may be unable to make premium payments.
53 These government funds, sometimes called "Unsatisfied Judgment Funds," are funded by car owners. The fees are collected with annual automobile license registration. The fund provides a pool of money to provide compensation to injured persons who would otherwise go without relief. Ross D. Netherton, Compensation of Automobile Accident Victims, Part 1, 2 AM. U. INT. L. REV. 1, 18-19 (1952-1953).
54 Under an impoundment plan, if a driver involved in an accident cannot show proof of insurance, his car is impounded until: (a) he can produce security sufficient to satisfy any judgment resulting from the accident; (b) six months have passed without any action filed against him from the accident; or (c) the driver shows proof that a suit had been filed and terminated in
reconvening legislature reintroduced the issue, the insurers sensed the issue was not going away. In a last-ditch effort to avoid compulsory liability insurance, the insurance industry created and offered what it termed a “voluntary plan,” what we today call uninsured motorist insurance. While insurers offered UM as an alternative to compulsory insurance, the New York legislature shocked the insurance industry by deciding that both UM and compulsory liability insurance were necessary to adequately protect drivers. In 1956, Governor Dewey’s successor, Governor Harriman, signed the Compulsory Insurance Act notwithstanding that insurers offered UM as a concession. As one insurer expressed the purported betrayal: “To the everlasting shame of political machinations, the public welfare was disregarded and a compulsory plan was enacted into law in [New York].”

Compulsory automobile insurance coupled with UM was effective, providing a fair and proper method for distributing the burden of uninsured motorists among their victims, drivers, and the insurance industry. New Hampshire, in 1957, was the first state requiring every auto insurance policy to include UM. Soon after, the rest of the states followed suit. While some states require UM inclusion in every automobile insurance policy, others allow the insured to reject the coverage. Today, every state except Michigan and Ohio require that insurers offer or include UM with every automobile insurance policy issued.

Future developments of uninsured motorist coverage led to underinsured motorist coverage. This type of insurance applies when the limits of coverage available for payment to the insured are below the limits of the insured’s UM. Underinsured coverage pays the difference between the underinsured motorist’s liability limits and the in-

his favor or to the satisfaction of the other party. Id. at 20.

55 Netherton & Nabhan, supra note 34, at 46.
57 WIDISS, supra note 5, § 1.12, at 16 (“The insurance industry conceived and developed the uninsured motorist endorsement in an attempt to forestall the enactment of . . . compulsory insurance . . . .”); Schwartz, supra note 6, at 422 (observing that UM was offered by the insurers in an effort to stave off the adoption of compulsory insurance).
58 Netherton & Nabhan, supra note 34, at 51.
59 Moser, supra note 56, at 720.
61 See Notman, supra note 33, at 6.
62 1 WIDISS, supra note 19, § 2.5.
63 See supra note 26.
This corrected the irony that an insured could recover more if an uninsured driver hit him rather than a minimally insured driver. For ease of discussion, this Note refers to both underinsured and uninsured motorist coverage as UM.

III. THE IMPETUS OF S.B. 97

Before S.B. 97, Ohio’s UM statute read:

3937.18 Uninsured and underinsured motorist coverage

(A) 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 offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

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

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64 OHIO REV. CODE ANN. § 3937.18(C) (West Supp. 2004).
66 Arguably underinsured and uninsured coverage are the same coverage. “[U]nderinsured motorist coverage is simply a different point on an undivided continuum between the amount of the insured’s own liability coverage and any lesser amount of coverage of the other driver.” Merkel, 693 A.2d at 708; see also Md. CODE ANN., Ins. § 19-509 (2002) (using “uninsured” to encompass both uninsured and underinsured); WASH. REV. CODE ANN. § 48.22.030 (West Supp. 2005) (using “underinsured” to refer to both).
A. Selander: Some Commercial General Liability Policies Require UM Offers

Coupling financial responsibility laws with UM worked well enough in Ohio until the Ohio Supreme Court began a liberal expansion of UM to limits never imagined by the insurance providers, insurance customers, or legislature. The expansion began with Selander v. Erie Ins. Group.68 Two brothers, Eugene and Glenn Selander, were electricians and partners at Twin Electric.69 In 1992, the two were traveling in a Twin Electric pickup in the course and scope of employment when they were involved in a car accident with David Clark.70 The accident was caused by the negligence of Mr. Clark.71 As a result of the accident, Eugene lost his life, and Glenn suffered serious injuries.72 After collecting a combined sum exceeding $500,000,73 the Selanders’ clever attorney argued that the commercial general liability policy held by Twin Electric was an automobile or motor vehicle liability policy within the meaning of section 3937.18.74

Prior to S.B. 97, establishing that a commercial general liability or umbrella insurance policy is a motor vehicle policy within the meaning of section 3937.18 was a linchpin in a plaintiff’s case in the UM setting. Once established, courts provided UM by operation of law in an amount equal to the liability limits, unless it could be shown that the insured received a meaningful offer and gave express, written rejection of UM.75 Insurers rarely made the proper offer or received the proper rejection of UM.76 For this reason, most commercial insurance policies issued prior to Selander found to be motor vehicle policies were likely to have UM implied by operation of law.77

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68 709 N.E.2d 1161 (Ohio 1999).
69 Id. at 1162.
70 Id. at 1161.
71 Id.
72 Id.
73 Eugene’s widow, the administrator of Eugene’s estate, Glenn, and Glenn’s wife collectively recovered $103,500 from the tortfeasor’s liability insurance policy. Eugene’s wife and estate recovered an additional $200,000 from UM coverage provided in Twin Electric’s Commercial Auto Policy. Glenn and his wife recovered $100,000 from the same commercial policy, as well as $100,000 from UM coverage under a separate personal auto insurance policy. Id. at 1161-62.
74 See id. at 1163-64 (although the policy was not an automobile policy per se, liability coverage for non-owned vehicles, in the court’s opinion, brought the policy within the purview of Ohio’s UM law).
76 This occurred either because the insurers were unaware of the type of offer or rejection required by the statute or, more likely, because they did not consider the policy to be a motor vehicle policy requiring a UM offer.
77 Insurers were careful to make the proper, written offer and to attain the proper, signed
In a 4-3 decision, the court created UM by operation of law at the liability limits of $2 million and extended it to the Selander brothers. In its reasoning, the court found that coverage of “hired” or “non-owned” automobiles in the general liability policy provided sufficient coverage of automobiles to make the policy a motor vehicle policy. From this opinion came the oft-quoted sentence: “Where motor vehicle liability coverage is provided, even in limited form, [UM] must be provided.” Suddenly UM went from providing minimal compensation to providing excess coverage in the millions on commercial policies, some even expressly excluding UM coverage. As Chief Justice Moyer prophetically mused in his dissent: “The majority has opened a Pandora’s box. This opinion will overwhelmingly reach every existing company policy.” With this new law in hand, the plaintiffs’ attorneys of Ohio rushed to share in the bounty of this Pandora’s box.

B. Scott-Pontzer: An Off-Duty Employee Can Be an Insured Under Commercial Insurance Policies

Exactly three weeks after the Selander decision, the court expanded UM even further in the highly criticized Scott-Pontzer decision...
sion.\textsuperscript{83} Again, the insured did not make the proper offer and rejection of UM, and the court implied UM as a matter of law at the policy's liability limits. This time, however, the court extended UM to an off-duty employee of the corporate policyholder. The court found that naming only a corporation as the named insured was ambiguous. Construing ambiguous terms against the insurer,\textsuperscript{84} as the court claimed was "universally h[e]ld," the court found the plaintiff's deceased husband to be an insured under the commercial policy.\textsuperscript{85} The court reasoned:

[I]t would be reasonable to conclude that "you," while referring to Superior Dairy, also includes Superior's employees, since a corporation can act only by and through real live persons. It would be nonsensical to limit protection solely to the corporate entity, since a corporation, itself, cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Here, naming the corporation as the insured is meaningless unless the coverage extends to some person or persons—including to the corporation's employee.\textsuperscript{86}


\textsuperscript{84} This is the well-established doctrine of \textit{contra proferentem}. Under this doctrine, contract language is construed against the party that drafted the contract since that party controlled the language and created the ambiguity. 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:12 (4th ed. 1999) ("These principles are often applied to insurance policies, which are drafted solely by the insurer."); 2 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 22:14 (3d ed. 1997) (stating the same proposition). \textit{Contra} Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021, 1031 (Md. 1993) (citing Cheney v. Bell National Life, 556 A.2d 1135, 1138 (Md. 1989) ("Maryland does not follow the rule, adopted in many jurisdictions, that an insurance policy is to be construed most strongly against the insurer.").

\textsuperscript{85} Scott-Pontzer, 710 N.E.2d at 1119.

\textsuperscript{86} \textit{Id.} at 1119. Of course, this assertion would be correct if the corporation actually chose to purchase UM. UM provides very little, if any, protection to a corporation. Because, as the Scott-Pontzer court pointed out, a corporation cannot suffer bodily injury or death, one must construe the corporation to mean the employees in order for UM to have any usefulness or meaning. However, Superior Dairy purchased the automobile and umbrella policies to protect its assets in the form of liability protection and property protection. In this context, it is absolutely sensible to limit protection to the corporation since a corporation can become liable for damages to others and can own property such as a fleet of vehicles.

The primary mistake the court made was to import public policies applicable to individuals to corporations. An individual would want to purchase UM coverage, to protect one's self, along with one's automobile liability policy purchased to protect one's assets. A corporation, on the other hand, would not make the same choice. A corporation, such as Superior Dairy, would want to protect its assets. However, since a corporation cannot suffer bodily injury or death, the corporation would not choose to purchase UM. The court was correct, a corporation as the only named insured in a UM policy is nonsensical. This should have led the court to refuse to imply UM as against the obvious intent of the parties, instead of including all the employees of Superior Dairy as named insureds—a far less reasonable response.
Even more perplexing, the court refused to enforce the express restriction within the excess/umbrella insurance policy that coverage apply only to employees acting within the scope of employment. The court held that "any language in the . . . umbrella policy restricting insurance coverage was intended to apply solely to excess liability coverage and not for purposes of underinsured motorist coverage." 87 Henceforth, whenever courts created UM by operation of law, courts did so without the exclusions, restrictions, or limitations with which insurers ordinarily would have issued it. 88

Three months later, in September of 1999, the court, in Ezawa, 89 in a one-sentence opinion, extended the faulty Scott-Pontzer logic to find that the son of an employee injured in a car accident completely unrelated to the employer's business was insured under a commercial insurance policy. "Pandora's box continue[d] to release its contents." 90

If it truly is "well settled that an insurance policy is a contract and that the relationship between the insured and the insurer is purely contractual in nature," 91 then Scott-Pontzer was an erroneous decision. It is a fundamental tenet that contracts are to be interpreted so as to give effect to the parties' intentions. 92 Neither the insurer nor the corporate policyholder intended to provide UM to the corporation's employees and their families when engaged in activities completely detached from the corporation's business. 93 In fact, the plain

Applying insurance laws to commercial and individual insureds without distinction is a problem that the Scott-Pontzer court shares with the legislature who overruled it with S.B. 97. Both the legislature and courts of Ohio need to realize that commercial entities and individuals purchase insurance for different reasons, possess disparate sophistication, and that each invoke different public policies. Had the legislature realized this, perhaps they would have wisely left individual policies alone and applied S.B. 97 only to commercial policies as suggested infra Part V.B.1.

87 Id. at 1120.
88 Examples of these limitations not extended to UM created by operation of law include deductible limitations, see Hall v. Kemper Ins. Cos., No. 02CA17, 2003 WL 22336027, at *18 (Ohio Ct. App. Sept. 30, 2003), and automobile exclusions, see Burkart v. CNA Ins. Co., No. 2001CA00265, 2002 WL 316224 (Ohio Ct. App. Feb. 25, 2002) (refusing to enforce clause that excluded coverage for bodily injury arising out of the use of an automobile).
90 Id. at 1143 (Stratton, J., dissenting).
91 Scott-Pontzer, 710 N.E.2d at 1119.
93 Scott-Pontzer, 710 N.E.2d at 1122-23 (Stratton, J., dissenting); Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1266 (Ohio 2003) ("[I]t is doubtful that either an insurer or a corporate policyholder ever conceived of contracting for coverage for off-duty employees occupying noncovered autos, let alone the family members of the employees.").
language of the contract clearly evinces their desire not to insure employees outside the scope of employment.\textsuperscript{94}

Nonetheless, \textit{Scott-Pontzer} and its progeny became the law, and plaintiffs' attorneys across Ohio reexamined old cases and eagerly inspected insurance policies issued to clients' employers or clients' family members' employers. To the attorneys' delight, many of these policies contained the \textit{Scott-Pontzer} ambiguity—the corporation as the only named insured.\textsuperscript{95} The attorneys were further aided by the classification of UM claims as contractual claims\textsuperscript{96} with a fifteen-year statute of limitations\textsuperscript{97} as opposed to the two-year limit for tort claims.\textsuperscript{98}

The critical element that permitted the courts to impose UM, when no premium was received for the coverage, was the insurer's failure to make a proper UM offer. The case law followed in \textit{Scott-Pontzer}, \textit{Selander}, and \textit{Ezawa} required that the insurer's offer and the insured's rejection both be in writing.\textsuperscript{99} Because insurers rarely made proper UM offers,\textsuperscript{100} courts often provided coverage by operation of law.

\section{C. Linko: The Meaningful Offer Requirement}

In 2000, the court landed another huge blow against the insurance industry in Ohio. It brought even more potential claims within the \textit{Scott-Pontzer} purview with the \textit{Linko}\textsuperscript{101} decision. \textit{Linko} held that section 3938.17 required a "meaningful" offer, one that is "an offer in substance and not just in name."\textsuperscript{102} To constitute a meaningful offer

\textsuperscript{94} See \textit{Scott-Pontzer}, 710 N.E.2d at 1120. By extending coverage to off-duty employees and their families, the court ignored what Professor Keeton termed an "implicit understanding" that an ambiguity will not be construed in favor of coverage if such construction is against the reasonable expectations of the insured. Robert E. Keeton, \textit{Insurance Law Rights at Variance with Policy Provisions}, 83 HARV. L. REV. 961, 969 (1970). Clearly in \textit{Scott-Pontzer} and its progeny, the employees and their relatives did not expect to be insured by their employers' insurance policies. Only after consulting attorneys did the insureds realize that they had claims against these commercial insurers.


\textsuperscript{97} \textit{OHIO REV. CODE ANN.} § 2305.06 (West 2004).

\textsuperscript{98} \textit{OHIO REV. CODE ANN.} § 2305.10 (West 2004).


\textsuperscript{100} See \textit{supra} note 76 and \textit{infra} note 109 and accompanying text for possible explanations of why the insurers failed to make the proper UM offers.

\textsuperscript{101} \textit{Linko v. Indemnity Ins. Co.}, 739 N.E.2d 338 (Ohio 2000).

\textsuperscript{102} \textit{Id.} at 342.
and to avoid courts creating UM by operation of law, the Linko court required the insurer to submit three elements in writing to the insured: (1) a brief description of the coverage; (2) the premium for that coverage; and (3) an express statement of the UM coverage limits. The court required written offers and rejections to avoid needless litigation over whether either was in fact made. The court required the three elements to assure that the insured made an informed decision of whether or not to reject UM. Like Scott-Pontzer and Selander, the court was again divided 4-3 in favor of requiring this meaningful written offer.

While there is a strong policy reason for requiring a meaningful offer and written rejection of UM, a state should implement it statutorily. Connecticut, for example, requires insurers to make a meaningful offer of UM by statute. The statute provides detailed instructions to insurers explaining how to make the UM offer, even prescribing some of the exact language to be used on the offer form. Section 38a-336(a)(2) states that no reduction or rejection is effective unless any named insured has signed an informed consent form which shall contain: (A) An explanation of uninsured and underinsured motorist insurance approved by the commissioner; (B) a list of uninsured and underinsured motorist coverage options available from the insurer; and (C) the premium cost for each of the coverage options available from the insurer. Such informed consent form shall contain a heading in twelve-point type and shall state: "WHEN YOU SIGN THIS FORM, YOU ARE CHOOSING A REDUCED PREMIUM, BUT YOU ARE ALSO CHOOSING NOT TO PURCHASE CERTAIN VALUABLE COVERAGE WHICH PROTECTS YOU AND YOUR FAMILY. IF YOU ARE UNCERTAIN ABOUT HOW THIS DECISION WILL AFFECT YOU, YOU SHOULD GET ADVICE FROM YOUR INSURANCE AGENT OR ANOTHER QUALIFIED ADVISOR."

Stipulating the type of offer required by section 3937.18 in a retroactive judicial decision was unfair to insurers. The language of the

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103 Id.
104 Id. at 343.
105 Chief Justice Moyer, Justice Stratton, and Justice Cook dissented in Scott-Pontzer, Selander, and Linko.
106 See Linko, 739 N.E.2d at 343-44 (Cook, J., dissenting) (accusing the court of imposing "extrastatutory requirements upon insurers" with the three element requirement).
statute only required that UM be "provided."\textsuperscript{108} The insurers failed to make Linko offers because they were unaware that such a descriptive offer was required.\textsuperscript{109} It followed that practically every motor vehicle policy issued prior to Linko brought before Ohio courts without UM would have it imposed by operation of law. Worse yet for insurers, when UM was imposed by operation of law it was implied without any of the exclusions or restrictions with which it would normally have been issued.\textsuperscript{110}

IV. S.B. 97: ELIMINATING THE UM OFFER REQUIREMENT

A. The Battle for Legislative Change

The year 2000 became a very bad year for insurers and their commercial customers to whom the insurers passed on their losses via premium increases.\textsuperscript{111} The insurers marched to Ohio's capital with their commercial customers in tow, who were for the most part small businesses, to plead their case with the legislators. One by one they testified before Ohio's General Assembly. They testified how these two cases, Scott-Pontzer and Linko, had resulted in losses for the insurers and astronomical increases in premiums for their commercial customers.\textsuperscript{112} The insurance juggernaut Travelers lamented that it had to pay out $50 million in claims while only collecting $47 million in premiums.\textsuperscript{113} The insurance industry and its legislative allies proposed S.B. 97, which would make offers of UM completely optional.


\textsuperscript{111}It is important to note that the insurance industry's outcry related to Scott-Pontzer's effect on policies that had already been issued. Since the industry quickly responded to Scott-Pontzer by clarifying the ambiguous language and making the appropriate offer of UM, Scott-Pontzer had virtually no prospective effect on policies issued after the holding. See supra text accompanying note 28 and infra text accompanying notes 130-132.

\textsuperscript{112}It is unclear whether the premium increases were levied to offset prior losses, to offset future losses on policies issued prior to Scott-Pontzer and its progeny, to cover the additional risk posed by an unpredictable and anti-insurance Ohio Supreme Court, or any combination of these reasons.

\textsuperscript{113}Bill History, supra note 8. It is difficult to feel sympathy for Travelers' $3 million loss when one considers that Travelers' enjoyed a $1.1 billion net profit in 2001, a year when most corporations experienced losses. TRAVELERS PROPERTY CASUALTY CORP., 2002 ANNUAL REPORT (2003), available at http://investor.stpaultravelers.com/phoenix.zhtml?c=177842&p=irol-reports. Travelers' grievances over relatively small losses resulting in a net profit have the same hollow ring as the insurance industry's complaints over the losses in Massachusetts due to its compulsory insurance laws. See supra note 50.
and reduce the fifteen-year statute of limitations on UM claims to two years. In effect, eliminating the offer requirement eliminates the opportunity for courts to imply UM and, in the unlikely event that courts imply UM, the effects of such a decision would be much less costly with the two-year statute of limitations.

Mr. Frank Todaro, representing the Ohio Academy of Trial Lawyers, and Ms. Graci Jungkurth, a victim advocate for Mothers Against Drunk Driving, argued for a statutory change less drastic than the complete elimination of the offer requirement. Mr. Todaro made arguments similar to those in this Note: (1) that Linko and Scott-Pontzer could be sufficiently dealt with by eliminating the need for an offer only to commercial entities while retaining the offer requirement for individual policies; (2) that insurers could cease to offer UM under S.B. 97; and (3) that S.B. 97 would be a drastic divergence from the rest of the United States. Ms. Jungkurth’s story is similar to the draconian hypothetical posed at the beginning of this piece. An uninsured drunk driver hit Ms. Jungkurth, her two sons, and her husband. Her husband and one of her sons died as a result. She testified that without the mandatory offer and explanation, she may not have purchased UM and would have lost everything.

B. The New UM Statute

In the end, the commercial customers and insurers won the argument. The Ohio House and Senate overwhelmingly approved S.B. 97, and Governor Taft signed it into law on October 31, 2001. Its proponents got their optional offer of UM, but had to settle for a three-year statute of limitations, rather than the proposed two-year limit. In its new form, section 3937.18 states, in relevant part:

3937.18 Uninsured and underinsured motorist coverage.

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures 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, may, but is not required to, include uninsured motorist coverage, underinsured

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114 Bill History, supra note 8.
115 Id.
116 Id.
117 Id.
118 See id.
motorist coverage or both uninsured and underinsured motor-

S.B. 97 states the intent of the General Assembly in enacting the new act to:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage . . .

(2) Eliminate the possibility of uninsured motorist coverage . . . being implied as a matter of law in any insurance policy . . .


C. The Problem with the New Statute

The major impact of section 3937.18 is the complete elimination of the UM offer requirement. Insurers may now make the offer in any manner they choose, make no offer at all, or refuse to provide UM altogether. Since most individuals are not savvy or sophisticated risk managers, they may not understand the need and value of purchasing UM. Without a meaningful offer and an appreciation for UM, fewer individuals will purchase the coverage.\(^{121}\)

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\(^{121}\) See Rice, supra note 60, at 518. After requiring a UM offer, the number of consumers in California purchasing UM with their automobile insurance policies rose from 25% to 90%. Id. Thus, the impact of requiring a meaningful offer of UM to assure its purchase cannot be overstated.
with the written rejection requirement will further reduce the number of drivers carrying UM.\textsuperscript{122} Worse yet, the insurers may refuse to provide UM even when requested by the purchaser.\textsuperscript{123}

It is important to require that insurers make a meaningful offer of UM to consumers to assure its continued purchase. A large inequality in bargaining power exists between insurers and consumers.\textsuperscript{124} Insurers need to apprise consumers in conspicuous and clear language of the availability of UM. Courts and legislatures recognize that insurance policies are usually contracts of adhesion\textsuperscript{125} and that consumers generally accept the policies “as is.”\textsuperscript{126} Furthermore, the consumer may underestimate the need for UM. The consumer may mistakenly believe that there are very few or no uninsured motorists because of the compulsory liability laws, or that his liability policy protects him from uninsured motorists. Underestimating the number of uninsured motorists becomes even more dangerous when one considers that uninsured motorists cause a disproportionately large number of car accidents.\textsuperscript{127}

Another more subtle effect that S.B. 97 will have is changing the public policy of Ohio. The General Assembly boldly stated that its intent was to express the public policy of Ohio as eliminating the UM offer requirement.\textsuperscript{128} In the future, when judges are confronted with cases involving UM, they will tend to devalue the importance of UM. This may result in grave and unintended consequences, such as an

\textsuperscript{122} See Schwartz, supra note 6, at 423 (stating that the high percentage of drivers carrying UM is “due, in part, to the burdens that state law imposes on both the insurer and the insured if a rejection of [UM] is being considered”). By removing the “burden” posed by the UM offer and rejection requirements, S.B. 97 is sure to decrease the number of insureds who purchase UM.

\textsuperscript{123} Recall that insurers dislike UM because of unfavorable judicial treatment and because it forces them to oppose their customers: the insureds. See supra note 5 and accompanying text. Insurers created UM only as a way of avoiding compulsory liability insurance. See supra note 57. A practitioner faced with an insurer who has refused to provide UM coverage may consider using a “regulatory estoppel” argument in order to have UM implied as a matter of law. Representatives of the insurance industry represented to the General Assembly that if S.B. 97 was passed, insurers would continue to offer UM. First Hearing on S.B. 97 Before House Comm. on Ins., 124th Gen. Assemb., Reg. Sess. (Ohio 2001). Because the General Assembly relied on these representations in passing S.B. 97, insurers should be estopped from refusing to offer the coverage. Cf. Morton Int’l, Inc. v. Gen. Accident Ins. Co. of Am., 629 A.2d 831, 855 (N.J. 1993) (considering “estoppel-type arguments” for representations made by the insurance industry throughout the regulatory history of the pollution-exclusion clause in commercial general liability insurance policies).

\textsuperscript{124} Keeton, supra note 94, at 963.

\textsuperscript{125} Id. at 966.

\textsuperscript{126} See Ady v. West Am. Ins. Co., 433 N.E.2d 547, 549 (Ohio 1982) (noting that “[m]ost consumers accept the policies in toto and do not question, let alone actively negotiate to change or omit, any of the provisions in the pre-printed forms”).

\textsuperscript{127} Schwartz, supra note 6, at 422.

innocent victim receiving no compensation. UM exclusions previously treated with judicial hostility will enjoy a much warmer reception in Ohio courts.

It is for these reasons that forty-eight states require that insurers at least make an offer of UM with every automobile insurance policy sold.

V. HOW OHIO'S GENERAL ASSEMBLY SHOULD HAVE ADDRESSED SCOTT-PONTZER

A. Legislative Change Was Unnecessary

The Ohio Legislature did not need to change section 3937.18. The statute, after all, was not the problem. The logic of Scott-Pontzer was not the result of a poorly-worded statute in need of redrafting. Instead, it was the combined effect of a misguided court and a poorly-worded insurance form, a court and form that have since changed. Furthermore, it was evident at the time of S.B. 97 that Scott-Pontzer had a limited life span and would die out without any legislative intervention.

After the Scott-Pontzer ruling and prior to S.B. 97, insurers quickly modified the language in their policies to protect themselves from the costly holding. They removed the Scott-Pontzer ambiguity from their policy forms and made the proper Linko offer of UM to foreclose the possibility of UM implied as a matter of law. That being the case, Scott-Pontzer did not apply to policies issued after its holding and had "little precedential value."

Since S.B. 97 applied prospectively and not retroactively, it is unclear why it was necessary. Since all the insurance forms were changed after Scott-Pontzer and prior to S.B. 97, the Ohio General Assembly did not need to overrule Scott-Pontzer prospectively. In

129 See State Farm Auto. Ins. Co. v. Alexander, 583 N.E.2d 309 (1992). In Alexander, the insured was injured while occupying his own insured vehicle as a passenger. The insured, Percy Alexander, had liability and UM automobile insurance. However, due to exclusions in both coverages, Percy fell into a paradoxical no man's land. Because the driver of Percy's car caused the accident, Percy's liability insurance would have covered anyone in the world who was injured as a result except, ironically, Percy due to a clause that excludes coverage for bodily injuries to an insured. Percy's UM coverage excluded injuries caused by the driver of a vehicle insured under the same policy, the so-called "household exclusion." The court found that the UM exclusion was inconsistent with the former section 3937.18 and consequently found the exclusion unenforceable. With S.B. 97, it is clear that applying the "household exclusion" is consistent with the new statute and the new public policy. Thus, Percy Alexander would be unable to recover under his liability and UM policies under today's regime.

130 Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1271 n.10 (Ohio 2003).

131 Id. at 1277 (Pfeifer, J., dissenting).

132 Id.
other words, the damage was already done. What the insurers really needed was a retroactive judicial overruling to rescue them from the commercial policies issued before *Scott-Pontzer*. Undaunted by this reality, the insurers seized the opportunity to campaign for legislative change. While S.B. 97 did not save them from *Scott-Pontzer*, it provided the industry with a great benefit by greatly reducing the possibility of a court creating UM by operation of law in an insurance policy. S.B. 97 compensated the insurance industry for a past judicial wrong with Ohio’s drivers picking up the tab.

Courts in Ohio, limiting the *Scott-Pontzer* effect with a patchwork of exceptions and limitations, made legislative change even more unnecessary. The most popular and effective limitation was barring the claim for violation of the notice or subrogation provisions of the policy. Most automobile insurance policies require that an insured give notice to the insurer that an action giving rise to a claim has occurred. In a UM setting, this is especially important for the insurer to protect its interests by verifying that all possible tortfeasors are in fact judgment proof. In Ohio, the courts relieve an insurer of its obligation to provide coverage “if it is prejudiced by the insured’s unreasonable delay in giving notice.”

Courts in Ohio have used this provision to deny *Scott-Pontzer* claims. Those courts held that failure of an insured to give notice to an insurer of a claim occurring prior to *Scott-Pontzer* is unreasonable, notwithstanding that the insured had no way of knowing that such a

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133 *See* Press Release, Hannah News Service, Ohio's Auto Insurance Lower Than Most States (Aug. 14, 2001) (on file with author) (stating that insurers estimate that $1.5 billion would be paid out on *Scott-Pontzer* related claims even after S.B. 97 was passed); T.C. Brown, *Court Upends Its Own Ruling on Insurance*, The Plain Dealer (Cleveland, OH), Nov. 6, 2003, at 1 (even after S.B. 97, insurers had reserved $2 billion for *Scott-Pontzer* claims).

134 *See* supra note 19, § 42.2.

135 Notice is required to protect an insurer’s subrogation rights. Early notice assures the insurer effective subrogation by giving it the ability to fully investigate the claim and to fully pursue all possible tortfeasors and relevant insurance policies. *See* Ferrando v. Auto-Owner's Mut. Ins. Co., 781 N.E.2d 927 (Ohio 2002); *see also* supra note 19, § 44.4. The notice and subrogation provisions also help protect the insurer from possible collusion between the insured and tortfeasor. *See* Bogan v. Progressive Ins. Co., 521 N.E.2d 447, 456 (Ohio 1988), *overruled on other grounds* by Ferrando v. Auto-Owner's Mut. Ins. 781 N.E.2d 927 (Ohio 2002).

Without subrogation and notice requirements, there would be little incentive for an insured to seek a large recovery from a tortfeasor whose liability limits are below the insured’s UM limits. Because stacking is not permitted, the insured’s total possible recovery will be his UM limits regardless of how much is collected from the tortfeasor. The difference between the UM limits and the amount recovered from the tortfeasor will be paid by the UM insurer. It is of little consequence to the insured how the distribution is allocated, but it is of a great consequence to the insurer. *See* supra note 78 for discussion on stacking. Furthermore, an insured may, for convenience, prefer to recover from the insurer rather than the tortfeasor. *Schwartz, supra* note 6, at 430.

136 *Ferrando*, 781 N.E.2d at 945.
claim existed and further being unaware of any notice provision within the policy. They ruled that awaiting a favorable Supreme Court decision is not a reasonable excuse for the delay. This limitation could effectively defeat all Scott-Pontzer claims except for the rare occasion when the claimant could show that the insurer suffered no prejudice from the delay.

Insurers will no longer need to rely on this patchwork of exceptions and limitations to Scott-Pontzer. On November 5, 2003, the conservative majority of the Ohio Supreme Court came to the rescue of the insurance industry. In yet another 4-3 decision, Galatis overruled the highly criticized Scott-Pontzer decision. Galatis held that naming a corporation as the insured could extend insurance coverage to employees but "only if the loss occurs within the course and scope of employment." Because of the changing composition of the Ohio Supreme Court from a liberal to conservative majority, the Ohio General Assembly might have foreseen this action by the court. Such foresight would have made a legislative change even less necessary.

B. Overrule With More Finely Tailored Drafting

The Ohio General Assembly could have modified Section 3937.18 to negate the effects of Scott-Pontzer and its progeny while preventing similar future actions by the judiciary and assuring the availability and presence of UM in personal automobile insurance policies. Legislative responses should have focused on the insurance industry's major complaint: the judicial creation of UM at the extremely high liability limits when the insured paid no premium.

1. The Commercial Exception

To best achieve the above-stated objectives, the Ohio General Assembly should have eliminated the requirement of a UM offer for commercial general liability, excess liability, and umbrella policies, while retaining the offer requirement for personal automobile insur-


138 See Ferrando, 781 N.E.2d at 929.

139 Galatis, 797 N.E.2d at 1259.

140 Id.
ance policies. Several other states facing a similar problem as Ohio, including Arizona, took this approach. \(^{141}\) Recall that Selander relied on the Arizona Supreme Court's *Gilmore* decision for implying UM into a commercial general liability policy. \(^{142}\) Arizona statutorily overruled *Gilmore* in 1993 with the following addition to its UM statute:

An insurer is not required to offer, provide or make available coverage conforming to this section in connection with any general commercial liability policy, excess policy, umbrella policy or other policy that does not provide primary motor vehicle insurance for liabilities arising out of the ownership, maintenance, operation or use of a specifically insured motor vehicle. \(^{143}\)

Arizona limited its statutory overruling to commercial policies and left individual policies alone.

This approach would foreclose the possibility of the judiciary imposing UM in a commercial insurance policy where the parties did not intend UM. The Arizona statute does not limit a corporation’s option to purchase the coverage if so desired. Yet the offer requirement persists for policies that provide primary motor vehicle insurance for vehicles specifically identified, \(^{144}\) which are likely the only cars that corporations would desire to cover with UM. Corporations might choose to provide UM coverage to drivers and passengers of

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\(^{141}\) It is interesting to note that Arizona contemplated completely eliminating the UM offer requirement as Ohio has with S.B. 97. *See* Joel DeCiancio, Comment, *Legislative Review S.B. 1445—The Legislature’s Attempt to Reverse Judicial Treatment of Uninsured and Underinsured Motorist Coverage in Arizona*, 30 ARIZ. ST. L.J. 469, 480-84 (1998). Due to strong opposition, those interested agreed to place the bill on the November 1998 ballot to allow the voters to decide. *Id.* For reasons unknown to this author, the bill never appeared on the November 1998 ballot, and the Arizona UM statute continues to require insurers to offer UM. *ARIZ. REV. STAT. ANN.* § 20-259.01 (West Supp. 2004).


\(^{143}\) *ARIZ. REV. STAT. ANN.* § 20-259.01(L) (West Supp. 2004);

\(^{144}\) *ARIZ. REV. STAT. ANN.* § 20-259.01(L) (West Supp. 2004).
company cars to protect those furthering its business, and also to avoid possible lawsuits against it brought by those injured without any other means of recovery.

Eliminating the required offer of UM to commercial purchasers of insurance is a more tailored response to the negative effects of Scott-Pontzer. First, the Scott-Pontzer anomaly only occurs with respect to commercial insurance policies. A fortiori, any legislative response should have focused on commercial policies. Second, a corporation is less in need of a meaningful UM offer than an individual. The two fears regarding S.B. 97 with respect to individuals are: (1) that one may not purchase UM either because he does not appreciate the need and importance for having it or does not know it is available due to a lack of offer; and (2) that one may be unable to purchase UM because insurers refuse to provide it. These fears are not as great for corporate entities. Unlike individuals, corporations have educated and sophisticated business managers who are aware of the available insurance coverages. Therefore, there is little need for an insurer to explain to them the availability and importance of UM since they should already appreciate it. One of the Scott-Pontzer dissenters, Justice Cook, embraced this sentiment in his Gyori dissent: "[I]n relation to the average household consumer [a meaningful offer] more often than not will require an insurance carrier to tender a formal offer explaining the statutory offering requirements and other available options, the same does not hold true for the sophisticated insurance purchaser . . . ."

If insurers do not make UM available, the effects upon a corporation are less severe than the effects upon an individual. Workers' Compensation and personal automobile policies would still protect employees of the corporation when in the course and scope of employment. Furthermore, corporations are unlikely to fret over the inability to protect employees and their families while outside the course and scope of employment. UM, therefore, provides a minimal benefit to a corporation.

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146 This point illustrates how vulnerable Ohio drivers are under this new law. These employees are less likely to carry UM on their personal policies today without a meaningful offer requirement under S.B. 97. They are, therefore, more likely to go without compensation. Instead of eliminating one path of recovery for a victim of an uninsured motorist (the commercial policy), S.B. 97's categorical approach may cut off a second path of recovery as well (the individual's personal policy).

147 See Westfield Ins. Co. v. Galatis, 797 N.E.2d 1256, 1264 (Ohio 2003) (observing that insuring off-duty employees "is extraneous to the general intent of a commercial auto policy" and "absen[t] of any benefit to the . . . corporation").
The impact of implied UM is far more costly to insurers for corporate insurance policies than for personal automobile policies. This is because when courts created UM by operation of law in Ohio, courts did so at the liability limits. For individuals, this means implied UM would in most cases not exceed $100,000. However, for a corporation the limits could easily reach several million dollars. This, together with the fact that Scott-Pontzer only affected commercial policies, explains why commercial insurance policies experienced premium increases exponentially higher than personal automobile policies following Scott-Pontzer.

Frank Todaro and Rep. Metelsky similarly argued in front of the House Insurance Committee to eliminate the offer requirement for commercial policies, but to maintain it for personal automobile policies. The proponents of S.B. 97 who were opposed to exempting personal automobile policies responded that to do so "would dramatically weaken the bill to the point of missing its stated purpose, which is to prevent any future Ohio Supreme Court decisions from expanding the scope of such coverage beyond what the legislature intended."

Maintaining the UM offer requirement for individual policies would not weaken the bill since the court was expanding the scope of UM beyond legislative intent only with respect to commercial policies, leaving personal automobile policies mostly unaffected. The four cases that were actually overruled by S.B. 97 involved only commercial policies. While the Ohio General Assembly claims that S.B. 97 overruled Sexton, this author respectfully disagrees. Sexton, listed as one of the five cases overruled by S.B. 97, was the only listed case that involved a personal automobile insurance policy. The passing of S.B. 97 completely unaffected Sexton since S.B. 267 pre-

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152 Id.

153 See supra text accompanying note 120.
viously overruled that case. Furthermore, the court had halted its expansion of UM by refusing to imply UM into a homeowner’s insurance policy that provided coverage for a limited class of motor vehicles not subject to registration in Davidson v. Motorists Mutual Insurance Co. Davidson was important not only because it showed there were limits to the court’s UM implication, but it more clearly defined for insurers which insurance policies actually require UM offers.

2. Declare Ohio a “Minimum Liability” State

One of the major complaints of the insurance industry was that UM, created by operation of law, was implied at limits equal to the liability limits. This effect was especially harsh with the million dollar liability limits of commercial insurance policies. The language of section 3937.18 compelled the use of the liability limits for the determination of implied UM limits. Prior to S.B. 97, section 3937.18 read: “Uninsured motorist coverage . . . shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage . . . .”

There are two UM philosophies in the United States: “full recovery” and “minimum liability.” The overall policy of UM is the

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154 S.B. 267, 123d Gen. Assemb., Reg. Sess. (Ohio 2000). Sexton involved a father who sought UM coverage under his automobile policy to pay for funeral expenses for his daughter who was killed as a passenger in an uninsured motorist’s car. The court awarded coverage finding that the statute did not require that the insured suffer a bodily injury, only that he be legally entitled to recover damages because of a bodily injury. Sexton v. State Farm Mut. Auto. Ins. Co., 433 N.E.2d 555, 558 (Ohio 1982). S.B. 267 modified section 3937.18 to require that the insured actually suffer the bodily injury in order to recover.

155 744 N.E.2d 713 (Ohio 2001).

156 To be a motor vehicle policy, the policy must provide liability protection for vehicles subject to registration. Davidson, 744 N.E.2d at 718. Further guidance as to what policies require UM offers was provided with House Bill 261. This bill added subsection (L) to section 3937.18 to define a “motor vehicle liability policy” requiring a UM offer as “[a]ny policy of insurance that serves as proof of financial responsibility . . . for owners or operators of the motor vehicles specifically identified in the policy of insurance.” H.B. 261, 122d Gen. Assemb., Reg. Sess. (Ohio 1997). This bill limited Selander’s holding to policies issued prior to H.R. 261’s enactment. For policies issued after its enactment, offers of UM were only required for policies that specifically identified automobiles. Gilcreast-Hill v. Ohio Farmers Ins. Co., No. 20983, 2002 WL 2008974, at *3 (Ohio Ct. App. Sept. 4, 2002). It could be argued that this bill alone provided adequate guidance to insurers as to what policies require a UM offer and made S.B. 97 unnecessary.


158 Recall in Selander that UM created by operation of law was done so at the $2 million liability limits from the commercial general liability policy. See supra text accompanying note 78.


160 See Lisa K. Gregory, Annotation, “Excess” or “Umbrella” Insurance Policy as Providing Coverage for Accidents with Uninsured or Underinsured Motorists, 2 A.L.R.5th 922 (1992) (discussing the two approaches to UM and how the philosophy evinced by the state’s UM statute is determinative of whether courts imply UM into excess or umbrella commercial
same across the United States: to put the injured party in substantially the same position that he would have been, had the driver been insured.\textsuperscript{161} The question to be resolved, then, is how well should this tortious driver have been insured. How a state answers this question determines whether it is a “full recovery” or “minimum liability” state.

States that impute this uninsured tortious driver with the full liability limits of the injured party’s insurance policy are “full recovery” states.\textsuperscript{162} It is the policy of these states that UM should provide an individual with the same protection that he provides to strangers. These states, including pre-S.B. 97 Ohio, demand UM offers at the liability limits. When insurers do not give the proper offer, courts create UM by operation of law at the full liability limits.\textsuperscript{163}

States that impute the uninsured driver with the legal minimums of liability insurance are “minimum liability” states.\textsuperscript{164} In these states, the purpose of the uninsured motorist statute is not to make all drivers whole from accidents with uninsured drivers, but to make sure that drivers injured by such drivers are protected to the extent that they would have been protected had the driver at fault carried the statutory minimum of liability insurance.\textsuperscript{165}

“Minimum liability” states require that insurers provide UM at statutorily determined minimum levels, usually equal to the minimum liability limits set forth in the state’s financial responsibility law.\textsuperscript{166} Failure to provide UM results in its creation by operation of law at the statutory minimums.\textsuperscript{167}

The Ohio General Assembly could have adequately responded to the insurance industry’s complaints by declaring Ohio a “minimum liability” state. The Ohio Legislature could have easily accomplished this solution by requiring that insurers offer UM at the minimum li-

\textsuperscript{162} See Gregory, supra note 160, at 934.
\textsuperscript{163} See, e.g., Selander v. Erie Ins. Group, 709 N.E.2d 1161, 1164 (Ohio 1999).
\textsuperscript{164} See Gregory, supra note 160, at 934.
\textsuperscript{165} Pabitzky v. Frager, 210 Cal. Rptr. 426, 427 (Ct. App. 1985).
\textsuperscript{166} See, e.g., ALA. CODE § 32-7-23 (1999) (requiring UM coverage with each automobile insurance policy at limits equal to those set in its Motor Vehicle Safety-Responsibility Act, ALA. CODE § 32-7-6 (1999); $20,000 per person and $40,000 per accident); 215 ILL. COMP. STAT. ANN. 5/143A-2 (West Supp. 2004) (mandating requirements similar to Alabama’s).
ability limits as stated in Ohio’s Financial Responsibility Act. These changes would have virtually nullified the costly effects of Scott-Pontzer and its progeny. First, in those situations where UM was created by operation of law, it would be done at the Ohio statutory minimums of $12,500 per person and $25,000 per accident. This cost to the insurer for its failure to make an offer of UM is exponentially smaller than the cost incurred with the $2 million UM limits under the “full recovery” regime that Selander dictated.

Furthermore, because stacking is not permitted in Ohio, insurers would only be required to provide this minimum coverage when the insured recovered less than $12,500. In Selander, for example, the plaintiff would not have recovered from the commercial policy under a “minimum liability” regime. The plaintiffs had already recovered a sum far exceeding the $12,500 limit that courts would have implied. The likelihood that an insured employee will be unable to recover more than $12,500 becomes even less likely when one considers that Workers’ Compensation benefits count toward the total as well.

Second, “minimum liability” states find that policy to be irreconcilable with implying UM into excess or umbrella policies. Recall that Scott-Pontzer found imposition of UM by operation of law in an umbrella/excess policy to be consonant with the “full recovery” policy of the former section 3837.18. Saving insurers from the possibility of UM creation by operation of law in excess and umbrella insurance polices would represent a further cost savings to insurers.

It is unclear to what philosophy Ohio now subscribes. In wiping out the offer requirement from section 3937.18, the Ohio General Assembly also wiped out the language indicating how much UM insurers should provide. What then is the policy of Ohio? How much insurance should we impute to the uninsured tortious driver? If insur-

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169 OHIO REV. CODE ANN. § 4509.20 (West 1999).

170 See supra note 78 (explaining “stacking” of UM).

171 Recall that the Selander plaintiffs had already recovered more than $500,000 from other policies. See supra note 73 and accompanying text.


173 See, e.g., Continental Ins. Co. v. Howe, 488 So.2d 917 (Fla. Dist. Ct. App. 1986) (applying Rhode Island’s “minimum liability” law in refusing to imply UM into umbrella policy since an injured must have already recovered at least the minimum from the underlying primary policy).

ers choose to continue offering UM, at what limits will they offer it? The discretionary language of the new section 3937.18 indicates that the legislature has left these decisions to the insurers.

3. Mandate a Minimum Amount of UM Without the Opportunity to Reject.

What was most costly to the insurers in Scott-Pontzer and its progeny was the creation of UM by operation of law in policies where the insurers did not collect premiums for UM. Insurers could not stay in business very long if they were required to pay on policies where they collected no premiums. Presumably, the industry would have no complaints, however, if it had collected premiums on the relevant policies. The Ohio Legislature could have limited the creation of UM by the courts where the insurer collected no premium by mandating UM in all policies that provide motor vehicle coverage and refusing to permit the insured to reject the coverage.¹⁷⁵

This approach is similar to that used successfully by New York, a state at the vanguard of automobile insurance law. New York requires that automobile insurance policies automatically include UM at the minimum mandatory liability limits.¹⁷⁶ However, New York permits the insured to purchase a greater amount of UM up to the liability limits in the policy.¹⁷⁷ Its statute requires that insurers offer this additional coverage in writing.¹⁷⁸

This requirement, that insurers offer additional UM up to the liability limits, would not remedy the problem in Ohio. Therefore, the Ohio General Assembly should not include this in any Ohio plan. Under the New York scheme, policies with minimum UM coverage would still be susceptible to additional implied UM at the high liability limits if the insurer failed to make the proper offer or receive the proper rejection. To effectively respond to the fears of insurers in Ohio, the legislature should give insurers complete discretion to offer

¹⁷⁵ This is the approach favored by Professor Widiss. See WIDISS, supra note 5, § 8.3, at 286 ("[I]t seems both justifiable and desirable to eliminate the right to reject [UM] coverage in order to assure protection for those classes of insureds who do not exercise a knowledgeable waiver of the protection.").
¹⁷⁶ N.Y. INS. LAW § 3420(f)(1) (McKinney Supp. 2004). Maine employs a similar approach. See ME. REV. STAT. ANN. tit. 24-A, § 2902(2) (West Supp. 2004) ("the amount of [UM] coverage to be so provided may not be less than the amount of coverage for liability for bodily injury or death in the policy offered or sold to a purchaser unless the purchaser expressly rejects such an amount, but in any event may not be less than the minimum limits for bodily injury liability insurance provided for under [the Financial Responsibility Act]").
¹⁷⁸ See N.Y. INS. LAW § 3420(f)(2)(B) ("[i]nsurers shall notify insureds, in writing, of the availability of supplementary uninsured/underinsured motorists coverage").
additional UM coverage, but no choice whether to offer the minimum UM coverage.

The New York approach stands in stark contrast to Ohio’s new approach. New York, in essence, allows the insured to choose whether to adopt a “minimum liability” or “full recovery” policy. The insured chooses whether he will impute the tortious driver with limits at the minimum allowed by law or at limits equal to the insured’s liability limits.\(^\text{179}\) Ohio, on the other hand, defers to the insurers to decide, even on an \emph{ad hoc} basis, what policy to adopt.

Automatically including UM in policies greatly reduces the possibility that technical offer and rejection requirements may override the intentions of the parties. Many of the cases in Ohio involved sophisticated corporate entities that knowingly and voluntarily intended to reject UM.\(^\text{180}\) Nonetheless, the courts would imply UM because the insurer did not make the proper offer or because the insured did not make the rejection in the proper manner. Mandating UM in these policies dispenses with the offer and rejection requirements. This avoids penalizing insurers for millions of dollars due to mere technical errors.

Mandating UM coverage also increases the likelihood that insurers will collect premiums for UM on policies with the potential for court-implied UM. When an insurer is unsure whether a policy provides sufficient motor vehicle protection to mandate UM, they will surely err on the side of providing it and collect a premium. If this approach becomes too costly to consumers, the legislature can respond by drafting more bright-line rules defining specifically which policies require UM.

In the rare instances when the courts mandate UM in a policy where the insurers had not collected a premium, the costs to the insurers would be slight. The implied limits would be far below the limits imposed under a \emph{Selander} regime. Following the New York or Massachusetts approach, the limits would be, from the insurer’s perspective, a paltry $12,500. As discussed in the preceding section, the plaintiff would only recover this amount in the unlikely chance that

\(^{179}\) \textit{See supra} notes 160-167 and accompanying text (discussing what insurance to impute to an uninsured driver ).

\(^{180}\) \textit{See, e.g.,} Gyori v. Johnston Coca-Cola Bottling Group, Inc., 669 N.E.2d 824, 824 (Ohio 1996) (creating UM by operation of law at $15 million limits for lack of written offer, notwithstanding that company’s risk manager solicited bids with a specification expressly rejecting UM); Campbell v. Westfield Ins. Co., No. 02AP-1369, 2003 WL 22332007, at *1 (Ohio Ct. App. Oct. 14, 2003) (creating UM by operation of law at $2 million limits for failure of written offer/rejection form to meet \emph{Linco} requirements, notwithstanding that company’s owner knowingly chose to reject the coverage because his two-year experience with the coverage convinced him it “was neither needed nor worth its cost”).
the total of other recoveries is below $12,500. In these instances, the need for recovery by the insured is at its greatest. This approach would significantly reduce the exposure of the insurers while placing a fair share of the uninsured motorist burden upon them.

C. Additional Protection

The Ohio General Assembly could have accompanied the enactment of S.B. 97 with other legislative action to maintain protection for innocent motorists against uninsured motorists. Many legal paradigm shifts involve a *quid pro quo* exchange. For example, under a Workers' Compensation system, an employee traded his common law right to sue an employer for a more certain no-fault statutory scheme. The employer traded his defenses of fellow servant, contributory negligence, and assumption of risk for a more predictable system without the costs of trial and the risk of high sympathetic jury awards. Each side lost some rights but gained other benefits. Thus, the balance of equities was maintained.

With S.B. 97, however, the drivers of Ohio lost a guaranteed right to purchase UM and received nothing in return. The following subsections discuss some additional protection that the Ohio General Assembly could have provided to compensate Ohio drivers for the protection lost with S.B. 97.

1. Increased Mandatory Liability Limits

Increasing the relatively low liability limits in Ohio would narrow the gap of uncompensated damages widened by S.B. 97. Ohio's Financial Responsibility Act requires that Ohio drivers carry liability insurance with limits of $12,500 for bodily injury to or death of one

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181 See *supra* text accompanying note 170-172.
182 See ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (1997).
183 Id.
184 The Ohio Legislature would argue that Ohio's drivers received lower automobile insurance premiums in return for S.B. 97. Instead, the opposite is more likely true. Under *Scott-Pontzer*, its progeny, and former section 3937.18, a portion of the draw on individual policies had been displaced to commercial policies. Under S.B. 97, the likelihood that employees will recover under commercial policies is far less likely and the claims on personal automobile insurance policies will increase, causing a commensurate increase in premiums.

Additionally, UM premiums will increase because fewer insureds will purchase the coverage without the statutorily required UM offer. See *supra* notes 121-23 and accompanying text. According to the law of large numbers, as the number of insured persons increases, the accuracy of risk prediction increases. George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1021 (1989). The more accurately risk is predicted, the lower the premium will be. See id. Inversely, if the number of UM insureds decreases, the risk becomes less predictable. Therefore, UM premiums in Ohio will increase due to the decrease in risk forecasting caused by the reduction in the number of insureds in the risk pool.
person in any one accident, $25,000 for bodily injury to or death of more than one person in any one accident, and $7,500 for damage to property in any one accident. The insurance industry numerically represents these limits as 12.5/25/7.5. Punishments for failure to have insurance at these statutory minimums include revocation of driving privileges, impoundment of license plates, and fines.

The Ohio limits are grossly inadequate. They are little higher than they were when the law was first enacted in 1953 and have remained unchanged for thirty-five years. In fact, the reason that they have remained unchanged for so long is likely because of the prevalence of UM. Low minimum liability limits of tortfeasors are not an issue for those injured persons carrying UM. Thus, few drivers would ever look to these limits for recovery since their UM would often assure them coverage beyond these low limits. With the abolition of the UM offer requirement, more drivers may come to rely upon these low limits.

There are only four states with limits lower than Ohio: Oklahoma (10/20/10), Florida (10/20/10), Mississippi (10/20/5), and Louisiana (10/20/10). Oklahoma and Florida, however, have very consumer-friendly informed consent forms required for UM offers and rejections that warn of the risks to insured and family of not purchasing UM. Since more drivers are likely to carry UM in those two states, it is less likely that injured drivers will rely solely on the liability insurance of the tortfeasor. In other words, the only time one will rely on these low liability minimum limits is when the injured driver has acted against the advice of the government and knowingly chosen not to purchase UM coverage. To borrow a concept from torts, it is as if

\[\text{OHIO REV. CODE ANN. § 4509.01 (West Supp. 2004).}\]
\[\text{Id.}\]
\[\text{Insurance Information Institute, Auto, What Are the Driving Laws in my State?, at http://www.iii.org/individuals/auto/a/stateautolaws (last visited May 6, 2005) [hereinafter III Report] (listing each state’s minimum liability limits).}\]
\[\text{FLA. STAT. ANN. § 627.727 (West Supp. 2005); OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 2005) (requiring form that states: The law requires us to advise you of this valuable right for the protection of you, members of your family, and other people who may be hurt while riding in your insured vehicle. You should seriously consider buying this coverage in the same amount as your liability insurance coverage limit. . . . THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!).}\]
the insured has assumed the risk of being injured by one with low liability limits.

Whereas, in Ohio it might be said that drivers without UM have not assumed the risk of braving the roads without UM's vital protection. Recall that one assumes a risk only if that person fully understands and appreciates the risk yet voluntarily chooses to assume the risk.\(^{190}\) Under S.B. 97, one does not assume the risk since the unprotected driver does not fully understand the risk of driving without UM unless he receives an adequate offer as stated in Linko.\(^{191}\) Also, the insured's decision would not be voluntary if insurers choose not to offer UM coverage even when requested, as S.B. 97 permits insurers to do.

While increasing the minimum limits would more fully compensate motorists injured by drivers who purchase minimum coverage, this increase must be offset by the number of minimum coverage purchasers who would choose to forego purchasing any liability insurance when faced with the associated higher premiums. Furthermore, it must be considered that increasing the minimum limits does nothing in the way of compensating those injured by hit-and-run drivers, which is a growing epidemic.\(^{192}\)

2. Reduce Number of Uninsured Motorists

The Ohio legislature might have reduced the number of uninsured motorists in Ohio by stricter enforcement of the Financial Responsibility Act or increasing the severity of penalties for noncompliance with the act. The number of uninsured motorists in Ohio is estimated at 13%, which is just slightly below the U.S. average of 14%.\(^{193}\) Maine enjoys the lowest percentage of uninsured drivers at just 4%.\(^{194}\)

\(^{190}\) Restatement (Second) Torts § 496C (1965). The medical malpractice doctrine of "informed consent" is equally applicable. Just as doctors are required to disclose and explain the risks of different medical procedures to patients, Nickell v. Gonzalez, 477 N.E.2d 1145, 1148 (Ohio 1985), insurers should be required to disclose and explain to insureds the risks of driving without UM.\(^{191}\) Linko v. Indemnity Ins. Co., 739 N.E.2d 338, 342 (Ohio 2000).\(^{192}\) In response to this growing problem, Ohio has recently raised the penalties for hit-and-run drivers. H.B. 50, 125th Gen. Assemb., Reg. Sess. (Ohio 2002). This author believes that one factor that has led to the increase in hit-and-run accidents is the increased stiffness in DUI criminal penalties, lower blood alcohol level limits, and greater social stigma associated with DUI arrests. See OHIO REV. CODE ANN. § 4511.19 (West Supp. 2004) (lowering legal limit from 0.1 to 0.08). Drivers who have had a little to drink and are involved in small accidents may not wait for the police out of fear of DUI penalties and social stigma.\(^{193}\) News Release, Insurance Research Counsel, IRC Study Estimates 14% of Drivers Are Uninsured, available at http://www.ircweb.org/news/2001-02-01.htm (last visited May 7, 2005) [hereinafter IRC Study].\(^{194}\) Id.
While Ohio requires that operators of vehicles maintain liability insurance, it does not require that drivers verify coverage when registering a vehicle. At registration, Ohio only requires that the applicant sign a statement affirming that the applicant maintains insurance and promising not to drive without proof of financial responsibility. Ohio requires drivers to verify proof of insurance when involved in a traffic accident requiring an accident report, upon request by a peace officer or highway patrol officer when receiving a traffic ticket, or when randomly selected to provide proof by mail.

It is unclear whether changing the Ohio law to require applicants to verify proof of financial responsibility at the time of registration would be effective. The Ohio General Assembly should couple this law with a requirement that insurers notify the Department of Motor Vehicles ("DMV") if and when the coverage is cancelled to avoid uninsured motorists subverting the law. Otherwise, drivers might, for example, purchase insurance simply to register the car, then cancel the policy soon afterwards.

This approach has inefficiency drawbacks and high transaction costs. For example, when one switches insurers, the DMV would receive notice of a cancellation. To ensure that the formerly insured has truly switched, an additional requirement would be necessary for the new insurer to notify the DMV of a new policy. The DMV would need to cross reference the cancellation and new policy. The DMV would also need to account for lag times in reporting. This could create great confusion with different policies for different cars under the same named insured. Further problems occur when determining who bears the transaction costs for reporting and accounting. It is far from clear, though, that compulsory insurance laws are effective

195 While liability insurance is the most common way to satisfy Ohio's Financial Responsibility Law, drivers can use various other methods for compliance, including self-insurance, bond, or deposit. See OHIO REV. CODE ANN. § 4509.45(A) (West Supp. 2004).


198 OHIO REV. CODE ANN. § 4509.101(3) (West Supp. 2004). It appears that there are two types of "proof" of insurance required in Ohio. Under section 4509.44 and 4503.20, a signed statement suffices as "proof" when registering a vehicle. However, under section 4509.101(3) and 4509.45, a driver must "verify the existence of proof of financial responsibility" by furnishing the actual insurance card issued by the insurer in the special situations when "verification" is required.


Increasing the severity of the penalties for violation of Ohio’s Financial Responsibility Act would very likely reduce the number of uninsured motorists. Currently in Ohio, the punishment for driving without insurance is suspension of the person’s driving privileges and impoundment of the person’s license until the person can show proof of insurance. The suspension occurs for a minimum of ninety days. To reinstate his driving privileges, the formerly uninsured driver must pay a fee of seventy-five dollars for the first violation, two-hundred-fifty dollars for the second violation and five-hundred dollars for violations thereafter.

New York has a tougher approach than Ohio and, perhaps as a result, has half the number of uninsured motorists. Like Ohio, anyone caught without insurance in New York will have his driver’s license and registration revoked. In addition, uninsured drivers are subject to fines of $900 to $2,250, or imprisonment for no more than fifteen days, or both. The threat of imprisonment would serve as a strong deterrent. It would also send a strong signal that Ohio considers driving without automobile insurance to be a serious crime.

3. No-Fault System & Compensation Fund

Ohio could have considered employing two alternate means for compensating the victims of UMs: no fault and public compensation funds. Twelve states currently use what is termed “no-fault” insurance. In general, these systems require that drivers purchase insurance that covers that driver’s own injuries regardless of who was at

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200 Insurance Information Institute, Compulsory Auto Insurance Study, at http://www.iii.org/media/hottopics/insurance/compulsory (last visited May 6, 2005) (noting that New Hampshire does not have compulsory insurance laws, yet has fewer uninsured drivers than nearby Connecticut, Rhode Island, and Vermont who all have such laws).
201 Id.
203 Id.
204 Id.
205 7% of New York drivers are uninsured. IRC Study, supra note 193.
208 Maryland, for example, uses possibly the “most comprehensive and intricate system in the United States,” involving a combination of several methods including compulsory auto insurance, required offer of UM, no-fault, and public fund. Joel P. Williams, Insurance Law—Protecting the Public Under Maryland’s Compulsory Motor Vehicle Insurance Scheme, 25 U. BALT. L. REV. 289, 295 (1996).
209 III Report, supra note 188.
fault for the injuries. Public compensation funds are a government created and operated pool of money used to provide minimal compensation to victims who have no other recourse for recovery. While it is worth mentioning these other options, the benefits and disadvantages of these alternate approaches to compensation are widely discussed and beyond the scope of this Note.

VI. BACK TO THE FUTURE: REINSTATING FORMER SECTION 3937.18

The opportunity still exists for the Ohio General Assembly to compensate Ohio drivers for the protection that they lost with S.B. 97. The legislature may still enact today all of the additional protections and statutory changes discussed above that it should have considered at the time of S.B. 97. However, since the Ohio Supreme Court has regained its senses and overruled the illogical and costly aspects of Scott-Pontzer, the reasons for enacting S.B. 97 have vanished. Therefore, the easiest and most logical step that the legislature should take is to reinstate the former section 3937.18 language and the meaningful UM offer requirement.

VII. CONCLUSION

UM is a strange and confusing concept, and this is especially true in Ohio. However, requiring that insurers make meaningful offers of UM is still the best way to insure that drivers are adequately protected on the roads from uninsured motorists. An attorney’s comments thirty-eight years ago still ring true today:

[UM] is no panacea. It is still the subject of much controversy, and perhaps even more bewilderment and confusion. The path to a just award under this coverage is lined with pitfalls, ruts, and hazardous curves in the form of conditions, exclusions and restrictive definitions. Such is true, however, of the path to recovery under most types of insurance. Whatever the criticism, this experiment is registering a high degree of success in achieving its objective - to alleviate many of the

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210 Id.
211 See supra note 53.
212 See generally KEETON & O'CONNELL, supra note 45; JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975).
213 For an amusing example, see Mayor v. Wedding, No. 2003-P-0011, 2003 WL 22931354 (Ohio Ct. App. Dec. 12, 2003) (involving the novel claim that a cow is an uninsured motorist).
woes heretofore borne by the innocent victims of financially irresponsible motorists. It seems to be here to stay.\textsuperscript{214}

\textit{Scott-Pontzer} and its correlative cases required corrective action. However, it was not the Ohio General Assembly that needed to respond. Those who needed to respond did so. The insurers changed the language of their policies and the courts limited and eventually overruled \textit{Scott-Pontzer}. With the reasons for S.B. 97 no longer present, the legislature should return to the old language of section 3937.18 requiring a meaningful offer of UM. If the legislature is not amenable to reinstating the old language, they should consider other methods for saving Ohio’s drivers from being the least protected in the United States.

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\textsuperscript{214} Notman, supra note 33, at 23.

\textsuperscript{†} J.D. Candidate, 2005, Case Western Reserve University School of Law. I would like to thank my fiancé, Amanda, for her patience and support during the writing of this note and during the three arduous years of law school. I would also like to thank Professor Wilbur Leatherberry not only for his assistance in shaping this note, but also for his teachings of the difficult and sometimes confusing subject of insurance law in the classroom.
APPENDIX

Uninsured Motorist Statutes
<table>
<thead>
<tr>
<th>State</th>
<th>Code or Statute References</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>Ala. Code § 32-7-23 (1999)</td>
</tr>
<tr>
<td>AK</td>
<td>Alaska Stat. § 21.89.020 (Michie 2004)</td>
</tr>
<tr>
<td>ID</td>
<td>Idaho Code § 41-2502 (Michie 2003)</td>
</tr>
<tr>
<td>IN</td>
<td>Ind. Code Ann. § 27-7-5-2 (West 2003)</td>
</tr>
<tr>
<td>State</td>
<td>Statute Reference</td>
</tr>
<tr>
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</tr>
<tr>
<td>NE</td>
<td>NEB. REV. STAT. ANN. § 44-6408 (Michie 1998)</td>
</tr>
<tr>
<td>NV</td>
<td>NEV. REV. STAT. ANN. 690B.020 (Michie 2003)</td>
</tr>
<tr>
<td>NH</td>
<td>N.H. REV. STAT. ANN. § 264:15:00 (2004)</td>
</tr>
<tr>
<td>NM</td>
<td>N.M. STAT. ANN. § 66-5-301 (Michie 2001)</td>
</tr>
<tr>
<td>NY</td>
<td>N.Y. INS. LAW § 3420 (McKinney Supp. 2004)</td>
</tr>
<tr>
<td>OK</td>
<td>OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 2005)</td>
</tr>
<tr>
<td>OR</td>
<td>Or. REV. STAT. § 742.502 (2003)</td>
</tr>
<tr>
<td>PA</td>
<td>PA. STAT. ANN. tit. 40, § 2000 (West 1999)</td>
</tr>
<tr>
<td>RI</td>
<td>R.I. GEN. LAWS § 27-7-2.1 (2002)</td>
</tr>
<tr>
<td>SD</td>
<td>S.D. CODIFIED LAWS § 58-11-9 (Michie 2000)</td>
</tr>
<tr>
<td>TN</td>
<td>TENN. CODE ANN. § 56-7-1201 (2000)</td>
</tr>
<tr>
<td>TX</td>
<td>TEX. INS. CODE ANN. § 5.06-1 (Vernon 2002)</td>
</tr>
<tr>
<td>VT</td>
<td>VT. STAT. ANN. tit. 23, § 941 (1999)</td>
</tr>
<tr>
<td>VA</td>
<td>VA. CODE ANN. § 38.2-2206 (Michie Supp. 2004)</td>
</tr>
<tr>
<td>WV</td>
<td>W. VA. CODE ANN. § 33-6-31 (Michie 2003)</td>
</tr>
<tr>
<td>WI</td>
<td>WIS. STAT. ANN. § 632.32 (West 2004)</td>
</tr>
<tr>
<td>WY</td>
<td>WYO. STAT. ANN. § 31-10-101 (Michie 2003)</td>
</tr>
</tbody>
</table>