

## **A Broader Approach for the Meaning of the Term “Occupying” Within Uninsured Motorist Insurance Contracts**

### **I. INTRODUCTION**

Bert was driving his car with his friend Ernie in the passenger seat. Suddenly, they hear a loud pop which sounds like a gun shot. Realizing that he has just blown a tire on his car, Bert pulls over on the side of the highway. Ernie tells Bert to wait in the car while he changes the tire. Ernie gets the spare tire out but realizes that Bert does not have a jack in his car. Luckily, a Good Samaritan pulls over about one hundred fifty feet ahead of Bert’s car. Ernie walks up to the Good Samaritan, explains his situation, and borrows a jack. After changing the tire, Ernie brings the jack back to the Good Samaritan’s car and puts it in the trunk. While Ernie is thanking him and shaking his hand, a third vehicle strikes Ernie causing him severe injuries. The driver admits that he never saw Ernie and that he feels horrible for causing the accident. After emergency personnel take Ernie to the hospital, the police investigation reveals that the driver has no insurance.

Several months later, Ernie is released from the hospital and files a claim under Bert’s uninsured motorist liability coverage in order to recover his medical expenses. After a few weeks, Bert receives a phone call from his insurance company saying that his uninsured motorist liability coverage does not cover Ernie. The insurance agent explains that since Ernie is not the named insured under the policy nor a family member residing with Bert, he is only covered by the policy if he had been “occupying” the vehicle within the terms of the insurance policy at the time he was hit by the uninsured motorist. Bert re-reads his insurance policy which defines “occupying” as in, upon, entering into or alighting from the vehicle. Devastated, Ernie hires an attorney and files a lawsuit against the insurance company.

For purposes of the action, the parties stipulate that Ernie was not a named insured under the policy and that the sole issue for the trial court’s determination was whether he was “occupying” the vehicle at the time of the accident. After several trials, the case is appealed to the Ohio Supreme Court which grants the certiorari to hear the case. How will the Ohio Supreme Court rule on this set of facts?

The current test set forth by the Ohio Supreme Court to determine occupancy status seems to be largely about physical proximity. However, the subsequent cases that were decided after this test seemed more concerned with the plaintiff’s activity and motivation. This Comment proposes that the Ohio Supreme Court should take a broader approach when interpreting the meaning of the term “occupying” in insurance contracts. The permissible physical proximity should be extended to a distance of two hundred feet. If the accident occurred within two hundred feet of the insured vehicle, then the

court should examine the plaintiff's relationship to the insured vehicle. Ohio case law sets forth three tests that determine if the claimant has a sufficient relationship to the insured vehicle: the vehicle-oriented test, the performance of a task related to the vehicle test, and the foreseeably identifiable conduct test. By taking a broader approach, plaintiffs will have the opportunity to prove a sufficient relationship with the insured vehicle by satisfying any one of the three tests. The claimant should not be limited to only one test, and the analysis should not end just because one test cannot be satisfied. If the plaintiff can establish a sufficient relationship through one of the tests, regardless of whether or not they cannot satisfy all of them, then the claimant should recover damages for occupying the insured vehicle. By taking a broader approach, the Ohio Supreme Court will reduce lengthy litigation over arbitrary distances and will allow claimants a greater opportunity to recover compensation through their uninsured motorist insurance coverage.

This Comment proposes a broader approach when interpreting the meaning of the term "occupying" for uninsured motorist liability coverage. Section II considers the origin of uninsured motorist liability coverage which was developed in response to the fact that a lot of harm was created by financially irresponsible parties. Section II also clarifies the different classes of insureds and the various terms that are used to define whether a claimant is occupying an insured vehicle. Section III consists of three parts. The first part of Section III details the rules of construction for interpreting insurance contracts. The second part of Section III focuses on Ohio's standard for determining whether a claimant is occupying a vehicle and the various tests establishing a sufficient relationship to an insured vehicle. The third part of Section III explores whether other states apply a broad approach when determining the occupancy status of a claimant. Section IV advocates that any accident within two hundred feet of the insured vehicle constitutes a reasonable geographic proximity which requires a "relationship" analysis. Section IV also suggests that a claimant may establish a sufficient relationship with the insured vehicle by satisfying any one of the three tests. This Comment concludes that a broader approach will give claimants more bargaining power when settling with the insurance company, will reduce lengthy litigation over arbitrary distances, and will allow claimants a greater opportunity to recover damages.

## II. BACKGROUND

### *A. The Origin of Uninsured Motorist Coverage*

In the United States, recovery for injuries caused by another person resulting from an automobile accident has primarily been predicated on the principle that the economic cost of personal injuries or property damage

arising from the negligence of another person should be borne by the negligent party.<sup>1</sup> Nevertheless, in many situations, innocent victims are unable to recover any compensation from the negligent party because the financially irresponsible lack insurance or the financial resources to recompense the victim for their negligence.<sup>2</sup>

As automobiles were mass-produced, driving was brought within the reach of many drivers who did not possess adequate resources to recompense victims for serious injuries caused by their negligence.<sup>3</sup> In 1925, Connecticut addressed the problem of financial irresponsibility by adopting legislation that required motorists to purchase insurance if they lacked the personal financial resources to satisfy damage claims.<sup>4</sup> Motorists' driving privileges would be suspended if they were unable to prove that they could satisfy at least some claims resulting from an automobile accident.<sup>5</sup> The offender's license would not be restored until he or she proved his or her financial responsibility.<sup>6</sup> Shortly thereafter, new legislation provided for automatic suspension of a driver's license if he or she was convicted of a serious traffic law violation.<sup>7</sup> However, this legislation was still problematic because the suspension was not invoked until the occurrence of a serious traffic law violation.<sup>8</sup>

Likewise, New Hampshire began requiring all motorists in "accidents resulting in death, personal injury, or property damage" exceeding a certain amount to pay claims resulting from the accident up to the limits specified in the financial responsibility law of the state.<sup>9</sup> As a result, these laws caused motorists to obtain "liability insurance coverage in at least the minimum amounts specified by their . . . state financial responsibility laws."<sup>10</sup>

Although these laws reduced the ratio of uninsured to insured motorists, the number of uninsured drivers continued to rise in the post-World War II

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1. ALAN I. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 3 (1969). See MARGARET C. JASPER, *THE LAW OF NO-FAULT INSURANCE* 3 (1996) ("recovery for personal injuries sustained as a result of an automobile accident was subject to common law negligence rules").

2. WIDISS, *supra* note 1, at 3.

3. *Id.* at 4.

4. *Id.*

5. *Id.* (The State Commissioner of Motor Vehicles required the negligent operator "to prove his financial responsibility to satisfy any claim . . . of at least ten thousand dollars." (quoting Conn. Pub. Acts, ch. 183 (1925)).

6. *Id.*

7. WIDISS, *supra* note 1, at 6 (The American Automobile Association proposed the legislation in their model Safety Responsibility Bill).

8. *Id.* (When it seems that recovery of a judgment is unlikely, few accident victims are inclined to pursue actions against uninsured motorists.).

9. *Id.* at 7-8.

10. *Id.* at 8.

period as did the amount of harm they caused.<sup>11</sup> Consequently, pressure developed for adoption of a state-sponsored plan directed at compensation for those injured by uninsured motorists.<sup>12</sup> Shortly thereafter, the leading automobile liability insurers claimed that the problem could be effectively handled through private insurance “by the introduction . . . of the uninsured motorist endorsement.”<sup>13</sup> This endorsement protects “the purchaser (and other insureds as defined by the policy) by placing any insured person in the position he would have been in had the other motorist carried the minimum coverage required by the state financial responsibility laws.”<sup>14</sup> Therefore, recovery under the proposed endorsement was based on showing that the claimant was legally entitled to recover from a negligent driver but would not be able to do so.<sup>15</sup> The insurance industry soon incorporated the terms of the endorsement into the standard automobile liability policy which is referred to as “Uninsured Motorist Coverage.”<sup>16</sup> In 1957, New Hampshire required that all automobile liability policies by any insurer licensed in the state include uninsured motorist coverage.<sup>17</sup> By the end of 1968, forty-six states followed New Hampshire, and uninsured motorist coverage became “an integral part of automobile insurance policies throughout the United States.”<sup>18</sup>

### *B. Nature of Uninsured Motorist Coverage*

The uninsured motorist endorsement has a combination of first-party no-fault characteristics and third-party fault-based characteristics.<sup>19</sup> It has first-party no-fault characteristics because it statutorily protects the purchaser of the policy and members of their family.<sup>20</sup> It also has third-party fault-based characteristics because establishing legal liability against the uninsured

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11. *Id.* at 10 (“For example, in the early 1950’s it was estimated that 80-85% of the motorists in New York carried liability insurance, . . . [but] the loss in New York state alone attributed to uninsured drivers had risen to over \$7,000,000 per year.”).

12. WIDISS, *supra* note 1, at 10.

13. *Id.* at 12.

14. *Id.*

15. *Id.* at 12-13.

16. *Id.* at 15 (The insurance industry has used the term “Uninsured Motorist Coverage” interchangeably with “Innocent Victim Coverage” and “Family Protection Insurance.”).

17. WIDISS, *supra* note 1, at 15 (At that time, “the premiums range[d] from approximately \$2 to \$13 per year.”).

18. *Id.*

19. Nicolas P. Terry, *Uninsured Motorist Endorsement*, in 2 NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE 24-4 (1984).

20. *Id.* See Jasper, *supra* note 1, at 9 (Under no-fault insurance, if the insured is “injured in an accident, they are able to recover their economic losses – e.g., medical expenses and lost wages – directly from their own insurance carrier, regardless of who actually caused the accident.”).

motorist is required in order to recover under the uninsured motorist endorsement.<sup>21</sup>

The Standard Form Endorsement covers three classes of insured persons. Class I insureds are named insureds, designated insureds, and relatives residing in the insured's household.<sup>22</sup> Class II insureds are occupancy insureds whose status depends upon the permissive occupancy and/or use of an insured vehicle.<sup>23</sup> Class III insureds are derivative insureds whose status is as beneficiary under the policy when a certain type of loss is suffered due to "the bodily injury or death sustained by a Class I or Class II insured."<sup>24</sup>

Specifically, Class II insureds are covered by an "uninsured motorist ("UIM") endorsement."<sup>25</sup> Coverage typically provides for "any other person while occupying an insured highway vehicle."<sup>26</sup> Contested terms include what constitutes "occupying" a vehicle and what is "an insured highway vehicle."<sup>27</sup> Since there is no dispute whether the automobile in the posed hypothetical is an insured highway vehicle,<sup>28</sup> the pertinent question for this Comment is what constitutes "occupying."

The uninsured motorist endorsement defines "occupying" as "in, upon, entering into or alighting from the automobile."<sup>29</sup> The terms "entering into" or "alighting from" often dictate whether a motor vehicle is within or outside the scope of coverage in insurance policies or statutes mandating insurance

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21. Terry, *supra* note 19, at 24-4.

22. *Id.* at 24-7.

Each of the following is an insured under this insurance to the extent set forth below: (a) the named insured and any designated insured and, while residents of the same household, the spouse and relative of either; (b) any other person while occupying an insured highway vehicle; and (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b), above.

*Id.* at 24-6 n.1.

23. *Id.* at 24-7.

24. *Id.*

25. Terry, *supra* note 19, at 24-6.

26. *See id.* at 24-25.

27. WIDISS, *supra* note 1, at 30.

28. *See* Terry, *supra* note 19, at 24-62; *see generally* 4 NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE App D-4-5 (MB 1984):

'insured highway vehicle' means a highway vehicle: (a) described in the schedule as an insured highway vehicle to which the bodily injury liability coverage of the policy applies; (b) while temporarily used as a substitute for an insured highway vehicle as described in subparagraph (a) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction; (c) while being operated by the named or designated insureds or by the spouse of either if a resident of the same household.

29. Terry, *supra* note 19, at 24-30.

coverage.<sup>30</sup> Questions of coverage arise when two or more insurers are responsible for compensating a claimant or whether the claimant was occupying the insured vehicle.<sup>31</sup> Some courts liberally construe the endorsement in favor of the insured, whereas other courts construe the “terms within their plain meaning[] or according to the legislative intent.”<sup>32</sup> Nevertheless, courts acknowledge that individual circumstances are important to each accident that occurred.<sup>33</sup> Since entering or alighting is distinguished from other acts related to using an automobile, courts will resolve disputes on the basis of vehicle entry or exit only if insurance policies or statutes define “in or upon,” “loading” or “unloading,” “occupying,” “owning,” “maintaining,” or “using” to include entering into or alighting from.<sup>34</sup>

### III. ANALYSIS

#### A. Rules of Construction for Interpreting Insurance Contracts

Ohio courts have frequently confronted the problem of interpreting the term “occupying” for purposes of insurance coverage.<sup>35</sup> Although the task may seem easy, an examination of those cases reveals that determining whether a person is “occupying” a vehicle is not as easy as it first appears.<sup>36</sup> Specifically, the term “occupying” often becomes ambiguous when determining whether insurance coverage should be extended in certain factual circumstances.<sup>37</sup>

Generally, insurance contracts are subject to certain interpretive rules because they are recognized to be contracts of adhesion.<sup>38</sup> Words in an insurance contract are often construed in their ordinary sense rather than in a purely technical or legal sense.<sup>39</sup> Moreover, if the insurance contract is

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30. Robert Roy, Annotation, *What Constitutes “Entering” or “Alighting From” Vehicle Within Meaning of Insurance Policy, or Statute Mandating Insurance Coverage*, 59 A.L.R. 4th 149, 154 (2004).

31. *Id.* at 154-55.

32. *Id.* at 155. See ALAN I. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 49-50 (Supp., 1981).

33. Roy, *supra* note 30, at 155.

34. *Id.* at 156-58.

35. See Halterman v. Motorists Mut. Ins. Co., 443 N.E.2d 189 (Ohio App. 1981); Robson v. Lightning Rod Mut. Ins. Co., 393 N.E.2d 1053 (Ohio App. 1978).

36. Robson, 393 N.E.2d at 1054.

37. See *id.*; see also Gomolka v. State Auto. Mut. Ins. Co., 436 N.E.2d 1347, 1348 (Ohio 1982) (“where the provisions of an insurance policy are clear and unambiguous courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties”).

38. Hounshell v. Am. States Ins. Co., 424 N.E.2d 311, 314 (Ohio 1981).

39. King v. Nationwide Ins. Co., 519 N.E.2d 1380, 1383 (Ohio 1988).

susceptible to more than one interpretation, then it will be strictly construed against the drafting party, the insurer, and construed liberally in favor of the nondrafting party, the insured.<sup>40</sup> Additionally, the legal doctrines of waiver, estoppel, election, and reformation of contract are available to the insured and should be liberally construed to validate the insured's reasonable expectation of coverage.<sup>41</sup> Finally, "any exclusion, exception, or limitation to coverage must be clearly, expressly, and unambiguously stated in the insurance contract."<sup>42</sup>

The Ohio Supreme Court has reiterated the above rules of construction when interpreting the term "occupying" within insurance contracts. The court stated that "the uninsured motorist statute should be construed liberally in order to effectuate the purpose that coverage be provided to persons injured through the acts of uninsured motorists."<sup>43</sup> Several years later, the Ohio Supreme Court reinforced its liberal construction of interpreting insurance motorist contracts when it stated "[l]anguage in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer."<sup>44</sup>

#### B. Ohio Case Law

Unfortunately, those interpretive aspirations have not always been realized by the Ohio Supreme Court. In *Kish v. Central National Insurance Group of Omaha*, the court examined what constitutes "occupying" a motor vehicle in the context of UIM coverage.<sup>45</sup> In *Kish*, the insured's car was rear-

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40. See *Turek v. Vaughn*, 798 N.E.2d 632, 638-39 (Ohio App. 2003); see also *Trinova Corp. v. Pilkington Bros., P.L.C.*, 638 N.E.2d 572, 576 (Ohio 1994); *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 597 N.E.2d 1096, 1102 (Ohio 1992); *Karabin v. State Auto. Mut. Ins. Co.*, 462 N.E.2d 403 (Ohio 1984) (paragraph two of syllabus).

41. Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 567-68 (1996). See generally *Turkek*, 798 N.E.2d at 638 (standing for the proposition that common principles of constructionism apply to contract interpretation); *Cincinnati Ins. Co., v. Babcock*, No. L-87-035, 1988 Ohio App. LEXIS 1604, at \*4-5 (1988) (an example of estoppel and waiver being asserted in insurance litigation).

42. Swisher, *supra* note 41, at 568.

43. *Kish v. Cent. Nat'l Ins. Group of Omaha*, 424 N.E.2d 288, 291 (Ohio 1981) (quoting *Curran v. State Auto. Mut. Ins. Co.*, 266 N.E.2d 566, 569 (Ohio 1971)).

44. *Joins v. Bonner*, 504 N.E.2d 61, 64 (1986) (quoting *Buckeye Union Ins. Co. v. Price*, 313 N.E.2d 844 (1974) (syllabus)). See *King*, 519 N.E.2d at 1380 (syllabus) ("Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured."); *Great Am. Mut. Indem. Co. v. Jones*, 144 N.E. 596 (1924) ("policies of insurance which are prepared by the insurance company and which are reasonably open to different interpretations will be construed most favorably to the insured." (quoting *Mumaw v. W. & S. Life Ins. Co.*, 119 N.E. 132 (1917) (syllabus))).

45. 424 N.E.2d at 290.

ended by an uninsured motorist.<sup>46</sup> The insured exited his car to confer with the uninsured motorist who emerged from his car armed with a shotgun.<sup>47</sup> Before the insured could get back to his car, the gunman fatally shot him.<sup>48</sup> Although the court said that the insurance contract should be liberally construed in the insured's favor, the court held that the policy did not apply because the insured was not occupying the vehicle.<sup>49</sup> The decedent's contract insured death resulting from the use of the insured vehicle.<sup>50</sup> When using the vehicle, the insured was involved in a rear end collision caused by the uninsured motorist which led to the death of Kish. Clearly, the insured was injured as a result of using the vehicle, and the court erred by ruling for the insurance company. By failing to strictly construe the insurance policy in favor of the insured, the court in this inappropriate and unjust ruling actually narrowed liability for insurance companies. This case is bad law and illustrates the need for broader protection to prevent unjust results.

In 1986, the Ohio Supreme Court was faced with another determination of whether a claimant was "occupying" the insured vehicle in *Joins v. Bonner*.<sup>51</sup> In *Joins*, the minor passenger had just exited the insured vehicle and began crossing the street.<sup>52</sup> Before he reached the curb, the child was struck and severely injured by an uninsured motorist.<sup>53</sup> Unlike its decision in *Kish*, the *Joins* court demonstrated a willingness to employ a broader approach to the definition of "occupying" the vehicle.<sup>54</sup> The *Joins* court allowed coverage for a passenger that exited, but the *Kish* court denied coverage for the insured who was using the vehicle and then exited. Correctly, the *Joins* court liberally construed the insurance contract in favor of the insured and recognized the need for a broader approach.<sup>55</sup> As a result, the court established the following test for determining whether a person is "occupying" a vehicle:

In construing uninsured motorist provisions of automobile insurance policies which provide coverage to persons 'occupying' insured vehicles, the determination of whether a vehicle was occupied by the claimant at the time of an accident should take into account the

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46. *Kish v. Cent. Nat'l Ins. Group of Omaha*, No. 39235, 1980 WL 354314, at \*1 (Ohio App. July 3, 1980).

47. *Id.*

48. *Id.*

49. *Kish*, 424 N.E.2d at 295.

50. *Id.* at 293.

51. 504 N.E.2d at 63-64.

52. *Id.* at 63.

53. *Id.*

54. *Id.* at 63-64.

55. *See id.*

immediate relationship the claimant had to the vehicle, within a reasonable geographic area.<sup>56</sup>

Thus, a claimant must have an immediate relationship to the vehicle within a reasonable geographic area in order to “occupy” the vehicle for insurance purposes. However, this test seems to be largely focused on physical proximity because the court reasoned that “a person is not ‘finished’ with exiting a vehicle until he or she reaches a place of safety on the side of the street or road to which he or she is proceeding.”<sup>57</sup> Due to the specific facts in the case, the court’s reasoning focused mainly on the precise language of reaching the nearest place of safety, reaching the other side of the street, and reaching the place to which the claimant is proceeding.<sup>58</sup> As a result, the *Joins* standard concentrates on physical proximity to establish an immediate relationship.

Pursuant to the *Joins* analysis, appellate courts have subsequently attempted to use physical proximity to establish an immediate relationship between the claimant and the vehicle. However, appellate courts struggled to determine what distance constituted a reasonable geographic perimeter around the insured vehicle. For example, the Tenth District Appellate Court held that the claimant was occupying the insured truck yet never determined whether the distance was within a reasonable geographic perimeter.<sup>59</sup> In *Morris v. Continental Insurance Co.*, the claimant was a passenger in the vehicle when an accident occurred with another automobile.<sup>60</sup> The driver and the claimant walked over to a pickup truck that stopped at the scene and had a cigarette.<sup>61</sup> As the claimant was walking back to the vehicle of which he was a passenger, another pickup truck struck the claimant within a few feet from the insured vehicle resulting in severe injuries.<sup>62</sup>

The *Morris* court began its opinion by analyzing the reasonable geographic area and citing the *Joins* opinion.<sup>63</sup> However, this court did not use physical proximity to establish an immediate relationship. The *Morris* court acknowledged the need for a reasonable geographic area, but it never answered if the accident was within a reasonable proximity of the insured vehicle. As a result, this court took a narrower approach and analyzed the *Joins* standard as if it were a two-part test. Since neither party disputed that

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56. *Joins*, 504 N.E.2d at 63-64.

57. *Id.* at 63.

58. *Id.*

59. *Morris v. Continental Ins. Co.*, 594 N.E.2d 1106, 1110-11 (Ohio App. 1991).

60. *Id.* at 1108.

61. *Id.*

62. *Id.* at 1108-09.

63. *Id.* at 1109-10.

the claimant was within a reasonable geographic perimeter of the insured vehicle, the court began analyzing whether the claimant had a sufficient relationship.<sup>64</sup> The *Morris* court stated there were two ways to establish a sufficient relationship to the insured vehicle.

First, the “performance of a task related to operation of a vehicle provides a sufficient basis for a relationship between the claimant and the vehicle, even when the claimant has no other connection to the vehicle.”<sup>65</sup> The court held that the claimant was performing a task related to the operation of the vehicle because his actions of observing the damage were related to driving the truck during earlier segments of the journey and his status as a passenger.<sup>66</sup>

Additionally, a “sufficient relationship to the insured vehicle [also exists] if the [claimant’s] conduct is ‘foreseeably identifiable’ with the normal use of the vehicle.”<sup>67</sup> Foreseeably identifiable conduct includes “performance of activities related to the claimant’s prior presence in the insured vehicle.”<sup>68</sup> The *Morris* court found that the claimant had a sufficient relationship because he was not only walking towards the vehicle but also observing the damage resulting from the accident, and such conduct is foreseeably identifiable with the normal use of the vehicle.<sup>69</sup>

Shortly thereafter, the Eighth District Appellate Court broadened the *Joins* test by focusing on the plaintiff’s activity and motivation to establish a sufficient relationship rather than physical proximity. In addition to the tests set forth in *Morris*, the Eighth District Appellate Court found that a sufficient relationship also exists to the vehicle if the claimant is “vehicle-oriented” as opposed to “highway-oriented” or “sidewalk-oriented.”<sup>70</sup> In *Cincinnati Insurance Co.*, the passenger was riding in an insured truck which he and the driver were using to carry bottles of pop to their stores.<sup>71</sup> Some of the bottles fell onto the highway about one hundred to one hundred ten feet away, and the passenger exited the truck to retrieve them at which time he was struck by another vehicle.<sup>72</sup>

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64. *Morris*, 594 N.E.2d at 1110-11.

65. *Id.* at 1110. See *Halterman v. Motorists Mut. Ins. Co.*, 443 N.E.2d 189, 192 (Ohio App. 1981).

66. *Morris*, 594 N.E.2d at 1111.

67. *Id.* at 1110 (quoting *Nationwide Mut. Fire Ins. Co. v. Turner*, 503 N.E.2d 212, 217 (1986)). See *Yoerger v. Gen. Accident Ins. Co.*, 648 N.E.2d 919, 921-22 (Ohio App. 1994) (holding that the claimant had a sufficient relationship with the insured vehicle when he was working on highway pavement nearby).

68. *Morris*, 594 N.E.2d at 1110.

69. *Id.* at 1111.

70. *State Farm Mut. Auto. Ins. Co. v. Cincinnati Ins. Co.*, No. 62930, 1993 Ohio App. LEXIS 3101, at \*12 (June 17, 1993) (citing *Halterman*, 443 N.E.2d at 192).

71. *Id.* at \*2.

72. *Id.*

The court cited a New York case as the origin of the vehicle-oriented test.<sup>73</sup> The New York court held that “a person has not ceased ‘occupying’ a vehicle until he has severed his connection with it—i.e., when he is on his own without any reference to it.”<sup>74</sup> Furthermore, a “short, temporary, enforced break in the occupancy of his vehicle for the express purpose of continuing occupancy “should not remove an individual from the protection . . . by an insurance carrier when it adopted the ‘occupying’ language in its policy.”<sup>75</sup> In the *Cincinnati Insurance Co.* case, the court found that the claimant’s “express purpose for temporarily leaving the vehicle was to retrieve these cases of pop and return them to the truck in order” to continue his trip.<sup>76</sup> Thus, the court held that the claimant was occupying the insured vehicle since he was vehicle-oriented, and he should not be denied coverage “because he was temporarily and fortuitously outside of the vehicle at the time of the accident.”<sup>77</sup>

Similarly, the Sixth District Appellate Court also used the vehicle-oriented test to analyze whether the claimant had a sufficient relationship with the insured vehicle.<sup>78</sup> In *Phillips*, the claimant and his girlfriend were driving together when they began arguing.<sup>79</sup> The claimant’s girlfriend jumped from the moving vehicle so the claimant pulled the vehicle into a parking lot and pursued her on foot.<sup>80</sup> While standing on a center divider attempting to return to his truck, the claimant was struck by an uninsured motorist and injured.<sup>81</sup> The *Phillips* court cited the *Joins* test, and then concluded that the claimant was not within a reasonable geographic perimeter because he was “at least two lanes of traffic away from the vehicle.”<sup>82</sup> The court never examined the number of feet that the claimant was from the vehicle, yet it concluded that two lanes of traffic away was not within a reasonable proximity. Furthermore, the *Phillips* court held that the claimant was not “vehicle-oriented” because

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73. *Allstate Ins. Co. v. Flaumenbaum*, 308 N.Y.S.2d 447, 461-66 (N.Y. Sup. Ct. 1970) (holding that because the passenger had alighted in mid-trip due to unexpected circumstances, and he fully intended to re-enter, although “fortuitously and temporarily outside of the vehicle at the time of the accident,” he was still vehicle oriented and occupying the insured vehicle for purposes of insurance coverage (quoting *Cincinnati Ins. Co.*, 1993 Ohio App. LEXIS 3101, at \*14)).

74. *Id.* at 462.

75. *Id.*

76. *Cincinnati Ins. Co.*, 1993 Ohio App. LEXIS 3101, at \*14.

77. *Id.*

78. *Auto-Owners Ins. Co. v. Phillips*, No. L-88-271, 1989 Ohio App. LEXIS 2283, at \*13 (June 16, 1989).

79. *Id.* at \*1.

80. *Id.*

81. *Id.* at \*1, \*13.

82. *Id.* at \*13.

he was standing on the center divider between the lanes of traffic.<sup>83</sup> This court never examined whether the claimant was performing a task related to the operation of the vehicle or if his activities related to his prior presence in the insured vehicle may be conduct foreseeably identifiable with the normal use of the vehicle. Thus, the court erred by only analyzing the claimant's conduct by the vehicle-orientation test instead of further inquiry into the relationship with the insured vehicle.

A couple years later, the Second District Appellate Court was faced with determining whether a claimant was "occupying" the insured vehicle for insurance purposes.<sup>84</sup> Similar to the *Morris* court, the Second Appellate District Court interpreted the *Joins* standard as a two-part test. In *Etter*, the claimant was driving his grandmother's insured vehicle and slid off the road onto the median.<sup>85</sup> Following a Trooper's instructions, the claimant returned to the vehicle to wait for the tow truck.<sup>86</sup> While waiting for the tow truck, another car slid off of the road.<sup>87</sup> Approximately twenty to thirty feet away from his vehicle, as the claimant was helping the owner push the vehicle, a third vehicle slid off the road and injured the claimant.<sup>88</sup>

Suitably, the *Etter* court began its opinion by analyzing whether the claimant was within a reasonable geographic perimeter. However, the court never examined whether twenty to thirty feet was within a reasonable geographic perimeter, but it merely concluded that "[o]ther courts have found that much greater distances are still within a reasonable geographic proximity."<sup>89</sup> This reliance evidences that the *Etter* court is unclear as to whether certain distances are within a reasonable geographic proximity. The *Joins* test only states that the distance has to be within a *reasonable* proximity, but courts are uncertain what distances are reasonable because the test was developed from a specific factual situation.<sup>90</sup>

After stating that the accident occurred within a reasonable geographic area, the *Etter* court said that a sufficient relationship could be established by the claimant's performance of a task related to the operation of the vehicle, the claimant's "foreseeably identifiable" conduct with the vehicle, or the claimant's vehicle-orientation.<sup>91</sup> Applying the foreseeably identifiable conduct test, the court held that the claimant was occupying the vehicle

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83. *Phillips*, 1989 Ohio App. LEXIS 2283, at \*12-13.

84. *Etter v. Travelers Ins. Co.*, 657 N.E.2d 298, 300 (Ohio App. 1995).

85. *Id.* at 299.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Etter*, 657 N.E.2d at 302 (citing *Cincinnati Ins. Co.*, 1993 Ohio App. LEXIS 3101, at \*4).

90. *See id.*

91. *Id.* at 301 (citing *Morris*, 443 N.E.2d at 1111).

because helping another driver is foreseeably identifiable with the normal use of a vehicle in certain situations.<sup>92</sup> The *Etter* court used a broader approach for determining the claimant's relationship with the vehicle because it recognized three different tests to establish a sufficient relationship; the court held that the claimant can occupy the vehicle simply by satisfying only one of the three tests.<sup>93</sup>

As evidenced above, appellate courts are applying more analysis to whether the claimant had a sufficient relationship and less analysis on whether there is a reasonable geographic perimeter. Yet, insurance companies still have the opportunity to deny claims on the basis that the claimant was not within a reasonable proximity of the insured vehicle. Therefore, a broader approach should be applied to reasonable proximity by acknowledging that any accident within two hundred feet constitutes a reasonable geographic perimeter. By adopting this broad approach, claimants, insurance companies, and courts can determine immediately whether the insured was within a reasonable proximity. Further, there should be no limitations or caveats on the two hundred foot rule. Any limitation, such as being in the same parking lot or on the same side of the street, would open the door for insurance companies to challenge the reasonable proximity by alleging another creative caveat. Limitations on this rule would create a case-by-case determination for every lawsuit challenging the reasonable proximity, which negates the purpose of the easy application of the two hundred foot rule.

By adopting the broader approach—if the accident occurred within two hundred feet of the insured vehicle and the plaintiff can satisfy one of the three sufficient relationship tests—plaintiffs will have more bargaining power when settling claims with the insurance company if the insurer knows that the law is more advantageous for insureds. Furthermore, a broader approach will allow courts to be more flexible when determining whether a claimant is occupying the insured vehicle, which also allows other states a greater opportunity to follow Ohio precedents and adopt the broader approach.

### *C. Other States' Approaches for Determining Occupancy Status*

Like Ohio, other states have developed different tests to interpret the meaning of the term “occupying” for insurance purposes.<sup>94</sup> Nevertheless, jurisdictions are split on whether they apply a broad approach when determining the occupancy status of a claimant. The original standard, which was the narrowest approach, required “physical contact” between the victim

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92. *Id.* at 302.

93. *Id.* at 301-02.

94. Terry, *supra* note 19, at 24-26.

and the insured vehicle.<sup>95</sup> Insurers encouraged the physical contact requirement because it excluded many types of accidents from uninsured motorist coverage.<sup>96</sup> Although many courts required physical contact at one time, this narrow approach is no longer mandatory in order to recover under the term “occupying” for insurance purposes.<sup>97</sup>

Many jurisdictions have attempted to broaden uninsured motorist coverage by focusing on whether the claimant is performing an act that is normally associated with the immediate “use” of the vehicle.<sup>98</sup> As a result, the Pennsylvania Supreme Court adopted the “transaction-oriented” approach which considers a claimant to be “occupying” the vehicle if:

- (1) there is a causal relation or connection between the injury and the use of the insured vehicle;
- (2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle, although the person need not be actually touching it;
- (3) the person must be vehicle oriented rather than highway or sidewalk oriented at the time; and
- (4) the person must also be engaged in a transaction essential to the use of the vehicle at the time.<sup>99</sup>

The Pennsylvania Supreme Court applied this test to an airport employee who was testing the compaction of the runway surface.<sup>100</sup> In *Curry*, the claimant was provided with a pick-up truck to transport him to and from the project site.<sup>101</sup> While testing the runway twenty feet from his truck, the claimant sustained extensive and permanent injuries when he was struck by a loaded

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95. *Id.*

96. *Id.*

97. *Id.* See *Lumbermen’s Mut. Cas. Co. v. Norris*, 303 N.E.2d 505 (Ill. App. 1973) (holding that, despite no physical contact with the vehicle, the claimant was “occupying” the vehicle when she was struck by another vehicle); *Mich. Mut. Ins. Co. v. Combs*, 446 N.E.2d 1001 (Ind. App. 1983) (holding that the physical contact requirement was irrelevant because the claimant was still occupying the car when he was injured after he exited to check his bumper).

98. See e.g., *Allied Mut. Ins. Co. v. W. Nat’l Mut. Ins. Co.*, 552 N.W.2d 561 (Minn. 1996) (claimant was not occupying the vehicle because he had no immediate expectation of occupying the vehicle since he was locked out); *Cuevas v. State Farm Mut. Auto. Ins. Co.*, 28 P.3d 527 (N.M. 2001) (the claimant, who was reaching for a spare tire, had a continuing relationship with the insured vehicle); *Utica Mut. Ins. Co. v. Contrisciane*, 473 A.2d 1005 (Pa. 1984) (the claimant was entitled to uninsured motorist coverage when he was handing his driver’s license to a police officer after an accident because he was engaged in a transaction essential to the use of the vehicle).

99. *Utica*, 473 A.2d at 1009.

100. *Curry v. Huron Ins. Co.*, 781 A.2d 1255, 1256-57 (Pa. 2001).

101. *Id.* at 1256.

dump truck.<sup>102</sup> The court stated that using the truck to drive to the project site and working twenty feet from the truck satisfied the first two prongs of the *Utica* test.<sup>103</sup> However, the court held that the claimant failed to satisfy the third prong because he was working on the runway and not preparing to enter the truck.<sup>104</sup> Further, the claimant also failed to satisfy the fourth prong because testing the compaction of the road surface was not an activity essential to the operation of a truck.<sup>105</sup>

The application of the transaction-oriented test actually takes a narrow approach to insurance coverage and demonstrates the potential for inconsistent results. By requiring the plaintiff to satisfy every prong, the application of the test requires a case-by-case determination. This case-by-case approach has considerable potential to produce inconsistent and unpredictable results. Despite Pennsylvania's attempt to broaden its uninsured motorist coverage, this test actually creates a narrow approach which makes it very difficult for the claimant to win.

Other tests that courts apply are either "reasonable connection" or "reasonable proximity."<sup>106</sup> Although there is little distinction between these two approaches, the reasonable proximity test places substantial focus on time and distance factors.<sup>107</sup> For example, a Minnesota court found that the claimant was occupying his vehicle when he was electrocuted by downed power lines at a distance of five or six feet from the passenger door of the vehicle.<sup>108</sup> The *Haagenson* court held that he was injured in sufficiently close proximity to the truck to be considered entering into it.<sup>109</sup> Applying the same test, Louisiana held that the time and distance relationship was too attenuated where the claimant was seriously injured after a minor collision when he walked seventy feet away to speak with a police officer.<sup>110</sup> Similar to the problem with the *Joins* reasonable proximity standard, this test merely gives a range between five and seventy feet to determine the reasonable proximity. Is a claimant within a reasonable proximity when hit twenty-five feet away, thirty-five feet away, or forty-five feet away? Courts will remain unclear whether a certain distance is within a reasonable proximity until litigation ensues and a case-by-case determination is made.

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102. *Id.* at 1257.

103. *See id.* at 1258-59.

104. *Id.*

105. *Curry*, 781 A.2d at 1259.

106. *Terry*, *supra* note 19, at 24-28.

107. *Id.*

108. *Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 650-52 (Minn. 1979).

109. *Id.* at 652.

110. *See George v. Breard*, 394 So. 2d 1282, 1283-84 (La. App. 1981).

In contrast, the “reasonable connection” test takes a broader approach by focusing on the “injured’s relationship to the vehicle,” rather than the claimant’s physical proximity.<sup>111</sup> For example, a claimant was attempting to jump-start another stranded vehicle.<sup>112</sup> The *Sayers* court held that he was “occupying” the vehicle because “[h]is attempted assistance was undeniably dependent upon and thus reasonably connected to the [insured] vehicle.”<sup>113</sup>

Another test used to determine occupancy is the claimant’s intent.<sup>114</sup> This analysis is similar to Ohio’s vehicle-oriented test because it focuses on whether the claimant severed his or her relationship with the insured vehicle.<sup>115</sup> If “the reason for leaving the vehicle and the claimant’s activities after leaving the vehicle are directly related to the insured vehicle itself[,]” then a more liberal approach is utilized.<sup>116</sup> Courts have found claimants occupying the insured vehicle when he or she had left the vehicle to replace a car battery,<sup>117</sup> flag on-coming traffic around a disabled automobile,<sup>118</sup> or mount chains on the tires.<sup>119</sup> However, if “the vehicle is the means of transportation to the point where the claimant leaves the vehicle, and the reason for leaving the vehicle is unrelated to the vehicle itself[,]” then courts have been less than lenient.<sup>120</sup> Courts have held that claimants who are returning to their car after going to a restaurant<sup>121</sup> or who leave their automobile and lock the doors manifest an intent to leave the vehicle and sever the relationship with it.<sup>122</sup>

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111. Terry, *supra* note 19, at 24-29.

112. *Sayers v. Safeco Ins. Co. of Am.*, 628 P.2d 659, 660 (Mont. 1981).

113. *Id.* at 661.

114. 2 NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE § 24.10 (MB 2005).

115. *Id.*

116. *State Farm Mut. Auto. Ins. Co. v. Farmers Ins. Co.*, 569 S.W.2d 384 (Mo. App. 1978) (claimant was occupying the insured vehicle when he exited to assist another motorist and was hit by another vehicle while he was returning to the car).

117. *E.g.*, *Ky. Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928 (Ky. App. 1991) (claimant was “occupying” the vehicle when replacing a car battery).

118. *E.g.*, *Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992) (claimant was “occupying” the vehicle when she was flagging on-coming traffic around the scene of a disabled truck).

119. *E.g.*, *Manming v. Summit Home Ins. Co.*, 623 P.2d 1235 (Ariz. 1980) (claimant was “occupying” the vehicle when she was struck while helping place chains on the tires).

120. *Farmers Ins. Co.*, 569 S.W.2d at 385.

121. *E.g.*, *Allstate Ins. Co. v. Horn*, 321 N.E.2d 285 (Ill. App. 1974) (claimant was not “occupying” the vehicle when he returned to the car after going to a restaurant).

122. *E.g.*, *Kelleher v. Am. Mut. Ins. Co.*, 590 N.E.2d 1178 (Mass. App. 1992) (claimant who left the car and locked the doors was not “occupying” it because the operation of the vehicle had ended and he had completely severed his relationship to the vehicle).

## IV. RESOLUTION

After addressing the issue of whether a claimant is occupying an insured vehicle, the Ohio Supreme Court developed a standard that requires an “immediate relationship . . . to the vehicle[] within a reasonable geographic area” in order to recover for insurance purposes.<sup>123</sup> Initially, this seemed to be a broader approach for determining the claimant’s occupancy status, but after further examination, the standard was largely focused on physical proximity. As the *Joins* test was applied to various factual circumstances, appellate courts began analyzing the claimant’s relationship more than the physical proximity of the accident to the insured vehicle. As a result, various tests were developed to determine whether a claimant had a sufficient relationship to the vehicle for insurance purposes. However, courts are currently unclear what distances constitute a reasonable geographic area within the insured vehicle. Moreover, courts are unsure which test to apply when determining whether the claimant has a sufficient relationship for occupancy status.

Therefore, the Ohio Supreme Court needs a broader approach when interpreting the meaning of the term “occupying” in insurance contracts. When analyzing the reasonable geographic area, any accident within two hundred feet of the insured vehicle will constitute being within a reasonable proximity. The purpose of the rule is easy application to various factual situations without always resorting to litigation to determine whether the distance is within a reasonable proximity. The two hundred foot rule allows insureds, insurers, and courts to immediately know whether the accident occurred within a reasonable geographic perimeter of the insured vehicle. Moreover, there can be no limitations or caveats on the two hundred foot rule. Any limitation or exception, such as being in the same parking lot or on the same side of the street, would necessitate a case-by-case determination of reasonable proximity, which negates the purpose of the easy application of the two hundred foot rule.

Assuming that the accident occurred within two hundred feet of the insured vehicle, then the claimant must establish that he or she had a sufficient relationship to the vehicle. There are three tests that the claimant can satisfy to establish a sufficient relationship in order to receive compensation. First, the “performance of a task related to operation of a vehicle provides a sufficient basis for a relationship between the claimant and the vehicle, even when the claimant has no other connection to the vehicle.”<sup>124</sup> Second, a sufficient relationship to the insured vehicle also exists if the claimant’s

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123. *Joins*, 504 N.E.2d at 63-64.

124. *Morris*, 594 N.E.2d at 1110.

conduct is “foreseeably identifiable with the normal use of the vehicle.”<sup>125</sup> Foreseeably identifiable conduct includes “[p]erformance of activities related to the claimant’s prior presence in the insured vehicle.”<sup>126</sup> Third, a sufficient relationship exists with the vehicle if the claimant is “vehicle-oriented” as opposed to “highway-oriented” or “sidewalk-oriented.”<sup>127</sup> A person is vehicle-oriented and has not stopped “occupying” a vehicle until he has severed his connection with it—i.e., when he is on his own without any reference to it.”<sup>128</sup>

The broad approach only requires that the claimant prove a sufficient relationship with the insured vehicle by satisfying any one of the three tests. Even if the claimant cannot establish a sufficient relationship through one test, the broad approach requires that the analysis continues by applying the remaining tests. Thus, the plaintiff has more chances to establish a sufficient relationship with the insured vehicle in order to receive compensation.

Additionally, there are many benefits resulting from a broader approach when determining a claimant’s occupancy status. Under this approach, expensive litigation will be reduced when the legal issue is whether the accident occurred within a reasonable geographic proximity. Furthermore, claimants will have more bargaining power with insurance companies when settling insurance claims because the law will be more advantageous for the insured if litigation ensues. By applying this broad approach, court will establish favorable precedents for plaintiffs and pressure insurance companies to handle claims in a more equitable manner. Finally, a broader approach will be more flexible for the courts and will allow other states a greater opportunity to follow Ohio precedents and to adopt this approach.

## V. CONCLUSION

The Ohio Supreme Court should apply a broader approach when determining a claimant’s occupancy status for insurance purposes. The origin of uninsured motorist liability coverage developed in response to the fact that a lot of harm was created by financially irresponsible parties. States attempted to solve this problem by allowing potential victims to purchase first party insurance against the risk. Accomplishing this objective requires that a rather broad protection must be made available.

By adopting the approach set forth in this comment, broad protection can be made available to insureds. The current standard in Ohio requires an

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125. *Id.* (quoting *Turner*, 503 N.E.2d at 217).

126. *Id.*

127. See *Cincinnati Ins. Co.*, 1993 Ohio App. LEXIS 3101, at \*12 (citing *Halterman*, 443 N.E.2d at 192).

128. *Id.* at \*13 (quoting *Flaumenbaum*, 308 N.Y.S.2d at 462).

immediate relationship to the vehicle within a reasonable geographic area in order to recover for insurance purposes. A broad approach to this current test would allow any accident within two hundred feet of the insured vehicle to be considered within a reasonable proximity. Furthermore, a claimant would only have to prove a sufficient relationship with the insured vehicle by satisfying any one of the three tests. By implementing this broad approach, the Ohio Supreme Court will reduce lengthy litigation over arbitrary distances and will allow claimants a greater opportunity to recover compensation through their uninsured motorist insurance coverage.

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