

# Repeal the Only Louisiana Law Preventing Competent Persons From Testifying—The UM Statute

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Only the dead, the insane, and the insurance company have laws preventing those with an interest in a case from testifying against them. In the early 1800s, these laws in the USA and Great Britain were broader with any witness with an interest in a case barred from testifying. Most states and Great Britain have since repealed these laws. A minority of states have "deadman statutes" that prevent testimony by plaintiffs who most commonly entered into disputed contracts with the mentally ill or a person who later dies.<sup>2</sup> Six states, including Louisiana, have uninsured-motorist (UM) statutes that prevent interested parties from testifying against an insurance company in a miss-and-run accident.<sup>3</sup> Louisiana's UM statute bars testimony of relevant information preventing the fact finder from making intelligent and just decisions. It is unnecessary given vigorous cross-examination and a jury that assesses the veracity of witnesses. Unlike the deadman statutes that protect those with no voice, the UM statute protects experienced litigators with adequate resources.

The Louisiana UM statute requires UM insurance coverage of hit-and-runs where the driver avoids hitting the hit-and-run driver, but runs into some other object or off the road (a miss-and-run). The injured driver can only use disinterested and independent witnesses to prove the accident occurred. The earlier UM statute did not require UM insurance to cover these miss-and-runs.<sup>4</sup> Scholars and the insured criticized this as unfair

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<sup>2</sup> Louisiana's deadman statute allows interested persons to testify but requires an uninterested person to prove the plaintiff's claim. R.S. 13:3721; 575 So. 2d 894.

<sup>3</sup> 2 Auto. Liability Ins. 4th § 24:9 (2006); R.S. 22:680(1)(f).

<sup>4</sup> R.S. 22:1406(D)(1)(f).

to the driver skillful enough to avoid a hit-and-run driver and the law was changed to include these accidents.<sup>5</sup> Since miss-and-runs often have only interested witnesses available to testify, there is a temptation the witnesses would claim the accident a miss-and-run when it was really due to falling asleep, reckless driving, or negligence. To prevent fraudulent recovery, legislators amended the statute to prevent interested persons from testifying.

The UM statute is the only exception to the Louisiana Code of Evidence that “every person of proper understanding is competent to be a witness.”<sup>6</sup> In cases other than miss-and-run UM suits, interested witnesses are competent to testify if they can show that they have relevant personal knowledge and have an understanding of the obligation to tell the truth. Interested witnesses are competent to testify under the Federal Rules of Evidence except in diversity suits where deadman and UM statutes apply.<sup>7</sup>

A law review article posed the problem: “If there are no witnesses to the accident other than the insured and the jury believes the testimony of the insured, the insurance company will have no way to rebut his claim that he was driven off the road by an unidentified driver.”<sup>8</sup> Given that, why should the UM law be repealed?

Esteemed legal scholars have criticized laws preventing interested witnesses from testifying for the past 150 years.<sup>9</sup> I will use their arguments below in answering the above question.

There is a way the insurance company can rebut the drivers claim in the miss-and-

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<sup>5</sup> Ronald Whitney, *Uninsured motorist coverage for hit-and-run vehicles: The requirement of physical contact*, 49 La. L. Rev. 955 (1989).

<sup>6</sup> La. Code Evid. art. 601. Judges and jurors may be disqualified witnesses but are not incompetent (art. 605, 606).

<sup>7</sup> Fed. R. Evid. 601.

<sup>8</sup> Whitney, 49 La. L. Rev. 955.

<sup>9</sup> Roy R. Ray, *Dead Man's statutes*, 24 Ohio St. L. J. 89 (1963).

runs. Cross-examine the witness, disclose the interests of the witness, and use circumstantial evidence. Let the jury assess the truthfulness of the witness's testimony.

The UM statute is an injustice to the honest claimant. Just as preventing testimony of a fraudulent claim protects the insurance company, preventing testimony of an honest claim may destroy the injured driver's claim. Furthermore, it is difficult to prove the miss-and-run using circumstantial evidence because paid experts in UM suits are interested witnesses.<sup>10</sup> The UM statute seeks to avoid the *possibility* of injustice to the insurance company, but makes a *certain* injustice of failure of due process for the injured plaintiff.

The statute rests on a flawed understanding of human nature. Bans on interested persons testifying would be fair if there are more dishonest persons than not, and if interested witnesses are more likely to perjure themselves than not. This runs contrary to human experience.<sup>11</sup>

There is less litigation and fewer appeals if the testimony of the interested witness is treated like other evidence where the gateway step is whether the witness is competent and the testimony relevant and reliable. Existing evidence law examines the merits of the evidence and not the identity of the witness.<sup>12</sup> Evidence rules are effective elsewhere in civil and criminal matters—why not here? Instead, court opinions accumulate in defining a disinterested witness. Some Louisiana circuits argue disinterested witnesses can only be eyewitnesses<sup>13</sup> while other circuits claim they may include professionals that arrive after the accident occurred and unpaid experts.<sup>14</sup> Resolve this conflict by allowing La. Code of

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<sup>10</sup> *Snowden v Voyager Indem. Ins. Co.*, 825 So. 2d 1223 (La. App. 1<sup>st</sup> Cir. 2002).

<sup>11</sup> *Ray*, 24 Ohio St. L. J. 89.

<sup>12</sup> W. Dent Gitchee, *Should Tennessee bury the dead man statute as Arkansas has?* 18 Mem. St. Univ. L Rev. 195 (1988).

<sup>13</sup> *Jackson v State Farm Mut. Auto Ins. Co.*, 665 So. 2d 661 (La. App. 2<sup>nd</sup> Cir. 1995).

<sup>14</sup> *Wheat v Wheat*, 868 So. 2d 83 (La. App. 1<sup>st</sup> Cir. 2003); *Snowden*, 825 So. 2d 1223.

Evidence article 601 to control.

The UM statute's bar on testimony is powerful and should be used sparingly. Instead, the law is interpreted broadly by the courts as exemplified by the circuit that bars all testimony except disinterested eyewitness to the accident.<sup>15</sup>

What could replace the testimonial bar in the UM statute and still protect the insurance company? Existing evidence law could suffice as described above. Legislators, however, may prefer additional safeguards. Other solutions include raising the standard of proof of the accident to clear and convincing or requiring corroborating evidence. At the least, the testimonial bar could remain but at the judge's discretion.<sup>16</sup>

Louisiana's UM statute banning interested persons from testifying should be repealed or, at the least, interpreted narrowly to minimize finding testimony essential to an honest person's claim inadmissible. Existing evidentiary and procedural rules are effective in fighting perjury and should be effective here. If the problem is greater than this, legislators may wish to increase the burden of proof on the plaintiff rather than prevent the plaintiff from testifying.

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<sup>15</sup> *Id.*

<sup>16</sup> Ray, 24 Ohio St. L. J. 89.