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Joseph W. Little
University of Florida

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JOSEPH W. LITTLE*

No symposium on recent developments in tort law would be complete without a commentary on no-fault reparations, and yet no topic is less needy of further exposition. Since the Massachusetts No-Fault Automobile Reparation Act went into effect in January 1971, more than 100 law journal articles on the broad topic of no-fault reparations have been published, as have a multitude of books, reports, and newspaper and popular journal accounts.[1] Aware of this massive outpouring of words, I first intended to pick out a narrow issue and produce a careful analysis that might clarify a small point in the minds of the legislators and judges who have to wrestle with no-fault systems. My inclination was to examine the theory and operation of tort exemption thresholds in states that have enacted modified no-fault laws.[2] In re-

*B.S. 1957, Duke University; M.S. 1961, Worcester Poly. Institute; J.D. 1963, University of Michigan. Professor of Law, University of Florida, Spessard L. Holland Law Center.

[1] This author has contributed to this sea of words. *See* Little, *Common Law Fault as a Core Issue in the Automobile Insurance Controversy*, 27 TRAFFIC Q. 91 (1970); Little, *How No-Fault Is Working in Florida*, 59 A.B.A.J. 1020 (1973); Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects*, 9 J. OF LAW REFORM 1 (1976).

[2] At this point I will define this concept and several others that must be distinguished. A *pure no-fault law* is one which completely abrogates tort liability in respect to a given class of civil wrongs and substitutes payment of some reparations for all losses in the class. Workmen's compensation laws illustrate this form and apply generally to the class of injuries suffered by employees on the job. So far, there is no North American example of the pure no-fault concept in the automobile reparations field. A *modified no-fault law* is one that abrogates tort liability in respect to a given class of civil wrongs except for those that fall into a specially defined subclass. In existing laws the special subclasses are defined to include injuries of greatest severity. The criteria that must be met to get into that special subclass are known as tort exemption thresholds. In addition to the two forms of no-fault that involve tort exemptions there is another form that has been adopted in some states. This form simply imposes requirements concerning first party no-fault insurance, but without abrogating fault liability at all. These are known as *add-on no-fault laws*. If insurance companies must offer this coverage but motorists are not compelled to buy it, the laws are known as *mandatory add-on laws*. If motorists are compelled to buy the insurance, the laws are known as *compulsory add-on laws*. Some add-on laws are neither mandatory nor compulsory but merely authorize the issuance of no-fault coverages. This classification system is adopted from Keeton, *Compensation Systems and Utah's No-Fault Statute*, 1973 UTAH L. REV. 383, 385-90.

It is appropriate here also to define certain insurance terms that are used in the ensuing discussion. Insurance is bought to hedge against risks to which the buyer is exposed. If a buyer wants to be paid for losses stemming from bodily injury that might

viewing much of the post-1970 law journal literature, however, I was struck by the fact that there has been no article that attempts to summarize all aspects of no-fault in terms of its promised goals and in light of the experience of no-fault states.[3] Furthermore, I was struck by the fact that certain aspects of the automobile crash reparations system which have never been exposed to excessive discussion may involve important potentials for cost savings. In view of this I decided that I

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befall him or damage that might be incurred by his property, he purchases *first party insurance* and his insurance company becomes obligated to pay him under the terms of the insurance policy worked out between them. In the automobile insurance field *Medical Payments* and *Collision* coverages are examples that have existed for a long time. *Personal Injury Protection,* commonly called *PIP,* coverage is a new first party coverage stemming from no-fault laws. If a buyer wants to be indemnified against any legally enforceable economic liability he may incur to some other person because of harm that he has caused them, he purchases *third party insurance* and his insurance company becomes obligated under contract to defend him against coverage claims and to pay judgments against him in accordance with the terms of the policy. In the automobile insurance field *Bodily Injury Liability* and *Property Damage Liability* coverages are illustrative.

Other coverages of both first and third party modes exist, but only one will be defined here after this brief explanation of how recoveries are made. If an injured person wishes to recover under a first party coverage, he simply files a claim with his insurance company and is paid in accordance with his contract. Disputes between them, if any, are contractual disputes. By contrast, if an injured person wishes to recover against the third party insurance company of some tortfeasor who caused harm to the injured person, the injured person must first establish a tort cause of action against the tortfeasor. Hence, disputes fall generally into the tort arena. In some cases a tortfeasor is uninsured and financially irresponsible, making a tort claim valueless. The risk of being injured by such a person gave rise to a special kind of first party automobile insurance known as *Uninsured Motorists's Coverage (UMC).* An injured person collects from his own insurance company, but only after it has been established that his injuries were caused by the fault of an uninsured and financially irresponsible tortfeasor.

[3] As of January 1976 the roll-call of no-fault states is:

Partial Tort Exemption	Compulsory Add-on	Mandatory Add-on	Add-on (neither)
Colorado	Arkansas	Oregon	South Dakota
Connecticut	Delaware		Texas
Florida	Maryland		Virginia
Georgia	South Carolina		Wisconsin
Hawaii	Kentucky		
Kentucky*			
Michigan			
Minnesota**			
Nevada			
New Jersey			
New York			
Pennsylvania			
Utah			
Puerto Rico			
Saskatchewan			

*Under the Kentucky law each person elects whether or not to retain tort rights and liabilities.

**Minnesota was an add-on state until the law was converted to a partial tort exemption variety by the 1974 Legislature. MINN. STAT. ANN. § 65B (Cum. Supp. 1976).

would write yet another general article about no-fault but would try to tie no-fault in theory as closely as I could to no-fault in practice—as manifested in the no-fault laws and experience under these laws.[4]

In pursuit of those goals, this paper has been organized into several sections. First, there is a section on why the no-fault movement came to be. Because this has been discussed in numerous articles, it is brief. Second will be a section defining a set of reform goals. An attempt is made to extend the goals beyond those most often stated by no-fault proponents and also to discuss openly some of the non-goals that might accompany reform. Next, a section discussing how existing no-fault laws relate to the stated reform goals is presented. This section includes a discussion of the theory of the relationship between no-fault and these goals and also discusses goal attainment in various no-fault jurisdictions to the extent data are available to evaluate it. The fourth section systematically reviews the elements of no-fault as they relate to the attainment of various goals and also treats, in more depth, the non-goals that might be concomitants of no-fault and particularly of adjustments to existing no-fault laws. The final section of the paper is an evaluation (offered with much trepidation) of the effectiveness of existing no-fault laws in attaining various reform goals.

WHY NO-FAULT?

One cannot really understand the factors that gave rise to the no-fault[5] laws and the issues involved in no-fault without understanding

[4] The state of the literature allows one to find almost any opinion about no-fault that one seeks. The following quotations are representative of the diverse views that have been expressed, based mainly upon no-fault theory and not upon experience:

(a) "New Jersey's no-fault plan is a pragmatic reparation's reform law which alleviates shortcomings of traditional automobile insurance. While premium costs and docket congestion are reduced, the primary benefit is prompt compensation of economic losses." Note, *Automobile Reparation Reform: New Jersey's No-Fault Plan*, 27 RUTGERS L. REV. 127, 138 (1973).

(b) "[The New York no-fault law] will not provide a more adequate system of compensation, nor will it reduce court congestion. What it will do is deprive the innocent accident victims of basic rights to compensation . . . . If the fault system is imperfect, at least it is not unconstitutional." Note, *No-Fault Insurance in New York: Another Hazard for the Innocent Driver*, 40 BROOKLYN L. REV. 689, 720 (1974).

(c) "This review of leading cost studies, coupled with some elementary sensitivity analysis, suggests that no-fault insurance would cost less than automobile insurance under the present system. Indeed the savings could be substantial but they could also be substantially less than claimed by no-fault's most enthusiastic supporters." Williams, *Will No-Fault Cost More or Less?*, 21 CATH. U.L. REV. 405, 416 (1972).

[5] Why no-fault? Much has been written on this topic. The best syntheses to be found are probably R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); REPORT OF N.Y. INS. COMMISSION, AUTOMOBILE INSURANCE: FOR WHOSE BENEFIT? (1971); A

the relationship between the law of torts and the insurance reparation system that exists in this country. Over most of the years in which automobiles and automobile crashes have been a part of our culture, the resolution of automobile crash reparation issues has been a matter of private law. Government imposed relatively little statutory law. Until the no-fault reform movement, only North Carolina, Massachusetts, and New York had a governmentally imposed requirement that motorists purchase insurance as a condition to use of the highways, unless the motorist had already been involved in certain designated kinds of crashes or had been convicted of certain highway offenses.[6] The role of government was seen merely as one of making the courts available to resolve the private claims that arose among users of the highways. The state had nothing to do with whether or not legitimate claims were collectible, and there was no governmental goal to provide reparations to crash victims.

Into this void stepped the insurance industry to provide protection against the risks that were perceived by motorists. These risks fall generally into two classes. One is the class associated with suffering injury to oneself or damage to one's property, and the second is the class or risks associated with liability for harm done to the person or property of someone else. Interestingly enough, motorists have traditionally been more concerned about economic risks than they have been about risks of injury to themselves or their property. The fact that a greater proportion of motorists traditionally have purchased liability insurance than have purchased first party insurance adds credence to this view.[7] Furthermore, the amount of risk covered in liability insurance policies is typically more than the amount of risk

Study of Hawaii's Motor Vehicle Insurance Program, Special Report No. 72-1, A Report to the Legislature of the State of Hawaii (January 1972). The best single compilation of analyses of factors underlying the discontent is probably WALTER E. MYERS RESEARCH INSTITUTE OF LAW, DOLLARS, DELAY AND THE AUTOMOBILE VICTIM: STUDIES IN REPARATION FOR HIGHWAY INJURIES AND RELATED COURT PROBLEMS (1968). Also of much value in this regard is a series of reports issued by the U.S. Department of Transportation, especially I DEP'T OF TRANSPORTATION AUTOMOBILE INSURANCE AND COMPENSATION STUDY, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES (April 1970).

[6] The import of financial security laws is to require motorists to obtain insurance or other security only after having had an injury-producing crash or non-crash violations such as driving while intoxicated. Florida's financial responsibility law is illustrative. *See* FLA. STAT. ANN. § 324 (1975). *See generally* C. BRAINARD, AUTOMOBILE INSURANCE 415-48 (1961).

[7] The insurance buying practices of Florida motorists is illustrative. In a sample of over 4,000 policies in force in 1971, the last pre-no-fault year in Florida, 16.2 percent of the policy holders who purchased liability coverage chose not to buy first party coverages. This statistic is derived from data in the possession of the author obtained in an impact study of the Florida no-fault law sponsored by the Council on Law-Related Studies of Cambridge, Massachusetts, and the University of Florida College of Law.

covered in first party insurance policies.[8] In sum, the automobile crash victim reparation system in this country has come to be a synthesis of the law of torts, based strongly upon the fault concept and the liability insurance system. For convenience this system will be referred to as the tort law-liability insurance system.

To reformists, the principal shortcoming of the system was that too many people were left uncompensated after suffering injury on the highway. The requirement of fault as a condition of recovery and the concomitant doctrine of contributory negligence left a large proportion of injured persons without any entitlement of recovery under traditional tort law. Because first party insurance coverages were far from universal, and even when they existed they usually paid up to relatively small limits, the result was a system that left a great many victims uncompensated.

The same factors that yield uncompensated victims also yield under-compensated victims. However, other factors compound the under-compensation picture, especially in instances of severe injury. It has already been observed that first party insurance coverages have relatively low limits. Severely injured victims often suffer tangible losses much greater than these limits. Moreover, even if there is a third party at fault, against whom a liability claim may be made, quite often the amount of liability coverage that such a third party may have purchased will be exceeded by the extent of injuries suffered. This means that even though there was liability insurance in the picture, the victim will still remain under-compensated because of the limits of liability under the insurance contract, unless the tortfeasor himself was of sufficient financial stature to pay a judgment out of his own resources. As a result, I believe it to be true that the injured party's claim would most often be settled within the limits of coverage of the tortfeasor's liability insurance policy.

A third major criticism of the tort law-liability insurance reparation system is that many crash victims were over-compensated. Two factors are at work here. One derives from the fact that our law of torts recognizes damages based on intangible aspects of the personal injury suffered by an injured victim. These intangible elements com-

[8] Liability insurance is purchased up to limits agreed to by the contracting parties. Typically, limits will be set for bodily injury liability to an individual; aggregate bodily injury liability in a single crash; and property damage liability per crash. To illustrate, a 15/30/5 automobile liability policy would insure the motorist for risks up to $15,000 per individual; $30,000 for all persons in the crash; and $5,000 aggregated property damage. Liability above those limits would be uninsured. First party insurance also is issued up to limits, typically $5,000 per person per crash.

monly are denominated as pain, suffering, and inconvenience, and are intended to compensate for losses that do not manifest themselves directly in economic terms as do medical expenses and lost wages. The mere existence of this element of recovery gives potential value above tangible losses to virtually every personal injury claim, especially those in which bodily injury has been clearly manifested. When this factor is joined with the fact that it costs a liability insurance company a substantial amount of money to investigate elements of fault and of damages in claims, it is understandable that in a certain class of small claims it is more economical from the liability insurance companies' standpoint to pay the claim than it is to defend it. Accordingly, in a large class of cases in which either liability or the extent of damages was in some doubt, it became the practice of liability insurance companies to pay the "nuisance" value of the claims rather than to litigate them, suffer all of the costs associated with the litigation, and still stand the risk of losing in court. Typically, the nuisance value of a small claim would be somewhere in the range of three to five times provable medical expenses. While not always true, this system generally had the effect of awarding more money than was justified to a great many victims who had suffered only minor injuries and in some cases to victims who had suffered no injury at all. Because the great preponderance of automobile crash victims suffer only minor injuries, the economic impact of this practice was large.[9]

A second factor that contributed to the over-compensation of some victims was the availability of collateral sources of recovery and the so-called "collateral source rule" that prevails in the tort law of most jurisdictions. In many instances, an injured victim would be entitled to payment for medical losses under a health or accident policy or under workman's compensation or similar employment related programs, and commonly he would be entitled to continuation of wages from the same or similar sources. Under the collateral source rule the existence of these sources of recovery did not require the diminution of the tort recovery. That the victim had been prudent

[9]That the bulk of personal injury claims falls into a range of values less than $1,000 is shown by the following statistics derived from a Florida study of insurance claims.

Settlement Amounts	Percentage of All Claims		
	1971	1972	1973
$0 to $500	64.8	63.7	70.2
$501 to $999	10.4	9.7	9.0
$1,000 to $2,000	14.8	10.0	5.1
$2,000 and above	10.0	16.6	15.6
	(298 claims)	(330 claims)	(332 claims)

Source: Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects*, 9 J. OF LAW REFORM 1, Table 14 (1976).

enough to provide protection for himself, it was argued, should not be of advantage to the tortfeasor. Furthermore, because recovery from the collateral sources was guaranteed by contracts between the victim and his employer or his first party insurance carrier, the fact that recovery was unavailable under the tort law did not affect the right to receive the first party benefits. As a consequence, the collateral source rule tended to enhance the over-compensation in instances of minor injuries among the class of victims which was entitled to protection from the collateral sources. It is also true, of course, that the collateral source rule helped alleviate the effects of under-compensation in some instances.

Delay of the settlement process because of congestion in the courts was another causative factor in the no-fault reform movement. No-fault reformists were able to document the fact that crowded court dockets in some jurisdictions sometimes caused delays of several years in settling law suits.[10] Extensive delay in settlement of liability claims means not only that the claimant must wait to receive his money, but also that in many instances he may get less money than he is entitled to. This is most likely to occur in instances of very severe injury in which a claimant has been rendered impecunious and is coerced by his circumstances to settle his case for less than the verdict that might be rendered by a jury. Hence, court congestion is bad not only because delay in justice is bad but also because it exacerbates the maldistribution of benefits already existing under the tort law-liability insurance system.

The escalating cost of insurance was perhaps the factor that most significantly assisted the no-fault reformists. While to many reformists, the problems of under-compensation and no compensation may have been more important, it was the cost factor that caught the interest of the public and enabled the reformists to overcome institutional resistance to change.[11] The blame for increasing costs was usually laid on the so-called nuisance value of the minor personal injury claim under liability policies, and also to the lawyers' fees that were paid by claimants. No-fault was offered as a way of reducing these elements of cost and many people supported the change on that basis. As will be shown in later discussion, however, other cost factors have not yet been touched by the existing no-fault laws and some aspects

[10] Data on delay in courts are assembled in Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in DOLLARS, DELAY AND THE ACCIDENT VICTIM at 151, *supra* note 5.

[11] *See, e.g.*, the backdrop that led to passage of the Massachusetts law as described in Coombs, *The Massachusetts Experience Under No-Fault*, 44 MISS. L.J. 158 (1973).

of these laws are counterproductive in the sense that they actually add additional costs.

While there may have been other factors that contributed to the reform movement, these were the most instrumental.

What Are Reasonable Reform Goals?

Having sifted through the great volume of writing criticizing the underlying tort law-liability insurance reparation system, I would propose reform goals in five areas: (1) redefinition of reparations; (2) cost reduction goals; (3) cost reallocation goals; (4) reallocation of societal resource goals; and (5) elimination of corruption in the reparation system goals. Each of these points will be developed in a general way here and the theory and practice of how no-fault might lead to its attainment will be discussed in the next section of the paper. Table I isolates individual goals and indicates generally how they have been influenced by existing no-fault laws and what some of the unintended externalities have been.

Reparation Goals

Two general reparation goals may be stated. The first is simple and straightforward—to provide essential medical care and life support for *all* victims of automobile crashes. Professor Alfred Conard's statement that:

> Wounds should be healed, bones set, prostheses supplied, psychic readjustment achieved, and occupational retraining provided when needed . . . for every victim, regardless of whether or not the victim was himself careless, whether or not the guilty driver can be found, and whether or not he can pay or has purchased adequate insurance. Medical services should be supplied for humanitarian reasons—because the modern conscience demands that no one unnecessarily be left physically impaired. They should also be supplied for economic reasons—because every one loses when a member of society ceases to contribute to the national product and becomes instead a burden on the shoulders of others . . .[12]

A second reparation goal would be to seek more equitable distributive justice in the allocation of benefits paid to crash victims. One sub-goal would be to eliminate over-payment to victims of minor

[12] Conard, *The Economic Treatment of Automobile Injuries*, in Dollars, Delay and the Accident Victim at 431, *supra* note 5.

injuries, where that over-payment represents nothing but the nuisance value of the claim. The second sub-goal would be to eliminate under-payment of the victims of severe injury, and a third sub-goal would be to make payments available sooner to all recipients.

It should be noted here that some goals will be inconsistent with other goals. For example, the goal of universal reparations for all victims and the goal for eliminating under-payment of victims of severe injuries are inconsistent with the next general goal of reducing cost.

Cost Reduction Goal

When reformists have spoken of cost reduction, they have been referring to the cost paid by consumers for insurance contracts. As already observed, the focus of cost reduction analyses has been the nuisance value of minor personal injury cases and payments made to lawyers by injured claimants against tortfeasors and their liability insurers. While these aspects of cost must be accounted for, to concentrate solely upon them is to fail to obtain a complete picture of the cost structure of insurance.[13]

One may look to the basic accounting structure and experience of the insurance industry to obtain a fuller picture. For example, if one looks at the aggregated experience of mutual and stock automobile liability insurance companies for years 1964-73, one will find approximately the following disposition of each premium dollar paid by consumers.[14] (1) Paid out in benefits: $.62. (This includes both the amount that finally gets into the hands of beneficiaries and the amount beneficiaries pay to lawyers and others in obtaining the benefits.) (2) Spent by insurance company in investigating and paying claims: $.12. (3) Commissions paid to agents and brokers: $.11. (4) Other underwriting expenses: $.14. (5) Underwriting profits: Nil or slightly

[13] Discussion of insurance company accounting practices and how they allocate costs is to be found in Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 MISS. L.J. 15 (1973), and *A Study of Hawaii's Motor Vehicle Insurance Program*, Special Report No. 72-1, A Report to the Legislature of the State of Hawaii (January 1972). *See also* Williams, *Will No-Fault Cost More or Less?*, 21 CATH. U.L. REV. 405 (1972).

[14] To support this set of estimates aggregate insurance experience data for the years 1964-73 have been extracted from A.M. BEST, AGGREGATES & AVERAGES (1974) and reproduced here.

From the same publication is obtained the following information breaking down the ratio "Losses Adjusting Expenses incurred to Premium Earned" for the year 1974 into components as follows:

Stock Companies: 64.0 percent losses; 11.2 percent Adjusting Expenses (Bodily injury liability).

Mutual Companies: 60.8 percent losses; 13.4 percent Adjusting Expenses (Bodily injury liability).

CUMULATIVE BY LINE UNDERWRITING EXPERIENCE—

KINDS OF INSURANCE	Year	Premiums Written	Unearned Premiums	Premiums Earned	Losses & Adj. Exp. Inc. to Prems. Earned	Ratios to Prems. Written			Underwriting Profit or Loss	Ratio to Prems. Earned
						Comms. & Brok. Inc'd	Other Underwriting Exps. Inc'd	Total Underwriting Exps. Inc'd		
Automobile Liability	1964	$3,294,336,825	$1,350,534,503	$3,201,229,738	76.1	16.3	14.0	30.3	$-233,874,494	-7.3
	1965	3,688,364,112	1,504,538,657	3,527,495,667	76.2	15.9	13.2	29.1	-236,115,369	-6.7
	1966	4,081,282,915	1,655,176,387	3,925,377,140	74.9	15.6	12.9	28.5	-180,579,232	-4.6
	1967	4,423,505,770	1,796,260,093	4,278,095,578	74.4	15.4	12.9	28.3	-155,471,098	-3.6
	1968	4,740,236,997	1,927,331,213	4,611,210,284	76.1	15.3	12.9	28.2	-233,104,617	-5.1
	1969	5,201,245,750	2,091,740,035	5,030,964,560	77.8	14.9	12.7	27.6	-318,911,138	-6.3
STOCK	1970	5,968,112,736	2,388,963,728	5,662,371,794	78.3	14.5	12.2	26.7	-369,298,284	-6.5
	1971	6,777,181,401	2,669,374,976	6,481,838,207	74.0	14.2	12.1	26.3	- 96,166,330	-1.5
	1972	7,068,814,594	2,758,154,499	6,979,578,071	73.9	14.3	12.8	27.1	- 87,900,836	-1.3
	1973	7,250,535,000	2,812,581,000	7,198,196,000	76.1	14.2	13.5	27.7	-287,463,000	-4.0
Totals		52,493,616,100		50,896,357,039	75.7	14.9	12.8	27.7	-2,198,884,398	-4.3
Automobile Liability	1964	$ 1,610,094,242	$ 510,905,362	$ 1,567,077,335	81.4	8.4	16.0	24.4	$-102,165,390	-6.5
	1965	1,760,320,422	562,710,806	1,704,407,189	79.7	8.1	15.4	23.5	- 67,190,251	-3.9
	1966	1,996,697,551	622,954,154	1,934,454,268	79.8	7.8	14.8	22.6	- 59,729,903	-3.1
	1967	2,184,491,527	681,473,497	2,126,649,229	79.4	7.8	15.0	22.8	- 59,862,910	-2.8
	1968	2,420,066,174	755,841,823	2,344,100,500	80.0	7.5	15.2	22.7	- 80,200,500	-3.4
	1969	2,728,518,907	843,403,141	2,639,163,774	80.9	7.4	15.0	22.4	-105,568,023	-4.0
MUTUAL	1970	3,072,846,428	948,450,857	2,967,849,511	78.7	7.3	14.3	21.6	- 29,584,253	-1.0
	1971	3,303,477,000	1,027,110,000	3,225,991,000	71.9	7.3	14.3	21.6	193,944,000	6.0
	1972	3,425,615,000	1,055,727,000	3,390,758,000	71.7	7.4	14.9	22.3	196,542,000	5.8
	1973	3,506,236,000	1,066,271,000	3,499,800,000	74.6	7.3	15.3	22.6	95,356,000	2.7
Totals		26,008,363,251		25,400,250,806	77.1	7.6	14.9	22.5	- 18,459,230	-0.1

negative.[15] By comparison, the distribution of the premium dollar paid in for automobile physical damage insurance is about as follows: $.60 to beneficiaries; $.08 to investigation and adjustment cost; $.12 to commissions; $.14 to other underwriting expenses; and, $.05 to profit.[16]

[15]Most of the profit made by automobile liability insurance companies comes from the investment value of premiums between the time they are paid in by policy holders and paid out by insurers. Spangenberg explains this system. *See* Spangenberg, *supra* note 13. Hence, while underwriting profits may be small or nonexistent, investment profits are generally substantial. This, of course, allows the insurance industry to stay in business.

[16]From the same source from which the Bodily Injury Liability data of footnote 14 were extracted were obtained the following Automobile Physical Damage Data:

CUMULATIVE BY LINE UNDERWRITING EXPERIENCE—

KINDS OF INSURANCE	Year	Premiums Written	Unearned Premiums	Premiums Earned	Losses & Adj. Exp. Inc. to Prems. Earned	Ratios to Prems. Written			Underwriting Profit or Loss	Ratio to Prems. Earned
						Comms. & Brok. Inc'd	Other Underwriting Exps. Inc'd	Total Underwriting Exps. Inc'd		
Auto Physical Damage	1964	$ 1,781,702,767	$ 1,028,707,740	$ 1,711,700,495	70.4	18.1	13.0	31.1	$- 47,369,641	-2.8
	1965	2,031,370,669	1,148,044,725	1,905,093,519	68.9	17.7	12.3	30.0	- 17,192,492	-0.9
	1966	2,313,857,660	1,269,287,970	2,190,801,670	61.8	17.5	12.1	29.6	150,983,836	6.9
	1967	2,426,071,038	1,321,001,709	2,372,726,530	63.3	17.4	12.5	29.9	144,689,765	6.1
	1968	2,620,046,924	1,405,834,383	2,537,155,049	69.6	17.0	12.5	29.5	- 629,178	...
	1969	2,883,173,804	1,518,244,685	2,768,465,890	74.9	16.2	12.3	28.5	-125,785,275	-4.5
STOCK	1970	3,275,111,129	1,647,074,774	3,142,984,468	70.7	16.0	12.2	28.2	- 2,201,263	-0.1
	1971	3,702,848,000	1,784,403,000	3,545,304,000	63.1	15.8	12.2	28.0	274,141,000	7.7
	1972	4,111,287,000	1,915,199,000	3,978,679,000	62.4	16.0	12.5	28.5	322,175,000	8.1
	1973	4,383,561,000	2,025,965,000	4,268,984,000	68.0	15.9	13.0	28.9	99,563,000	2.3
Totals		29,529,029,991		28,421,894,621	67.0	16.5	12.5	29.0	798,374,751	2.8
Auto Physical Damage	1964	$ 726,800,448	$ 248,489,856	$ 704,252,352	72.6	8.5	16.0	24.5	$ 14,625,867	2.1
	1965	829,448,184	283,233,887	793,839,386	70.3	8.3	15.2	23.5	40,765,546	5.1
	1966	944,208,358	313,140,371	913,514,824	64.5	7.8	14.6	22.4	111,885,507	12.2
	1967	1,031,757,421	336,642,660	1,008,294,868	67.1	7.8	15.1	22.9	95,622,045	9.5
	1968	1,146,194,177	373,076,159	1,109,205,761	76.5	7.7	15.2	22.9	- 2,240,337	-0.2
	1969	1,313,687,877	424,156,059	1,262,012,480	85.7	7.5	15.1	22.6	-116,609,983	-9.2
MUTUAL	1970	1,548,452,784	486,185,831	1,486,038,164	76.4	7.3	14.4	21.7	14,868,842	1.0
	1971	1,736,379,000	546,529,000	1,685,670,000	64.0	7.1	14.2	21.3	236,165,000	14.0
	1972	1,904,573,000	563,784,000	1,875,356,000	63.6	7.1	14.6	21.7	-268,892,000	-14.3
	1973	2,035,428,000	600,236,000	2,001,238,000	68.5	7.1	15.0	22.1	180,139,000	9.0
Totals		13,216,929,249		12,839,421,835	70.4	7.5	14.8	22.3	844,113,487	6.6

Looking to this more complete analysis of the cost of insurance, one can suggest that cost paring need not be limited to pain and suffering benefits and claimants' legal fees. Settlement costs incurred by the insurance industry in processing claims, and marketing and other underwriting costs of providing insurance are other potential targets. Ideally, a third area might be to reduce profits, if profits were unreasonable, but if one is to examine only underwriting profits, one would conclude that not much gain is to be made.

Equitable Cost Assessment Goals

The *raison d'etre* of insurance is to spread the cost of designated risks among a large population of persons so that the individuals "selected" to suffer the damage being guarded against will not have to bear the brunt of the full economic cost. Consequently, it is simply a contradiction in terms to suggest that the full costs of the insurance be allocated to the individual upon whom harm actually falls. Nevertheless, it is true that certain people are exposed to greater risk from a given danger than are others, and this being so, it is arguably correct that the class of persons exposed to the greatest risk should pay more than members of classes exposed to less risk. Traditionally, these considerations have been part of the pricing mechanisms used by insurance companies in allocating the costs of insurance among their policy holders. Nevertheless, existing insurance price structures have been criticized on the basis that they do not define risk categories on a fair basis.[17] For example, drivers under age 25 have uniformly been cast into high risk-high price categories without consideration of the driving proclivities of the individuals. Interestingly enough, various no-fault measures, while perhaps meeting some goals, may in fact create their own inequities in price.[18]

Another facet of cost allocation is the fact that when heavy trucks crash with passenger vehicles the risk of personal injuries being suffered is much greater among occupants of the passenger vehicles than among occupants of the trucks. Under the pricing of liability insurance, this risk differential shows up in higher costs of insurance paid by truckers to account for the greater economic risk to which they are

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The breakdown of losses and adjusting expenses in 1974 was as follows:
Stock Companies: 61.2 percent losses; 7.8 percent expenses.
Mutual Companies: 59.8 percent losses; 9.1 percent expenses.

[17] *See, e.g., A Study of Hawaii's Motor Vehicle Insurance Program* 49-61 Special Report No. 72-1, A Report to the Legislature of Hawaii (January 1972).

[18] *See, e.g.,* Blum & Kalven, *Ceilings, Costs, and Compulsion In Auto Compensation Legislation,* 1973 UTAH L. REV. 341, 362-64.

exposed when a crash occurs. If the liability system were to be completely supplanted by a first party system in which each motorist was responsible for the injuries suffered in his own vehicle, then the price of truck insurance would go down, representing decreased risk, and the price of automobile insurance would go up, representing the other side of the coin. It is this difficult problem of cost assessment that has in part led some jurisdictions to exclude commercial vehicles from the coverage of their no-fault laws.[19]

Reallocation of Societal Resources Goals

Reduction of court congestion has already been enunciated as a means of aiding the goal of distributive justice in payment of benefits. In addition, taking cases out of court that ought not be there to begin with frees the courts and their attendant mechanisms for utilization in the resolution of more worthy issues. I hasten to add that the resolution of private disputes about liability matters is not thought of as unworthy per se. But elimination of cases that come into the courts only because deficiencies in legal processes give litigation value to cases that would be denied actual value by prompt application of substantive law, is a worthy goal.

Furthermore, time and resources spent by lawyers and doctors and various people that support their activities in preparing for and litigating many claims could better be utilized in other areas. To the extent that the nuisance value theory of minor personal injury claims causes the use of more medical resources than the injuries actually require, the system clearly causes waste of precious resources that need to be reallocated for more deserving purposes.

The Goal of Ending Corruption in the System

Implicit in the nuisance value theory that leads to the magnification of the value of certain minor injury claims is the notion that the legal and medical professions and the insurance industry are willing accessories to claims practices that border on fraud. Clearly, professional responsibility requires that lawyers and doctors give the benefit of the doubt to their clients and patients. Nevertheless, to the extent that the system is being overtly corrupted by members of the professions themselves, a reform goal should be to find measures to end such corruption.

[19] For example, the Florida law does not bring commercial vehicles under the no-fault requirements, presumably at least in part on this account. The exclusion is accomplished by restrictively defining covered motor vehicles. FLA. STAT. ANN. § 627.732(1) (1973).

Non-Goals

In setting reform goals, one should also anticipate externalities that one does not seek to obtain. These I call non-goals. One non-goal often associated with the no-fault reform movement is to undermine societal values of individual responsibility. Some people believe that the concept of fault is crucial to accepted notions of individual responsibility and that eliminating fault from any part of the tort law would be a dangerous move.[20] Other non-goals that one might enunciate would be to put lawyers out of business, to put insurance companies out of business, and to create a system more susceptible to abuse of professionalism and to fraud than is the existing system.

Do Existing "No-Fault Systems" Address These Goals?

In Theory

The term "no-fault systems" is used to describe the sets of measures that have been proposed and enacted to cure the ills of the tort law-liability insurance reparations system. This acknowledges that the no-fault concept is only one of a battery of measures that will be needed. Table I lists the set of reform goals proposed earlier and correlates them with specific measures that might be a part of a comprehensive no-fault reform system. The lineup of reform measures is comprised of: (1) mandatory first party insurance that pays tangible economic,

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[20]A U.S. Department of Transportation sponsored review of literature concluded that efforts to correct human driving errors were largely ineffective. Dep't of Transportation Automobile Compensation Study, Causation, Culpability and Deterrence in Highway Crashes (1970). This minimizes the influence of the fault principle in behavior control and has been strongly criticized. *See, e.g.*, Mancuso, *The Utility of the Culpability Concept in Promoting Proper Driving Behavior*, 55 Marquette L. Rev. 85 (1972); Lawton, *Commentary: No-Fault: An Invitation to More Accidents*, 55 Marquette L. Rev. 73 (1972); Ring, *The Fault with 'No-Fault,'* 49 Notre Dame Law. 796 (1974): "Much of the confusion connected with no-fault stems from the 'no-fault' label. 'Fault' is and always will be present. It is only *responsibility* for fault that would be abolished by the insurance industry's proposals. This is the fault with no-fault." *Id.* at 825.

Another critic has said:

> It is the purpose of the tort system to differentiate between right and wrong, between good driving and bad, and impose liability upon the wrongdoer for the whole loss he inflicts. Tort liability insurance is intended to help the wrongdoer pay his obligation, including the obligation to compensate for disability, suffering, and loss of enjoyment of life. The simple reason why the tort system does not compensate *all* victims is that many victims are totally wrong and have no just claim on other drivers for compensation.

Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 Miss. L.J. 15, 52 (1973).

Thoughtful defenses of the fault principle may also be found in Tunc, *Fault: A Common Name For Different Misdeeds*, 49 Tulane L. Rev. 279 (1975) and Green, *No-Fault: A Perspective*, 1975 B.Y.U.L. Rev. 79, and an historical and contemporary overview of the attitudes of courts toward fault is to be found in Jorgensen, *Liability and Fault*, 49 Tulane L. Rev. 329 (1975).

medical, rehabilitation, and income losses without regard to fault; (2) abrogation of tort liability for economic losses to the extent they are paid by the no-fault plan; (3) abrogation of tort liability for pain and suffering; (4) abrogation or modification of the collateral source rule; (5) enhancement of bulk insurance marketing plans or preemption of no-fault insurance to a state agency to be sold in conjunction with driver and vehicle licensing systems; and (6) revision of insurance pricing schedules to conform to rational risk allocation policies. Each of these measures is aligned with one or more reform goals in Table I and each is followed by a brief commentary.

Fashioning a workable reform package from this catalogue of corrective measures is not easy. Some measures work toward certain goals and against others. Furthermore, the extent of need for reform may vary greatly from place to place. Later discussion shows, for example, that court congestion proved to be markedly different in Massachusetts than in Delaware. Furthermore, the feasibility of each reform measure varies greatly in relation to local attitudes and pressures. That the interworking of these factors has produced an assortment of reform packages in states that have taken action already has been observed.[21] These plans all include a first party no-fault insurance element[22] and some of them include a partial abrogation of tort liability. None has yet gone the full route of complete abrogation and apparently only one state[23] has created a no-fault plan without limitation on the amount of mandated benefits. This means that present no-fault laws either simply add on a first party element with little[24] or no change in the underlying tort law-liability insurance system, or impose no-fault recoveries on a tort system that has been truncated by

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[21] *See* notes 2-3 *supra* & text accompanying. It might be observed that some people believe this variability is a bad thing and ought to be corrected by federal legislation. *See, e.g.*, Hart, *National No-Fault Insurance: The People Need It Now*, 21 CATH. U.L. REV. 259 (1972); Magnuson, *Nationwide No-Fault*, 44 MISS. L. REV. 132 (1973). Most of the national no-fault proposals have centered around the proposed Uniform Motor Vehicle Accident Reparations Act. An exposition is made in Henderson, *The Uniform Motor Vehicle Accident Reparations Act*, 44 MISS. L. REV. 107 (1973).

[22] But not all laws mandate such coverage. *See* note 2 *supra*.

[23] Michigan has no stated limit on medical and rehabilitation payments, MICH. COMP. LAWS ANN. § 500.3107(a) (1975), and work loss benefits extend over three years, MICH. COMP. LAWS ANN. § 500.3107(b) (1975). All other states apparently have some limit, with a high of $50,000 in New York, N.Y. INS. LAW, ch. 13, art. 18, § 671(1) (McKinney 1975), ranging downward to the lower levels seen in the states in this study.

[24] The Delaware law does not abrogate tort liability, but does preclude no-fault benefits from being pleaded and proved in court. DEL. CODE ANN. tit. 21, § 2118(g) (Rev. 1974). Notwithstanding this preclusion, however, Delaware lawyers are said still to be "cheerfully" pleading such damages. Clark & Waterson, *'No-Fault' In Delaware*, 6 RUTGERS-CAMDEN L.J. 225, 230 (1974). The purported goal of the Delaware plan is to eliminate the multiplier nuisance value effect in small cases. *Id.* at 230.

exemptions that abrogate tort liability except for designated classes of severe injuries.

While it probably would not be worthwhile to dissect and classify all the existing no-fault laws, it may be helpful to examine important features of a few. Massachusetts, Florida, and Delaware were front-runners in the reform movement and their systems have operated long enough to produce quantifiable results. For that reason the laws of these three states have been selected for scrutiny.

The laws of both Massachusetts and Florida are of the modified tort abrogation variety and are similar enough to make it unnecessary to present both except for the fact that somewhat different consequences have arisen in the two locales. The Delaware law is of the add-on variety. Central aspects of the no-fault systems of Massachusetts, Florida, and Delaware are set out in Tables II through IV. With no intention of presenting the basic information twice, a few comments will be made in this narrative in order to place the detailed information into perspective. Massachusetts, Florida, and Delaware all mandate that no-fault benefits be made available for medical and wage losses, but only up to a limit of $2,000 in Massachusetts, $5,000 in Florida, and $10,000 in Delaware (Table II). Presumably, these limits serve to hold down costs as do universally authorized deductibles (Table II), partial tort exemptions in Massachusetts and Florida, and a prohibition on pleading and proving certain losses in Delaware (Table IV). Other cost-reduction factors are noted in Table V. Massachusetts and Florida employ the tort exemption to the extent of abrogating liability for pain and suffering, unless specified thresholds are exceeded, but Delaware does not (Table IV). All the states exclude certain persons from coverage, but this seems to be more an attempt to disqualify wrongdoers than to save money (Table III). All three plans make benefits available to occupants of vehicles and pedestrians struck by vehicles (Table III), but Florida is more restrictive in that commercial vehicles and motorcycles are not covered (Table III). While presumably this was the result of lobbying, it could be recognition of the difficulty of allocating costs fairly through first party insurance when a mixture of vehicle types is covered. In both Massachusetts and Florida the no-fault benefits protect the insured and other named persons even when they are occupants of a vehicle other than that owned by the insured person.

In sum, one can see some realization of a limited general reparation goal; somewhat limited attempts at enhancing distributive justice; possible important inroads on nuisance value recoveries in Massachusetts and Florida, but less so in Delaware; only minor efforts to reduce col-

lateral source duplications; possible important reductions in settlement costs and court congestion in Massachusetts and Florida, but less so in Delaware; but no recognized addressing of cost reallocation goals. These factors are compiled in Table VI with a comparison of the theoretical and practical results observed in the three states.

Although the decision to eschew detailed examination of all no-fault laws will be adhered to, the great variability among approaches taken to treat the "nuisance value" and other cost-related criticisms of tort law-liability insurance systems is so remarkable as to deserve further comment. It has been observed that some states have adopted a modified tort exemption scheme and others have not. Several of the add-on states simply pile no-fault benefits on top of existing systems and took no cost-saving measures.[25] Three add-on states tried novel approaches to reduce nuisance value or duplicative recoveries. Oregon[26] and South Carolina[27] did it by setting off from the dollar value of tort recoveries the dollar value of no-fault benefits paid. Presumably, litigating practices are not affected in the slightest, but the overlap of no-fault benefits and tort recoveries is eliminated. Oregon[28] and South Carolina[29] also preclude duplication of no-fault and workmen's compensation benefits. While overlap is cut back, it is hard to see how any existing nuisance value problem would be relieved.

As has been observed, Delaware's no-fault law addresses nuisance value by prohibiting the pleading and proving of payable no-fault benefits.[30] Delaware also prevents overlapping of no-fault and workmen's compensation benefits.[31] Thus, it would appear that the Delaware law goes further than Oregon and South Carolina in treating underlying

[25] Among these are Maryland, MD. ANN. CODE art. 48A, § 533 (Supp. 1975); South Dakota, S.D. LAWS § 58-23-6, 7, 8 (Supp. 1975); Wisconsin, WIS. STAT. ANN. § 204.30 (1975); and Texas, TEX. INS. CODE art. 5.06-3 (1975).

[26] ORE. REV. STAT. § 743.835 (1974).

[27] South Carolina Insurance Reform Act, S.C. CODE ANN. § 46-750.115 (Cum. Supp. 1975). It has been noted that the fact that the law requires the set off of benefits *paid* rather than *payable* may create bad results. *The South Carolina Insurance Reform Act (Part I): 'No Fault' and Contributory Negligence—A Synopsis and Appraisal,* 26 S.C. LAW REV. 705, 721 (1975).

[28] ORE. REV. STAT. § 743.810(1) (1974) reduces no-fault benefits if the injured person is entitled to receive workmen's compensatory "or any similar medical or disability benefits."

[29] South Carolina Insurance Reform Act, S.C. CODE ANN. § 46-750.115(d) (Cum. Supp. 1975), reduces the no-fault benefits to the extent that workmen's action benefits have been received.

[30] DEL. CODE ANN. tit. 21, § 2118(g) (Rev. 1974). The Delaware law avoids the uncertainty created in the South Carolina law, *see* note 27 *supra,* by precluding the pleading and proving of benefits *available.*

[31] DEL. CODE ANN. tit. 21, § 2118(f) (Rev. 1974) subrogates the victim's workmen's compensation rights to the no-fault carrier. Compare the South Carolina approach, note 29 *supra.*

ills and presumably is better devised to reduce costs of liability insurance. It should be observed, however, that the Delaware plan calls for $10,000[32] in no-fault benefits; whereas, the Oregon and South Carolina plans call for only $3,000[33] and $1,000[34] respectively.

Among the tort exemption states the variety of plans is bewildering in detail. The tort exemption typically is stated in two parts. First, tort liability for economic losses is abrogated up to the amount of recoverable mandated no-fault benefits.[35] Hence, if the no-fault plan provides $1,000 in medical benefits and a $5,000 medical loss occurs, only $4,000 would be recoverable in tort. Second, liability for pain and suffering is abrogated unless a threshold is exceeded. All current partial tort exemption laws have thresholds defined by injury classifications that typically include death, permanent injury and permanent disfigurement,[36] and most have an alternative medical expense threshold.[37] Satisfying

[32] DEL. CODE ANN. tit. 21, § 2118(a)(2) (Rev. 1974).

[33] ORE. REV. STAT. § 743.800(1) (1974). Oregon also provides additional wage loss benefits. ORE. REV. STAT. § 743.800(2) (1974).

[34] S.C. CODE ANN. § 46-750.111 (Cum. Supp. 1975).

[35] At least the following states have this feature: Colorado, COLO. REV. STAT. § 10-4-713 (1973); Connecticut, 17A CONN. GEN. STAT. ANN. § 38-323(a) (1973); Florida, FLA. STAT. ANN. § 627.737(1) (1972); Georgia, GA. CODE § 56-34106(b) (1974) (the Georgia law precludes the pleading or recovering of no-fault benefits in an action against a tortfasor); Hawaii, HAWAII REV. STAT. §§ 294-1 et seq. (Cum. Supp. 1975); Kentucky, KY. REV. STAT. ANN. § 304.39-060(2)(a) (Supp. 1976); Massachusetts, MASS. GEN. LAWS ANN. ch. 90, § 34m (1970); Michigan, MICH. COMP. LAWS § 500.3135(2)(c) (1973) (work excess loss only; no-fault pays all medical); Minnesota, MINN. STAT. ANN. § 65B.51(2) (Supp. 1975); Nevada, NEV. REV. STAT. § 698.280(1)(h) (1973); New York, N.Y. INS. LAW § 673(1) (1974); Pennsylvania, PA. STAT. ANN. tit. 40, § 301(a)(4) (1974); Puerto Rico, 2A P.R. LAWS ANN. tit. 9, § 2058(1) (Cum. Supp. 1974).

[36] In addition to the states listed in note 35 *supra*, the following statutes also have this sort of pain and suffering threshold: CONN. GEN. STAT. ANN. § 38-323(a) (Supp. 1976); KAN. STAT. ANN. § 40-3117 (1974); N.J. STAT. ANN. § 39:6A-8 (1973); and UTAH CODE ANN. § 31-41-9 (1973). Most states copy some or all of the criteria initially enacted in the Massachusetts law. Some also include a threshold based upon a specified duration of disability. *See, e.g.*, Colorado, 52 weeks, COLO. REV. STAT. ANN. § 10-4-714(1)(f) (1974); Georgia, disability of ten consecutive days. GA. CODE § 56-34026(j) (1974); Minnesota, disability for 60 days or more, MINN. STAT. ANN. § 65B.51(3)(a)(4) (1975); and Pennsylvania, 60 consecutive days, PA. STAT. ANN. tit. 40, § 301(a)(5)(c) (1974) have this feature.

[37] The medical expense threshold on pain and suffering recovery varies from state to state: Connecticut, $400 (CONN. GEN. STAT. ANN. § 38-323(a)(7) (1973)); Colorado, $500 (COLO. REV. STAT. ANN. § 10-4-714(1)(e) (1973)); Florida, $1,000 (FLA. STAT. ANN. § 627.737(2) (1972); Georgia, $500 (GA. CODE § 56-3402(b)(j), 3410(b)(a) (1974)); Hawaii, an adjustable figure set at $1,500 through Aug. 31, 1976 (HAWAII REV. STAT. § 294-6(a)(2) (1974)); Kansas, $500 (KAN. STAT. ANN. § 40-3117 (1974)) Kentucky, $1,000 (KY. REV. STAT. ANN. § 304.39-060(2)(b) (Supp. 1976)); Massachusetts, $500 (MASS. ANN. LAWS ch. 231, § 6D (1970)); Michigan, none, tort exemption is not waived on this basis; Minnesota, $2,000 (MINN. STAT. ANN. § 65B.51(3)(a) (1975)); Nevada, $750 (NEV. REV. STAT. § 698.280(1)(h) (1975)); New Jersey, $200 expended on injury to "soft tissue of the body" (N.J. STAT. ANN. § 39:6A-8 (1973)); New York, $500 (N.Y. INS. LAW § 671(4)(b) (1974)); Pennsylvania, $750 excluding certain X-ray and rehabilitation costs in excess of $100 (PA. STAT. ANN. tit. 40, § 1009.301(a)(5)(B) (1975)); Puerto Rico, $2,000 (2A P.R. LAWS ANN. tit. 9, § 2058(b) (Cum. Supp. 1974)).

either the injury classification or the medical expense threshold eliminates the tort exemption as to pain and suffering damages but, except in Connecticut[38] and Florida,[39] does not eliminate the exemption on recovery of economic losses.

Kansas and Utah follow a slightly different scheme in that the tort exemptions apply only to non-economic detriment (pain and suffering) and not to economic losses. Overlapping of tort and no-fault recoveries for economic losses is avoided in Kansas by giving the no-fault insurer the right to reimbursement from tort judgments and settlements.[40] While the statutory scheme is not clear, Utah apparently avoids overlap by subrogating the no-fault insurer to a portion of the victim's claims through an arbitration process.[41]

The New Jersey plan is novel in that its tort exemption applies only to injury "confined solely to the soft tissue of the body."[42] Hence, the $200 medical expense and injury classification thresholds[43] pertain only to soft tissue injuries, because no tort exemption exists as to others.[44] The Puerto Rico law is peculiar in that the tort exemption not only is removed when economic losses exceed $2,000 but also when the loss exceeds $1,000 "for physical and mental suffering, including pain, humiliation and similar damages."[45] The Puerto Rico system may prove to be fraught with difficulties in distinguishing between legitimate and illegitimate claims. The Kentucky plan also embodies a unique feature. Under that state's law any person may "refuse to consent to the limita-

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[38] The Connecticut law has a single set of thresholds that applies to both "economic loss and non-economic detriment." Conn. GEN. STAT. REV. § 38-323(a) (1973). Overlap is avoided by "reimbursement from the claimant to the extent that (no-fault) benefits have been paid." CONN. GEN. STAT. ANN. § 38-325(b) (1973).

[39] Once a pain and suffering threshold is cleared in Florida, the injured victim may sue in tort for general damages and *all* economic losses including those paid by no-fault benefits. FLA. STAT. ANN. § 627.737(1) (1972). To avoid double payments the Florida law provides for subrogation of no-fault insurers to no-fault beneficiaries' liability recoveries. FLA. STAT. ANN. § 627.736(3) (1972). This system is criticized in note, *Insurer's Rights of Reimbursement Under Florida's No-Fault Law*, 26 FLA. L. REV. 534 (1974).

[40] KAN. STAT. ANN. § 40-3113 (Supp. 1975) provides that reimbursement shall be made to the extent of the recovery after reasonable attorney's fees and other expenses are deducted to prevent duplication of benefits. The Kansas law survived constitutional attack in Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974).

[41] UTAH STAT. ANN. § 31-41-9 (1973) provides thresholds for *general damages* and UTAH STAT. ANN. § 31-41-11 (1973) provides for subrogation.

[42] N.J. STAT. ANN. § 39:6A-8 (1973).

[43] *Id.*

[44] Rugamer v. Thompson, 130 N.J. Super. 181, 325 A.2d 860 (1974), held that no exemption pertains in a case of a fracture even though medical expenses were less than $200. Fennell v. Ferreira, 133 N.J. Super. 63, 335 A.2d 84 (1975), held that thresholds are an affirmative defense.

[45] 2A P.R. LAWS ANN. tit. 9, § 2058(2) (Cum. Supp. 1974).

tions on his tort rights and liabilities"[46] by filing an appropriate statement with the Department of Insurance in advance of having suffered an injury. Apart from this anomaly, the Kentucky law follows a typical partial tort exemption pattern.

In the absence of a great amount of data that is not now available or a long run of experience that has not yet been attained, it is exceedingly difficult to evaluate every state's program within its own context of purposes and goals. Nevertheless, the following subsection attempts to summarize the results of evaluations made in Florida, Delaware, and Massachusetts.

In Practice

The Council on Law-Related Studies of Cambridge, Massachusetts has sponsored empirical studies of no-fault operations in Massachusetts,[47] Florida,[48] and Delaware.[49] The Delaware findings can be succinctly put. First, no lessening of litigation and no diminution of the numbers of persons seeking pain and suffering recoveries were found to result from implementation of the Delaware add-on law. Moreover, the findings suggested that Delaware did not have a substantial number of nuisance value claims either before or after the new law was passed. Adverse impact on the law profession has been modest but is especially noticeable in connection with smaller cases. Costs were not examined in detail, but some reductions were made, perhaps because prices were formerly too high or because compulsory insurance spread the burden over more people. A strong affirmative result in making reparations available to more people was achieved due to universal coverage under Delaware's relatively generous no-fault benefit provisions. Information about these points is contained in Table VI.

In concluding his report the Delaware investigator made remarks that are important in two respects. First, they point up the necessity of being aware of the condition of the existing reparations system in a state in formulating a no-fault plan, and second, they offer a judgment about the efficacy of an add-on law in other states.

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[46] KY. REV. STAT. § 304.39-060(4) (1975). Rejection of the tort exemption denies the rejecting person the right to collect no-fault benefits. KY. REV. STAT. § 304.39-060(8) (1975).

[47] Widiss, *Massachusetts No-Fault Automobile Insurance: Its Impact on the Legal Profession*, BOSTON U.L. REV. 323 (1976); Widiss, *Accident Victims Under No-Fault Automobile Insurance: A Massachusetts Survey*, 61 IOWA L. REV. 1 (1975).

[48] Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of its Effects*, 9 J. OF LAW REFORM 1 (1976).

[49] Clark & Waterson, *'No-Fault' in Delaware*, 6 RUTGERS-CAMDEN L.J. 225 (1973).

> On the basis of the Delaware experience, one final point can be made about the question of the effects of an "add-on" as opposed to a partial tort exemption law. In a small, non-claims-conscious state the law has at most caused some reduction in the number of relatively trivial claims being made. Delaware did not have a mass of small claims in the courts before the new law was in effect, and it still does not. Whether the legislation would provide the necessary psychological incentives to discourage nuisance claims in a large claims-conscious jurisdiction is unproved. We strongly suspect that it would not, but the matter could only be settled on the basis of experience in such a state.[50]

Florida is a different state, has a different law, and has experienced somewhat different results. The following is an excerpt from the preface and summary of the Florida report of the Council on Law-Related Studies.

> The Florida no-fault system utilizes a tort threshold that was intended to keep relatively minor personal injury cases out of the courts. Data from Alachua and Dade Counties from years 1972 and 1973 suggest that the Florida system can reduce the frequency of personal injury litigation measurably. [Later portions of the report suggest a reduction of 15 to 20 percent.] Nevertheless, insurance companies complain that the law is being abused by artifices to defeat thresholds, particularly in Dade County, with a resulting increase in the number of suits being filed. No data are available in this study nor are there any known to the author that quantify this phenomenon.
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> The Florida no-fault law mandated that both first and third party personal injury insurance and third party property damage insurance be carried by covered motorists. . . . Experience under no-fault showed a very substantial shift from third party to first party claims for . . . personal injury . . . coverages. This is important because of differences in costs of the two claims modes. It appears clear that first party personal injury claims are paid with less puffing owing to nuisance value and that they also cost less to process. Therefore, a third party to first party shift implies cost savings.
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> * * *
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> The data suggest that the amount of time elapsing between dates of crashes and settlement dates of personal injury insurance claims was not noticeably affected by no-fault. Furthermore, as to those claims that wound up in court, no important diminution occurred in the amount of time elapsing between dates suits were filed and dates of settlement. Nevertheless, one may not properly infer that no benefit in speedier claims processing inured to personal injury victims. In fact a marked diminution in the amount of time elapsing between crash dates and dates of receipt of first payments did occur, indicating that

[50] *Id.* at 257.

victims are more likely to receive some recovery earlier, when their needs may be greatest.

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Personal injury insurance claims data show that more claims are settled in amounts much closer in value to verified medical losses than in the superseded system. This suggests that the nuisance value of relatively minor claims has been reduced, which arguably creates a more equitable settlement process so far as these claims are concerned. Whether severely injured victims are more adequately compensated under the no-fault system cannot be told from the data available in this study.

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Data obtained in this study suggest that three things happened in connection with personal injury insurance rates and benefits in the sample populations in the first two years of no-fault; first, that the amount of premiums paid per registered vehicle diminished; second, that the amount of benefits paid per registered vehicle increased; and third, the ratio of benefits to premiums increased. One may infer from these results that coverage for personal injury benefits expanded and the costs of processing claims were reduced.

In summary, the results of this study suggest that no-fault systems such as Florida Reparations Reform Act can produce changes in how reparations are made to injured victims of motor vehicle crashes and in how much they cost. . . . Whether or not the changes detected in [this study] are beneficial is, of course, for the political processes to determine. Whether or not one would want to rely on the results of this single study to predict that similar results would occur [elsewhere] is a matter for the judgment of the decision makers.[51]

The CLRS Florida report detected a measurable reduction in the number of personal injury claims involving the employment of lawyers and in the number resulting in litigation. A previously unreported survey[52] of a relatively small sample of personal injury lawyers found that 72 percent of those responding saw a diminution in their client populations in the first year of no-fault with one-third reporting a great decrease.[53] Nevertheless, about one-quarter reported no change and a few

[51] Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of its Effects*, 9 J. OF LAW REFORM 1 (1976).

[52] This information is extracted from Little & Monchick, *Some Observations on the Impact of Florida's 'No-Fault' Automobile Insurance Law on the Practicing Bar* (unpublished).

[53] Perhaps expressing the essence of the views of lawyers hurt by no-fault was this lamentation from one Florida practitioner:

While other professions, particularly the accounting profession, have expanded the scope of their business and services, the practice of law has been narrowing. Ever since I have been in the profession, I have seen lawyers lose their tax work to accountants, their estate work to title companies, their criminal work to public defenders, and now a great part of their tort practice to insurance com-

attorneys saw an increase in the numbers of their clients. As the fifth year of no-fault begins in Florida, it is fair to say that there has been no great hue and cry raised against it by lawyers. Many lawyers do not engage in personal injury work and are not directly affected. Moreover, most of those surveyed who are affected indicated that they were expanding their practices into other fields. Finally, Florida's boom growth probably camouflaged a reduction in the percentage of injuries that wound up in a lawyer's office under an increase in absolute numbers.

Further observations about the cost of insurance in Florida should be made. The no-fault law mandated a 15 percent cut[54] in bodily injury liability costs, and the costs of complete automobile insurance packages, including no-fault benefits and property damage, declined by 12 to 15 percent between 1971 and 1973.[55] In 1974, however, costs of the total package increased and in 1975 costs were 5 to 10 percent higher than 1971 values[56] in some parts of the state. In evaluating these trends one needs to be aware of the fact that the costs of medical services and automobile repairs escalated very rapidly during this period.

No-fault has had its greatest impact in Massachusetts. For reasons yet unknown the first year of no-fault in Massachusetts saw a 40 percent *decrease* in the number of reported claims as compared to a predicted 30 percent increase.[57] This was accompanied by a drop from $825 in 1970 to $660 in 1971 in the average cost of claims, and resulted in a windfall to Massachusetts' insurers despite a mandated reduction in premiums paid for bodily liability insurance.[58] The number of automobile personal injury lawsuits filed witnessed substantial declines early in the life of the no-fault law and the amount of litigation seems headed toward a stable reduction of about 50 percent.[59] Unfortunately, even in early 1976 some Massachusetts' court dockets remained clogged, holding up a "big back-log of motor vehicle tort cases awaiting trial, many dating

panies. The legal pie is getting smaller and there are more attorneys nibbling at it.

Id.

[54] FLA. STAT. ANN. § 627.741(2)(a) (1972).

[55] Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of its Effects*, 9 J. OF LAW REFORM 1, —— (1976).

[56] These estimates are based upon typical insurance premium figures contained in the author's files. *See also*, Brainard, *Florida: Land of Rising Costs in No-Fault*, 10 TRIAL 31 (1974).

[57] This phenomenon has been reported by several writers including Brainard, *The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers*, 44 MISS L.J. 174, 178 (1973).

[58] *Id.* at 174, 181. An initial 15 percent cut in bodily injury liability rates was mandated and was followed by a retroactive 27.6 percent refund.

[59] Widiss & Bovbjerg, *No-Fault in Massachusetts: Its Impact on Courts and Lawyers*, 59 A.B.A.J. 487, 489 (1973).

to pre-no-fault days."[60] It is reported that present congestion stems mainly from criminal cases.[61] While this has had an important economic effect on the legal profession in Massachusetts, most of the affected practitioners have been able to accommodate themselves to the new system. One observer of the Massachusetts experience has commented:

> Over 80 percent of the respondents in the general survey of the bar indicated that no-fault had not caused them to change or consider changing their professional lives as a result of no-fault. Of the remaining 17 percent, about a third of the group stated that they had already either entered into a new professional association or discontinued private practice. From an economic standpoint, many of these changes appear to have been advantageous.[62]

As indicated, costs of bodily injury liability insurance immediately dropped in Massachusetts, but no data are available to this writer to evaluate whether or not the advancing costs of medical and repair services has reversed the trend.

Only the Massachusetts study attempted to measure the effects of no-fault as perceived by traffic crash victims. This was done by surveying random samples of persons listed in official crash reports as having been injured in no–fault crashes. Four major points were probed: First, whether potential no-fault claimants were not making claims; second, the reasons that non-claimants do not make claims; third, the role of collateral sources in shaping no-fault claims decisions; and fourth, claimants' level of satisfaction with the system.[63]

It was found that many *officially* injured persons never made no–fault claims. Often they simply did not consider themselves as having been *actually* injured.[64] This attests to the imprecise nature of on-the-scene impressions garnered by police officers and perhaps also to their conservatism in erring on the inclusive side. About one-fifth of the non-claimants was injured but suffered little or no medical expense, little wage loss and made no claim.[65] About one-quarter appeared to have been "uninformed or misinformed" about the benefits of the

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[60] Letter from Professor David F. Cavers to the author, March 2, 1976. Professor Cavers is the president of the Council on Law-Related Studies and this information is derived from a manuscript he is preparing on the Massachusetts' courts for publication in the *New England Law Review.*

[61] *Id.*

[62] Widiss, *Massachusetts No-Fault Automobile Insurance: Its Impact on the Legal Profession,* 56 BOSTON U. L. REV. 323 (1976).

[63] Widiss, *Accident Victims Under No-Fault Automobile Insurance: A Massachusetts Profession,* 56 BOSTON U.L. REV. 323 (1976).

[64] *Id.* at 57.

[65] *Id.*

no-fault law.[66] While the investigator believes that the losses suffered by people in this group were small and unimportant to them, still some people apparently did forfeit extensive benefits through ignorance of the law. The Massachusetts' investigator believes that this could be avoided with adequate consumer education. Finally, about 20 percent of the non-claimants did not make no-fault claims because losses had been "wholly or substantially covered by other sources.[67]

Two very important inferences from these findings were drawn by the investigators. One was that: "The statements and actions of these non-claimants appear to justify the generalization that a significant number of non-claimants fall into this category precisely because they do not wish to abuse the system."[68] This suggests that overcompensation through collateral sources is not a universal practice. A second important inference was that having to make a claim against one's own insurance carrier does not dissuade victims from filing claims. Certain no-fault critics had propounded this in explanation of the shortfall in expected numbers of claims in the first no-fault years in Massachusetts,[69] but the Massachusetts findings, that less than three percent of the non-claimants saw it as a "dominant" factor and only three or four percent more assigned it "some importance"[70] in their decisions not to file claims, appear to have demolished it as a plausible exploration.

The Massachusetts survey showed that no-fault frequently leaves some losses uncompensated.[71] Many claimants were able to augment their recoveries from collateral sources, but a "clear majority" who obtained benefits from two or more sources sought multiple recoveries only because all losses had not been compensated.[72] Furthermore, many no-fault claimants, whom no-fault did fully compensate, did not seek recovery from collateral sources.[73] This finding plus the finding that many non-claimants had ignored no-fault benefits because full recovery had been obtained elsewhere led the Massachusetts' investigator to conclude "that most automobile accident victims in Massachusetts are not abusing the compensation system by attempting to secure the maximum recovery possible from other sources.[74]

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[66]*Id.* at 59.
[67]*Id.* at 60.
[68]*Id.*
[69]Spangenberg, *No-Fault Fact, Fiction and Fallacy*, 44 MISS. L.R. 15, 63 (1973).
[70]Widiss, *supra* note 63, at 61.
[71]*Id.* at 61.
[72]*Id.* at 63.
[73]*Id.*
[74]*Id.* at 60.

Notwithstanding the undercompensation reported above, the Massachusetts survey found claimants to be highly satisfied with no-fault. Of those who had received benefits, between 75 and 85 percent were either "fairly satisfied" or "well satisfied" with procedures and amounts received.[75] Of complaints made, the most important were that claimants often were left too long uninformed about the statuses of their claims and that the process took too long.[76] It was evident that some lawyers failed to inform claimants of benefits obtained from no-fault carriers. For example, some victims were simply unaware that they had received no benefits, when in fact their lawyers had applied for the benefits and applied them to the payment of medical bills.[77] In short, it appears, that some lawyers have not communicated the values of no-fault to their tort clients.

A Systematic Approach to Devising and Evaluating No-Fault Goals and Non-Goals

It should be apparent to the reader that the typical no-fault reform plan is comprised of two basic elements. The first is an assured package of *no-fault benefits* payable to all victims without regard to fault. Hereafter this package will be referred to as *basic benefits,* and will be assumed to provide specified medical, rehabilitative, and income benefits. Satisfactory *basic benefits* subsume several reparation goals, including a general reparation goal and the goal of receiving payments without undue delay.

The second part of most reform plans is the *tort exemption* element. The *tort exemption* also subsumes several goals including cost reduction, elimination of nuisance value, lessening court congestion, reallocation of societal resources, and lessening of corruption within the system. The myriad of subvariables within these two elements has already been exposed as have the numerous combinations of subvariables which have been employed. One purpose of this portion of the paper is to attempt to tie the elemental considerations into a simplified system that may be used both for designing new no-fault plans and evaluating present ones. One point that quickly emerges is that more detailed data are needed than are likely to be available to make a decision on the basis of formula alone. Very large areas of judgment seem sure to remain.

So far as reparation goals are concerned, the no-fault basic benefit principle provides a vehicle for eliminating uncompensated and under-

[75] *Id.* at 64.
[76] *Id.*
[77] *Id.* at 64-65.

compensated victims and also for eliminating payment delays. Ancillary measures are needed to prevent overpayment of some victims. These measures relate to various cost savings and reallocation goals. Consequently, the rational way to look at the whole system is to tie the various components together in a cost model. Fortunately, the near universality[78] of insurance makes it feasible to relate costs to the components of a reparation system, as follows:

Insurance Costs = First Party Insurance Costs + Liability Insurance Costs + Workmen's Compensation Costs + Health Insurance Costs + Other Insurance Costs

Each of these insurance elements may be divided into the costs components described earlier—benefits reaching the victim, victims' legal fees, insurance companies' settlement costs, commissions paid insurance agents, other underwriting costs, and profit. Benefits reaching victims can be further suballocated to medical related expenses, wage and earnings losses, and pain and suffering damages. Bearing in mind that all these elements do not pertain equally to each form of insurance, one may produce a simplified, comprehensive model as follows:

Insurance Costs of Automobile Crash Injuries = Medical Expenses + Wage Losses + Pain & Suffering Damages + Claimants' Lawyers Fees + Insurance Co. Settlement Expenses + Insurance Commissions + Other Underwriting Expenses + Profits + Collateral Sources

In this equation the term "collateral sources" designates the aggregation of all the costs of collateral insurance sources.

One may now produce a matrix to show what effect various no-fault reform measures would have on each of these cost elements. A "plus" or "minus" value may be assigned to each measure depending upon whether it would impose additional costs or allow savings when applied to the components set forth in Table VII.

Basic benefits, while meeting reparation goals, also increase costs of several elements, including the purely administrative aspects of the insurance system. If one were to choose unlimited benefits, these costs would increase even more.[79] This is one aspect of no-fault reform that

[78] Insurance does not cover all costs of motor vehicle crash injuries because of uninsured and underinsured situations. Nevertheless, the insurance system is so extensive that the uninsured situations probably do not disturb the validity of inferences that may be drawn from the following analysis.

[79] One no-fault critic uses U.S. Department of Transportation data to make the estimation that:

The automobile drivers who now buy standard limit policies would have to pay a

is not likely to receive advance attention and may be a source of disappointment when insurance costs do not fall to the degree anticipated.

The *tort exemptions* promise savings across the board. Reducing nuisance value pain and suffering damages is the prime goal, but medical expenses and wage losses presumably also decline because it is no longer profitable to inflate these elements in hope of magnifying the pain and suffering recovery. By the same token claimants' legal fees are diminished and, because less money is needed in the system, the various insurance-related administrative costs also decline.

To what extent one would eliminate pain and suffering damages is a matter of judgment. The states that set a medical expense threshold as great as $1,000 probably exempt a very great majority of all injuries. This fact tempts one to propose a complete pain and suffering exemption that would eliminate totally the liability insurance system and its attendant costs. Such a goal, even if otherwise desirable, does not appear feasible because, until no-fault becomes universal, motorists will need to purchase liability insurance to secure residual risks. Also, many reasonable people would insist upon some alternative means of making reparation for non-economic detriment suffered by severely maimed people, and others would strongly object to complete abrogation on philosophic grounds. Since complete abrogation seems an unlikely development in the forseeable future, no further consideration will be given it here.

Elimination of overlapping recoveries from collateral sources clearly reduces their costs. This assumes that *basic benefits* are primary. If collateral sources were made primary, various motor vehicle cost elements would be reduced instead. While eliminating the collateral source rule would be counterproductive to some reparations goals in some instances, it must be scored with minuses as a cost saver.

Several states allow *basic benefits* insurance carriers to seek reimbursement from tortfeasors' liability insurance carriers even though a threshold is not exceeded.[80] In other states when the pain and suffering threshold is exceeded the tortfeasor is allowed to recover all provable damages, including those for which *basic benefits* were paid.[81] In those states the *basic benefits* carrier is provided rights of subrogation to some

41 percent increase just to compensate the 1 percent of the whole number of victims, even if it were assumed that no payment whatever would be made for the economic loss of the remaining 99 percent.

Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 MISS. L.J. 15, 52 (1973). The one percent Spangenberg refers to comprises the most severely injured victims.

[80] *See, e.g.*, GA. CODE ANN. § 56-3407b (Cum. Supp. 1975); KY. REV. STAT. § 304.39-020(5)(b) (1974) and § 304.39-030(1) (1974); and PA. STAT. ANN. tit. 40, § 1009.201 (Cum. Supp. 1975).

[81] Kansas and Florida. *See* notes 37-40 *supra*.

or all of the recovery. These measures presumably serve several goals: to put more money in the hands of victims; to retain fault as an element in allocating costs between no-fault and liability carriers; and to attain these goals without allowing double recoveries. In fact, these measures also add costs to the system that could be avoided by precluding recovery of *basic benefits* from tortfeasors. Alternatively, one could allow for recovery against tortfeasors and provide complete reimbursement to the *basic benefits* carrier, probably providing lower savings. For classification purposes, the elimination of reimbursement receives minuses.

The compulsory aspect of no-fault reform causes more insurance contracts to be written and thereby increases administrative costs. Nevertheless, the overall effect should be to reduce the unit cost of insurance by virtue of the fact that a total pool of expenses is spread over more buyers. Hence, compulsory insurance receives minuses on Table VII.

Bulk insurance marketing plans and state insurance plans would cut tort law-liability insurance system costs that have remained untouched so far. Such measures would receive minuses and pluses because they could cut costs of already insured individuals but would increase certain overall costs.

The final item, effect of corruption of thresholds, reflects a phenomenon that may be occurring in reaction to Florida's exemption to pain and suffering damages. Because accruing $1,000 in medical expenses removes that exemption, the potential of abuse exists by utilizing medical resources for the sole purpose of exceeding the threshold. If lawyers, doctors, and claimants create an environment that causes or tolerates employment of unneeded medical procedures and costs for the purpose of surpassing the threshold, then every cost element of motor vehicle insurance will advance. Worse than that, a new source of corruption is created.

While a legitimate economic decision could not be made on the basis of a predomination of minuses (savings) over pluses (added costs), the minus-plus display in Table VII argues for taking a close look at no-fault with more complete data. One must place a value (that may in part be non-economic in nature) on his goals, of course, but if one finds that several reparation goals can be met while at the same time making savings, then reform may become well nigh irresistible. On the other hand, even salutory goals may be thwarted if the economic costs are too high.

The plan of Table VII may now be used to evaluate the law of Florida as an illustration. Florida provides *basic benefits* up to a limit

of $5,000.[82] While that limit has not been shown to be grossly inadequate it is doubtless true that certain reparation goals would be better served by higher limits, say $10,000 as in Delaware,[83] or $25,000 as in Colorado,[84] or $50,000 as in New York.[85] Caution should be taken to prevent the availability of "free" benefits from becoming a disincentive to speedy and complete recuperation of victims. Accordingly, it would be wise to leave some of the non-medical losses upon the victim, as is typically done in wage loss recoveries.[86] Furthermore, to avoid overlapping recoveries, whatever additions are made to *basic benefits* should be paralleled by an increase in an exemption to tort liability for damages covered by *basic benefits.*

The coverage of Florida's no-fault law also could be expanded to heighten the attainment of reparation goals. Presently commercial vehicles and motorcycles are excluded. Also, the Florida law contains no program for compensating victims of financially irresponsible motorists who have failed to purchase required insurance, and it does not protect the economic interests of the survivors of fatally injured victims. The first point is addressed in the laws of a few states by creating state funds financed by insurers[87] to compensate non-insured victims and the latter point is covered in a few states by inclusion of survivor benefits in *basic benefits.*[88] These measures would, of course, add costs to the system.

Florida's pain and suffering thresholds are typical: either $1,000 in medical expenses, or the occurrence of specified classes of physical injuries or death.[89] Presently, there are no data or cases available to evaluate the efficiency of physical injury classification thresholds, and it is difficult to evaluate whether or not the $1,000 medical threshold figure should be altered. My own inclination would be to increase the threshold so as to further reduce costs. This view can be countered on the grounds that a legitimate element of recovery is being denied and that an inherently corruptable system will simply be corrupted to greater extent. This threat leads to the conclusion that whatever else is done, some

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[82] FLA. STAT. ANN. § 627.736(1) (1972).

[83] DEL. CODE ANN. tit. 21, § 2118(a)(2) (Rev. 1974).

[84] COLO. REV. STAT. § 10-4-706(b) (1974).

[85] N.Y. INS. LAW § 671(a) (McKinney 1975).

[86] Most states that provide work loss benefits either limit the percentage of loss that may be recovered or impose an overall limit. *See, e.g.,* FLA. STAT. ANN. § 627.736(1)(a) (1972); COLO. REV. STAT. ANN. § 10-4-706(d) (1974); CONN. GEN. STAT. ANN. § 38-320(e) (Supp. 1976); HAWAII REV. STAT. § 294-2(10)(C) (Supp. 1975); MINN. STAT. ANN. § 65B.44 (3) (Supp. 1976): N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1975).

[87] *See, e.g.,* KAN. STAT. ANN. § 40-3116 (Supp. 1975).

[88] *See, e.g.,* GA. CODE ANN. § 56-3407b (Cum. Supp. 1975); KY. REV. STAT. § 304.39-020(1)(d) (1974) and § 304.39-030(1) (1974); FLA. STAT. ANN. § 627.737(2) (1972).

[89] PA. STAT. ANN. tit. 40, § 1009.201 (Cum. Supp. 1975).

measure should be taken to avoid abuse of the medical expense threshod. The Pennsyvania law contains a feature that may be helpful. From costs that may be aggregated to reach the threshold, the law excludes expenses of X-rays and rehabilitation expenses exceeding $100.[90] Presumably this reflects a belief that it is these kinds of services that are most easily misused. If it is feasible to segregate services that are most prone to abuse, then such a provision should be added to Florida's law.

When the pain and suffering thresholds are exceeded, a plaintiff may recover fully from the tortfeasor but must then make reimbursement to the *basic benefits* carrier. This plan is unwieldy and costly and should be supplanted by a plan which does not allow tort recovery for *basic benefits* in any situation.

Whether or not bulk insurance marketing plans could be effectively employed in Florida, I cannot say. For that reason no further comment on this subject will be made. On the other hand, it seems certain that the State of Florida could preempt the motor vehicle insurance business as a governmental function,[91] probably at substantial overall savings. Although it seems certain that no such change in Florida is likely to come to pass or even to be seriously considered, the pros and cons may nevertheless be examined.

On the pro side is the substantial savings in marketing and underwriting costs that might be forthcoming by integrating the marketing of insurance into the state's licensing systems. While I have no data to quantify the possible extent of savings in Florida, a careful study in Hawaii projected savings of about 14 percent.[92]

The opposing arguments are more numerous. For one, a great number of people are likely to be put out of work. Some of these would find employment in the state's insurance system, but probably not all. Moreover, the investment side of the insurance industry would be grossly affected.[93] Although a state plan would require accumulation and investment of reserve funds, the nature of the investments might change drastically. What effect this would have upon the economy that relies upon this investment resource is beyond the scope of this paper, but it could be great.

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90 PA. STAT. ANN. tit. 40, § 1009.301(5)(B) (Cum. Supp. 1975).

91 This statement ignores examination of constitutional issues that such a preemption would spawn. These issues, while neither trivial nor unimportant, are beyond the scope of this paper.

92 *A Study of Hawaii's Motor Vehicle Insurance Program*, Special Report No. 72-1, A Report to the Legislature of the State of Hawaii (January 1972).

93 Spangenberg describes and criticizes how the investment side of the insurance industry operates. *See* Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 MISS. L. REV. 15 (1973).

The most incendiary opposing argument would be ideological. Opponents would see such a move as an unnecessary intrusion by government into the free enterprise system. While intrusions by government are to be avoided at all reasonable costs, an objection to such a position can be made in this instance. Ordinarily, free enterprise is touted for its ability to innovate improvements in products and production and marketing techniques and thereby accomplish goals at less cost than a monopoly. With compulsory insurance, however, not much room is left in product design and production techniques. Therefore a strong argument can be made that competing on the basis of marketing techniques alone offers little hope for cost savings, especially when compared to a state monopoly that already has direct contact with all potential buyers. In short, if government has defined and mandated an insurance system, little room may remain for benefits to accrue from free enterprise. The appropriate answer to this may simply be that government bureaucracies are inherently wasteful and suspect and that the value of potential cost savings is not worth the risk. Certainly, it does not appear timely for the introduction of such a plan in Florida.

In summation I would repeat the cautionary remark made earlier —reform measures are best devised in terms of perceived need. If a state's existing tort law-liability insurance system is not subject to all the criticisms outlined earlier, then less extreme measures are justified. This may account for the add–on laws. Perhaps the only critical goal in add–on states was to make benefits available to more people. In Delaware, for example, nuisance value recoveries and court congestion apparently were not major problems; hence, tort exemptions may not have been as effective as they were in Massachusetts and Florida. The principal lesson of the current no-fault experience may be that plans ought to include elements that would meet local needs. This view, of course, runs in direct opposition to those who advocate national no-fault plans.

No-Fault: An Evaluation

Has no-fault proved to be a good movement or has it not? My own assessment is that no-fault is a much ballyhooed concept of modest attainments. Without doubt the most beneficial result is that almost everybody is entitled to prompt treatment of injuries without regard to fault and without delay. The extent of this benefit varies markedly as has been seen. Massachusetts has shown that court congestion can be eased, and Florida has shown that nuisance value can be deflated. Nevertheless, the biggest disappointment to the public may have been that costs of insurance have not declined to the extent anticipated.

Frequently, the added costs of no-fault benefits simply were not adequately calculated. In addition, inflation has tended to offset gains.

Finally, most states simply have not employed all of the cost saving methods available to them. When they do, better results in cost savings may been seen and, if comparable measures to eliminate unnecessary insurance costs such as those which have been taken to eliminate unnecessary legal costs are ever adopted, then very substantial savings may be anticipated.

Afterword

After this article was prepared, the 1976 Florida legislature addressed some of the points alluded to above. Its principal goal was reduction in insurance costs. Measures were adopted to replace the medical loss tort exemption threshold with a more stringent verbal threshold; to reduce overlap between no-fault, tort and collateral recoveries, and to outlaw fraudulent practices that allegedly had been employed to subvert the tort exemption. Each of these measures appears to be reasonably well suited to cutting costs and deserves detailed study by drafters of no-fault laws.

TABLE I

REFORM GOALS AND NO-FAULT SYSTEMS MEASURES

	Corrective Measure	Comment
1. *General Reparation Goal* Essential medical & rehabilitation services for *all* victims	Tangible economic losses payable without regard to fault	Payment of all benefits under an insurance plan will require more money.
Basic income support for wage earners & dependents	Tangible economic losses payable without regard to fault	Less than full payment is often proposed to hold costs down and retain work incentive.
Distributive Justice End overpayment minor injuries	a. Abrogate collateral source rule and abrogate tort liability for tangible economic losses paid without regard to fault b. Abrogate tort liability for pain and suffering	a. This presents hard issues as to what sources should be viewed as collateral sources and which should be primary. It also is counterproductive to full payment of severe injuries. b. Elimination of tort liability for pain and suffering ends nuisance value, but many people believe it to be a proper element of recovery, especially in severe injuries.
End underpayment severe injuries	Pay tangible economic losses without regard to fault and retain tort liability for pain & suffering in severe injury cases	Payment of full economic losses may drive insurance costs up. Retention of pain and suffering liability for severe injuries assists some victims and places costs on some at fault persons, but requires the continued existence of both first and third party insurance systems.
End delay in receipt of benefits	a. Pay no-fault benefits as losses accrue b. Abrogate tort liability in minor cases	a. First party benefits would be payable on demand. Disputes would be contractual in nature. b. With few cases those remaining in the courts may be settled quicker.
2. *Reduce Costs* Eliminate multiple recoveries of tanglible economic losses	Abrogate or modify collateral source rule and abrogate tort liability for tangible economic losses paid without regard to fault	see above
Eliminate nuisance value payments	Abrogate tort liability for pain and suffering	

TABLE I

Reform Goals and No-Fault Systems Measures

	Corrective Measure	Comment
Reduce claim adjustment & settlement costs of:	Abrogate tort liability for pain and suffering	
—Victims	Abrogate tort liability for pain and suffering	Victims' costs ordinarily come out of funds that insurance companies treat as benefits paid. Hence, the effect here may be to increase the net received by victims by reducing the amount paid to lawyers but without reducing insurance costs.
—Insurance industry	Abrogate tort liability for pain and suffering	Defense fees and adjustment costs should go down but will not be eliminated entirely (especially adjustment costs).
—Defendants	Abrogate tort liability for pain and suffering	Defendants often incur expenses not covered by insurance. These should be reduced.
Reduce Underwriting & Marketing Costs	a. Bulk insurance marketing	a. Costs may be significantly less. *See* Hawaii Report, *supra* note 5.
	b. Mandatory insurance operated in conjunction with state licensing agencies	b. Only Saskatchewan and Puerto Rico have tried this. Hawaii Report suggests significant savings are feasible. Free enterprise objections will be made.
3. *Cost Reallocation Goals*	a. Revise insurance pricing schedules to conform to more rational risk allocation policies b. Produce optional risk allocation system among insurers	a. Some stereotypes in present pricing systems are said to be unfair. *See* Hawaii Report, *supra* note 5. b. Even with no-fault insurance the notion of fault still hangs on in cases where fault could be clearly allocated. Tendencies exist to create a mechanism to shift the cost to the at fault driver through the cost of his no-fault insurance rather than affect the no-fault insurance costs of the not at fault victim. Some states have inter-company adjustment mechanisms. Whether they are worthwhile can be questioned.
4. *Reallocation of Societal Resources* End Court Congestion	Abrogate or limit tort liability	Reducing congestion arguably has several effects: speeds up cases that are in court, frees courts for other issues, reduces cost of operating courts.

TABLE I

REFORM GOALS AND NO-FAULT SYSTEMS MEASURES

	Corrective Measure	Comment
Transfer legal resources to other causes	Abrogate or limit tort liability	This assumes that there is a shortage of legal work power to do other law work that needs to be done.
Transfer medical resources to other causes	Abrogate or limit tort liability	This assumes that present practice of figuring the value of small tort claims as some multiple of medical expenses causes the waste of medical resources and that the time spent by medical doctors in litigation could be better spent in practice.
5. *End Corruption*	Abrogate tort liability for pain and suffering in minor cases	Ending nuisance value recoveries should relieve pressures on legal and medical professions to stretch system for benefit of clients, patients, and themselves. Partial tort abrogation employing thresholds may create new abuses, however.

TABLE II
CERTAIN BENEFIT PROVISIONS— MASSACHUSETTS, FLORIDA, AND DELAWARE

	Massachusetts: MASS. ANN. LAWS ch. 90 § 34A, 34M (1970)	Florida: FLA. STAT. ANN. § 627.736 (1972)	Delaware: DEL. CODE ANN. tit. 21, § 2118 (Rev. 1974).
1. Medical Benefits			
Medical	R & N	R & N	R & N
Hospital	N	N	R & N
Dental	R & N	R & N	R & N
Surgical	R & N	R & N	R & N
Medicine	Not mentioned	Not mentioned	R & N
X-ray	R & N	R & N	R & N
Ambulance	N	N	R & N
Prosthetics	R & N	R & N	R & N
Nursing	N Professional	N	R & N Professional
Prayer & healing	No	N & Remedial	No
2. Rehabilitation Services	Only prostheses mentioned	R & N	Only prostheses mentioned
3. Funeral Benefits	N	Up to $1000	Up to $2000
4. Income Payments			
Wage loss	Amounts actually lost by reason of inability to work and earn wages or equivalent, limited to 75 percent of previous year's wage or salary.	100 percent loss of gross income, except of such payments are not taxable then 85 percent.	Loss of earnings
Lost earning capacity	Loss or diminution of earning capacity to person not employed or self employed at time of accident, limited to 75 percent of previous years' wage or salary.	100 percent loss of earning capacity, except if such benefits are not taxable then 85 percent.	Not mentioned
Value of non-renumerative services that would have been performed	Ordinary and necessary for self and members of household, if not performed by other members of the household.	Ordinary & N for benefit of household	R & N extra expense

TABLE II
CERTAIN BENEFIT PROVISIONS— MASSACHUSETTS, FLORIDA, AND DELAWARE

	Massachusetts	Florida	Delaware
5. Maximum Aggregated First Party Benefits (Required)	$2,000 per person	$5,000 per person	$10,000 per person and $20,000 per accident
6. Time Limit on Accrual of Losses	Two years from date of accident	None	Incurred or medically ascertainable within twelve months of date of accident
7. Deductibles Allowable	Policy holder may elect deductibles of $100; $250; $500; $1,000; or $2,000 pertaining to policy holder alone, or policy holder and members of his household.	Owner may elect deductibles of $250; $500; or $1,000 pertaining to policy holder alone, or policy holder and relatives residing in his household.	Deductibles authorized in conformity to insurance company filings. Special exclusion for certain motorcycle injuries allowable.
8. Required Periodic Payment	Due and payable as loss accrues	Medical—due and payable as loss accrues Income payments (disability)—every two weeks	Not mentioned

NOTES: R=Reasonable
N=Necessary

TABLE III

No-Fault Benefit Coverage Details

	Massachusetts	Florida	Delaware
Basic Coverage:	Every motor vehicle registered in the state.	Every sedan, station wagon, or jeep type vehicle not used as a public livery conveyance for passengers, including any other four-wheel motor vehicle used as a utility automobile and a pickup or panel truck which is not used primarily in the occupation, profession, or business of the insured.	All motor vehicles registered in the state.
Compulsory or Permissive:	Compulsory	Compulsory	Compulsory
Benefits Payable to:	Named insured (or obligor of bond), member of insured's household, any authorized operator or passenger of insured vehicle including a guest occupant, and any pedestrian struck by the insured vehicle—as a result of bodily injury, etc., caused by accident and not suffered intentionally, while in, upon entering, or alighting from the insured vehicle. And for named insureds and members of household injuries suffered in, etc., motor vehicle not insured, unless recovery is had in tort.	"named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a motor vehicle or motorcycle" ". . For loss sustained by any such person as a result of bodily injury" (etc) . . "arising out of the ownership, maintenance, or use of a [motor vehicle]"	Persons occupying insured vehicle and any other person injured in an accident involving such vehicle except an occupant of another vehicle.
Exclusions:	Insurers may exclude persons whose conduct contributed to injury while operating a motor vehicle. 1. Under influence of alcohol or narcotis drug.	Insurers may exclude benefits to: a. Certain beneficiaries when occupying other uninsured vehicle. b. Persons operating insured vehicle without express or implied consent.	"may be subject to conditions and exclusions customary to the field of liability, casualty and property insurance and not inconsistent with the requirements of this section."

TABLE III
NO-FAULT BENEFIT COVERAGE DETAILS

	Massachusetts	Florida	Delaware
	2. While committing a felony or seeking to avoid lawful apprehension or arrest by police officer. 3. With specific intent to harm oneself or another.	c. Persons whose conduct 1. caused intentional injury to themselves; 2. resulted in conviction of alcohol or drug impairment while driving; or 3. involved committ a felony.	motorcyclists may exclude coverage of crashes involving no other vehicle.
Major Classes of Persons not covered:	Occupants of out-of-state vehicles, pedestrians, etc. struck by such vehicles.	Occupants of out-of-state vehicles, motorcycles, and commercial vehicles, pedestrians, etc. struck by such vehicles.	Occupants of out-of-state vehicles, pedestrians, etc. struck by such vehicles. Owners of insured vehicles while in uninsured vehicles.

TABLE IV

ABROGATION OF TORT LIABILITY

	Massachusetts	Florida	Delaware
1. For tangible economic losses	Every owner, registrant, operator or occupant of a motor vehicle is exempt from tort liability for bodily injury or death arising out of ownership or operation of a covered vehicle to the extent that the injured party is entitled to recover no-fault benefits (or would have been but for a deductible)	Every owner, registrant, operator or occupant of a covered motor vehicle and persons or organization responsible for such persons' actions is exempt from tort liability for bodily injury arising out of ownership, operation, maintenance or use of a covered vehicle to extent no-fault benefits are payable (or would be payable but for a deductible)	Any person eligible for no-fault benefits is precluded from pleading or introducing into evidence in an action against a tort feasor any no-fault compensation available without regard to elective deductions in coverage and whether or not such benefits are actually recoverable.
2. For pain and suffering	A plaintiff may not recover damages in tort from owners, registrants, operators or occupants of covered motor vehicles for pain and suffering, including mental suffering, from injury arising out of ownership, operation or maintenance of a motor vehicle unless: 1. specified no-fault medical benefits and funeral expenses exceed $500, or 2. death; or, partial or total loss of a bodily member; or, permanent and serious disfigurement; or, loss of sight or hearing, as defined, ensue	A plaintiff may recover damages in tort from owners, registrants, operators or occupants of covered motor vehicles for pain and suffering, mental anguish and inconvenience from injury arising out of an accident involving a covered motor vehicle unless: 1. specified no-fault medical benefits exceed $1000, or 2. death, or permanent injury within reasonable medical probability ensue	No exemption
3. Comments	a. Limited to crashes in Massachusetts.	a. Limited to crashes in Florida b. If pain and suffering exemption is removed, exemption on tangible economic losses is also removed, but not vice versa.	

TABLE V
COST FACTORS

	Massachusetts	Florida	Delaware
1. Collateral Source Rule	Not abolished, but there is partial tort exemption (see Table IV) and provision for reducing no-fault income benefits by amounts received under programs paying wages, salary or earnings while absent from work.	Not abolished, but there is a partial tort exemption (see Table IV). Otherwise no-fault benefits are primary except that workmen's compensation benefits are credited against them.	Not abolished, but insurers providing no-fault benefits are abrogated to the claimants' rights under any workmen's compensation law.
2. Deductibles	Yes, *see* Table II.	Yes, *see* Table II.	Yes, *see* Table II.
3. Bulk insurance provisions	None in no-fault law.	None in no-fault law.	None in no-fault law.
4. Insurance issued by state agency	No	No	No

TABLE VI
SUMMARY

	Massachusetts		*Florida*		*Delaware*	
	Theory	Practice	Theory	Practice	Theory	Practice
1. *General Reparations Goal*	$2,000 limit covers most injuries		$5,000 limit covers most injuries	$5,000 limit fully compensates great majority of claims	$10,000 limit covers substantial portion of injuries. Better than Massachusetts and Florida.	Anecdotal reports favorable
Essential medical & rehabilitation services for all victims						
Basic income support for wage earners & dependents	$2,000 limit covers most injuries		$5,000 limit covers most injuries	same as above	same as above	same as above
End overpayment min or injuries	$500 tort exemption helps but collateral sources not strongly affected		$1,000 tort exemption helps, but collateral source rule not strongly affected	Nuisance value eliminated on many claims	Preclusion of tort recovery of no-fault benefits helps, but collateral source rule not greatly affected	Probably not
End underpayment severe injuries	Limited improvement		Greater improvement	Up to $5,000	Much better than Massachusetts but not adequate for worst injuries	Up to $10,000
2. *Reduce Costs*						
Eliminate multiple recoveries tangible economic losses	Small improvement		Small improvement	Not evaluated	Less improvement	Very little improvement
Eliminate nuisance value payments	Tort exemption affects large share of of claims		Tort exemption affects larger share of claims than in Massachusetts	Effective on bulk of claims	Theoretically, but not as direct as in Massachusetts and Florida	Little improvement

TABLE VI
SUMMARY

	Massachusetts		*Florida*		*Delaware*	
	Theory	Practice	Theory	Practice	Theory	Practice
Reduce claim adjustment & settlement costs	Effective in claims of small value					
Victim's costs						
Insurance industry costs	same as above		Effective in more claims than in Massachusetts	Lawyers less often employed	Less certain than in Massachusetts and Florida	Little improvement
Defendant's costs	same as above		same as above	Not evaluated	same as above	same as above
Reduce underwriting & Marketing costs	Not addressed		Not addressed	Not addressed	Not addressed	Not addressed
3. *Cost Reallocation Goals*	Not addressed		Not addressed	Not addressed	Not addressed	Not addressed
4. *Reallocation Societal Resources*						
End Court Congestion	Could affect substantial proportion of small claims	Reduction in motor vehicle tort litigation on order of 50 percent reported. Court congestion remains a serious problem	Could affect greater proportion of claims than Massachusetts	Reduction of 15-20 percent in number of suits filed, but court congestion never a serious problem	Theoretically, but not as direct as in Massachusetts and Florida	No improvement, but not a problem
Transfer Legal Resources to other courts	same as above	Important transfer of legal resources reported	same as above	To some extent	same as above	Doubtful

TABLE VI
SUMMARY

	Massachusetts		Florida		Delaware	
	Theory	Practice	Theory	Practice	Theory	Practice
Transfer Medical Resources to other causes	Not able to evaluate	Not evaluated	Not able to evaluate	Not evaluated	Not able to evaluate	Not evaluated
5. *End Corruption*	Mixed-threshold pressures may affect improvement		Mixed-threshold pressures may affect improvement	Fraud on thresholds said to be practiced in some parts of the state	No improvement, may be worse	Not evaluated

TABLE VII

COST IMPACT OF ELEMENTS OF NO-FAULT SYSTEM ON EXPENSE COMPONENTS OF INSURANCE

	Medical Expenses	Wage Losses	Pain & Suffering Damages	Claimants' Fees	Ins. Co. Settlement Expenses	Ins. Commissions	Other under-Writing Expenses	Insurance Profits	Collateral Sources
Basic Benefits	+	+				+	+	+	
Unlimited Benefits	+	+				+	+	+	
Tort Exemption—Basic Benefits	—	—				—	—	—	
Tort Exemption—Pain & Suffering	—	—	—	—	—	—	—	—	
Eliminate Overlap of Collateral Sources									—
Subrogation & Reimbursement of No-Fault Insurers	+	+			+				
Compulsory Insurance—All Motorists	—	—	—			+	+	+	
Bulk Insurance						—	—	—	
State Insurance						—	—	—	
Effect of Corruption of Thresholds	+	+	+	+	+	+	+	+	

+ adds cost
— saves cost