

No-Fault Insurance at 40: Dusting Off an Old Idea to Help Consumers Save Money in an Age of Austerity

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■ Executive Summary

This year marks the 40th anniversary of the first state (Massachusetts) to implement a no-fault law. Between 1971 and 1975, the District of Columbia and 15 states followed suit. During the 1970s, the U.S. Congress also considered, but failed to adopt, a national no-fault law. Since 1975, however, no state has adopted a no-fault law, due in substantial part to the opposition of the trial bar and the failure of no-fault to lower premiums. Four states and the District of Columbia have repealed their laws. Today, the idea seems almost forgotten.

In this paper, the authors argue that no-fault was never given a chance in its intended form and the failure of the state laws to lower premiums lies not in the no-fault concept itself, but because the laws were structured in such a way as to undermine their effectiveness.

The authors also contend that, in a time when government deficits will result in lower benefits and higher costs for Americans on many fronts, properly structured no-fault laws – ones that take advantage of the new national health insurance law to reduce medical costs and give consumers the option to elect not to sue for pain and suffering – could enable consumers to save tens of billions of dollars a year. As such, the authors argue that no-fault should be thrust again into the public policy spotlight.

■ Introduction

The dire financial conditions faced by both federal and state governments today inevitably will call for either (or both) much lower services or much higher taxes. That makes it all the more essential to seek ways to reduce burdens on the citizenry.

Since state governments require motorists to carry automobile liability insurance, such coverage is very much like a tax. But when such a “tax” results in a wasteful, dilatory, and even corrupt system, it is all the more important to welcome a means to reshape the tax such that it both performs much better and costs much less.

Which means re-raising the issue of no-fault auto insurance.

■ About the Authors

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Peter Kinzler worked on no-fault insurance legislation as a staff member of the House Interstate and Foreign Commerce Committee in the 1970s and on auto choice as president of the Coalition for Auto-Insurance Reform during the 1990s and 2000s. He also was a consultant on insurance and other financial issues, including to NAMIC. He is now retired.

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This paper contains the views of these authors. The expression of those views herein is not attributable to nor controlled in any way by any other party. None of the authors has been paid for his work on this paper.

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For many years, the RAND Institute for Civil Justice did extremely valuable work on the oft-disputed efficacy of no-fault. RAND criticized the tort/liability system and, on the whole, appraised no-fault's performance very favorably. A series of studies have estimated that the potential savings for persons who elect a no-fault system and choose to forego suits for pain and suffering is approximately half the cost of their present personal injury coverage.¹

Before doing estimates of savings under choice proposals, RAND summarized the results of its extensive research analyzing existing tort and no-fault laws:

"No-fault approaches to compensation can yield substantial savings in total injury coverage costs, compared to the traditional system. However, whether or not any particular no-fault plan will reduce injury coverage costs and, if so, how much depends on its provisions [the level of no-fault benefits and the "threshold," the nature and size of barriers to concurrent pursuit of tort claims for pain and suffering]."² Specifically, the study found that:

- No-fault plans reduce transaction costs (primarily attorneys' fees for the plaintiffs and defendants);
- No-fault plans pay compensation more in line with one's economic losses than does the traditional tort system; and
- Compensation is more prompt under no-fault coverage.³

However, with a high degree of prescience, the same study cautioned that, "Some no-fault plans that provide generous PIP [Personal Injury Protection or no-fault] benefits may actually increase the total injury coverage costs of the system."⁴

A more recent RAND report done in 2010⁵ attempted to evaluate how state no-fault laws have worked. First, the report discussed the goals of no-fault supporters as follows: "The proponents of this approach [including the first-named author of this paper] argued it would reduce the overall costs of the system and increase the fraction of the auto-insurance dollar that would go to injured people. The elimination of these disputes would also speed the provision of compensation. Compensation would, thus, be adequate to cover the economic loss regardless of fault and would be more equitably distributed among injured parties."⁶

And, it turns out, a well-drawn auto insurance law could succeed in this regard. RAND continues to find no-fault pays faster and covers more essential economic losses. But even so, according to RAND, the merits of no-fault insurance are largely reduced to whether such insurance saves money compared to tort liability premiums: "Over time, ... dissatisfaction with no-fault grew, primarily because the hoped-for premium-cost reductions never materialized.... Political debate about no-fault increasingly focused solely on the issue of consumer premium costs, and the other justifications for the no-fault approach on which its original proponents relied lost political salience."⁷ RAND finds that the principal reason for what it sees as no-fault's failure is "very high medical costs"⁸ – its inability to hold down healthcare costs compared to health insurance's constraints through managed care, etc.

Thus, RAND argues that because of what it finds as too high costs, no-fault has ceased to appeal to policymakers, leading to no new no-fault laws, and a few states repealing their laws.⁹ RAND's point about consumer focus on cost is undoubtedly true. Since a

motor vehicle crash is a relatively rare experience,¹⁰ most consumers will pay more attention to the cost of their insurance premium than to the system of benefits the insurance policy provides in the event of an accident.

However, the RAND study fails to assess what happened to the proponents' no-fault proposals in both the legislative and judicial processes and what has been learned as no-fault moved from the drawing board into law. The authors of this paper have undertaken a thorough examination of the model state law and federal legislative no-fault proposals of the 1970s.

They also have looked at state experience with different levels of no-fault coverage (commonly referred to as PIP), PIP cost containment measures, and the laws' differing thresholds (restrictions on lawsuits). We show that a properly constructed no-fault law can fulfill the proponents' original objectives of better compensation of injured persons *and* the opportunity for consumers to save significant sums on their auto insurance premiums in these difficult economic times. The potential national annual savings for private passenger drivers from a good no-fault system is in excess of \$34 billion a year.¹¹

■ How Its Proponents Intended the No-Fault Concept to Work

Many commentators in the past proposed applying the principles of workers' compensation to auto accidents – trading the uncertainty of all or nothing legal actions in return for the certainty of guaranteed payment for economic loss and a schedule of limited additional payments for very serious injuries.¹² The

advent of the modern no-fault concept can be traced to a 1965 book titled *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, authored by Professors Robert E. Keeton and Jeffrey O'Connell.¹³

In 1972, the views of these and other no-fault proponents were memorialized in a model no-fault law, the Uniform Motor Vehicle Accident Reparations Act (UMVARA).¹⁴ It contained recommendations for the two key components of no-fault – the level of PIP benefits that an injured person was entitled to, regardless of fault; and the threshold restriction on tort suits needed to keep auto insurance premium costs in line with costs under the tort system.

Section 1(5)(i) of UMVARA called for the payment of all “reasonable charges incurred for reasonably needed

products, services, and accommodations” for all medical care and rehabilitation, without limit, and Section 13 imposed a limit of \$200 a week for work loss. In turn, Section 5(a)(7) called for a threshold that permitted lawsuits for noneconomic damages (read pain and suffering)

only if economic damages were in excess of \$5,000 and only “if the accident causes death, significant permanent injury, serious permanent disfigurement, or more than six months of inability of the injured person to work in an occupation.”

The provisions of S. 354, the National No-Fault Motor Vehicle Insurance Act introduced in the 93rd Congress in 1973, mirrored those of UMVARA. In addition to wage loss, Section 101(2) required payment of all medical and rehabilitation benefits without limit and Section 206(a)(7) contained a threshold identical to that in UMVARA.

■ The Model State No-Fault Law Meets the Legislative Process

So what happened to the proponents' provisions when they encountered the legislative process at the federal and state levels?

► **Congressional consideration of no-fault.** The proponents stayed quite true to the original idea – compromising over time by lowering the mandatory medical and rehabilitation benefits to \$100,000,¹⁵ but insisting on a verbal threshold that restricted lawsuits for noneconomic loss to cases of serious and permanent injury. The result? Between 1971 and 1978, when legislation was considered in both chambers of Congress, a bill passed the Senate in 1974 (for the only time) but was never reported out of the House Commerce Committee.

► **State experience.** Between 1971 and 1975, 16 states and the District of Columbia enacted no-fault laws. No two bills were the same, and only Michigan came close to UMVARA and the federal bills. The state experience can be broken into the two components of a no-fault law: the tort threshold and PIP benefits. In an effort to identify why personal injury costs have risen more in no-fault states than tort states in recent years, the authors examine in detail three key populous no-fault states – Florida, New York, and Michigan. They have experimented with different approaches to keep costs in line. Having identified what has worked and what has been problematic, the authors then make recommendations for a no-fault system that will effectuate the goals of the original proponents and offer consumers a chance to reduce their premiums significantly.

► **Thresholds: The ticking cost time bomb in no-fault laws.** As discussed earlier, UMVARA envisioned a “verbal” or descriptive threshold as an essential

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component of a good no-fault law. The rationale was that a threshold that permitted suits for pain and suffering only in cases of both “serious” and “permanent” injury would eliminate most lawsuits, thus offsetting the costs of PIP benefits. It would also make sure that pain and suffering damages would be available only to people in the greatest need. Another option was “dollar” thresholds, which permitted lawsuits if a person’s injuries reached a certain monetary level, such as \$500 or \$2,000. No-fault supporters opposed these thresholds on the following grounds:

- if set too low, the thresholds would not take enough costs out of the system to pay for PIP benefits;
- if set at a reasonably high level, the thresholds would become targets for the unscrupulous who would run up questionable PIP expenses so they could sue (thereby increasing PIP costs as well as tort costs);
- if not adjusted for inflation, the effectiveness of the thresholds would decrease over time; and
- regardless of the level, dollar thresholds would be inequitable, favoring people in high-cost areas over those in low-cost areas.

So what happened? The opponents of no-fault, principally the trial bar, adopted several tactics that prevented good no-fault laws from being enacted. First, they opposed adoption entirely, arguing that no-fault laws deprived injured people of the right to sue, and they backed up their arguments with a strong political presence. The trial bar succeeded in preventing 24 states from adopting any form of no-fault.

Where they failed to stop adoption altogether, the trial bar supported the

addition of PIP benefits but without restrictions on the right to sue. Ten states adopted such laws, dubbed “add-on” no-fault laws,¹⁶ in response to the trial bar and its argument that if insurers just treated people fairly, they would accept the PIP benefits and not sue. Most states that followed this route adopted a comparatively low level of PIP benefits similar to medical payments coverage already offered in tort states. Not surprisingly, no evidence exists that injured people in add-on states took their PIP payments and abandoned lawsuits.

The trial bar’s third tactic was to push for adoption of dollar thresholds. This effort greatly undermined no-fault laws. Of the original 16 no-fault states, only Michigan contained a verbal threshold while New Jersey adopted a \$200 threshold, barely a speed bump for injured persons and their lawyers on their way to court.

Even in Michigan, the trial bar successfully decoupled the concept of “serious” and “permanent,” thereby reducing the effectiveness of the threshold below the level intended by its proponents. The same scenario occurred in four other states – New York, New Jersey, Florida, and Pennsylvania – where verbal thresholds were subsequently adopted.

To simply lump all these states together or to focus on just New York, Florida, and Michigan fails to demonstrate just how far these laws deviated from the original intentions of no-fault proponents. The results, properly viewed, are what the opponents of good no-fault laws intended and should be viewed as such.

The 2010 RAND study spent a great deal of time examining recent increases in PIP costs, but it failed to emphasize the role of compromised barriers to at-fault (tort) claims as a major source of unnecessarily high premiums in some no-fault states. The study states clearly

the no-fault concept, “The central idea of a no-fault system is that, rather than seek recovery against another driver under conventional principles of tort law, an injured automobile-accident victim could simply recover the costs of the accident from his or her own insurance company.”¹⁷ But RAND then does not make any recommendations for tightening thresholds to sufficiently bar tort claims despite finding that tort liability costs for tort bodily injury are actually *higher* in no-fault states than in tort states.¹⁸

The 2010 RAND study does mention the huge cost saving potential of strong thresholds – 54 percent in personal injury coverage – that previous RAND studies had estimated.¹⁹ Further, the new RAND study remarks, “A key goal of no-fault was to reduce these (bodily injury) costs by shifting compensation from the [tort] . . . liability system to the first party PIP system by creating a threshold [barring] . . . access to [tort] compensation.”²⁰ But RAND then fails to explore the role of inadequate thresholds in the excessive costs of no-fault laws.

No state no-fault law adopted a threshold as strict as that proposed by UMVARA, the model state law. The New York and Florida laws are similar to each other but fail to combine the terms “significant” or “serious” and “permanent,”²¹ thereby leaving enough wiggle room for lawyers to argue and juries to find that whiplash, for example, is a serious injury or the loss of 5 percent use of a little finger is a permanent injury.

Even with weaker thresholds, it would still have been possible to keep costs from rising if the levels of PIP benefits had corresponded to lower thresholds. A U.S. Department of Transportation study assessing the efficacy of state no-fault laws noted the need for a balance between the level of a state’s no-fault benefits and the tightness of its threshold:

“[T]here is a close relationship between the percentage of automobile accidents which are removed from the tort system by the threshold, and the total amount of money that can be paid to accident victims in the form of no-fault (PIP) benefits and to third-parties in the form of tort bodily injury liability (BI) damages, without an adverse effect . . . in the form of an increase in premium rates beyond the rate of inflation”²²

The new RAND study misses this vital point in citing the significant decline in premiums after three no-fault states – Georgia, Connecticut, and Colorado – repealed their laws and reverted to the tort system as proof that no-fault is more expensive.²³ But all three laws were out of balance. The Georgia and Connecticut laws both had \$5,000 of PIP benefits coupled with only a \$400 tort threshold.

These thresholds were so low they barely restricted lawsuits when they were enacted in the 1970s, not to mention when the laws were repealed in the 1990s. Colorado’s no-fault law was even more out of balance, with \$100,000 of no-fault medical and rehabilitation benefits and a \$2,500 threshold. It should come as no surprise that costs declined after such laws were repealed.

It is telling that an actuarial study predicted that an alternative approach to repeal, namely, amending the Colorado no-fault law to lower benefits to \$50,000 and switching to a strong verbal threshold, would have produced approximately the same cost savings as a return to the tort system.²⁴

What do we find when the new RAND study tries to make distinctions among the no-fault states? It acknowledges that, since the 1990s, some no-fault states with limited PIP benefits have seen *declines* –

not increases – in costs.²⁵ This is because, while the states have thresholds that take relatively few cases out of the tort system, they also have modest PIP benefit levels that do not cost more than the costs eliminated by the threshold. In short, they are in balance.

At the same time, the RAND study shows a trend line of *increases* in costs for the *combined* experience of the no-fault laws of Michigan, Florida, and New York.²⁶

However, the RAND study confuses rather than clarifies the reasons for increased costs in these large, more densely populated no-fault states by lumping them together even though they have very different PIP benefit levels and thresholds with significant differences. They also have had different PIP experiences. The result is a serious distortion as to the different causes of the PIP problems in these three no-fault states and the role that weak thresholds play in failing to keep costs down in two of them.

The NAIC Fast Track Monitoring System, which reports comprehensive data for private passenger automobile insurance, documents the lack of balance in the laws.²⁷ The *Fast Track* system is the source of all data in this paper that refers to the pure premium (the cost of these losses to the insurer) in different states. The percentage changes in pure premium over time are based on Peter Kinzler’s calculations using the *Fast Track* data.

In New York, where the system intended for the PIP costs to be the dominant cost factor, the PIP costs in the first quarter of 2010 were less than half (48 percent) of the personal injury portion of the pure premium (PIP plus “tort” bodily

injury liability). The *Fast Track* data show a similar story in Florida. In 2010, PIP costs represented only 46 percent of total personal injury pure premium costs.

While both laws have verbal thresholds, neither law was or is sufficiently tight to make the system a predominantly PIP system, as advocated by no-fault proponents. It was not because the proponents failed to propose stricter thresholds; it was because of weakened thresholds that assured more tort claims.

Michigan’s verbal threshold is still more effective than those in New York and Florida, and Michigan residents are rewarded, according to the *Fast Track* data, with tort bodily injury costs approximately one-third of those in New York and Florida.

By contrast, Michigan’s threshold was originally drawn tighter. As a result, tort bodily injury liability costs have remained low and steady for a long time. Between 1987 and 2004, Kinzler’s calculations using *Fast Track* data show that Michigan’s pure premium for tort bodily injury increased a mere 35 percent in absolute dollars. However, recent

judicial experience has shown the vulnerability of even a tightly drawn verbal threshold to the vicissitudes of a changing court.

In 2004, the *Kreiner* decision issued by the Michigan Supreme Court²⁸ effectively turned a serious injury threshold into a serious *and* permanent injury threshold. Between that time and the summer of 2010, the pure premium for tort bodily injury dropped 19 percent. Then, in July 2010, the Michigan Supreme Court, acting with different justices, overruled the *Kreiner* decision, adopting a less restrictive standard where the plaintiff only needs to prove that his or her life has been affected by the injury.²⁹ The new standard, by making it easier for plaintiffs to recover, is likely to increase the cost of tort bodily injury coverage.

Nevertheless, even granted the difference in claim frequency between Midwestern and Eastern states, Michigan's verbal threshold is still more effective than those in New York and Florida, and Michigan residents are rewarded, according to the *Fast Track* data, with tort bodily injury costs approximately one-third of those in New York and Florida.

It is also worth taking a quick look at the Massachusetts law to see how flawed some no-fault laws were from the beginning and how lumping some or all no-fault laws together as RAND did can misrepresent problems in no-fault states. Massachusetts has always had a low level of benefits, \$2,000, and a low threshold, \$500, when it first went into effect in 1971, and then \$8,000 of benefits and a \$2,000 threshold starting in 1989. There's been relatively little abuse of the PIP benefits, as the *Fast Track* data show that the PIP pure premium cost has dropped over the last five years. This may be because it doesn't take many medical procedures in most parts of Massachusetts to reach the \$2,000 threshold without any fraud or buildup of PIP charges. The cost problem in Massachusetts is clearly due to its low threshold. It has the sixth highest tort bodily injury costs of any state, either tort or no-fault.³⁰ In Massachusetts, the *Fast Track* data in 2010 show that the tort bodily injury liability portion accounted for 83 percent of the total personal injury pure premium. *No-fault was never intended to layer PIP benefits on top of a barely limited tort system.* No amount of cost controls on PIP benefits could bring it into balance without tightening the threshold.

The RAND study includes a chart that shows dramatically the deficiencies of the tort thresholds, finding that bodily injury claims costs were higher in no-fault states than tort states between 1992 and 2006.³¹

RAND says this result is "surprising" in light of the purpose of thresholds, but RAND would not have been surprised had it focused on inadequate thresholds as a cause of higher premiums in no-fault states.³²

As a result of weak thresholds in the no-fault states (the exception being Michigan), the *Fast Track* data show that the pure premium for tort bodily injury approximates or exceeds the pure premium for PIP or no-fault benefits (that tort claims constituted only 14 percent of the premium in Michigan is explained by the state's very high PIP benefits along with its high threshold).

Even with PIP costs rising more than tort bodily injury costs in recent years, the *Fast Track* data show that tort bodily injury costs continue to approximate half (47 percent) of the total personal injury pure premium in no-fault states.

But no-fault laws were supposed to displace tort with PIP claims. Indeed, if one eliminates the low cost of tort bodily injury pure premium in Michigan, the tort bodily injury portion of the total personal injury premium for the rest of the no-fault states jumps

to 53 percent. Clearly, the chances of reducing costs would be far greater if one considered reforms to both halves of the premium. One would not see so many claimants "double dipping" in receiving both PIP and tort benefits or inflating their PIP costs in order to be able to sue in tort.

Thus, while RAND is correct that rising PIP costs in recent years have driven premiums higher in no-fault states than in tort states had the thresholds been what no-fault supporters advocated, the overall personal injury costs (PIP and tort) in no-fault states would have been far lower.

To generate an educated guess of just how much lower, Kinzler took the ratio of tort bodily injury to PIP costs in Michigan (25:75 in 2000)³³ and applied it to the other 10 no-fault states (excluding Pennsylvania because in 2000 less than half of its policyholders elected the no-fault law). The result is a stunning 36 percent reduction in the total cost of no-fault.³⁴

Obviously if no-fault thresholds were operating as intended, no one could make a plausible argument that no-fault laws weren't keeping costs down. (The later discussion in this paper demonstrates the huge savings potential from an even stricter threshold, one that limits lawsuits to only economic loss uncompensated by PIP.)³⁵

► **PIP Medical Benefits.** The failure to apply the same cost constraints used with regard to health insurance has resulted in unnecessarily high costs in some of the more urban states. Let's now consider in much more detail the role of PIP benefits in the costs of no-fault laws. RAND says the principal reason no-fault laws have been more expensive than anticipated is their incapacity to hold down healthcare costs compared to health insurance's constraints through managed care, etc.

The no-fault states came no closer to the model law with its level of PIP benefits than with the tightness of its threshold. The benefits range from a mere \$2,000 in Utah to \$50,000 in New York (for medical and work loss combined). Only New Jersey at \$250,000 and Michigan with its unlimited benefits are higher than those of New York.

Here, the problem did not lie with the deviation in the high level of benefits (at least with regard to costs) but, instead, with the deviation over time in its cost controls compared to those of health insurers, both public and private.

No-fault was never intended to layer PIP benefits on top of a barely limited tort system.

The no-fault laws adopted in the 1970s contained the standard cost-control language of the time – reasonable charges for reasonably needed products and services. However, unlike the laws applied to health insurers, no-fault laws often required auto insurers to pay claims within 30 days or else risk paying a penalty and being liable for attorneys’ fees.

In some cases, the result was that insurers had insufficient time to investigate the legitimacy of claims. Moreover, no-fault laws rarely were revised to reflect modern healthcare cost controls, leaving no-fault insurers out of step with health insurers. Not surprisingly, it appears the PIP system has been subject to more abuse and even fraud than any other health insurance system. In addition, it appears some medical providers have taken advantage of no-fault’s more generous benefits to offset the more restrictive reimbursement available through health insurance, i.e., they shifted their costs onto the PIP system. The result has been excessive increases in PIP premiums for no-fault insureds.

The RAND study includes compelling data to demonstrate greater utilization of, and higher reimbursement rates for, PIP medical benefits than for similar health insurance benefits.³⁶ What are the likely reasons for the higher cost of PIP benefits?

First, auto insurers are generally much less experienced and adept in controlling healthcare costs than health insurers. After all, auto insurers writing tort liability were, and are, obliged to pay all of the claimant’s reasonable medical

expenses arising from supposedly tortious conduct of the insured. While, as seen, the original 16 no-fault state laws limited reimbursement to reasonable charges for reasonably needed products and services, the laws did not offer an opportunity for insurers to use other cost-control devices such as deductibles and coinsurance. More importantly,

the no-fault laws did not keep up with changes in cost-control mechanisms.

While some of the no-fault states subsequently adopted fee schedules and even limited medical protocols, many did not. Of those that did place limits on PIP benefits, most did not place limits on the number of visits to medical providers as is common under health insurance contracts. In

addition, auto insurers lacked the clout that health insurers had to negotiate deep discounts for hospital and medical services.³⁷

As indicated above, insurer control of healthcare costs also was inhibited by the limited time no-fault laws gave them to investigate PIP claims (typically 30 days) or face penalties, including payment of the benefit plus interest and attorneys’ fees,³⁸ and by the limited amount of time to investigate a claimed benefit or be subject to fines under the state’s unfair claims settlement practices act.

It is thus not surprising that rising PIP costs have driven up premiums in some high-cost no-fault states in recent years, and reforms are needed.³⁹ Unfortunately, the RAND study provides aggregate data – for all no-fault states or for New York, Florida, and Michigan combined –

and as such, the data do not adequately reflect the different levels of benefits and demographics of the varying no-fault states. The study fails to distinguish between states experiencing problems and those that are not. And it fails to identify the different sources of higher costs in states experiencing problems.

In the aggregate, the RAND data show that the growth in real average PIP claim payments in all no-fault states between 1980 and 2006 rose *less* than the Consumer Price Index – Medical Inflation Index (CPI – Medical) for same period.⁴⁰ However, the aggregate data hides major problems with PIP costs in some no-fault states, akin to W.I.E. Gates talking about “the man who drowned crossing a stream with an average depth of six inches.”

Let’s examine the PIP experience in the three large no-fault states (Florida, New York, and Michigan) to understand what general and specific lessons can be learned from their experience. First, it is important to recall that the level of PIP benefits in the three states varies widely. Florida has \$10,000 of benefits, New York \$50,000, and Michigan unlimited medical benefits as well as much higher levels of work loss benefits. On its face, the different benefit levels and different demographics of the three states would suggest likely differences in experience, and that is exactly what has occurred.

■ The Florida Experience

Florida was the second state to adopt a no-fault law, which went into effect on January 1, 1972. Since then, the law has undergone many changes, including going from a dollar to a verbal threshold in 1976. On the PIP side, the level of benefits increased from \$5,000 to \$10,000 in 1978.

Through the years, Florida’s PIP coverage has been plagued by “escalating claims

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costs, high utilization rates for expensive diagnostic services, high chiropractor utilization rates, high rates of attorney involvement, and high rates of apparent claim fraud and claim buildup.⁴¹ For example, in 2007, Florida PIP claimants utilized:

- ▶ Expensive MRI procedures at a significantly higher rate than that for PIP claimants countrywide (33 percent versus 22 percent);
- ▶ More chiropractors (43 percent versus 22 percent); and
- ▶ More pain clinics (27 percent versus 20 percent).⁴²

Further, in a system designed to deliver medical benefits promptly without the need for attorneys, Florida claimants also use attorneys far more often than claimants in other no-fault states, resulting in much higher PIP claims:

- ▶ Attorneys in Florida are involved in 41 percent of PIP claims versus 31 percent nationally; and
- ▶ Where the most severe injury is neck or back sprain or strain, the average PIP claim for people who retain an attorney is \$11,677, or 62 percent higher than the \$7,217 claim for people with similar injuries in Florida who do not retain an attorney.⁴³

It is not surprising that claims adjusters estimate a much higher appearance of claims fraud and buildup (unnecessary or excessive treatment) in Florida:

- ▶ The appearance of fraud was noted in 10 percent of claims in Florida versus 6 percent nationally; and
- ▶ The appearance of claims buildup in 30 percent of claims in Florida versus 20 percent nationally.⁴⁴

The Florida Legislature has reacted to each surge in no-fault premiums with efforts to reform the PIP system. Among the controls adopted during major legislative battles in 1998, 2001, 2003, and 2007 were a workers' compensation fee schedule for certain medically necessary procedures, a medical fee schedule for some providers, and more funding for anti-fraud efforts.

More stringent changes were defeated, as was a 2011 effort by some Florida legislators to make further changes, including increased penalties for medical providers who knowingly submit false and fraudulent applications for clinics that treat crash victims. The most recent effort failed despite a run-up of PIP pure premium costs from \$100 in the fourth quarter of 2008 to approximately \$150 in the fourth quarter of 2010.⁴⁵

For all of its efforts, the Florida Legislature always seems a step behind in its efforts to combat the latest healthcare tactics. The result, over time, has been runaway increases in PIP costs:

- ▶ Between 1995 and 2003, PIP pure premium in Florida rose an average of 6.73 percent, nearly twice the 3.51 percent rate of the CPI – Medical;
- ▶ Between 1997 and 2007, the average total payment rose 70 percent versus an increase of 50 percent in the CPI – Medical;⁴⁶ and
- ▶ From the fourth quarter of 2008 through the first quarter of 2010, PIP costs rose 40 percent, and the Insurance Research Council (IRC) estimates the increase will be 50 percent measured to the fourth quarter of 2010.⁴⁷

In short, despite various legislative changes, PIP costs while fluctuating have surged.

And yet even with the large PIP increases, the *Fast Track* data show tort bodily injury costs in Florida were higher than PIP costs in the first quarter of 2010 (\$164.12 versus \$140.04), indicating that effective reform must address both PIP and tort bodily injury costs. It is also important to note the connection between the two parts of the system, because a loose threshold also results in higher PIP claims through the padding of such claims in an effort to meet the threshold test.

■ The New York Experience

As with Florida, New York has experienced a similar cycle of PIP abuse and legislative reform. As noted, New York has much higher PIP benefits than Florida, \$50,000 compared to \$10,000. The higher level of PIP benefits has created an appetite for abuse, as people with minor injuries use a wide range of nontraditional medical practitioners multiple times, particularly in New York City.⁴⁸

In 2004, the New York Insurance Frauds Bureau concluded that the no-fault system was attracting a hardened criminal element, both to collect PIP benefits and to aid in getting over the tort threshold.⁴⁹ Many fraud suspects had multiple prior arrests for such crimes as gun possessions, narcotics violations, robberies, etc. More recently, according to the Insurance Frauds Bureau, reports of no-fault fraud increased from 10,117 in 2006 to 13,433 in 2009.⁵⁰

PIP claimants in the New York City metro area have far more diagnostic tests and use many more medical providers than claimants in the rest of the state. They also hire more lawyers to handle PIP claims, leading to much higher claims, and have a far higher percentage of claims with the appearance of buildup of fraud. In 2010:

- ▶ 52 percent of claimants in the New York City metro area utilized an MRI versus 21 percent in the rest of the state, while 24 percent received an electromyography (EMG) versus only 4 percent in the rest of the state;⁵¹
- ▶ 49 percent used a chiropractor versus 20 percent in the rest of the state;
- ▶ 42 percent used a physical therapist versus 18 percent;
- ▶ 23 percent used a physiatrist (a physical medicine and rehabilitation specialist) versus 8 percent;⁵²
- ▶ 53 percent hired a lawyer versus 25 percent in the rest of the state, and attorney involvement was associated with much more extensive and expensive treatment and significantly higher claimed losses and payments;⁵³ and
- ▶ 35 percent of the claims in the New York City metro area had an appearance of fraud or buildup versus only 8 percent in the rest of the state.⁵⁴

Over the years, New York, like Florida, has enacted reforms to address PIP fraud, including adoption of medical fee schedules, increased funding to prosecute fraud, standards for investigating healthcare providers, a ban on those who engage in fraudulent practices, and providing extra time for insurers to review claims.

PIP cost increases have reflected the reforms, declining after their enactment but then rising again as abuse has managed to increase. Between 1995 and 2000, the *Fast Track* data show PIP costs increased 89 percent; an average of 13.7 percent per year compared to 3.78

percent for the CPI – Medical. Reforms then led to a drop of nearly 46 percent between 2000 and 2005.

However, PIP costs are rising again, climbing 31 percent in the four years ending in the first quarter of 2010 (compared to 16 percent for the CPI – Medical). The increase is even more dramatic if one examines the increase in the severity of the claims. The average dollar amount paid per PIP claim (“claim severity”) rose by 52 percent from 2005 to 2010 (compared to 20 percent for the CPI – Medical).⁵⁵ The reason for the smaller increase in pure premium cost was the decline in paid claims frequency.

In sum, New York continues to have significant PIP issues in common with Florida – such as overutilization by certain medical professionals and skyrocketing costs for those professionals, particularly in urban areas.⁵⁶ The abuses that have caused these increases clearly warrant fixing. And yet, in New York, as in Florida, tort bodily injury costs, which are associated with the weak thresholds, continue to outstrip PIP costs (\$145.92 versus \$135.80 in the first quarter of 2010).

The surest way to lower premiums for consumers is to address the unnecessary costs that arise from both the overutilization of PIP benefits and the inadequate thresholds.

■ The Michigan Experience

Michigan’s no-fault law is startling compared to all others in that it provides for much higher PIP benefits – unlimited medical, along with high wage loss, up to \$4,929 a month for a maximum of three years. It also had a relatively tight verbal threshold, albeit not as strong as the one contained in the 1970s model state law or the federal legislation.

But, if Michigan comes closest to the model no-fault law, then why has

it become the subject of so much controversy over rising rates? Unlike Florida and New York, the answer does not lie in the threshold, even with a recent court decision that has weakened it. As indicated above, Michigan’s threshold has indeed worked as anticipated to keep costs down.

The problem lies on the PIP side and most probably relates primarily to two factors: the unlimited nature of the law’s medical benefits and its lack of the constraints of today’s health insurance system. The latter makes it an attractive payment source for healthcare providers whose reimbursement rates under private health insurance, Medicare, or Medicaid are far lower and subject to more restrictive treatment limits.

For a considerable time after Michigan’s law took effect in 1973, its overall personal injury costs were quite low. In 1987, for example, the *Fast Track* data show the pure premium for personal injury (PIP plus tort bodily injury) was actually lower in Michigan than in Florida. Yet, as discussed above, Michigan’s no-fault system was far more generous, as contrasted with Florida’s \$10,000 of PIP benefits for medical and wage losses combined.⁵⁷

While the two states vary somewhat demographically, none of the differences could hide the fact that the residents of Michigan were operating under a much more generous compensation system at a similar cost.

Now, let’s examine what the *Fast Track* data show has happened to PIP and tort bodily injury costs in Florida and Michigan between 1987 and 2010. In Florida, by the first quarter of 2010, PIP pure premium costs had risen 250 percent while tort bodily injury liability pure premium had risen 116 percent (because it started at a much higher base, the tort bodily injury portion of the total

personal injury premium continues to be larger than the PIP portion).

In Michigan, the tort bodily injury pure premium has risen by only 25 percent. But the pure premium for PIP has skyrocketed by 360 percent, with PIP costing substantially more than tort coverage. The result is that the total personal injury pure premium in Michigan is now 20 percent higher than in Florida.

Although Florida also has experienced significant problems with PIP costs, it faced a far smaller increase in PIP premiums than Michigan. Inasmuch as the Michigan threshold is working to keep costs down, its PIP system needs to be addressed in order to lower the total costs of the Michigan no-fault law.

Two recent IRC studies and data from the Michigan Catastrophic Claims Association (MCCA) help to identify the sources of rising PIP costs. IRC studies consistently find the use of certain medical professionals – including chiropractors and alternative treatment professionals – is associated with the appearance of buildup or fraud in auto accident claims in many no-fault states, particularly in PIP claims.⁵⁸ But unlike Florida and New York, auto accident victims in Michigan do not use these healthcare providers disproportionately.⁵⁹ As a result, in 2006, Michigan had the 16th lowest PIP claim frequency (among the 19 PIP states).⁶⁰

However, because Michigan PIP claimants are entitled to unlimited medical benefits, the *Fast Track* data reveal that the average PIP claim severity cost in 2010 was much higher in Michigan – \$32,974 in Michigan versus \$8,742 in New York and \$7,673 in Florida.

Overall, between 1990 and 2006, PIP claim frequency in Michigan declined by 21 percent (versus a national average decline of 23 percent), but PIP claim severity rose by 218 percent (versus 86 percent nationally).⁶¹ Overall, PIP claims are fewer in Michigan but are for much higher losses.

These data suggest the obvious – unlimited benefits are *much* more expensive than limited benefits. But they don't tell us why the Michigan cost of PIP has risen so dramatically in recent years. For that information, we need to look at the experience of the MCCA, Michigan's special fund financed by levies on all auto insurers that pay all PIP medical claims in excess of \$500,000, about 1 percent to 2 percent of no-fault claims.⁶²

Inasmuch as the Michigan threshold is working to keep costs down, its PIP system needs to be addressed in order to lower the total costs of the Michigan no-fault law.

In 1979, the cost of caring for the most seriously injured no-fault accident victims was \$3 per car. While the cost has varied since 2001, when it was \$14.41 per car, the costs have skyrocketed until now, for fiscal year 2012, the assessment is \$145.⁶³ The total amount in

claims paid has risen commensurately, from \$0 in 1979 (when the fund only paid for losses in excess of \$250,000 and the law was only 6 years old) to in excess of \$700 million in 2008.⁶⁴

As a result, between 31 percent and 45 percent of the PIP premium goes for *very* few cases with losses above \$500,000,⁶⁵ paid from MCCA funds. MCCA also estimates that nearly half of the costs of catastrophic care (42 percent) will be paid for home care (attendant care) provided not only by outside agencies but family members.⁶⁶ Unlike other insurance for personal attendant care services – such as Medicaid or private long-term care policies – no limits exist on either the

number of hours for such care or their total costs. (Other insurance rarely pays for attendant care by family members.)

These data indicate that Michigan's main cost problems are associated with the extensive care provided for seriously injured persons, a non-issue in New York and Florida because of lower PIP benefits. Michigan's no-fault law also requires insurers to pay for all reasonable medical care without most of the restraints imposed in health insurance contracts. While Florida and New York limit charges for medical services through fee schedules, Michigan law contains no fee schedule for medical services or medical protocols for the treatment of injuries.

Below are some specific suggestions for reducing costs in Michigan even at the price of undermining the huge advantage that some people now enjoy with unlimited benefits for their catastrophic injuries. Our suggestions do not need to include changes in the threshold that has worked extremely well to hold down costs (although a change to the *Kreiner* standard would lower tort bodily injury costs), unlike the thresholds in New York and Florida. In addition to the suggestions made later for PIP reforms in all states, here are three Michigan-specific suggestions:

- ▶ **Reduce the huge costs of personal attendant care services by applying the rules of the injured person's health insurance policy.** Most health policies do not cover such services. Where they are covered, the services typically do not pay for family attendant care or at a rate equal to paid professional attendants. The services also limit the number of hours paid for professional attendant care. Given the huge costs in Michigan associated with these services, following the rules of the injured person's

health insurance policy would reduce significantly the costs of catastrophic care. An alternative would be to limit payment for personal attendant care services to the levels contained in a legislatively specified public- or private-sector health policy.

► **Permit insureds to elect to purchase lower levels of PIP benefits.** This approach is followed in New Jersey. There, insureds who elect the no-fault system receive \$250,000 of medical benefits, but low-income people can opt for a lower and much more affordable level.

► **Limit PIP benefits to \$500,000.** This amount is higher than in any other no-fault state, but it would result in lowering PIP premiums by one-third to one-half, the amount of the PIP premium presently accounted for by claims paid from the MCCA. Injured persons would still be entitled to benefits under their health insurance, which, under the new national law, will not impose either annual or lifetime caps on benefits. They could also file a tort claim for any uncompensated economic loss.

Absent reforms of this nature, the trend line in Michigan indicates that fewer and fewer people will be able to afford the cost of insurance and thus the benefits of the system.⁶⁷

■ Michigan in Context

If a no-fault regime is reasonably balanced between providing new PIP benefits and replacing old tort rights,

social betterment can be immense. Admittedly Michigan’s no-fault scheme can be viewed as overly ambitious, but its effects are an eye-opener as to what can be done under no-fault versus tort. Consider again how auto accident victims in Michigan are treated compared to other states, whether no-fault or otherwise. Motoring victims in Michigan are automatically eligible for unlimited medical expenses and about \$5,000 a month in lost wages for up to three years.

By contrast, in high-cost tort states, a seriously injured auto accident victim hit by a motorist carrying the average amount of liability insurance⁶⁸ has a highly contingent claim for a maximum net recovery of \$50,000.⁶⁹ And, yet, the

If PIP benefits were limited to \$500,000, it would lower PIP premiums by one-third to one-half.

average cost for PIP in Michigan for all these guaranteed benefits (plus the right to sue for pain and suffering in serious injury cases) is no higher than in many other highly urbanized states.

Moreover, if Michigan were to choose to limit mandatory PIP benefits to \$500,000, the state’s no-fault system would likely have costs close to the middle of all other states.

Such comparisons allow one to sympathize with Daniel Patrick Moynihan’s characterization of no-fault automobile reform as at least potentially “the one uncontestedly successful reform proposed in the 60s.”

■ The Policy Implications of Declining Tort Costs

Recall that RAND finds far greater utilization of multiple medical providers, with more visits to providers as well, in no-fault states compared to tort ones.⁷⁰ However, as cited above, despite some significant increases in PIP costs in Michigan, Florida, and New York in

particular in recent years, RAND finds that between 1980 and 2006 the total PIP claim payments in all states were in line with medical inflation.⁷¹ Inasmuch as the vast majority of PIP dollars goes for medical care, one would think such data indicate that PIP costs in the aggregate are not excessive and that, for the most part, the no-fault laws are working as intended. In fact, our review suggests that all but three no-fault states are performing well with respect to costs.

However, when RAND looked at *total injury* costs in no-fault states versus tort states to assess the success or failure of no-fault laws, it found the data show costs increasing at a far faster rate in no-fault states.⁷²

The reason for the increase lies not in out-of-control PIP costs (except in a few key states) but in the fact that tort costs for auto accidents have been falling in recent years. And tort costs account for the entire personal injury premium in at-fault states, as contrasted with about half the premium in no-fault states (admittedly a higher percentage that no-fault advocates believe appropriate).

Before examining the reasons for declining tort costs, let’s first examine RAND’s added speculation as to why medical costs are more expensive in tort states than in no-fault states. This results from cost-shifting in no-fault states from health insurance to PIP benefits – compared to tort states (even though much of the premium in the latter also goes to pay medical expenses). To the extent this speculation is accurate, it may undermine RAND’s argument that no-fault is a more expensive system than the tort system (and it also presents significant avenues for reform to lower auto insurance costs, as discussed later).

RAND indicates that, “One possibility (why medical costs in no-fault states grew so much faster than in tort states)

is that no-fault insurance shifts medical costs associated with auto accidents from the first-party health-insurance-system to the automobile-insurance system.⁷³ In support of this theory, RAND cites experience after the repeal of no-fault in Colorado where “the costs of inpatient medical care resulting from motor-vehicle accidents shifted from no-fault to Medicare, Medicaid, and the victims.”⁷⁴

A true comparison of no-fault and tort states should reflect all the costs of auto accidents, regardless of whether those costs are presently borne by auto or health insurance, because these are the costs consumers pay one way or another for auto accidents. RAND finds “almost certainly” that fewer auto accident costs are being internalized in the tort system than in the no-fault system,⁷⁵ resulting in turn in lower auto insurance costs in tort states.

The result is a false comparison of no-fault and tort system costs. The true test would be the total cost to insureds of both their auto insurance costs and the costs of auto crashes that are absorbed in their health insurance premiums. Add to that, there are costs that tort law does not redistribute at all.

This leads us to other causes of lower tort costs. One answer is simple – fewer paid claims. According to Kinzler’s calculations using *Fast Track* data, the paid claims frequency for tort bodily injury claims countrywide *dropped* by 25 percent between 1987 and 2010.

The most obvious reason is the dramatic reduction in fatalities and other crashes as a result of improved auto safety.

Inasmuch as the rules of the tort system have not changed in ways relevant to auto safety, credit here may be due to federal auto safety regulators along with private-sector auto safety groups.

Prominent among them is the Advocates for Highway and Auto Safety, a coalition of consumer advocates, safety and medical organizations, and auto insurers.

Another possible contributor to lower costs is a change by insurers to challenge more tort claims they view as disputable, regardless of size. This is an avenue much less available under PIP insurance with its greatly simplified – and therefore less disputable – criteria for payment.

But still to the extent increases in auto safety are part of the reason

why there are fewer tort bodily injury claims, shouldn’t increased safety also result in fewer PIP claims? After all, fewer accidents and accidents of lesser severity should mean fewer claims and less severe injuries. In fact, the *Fast Track* data show steep declines in paid claim frequency for both tort bodily injury and PIP claims: a drop of 25 percent in tort claims between 1987 and 2010 and a drop of 20 percent in PIP claim frequency.

The difference lies in the changes in paid claim severity. During this time period, the paid claim severity for tort bodily injury rose by 84 percent, but the paid claim severity for PIP rose 320 percent. (For a detailed explanation of the differential, recall the previous discussion of abuse and fraud in the PIP system in the no-fault states of Florida, New York, and Michigan.)

Of course, tort costs are only one side of the equation. The other is what one gets for one’s premiums. Here, tort costs, whether high or low, are almost always bad news especially for seriously injured accident victims. That is because tort insurance pays out compensation such that the percentage of compensation paid declines as the cost of the injury rises. This perverse form of insurance reflects the lesser payment for pain and suffering for larger claims.

A 2007 study conducted by the IRC analyzed categories of average claimed losses compared to payments for tort bodily injury claimants by size of loss.⁷⁶ The IRC compensation figures fall in line with earlier studies. Tort payments well above economic losses continue, on average, where the economic loss is small. For losses between \$501 and \$1,000, the average tort recovery was 232 percent of economic loss. But the percentage recovery declines dramatically as the losses mount. Between \$25,000 and \$50,000, tort compensation drops to 130 percent of economic loss. Then, in the highest category included in the study, losses more than \$50,000, the average tort payment drops to 64 percent.

If the injured person has to pay an attorney (which is typical for larger claims),⁷⁷ the amount available to pay medical bills and for wage loss would decline to 44 percent. Admittedly part of the problem is low limits of tort coverage. But low limits are a function of how expensive lower limits are due to the high cost of such generous payments of smaller claims with their large element of payment for noneconomic loss.

In this connection, the IRC found that 31 percent of all tort liability policies in 2002 (the latest data) covered \$25,000 or less in damages for all injured persons.⁷⁸ Using the IRC data for the different amounts of tort bodily injury liability coverage carried by policyholders and adjusting

A true comparison of no-fault and tort states should reflect all the costs of auto accidents, regardless of whether those costs are presently borne by auto or health insurance, because these are the costs consumers pay one way or another for auto accidents.

for the percentage of drivers with no coverage, Kinzler has projected that the average tort bodily injury policy provided about \$75,000 of coverage for a single individual injured in an accident. Once approximately a third of that amount is deducted for the average plaintiff's attorney fee, the net amount available to the serious accident victims was only \$50,000,⁷⁹ an amount inadequate today to cover such injuries, especially for any noneconomic damages.⁸⁰

That said, there is no denying that no-fault laws are not operating, even in Michigan, as the original supporters intended. The next section discusses briefly what has been learned from 40 years of experience with different no-fault laws and how that knowledge can be applied to make sure that no-fault laws provide a better compensation system at lower costs.

■ Lessons Learned From 40 Years of State Experimentation With No-Fault Insurance

Past and present RAND studies, as well as IRC data, support the notion that no-fault is a far better compensation system than tort: it succeeds in paying more people faster and more in line with their economic needs. But granted that lawyer-compromised thresholds were insufficient to lower tort costs enough to pay for the new PIP benefits, no-fault supporters must acknowledge that experience has shown that the model state law of 1972 needs updating in order to deliver on the promise of lower costs. Here are some statutory suggestions:

- ▶ Place a limit on mandatory PIP benefits. Unlimited benefits are simply too expensive, making insurance overly costly for many and unaffordable for low-income people. But even so, earlier RAND studies and some states' experience

have shown that minimum PIP limits can still be set reasonably high if coupled with the next two reforms.

- ▶ Insureds should be permitted to have their PIP benefits mirror restrictions on medical benefits applicable under the PIP payee's health insurance policy.
- ▶ Since even verbal thresholds are vulnerable to being weakened by either legislative compromises or state court decisions, insureds should be permitted to elect to forego most or even all claims for their noneconomic losses.⁸¹

The next section expands on a specific series of options for lowering the cost of auto insurance.

■ Ways to Reduce Premiums in No-Fault States

- ▶ **Lower PIP costs by taking advantage of the Patient Protection and Affordable Care Act of 2010 ("the Affordable Care Act").** Before discussing options to reduce excessive PIP costs, consider first the implications of the Affordable Care Act on PIP benefits.

RAND concedes the problem of expensive healthcare paid by auto insurers could be alleviated, as originally proposed by Keeton-O'Connell, by making PIP insurance excess (or secondary) to health insurance. But PIP insurers, vying to retain premium volume, became primary payors. The economist's argument for internalizing the cost of auto accidents also points that way. There were also other arguments for auto primacy. Since the costs of an auto accident can be high and health insurance policies often contain limits on benefits, the primacy of even high health insurance coverage runs the risk of having an auto accident use up so much

of an injured person's annual and/or lifetime limits on health coverage leaving them with insufficient coverage for illnesses. Such matters played a key role in making the case for the primacy of PIP benefits as a way to fill the compensation gaps left by the liability insurance system.⁸²

But the Affordable Care Act now outlaws annual and lifetime caps in all health insurance policies and prohibits health insurers from both denying coverage for people with pre-existing conditions, as well as dropping people with medical problems.

Efforts to repeal the legislation have mostly focused on the individual mandate, not on these provisions, suggesting that they may well remain in place regardless of the outcome of the political battle. Further, if the Affordable Care Act is not repealed or found to be unconstitutional, it will require uninsured people to purchase health insurance. Thus, the need for PIP benefits to cover health costs comes into question.

With these components of national health insurance in place, policymakers could focus on saving consumers money by having PIP benefits paid under the same rules as one's health insurance, coordinating PIP and health insurance more efficiently or even eliminating PIP medical benefits.

Over the next few years, the percentage of people without health insurance should be largely reduced if the Affordable Care Act is fully implemented. With annual and lifetime caps being eliminated, there will be no risk that the personal injury costs of auto accidents would wipe out or seriously impair a person's health insurance coverage. A remaining question is how to devise the most efficient, politically viable system for compensating auto accident victims in light of the new health insurance regime.

If the new healthcare law is fully implemented in the next few years, almost all U.S. residents will have the equivalent of “no-fault” first-party medical coverage for all of their health costs, including from auto accidents. In effect, the legislation will address the concern of no-fault proponents about inadequate healthcare compensation for seriously injured auto accident victims.

It, therefore, makes little sense to have both health and auto insurance cover the same losses. How then to rationalize the two systems? Several ways exist to revise the relationship between health and no-fault auto insurers to reduce the costs of paying for medical losses from auto accidents, either under the auto or health insurance system. Here are some possibilities, with a discussion of their potential benefits and drawbacks.

● **Health primacy.** By making health insurance primary, the health insurance system would pick up the medical costs of auto accidents, estimated at \$32.6 billion annually or approximately 2.35 percent of total healthcare costs in 2000.⁸³ The advantages would be a clean and simple system where the costs of transferring dollars from health insurers to no-fault auto insurers via subrogation would be eliminated; and lower medical costs because health insurers have more cost controls and more leverage to keep medical bills down than auto insurers.

What would be the disadvantages? First, the universe of those covered by health and auto insurance would not be the same. While the Congressional Budget Office estimates that more than 94 percent of U.S. residents will have health insurance coverage by 2019 if the

Affordable Care Act remains in effect, only about 85 percent of motor vehicle operators and other people injured in auto accidents would be covered.⁸⁴

As a result, some cross-subsidization would exist for health insureds paying for the costs of auto accidents. Thus, the economic theory of internalization of costs by motorists paying their way would be violated.

Second, savings might be diluted somewhat as hospitals and doctors seek to raise costs elsewhere to compensate for the loss of additional

revenue from the no-fault system. Some people might be charged more than the actual costs of their health expenses as happens now when healthcare providers charge private health insurers more than their actual costs to offset the shortfall in payments from public insurance programs and uninsured patients unable to pay for the healthcare services they now receive.⁸⁵

Third, – and most important – enormous political pressure is likely to arise to constrain costs in the new healthcare system. Transferring PIP medical costs into the health insurance system would raise the latter’s costs. The concern about raising healthcare costs, even if collapsing auto insurance medical costs into health insurance would be lower, could lead policymakers to retain health insurance as excess to auto insurance (and any other coverage).

Do alternatives exist where health insurance is secondary?

● **Health primacy with subrogation against PIP benefits.** One possibility

would be to retain both the cost restraints under health insurance along with internalizing automobile accident medical costs by making health insurance primary but providing health insurers with a right of subrogation against PIP insurers. If health insurers pay first, the PIP insurer would benefit from whatever leverage the insured’s health insurer has, but the costs of auto accidents would be internalized within the auto system.

But this too raises questions. A key political one – the previously mentioned pressure to keep health insurance costs low by keeping all other insurance primary – most likely would be a barrier to reform unless lawmakers were convinced the subrogation system would work well enough to make sure that auto accident medical costs were moved from health insurance to auto insurance.⁸⁶ But even if subrogation could lessen the impact on health insurance, that still entails the waste, clumsiness, and transaction costs of one insurer bearing the cost of an accident and then reshifting an already covered cost to another carrier ultimately responsible for payment.

● **Application of health insurance constraints to auto insurance claims.**

It must be reemphasized that vital issues remain as to the timing, funding, and implementation of the extremely controversial federal Affordable Care Act. In the interim, as suggested earlier, a relatively simple solution to coordinating PIP insurance and presently extant forms of health insurance would be for PIP insureds at least to be permitted to have their PIP medical benefits mirror restraints on benefits applicable under a PIP payee’s own health insurance. In effect, there would be no distinction in the payment of health benefits regardless of the source of the illness or injury.

Cost savings would be obvious from this approach to the extent that health insurers often pay far less for treating

If the new healthcare law is fully implemented in the next few years, almost all U.S. residents will have the equivalent of “no-fault” first-party medical coverage for all of their health costs, including from auto accidents.

the same injury than PIP insurers pay. It would also preserve the benefits of cost internalization. This change could be accomplished by either federal legislation (which, for example, already provides for federal secondary payment when a medical cost is covered by both a federal program such as Medicare and private health insurance) or accomplished state-by-state.

What savings could one anticipate from such PIP reforms? In 2000, the total medical cost of auto accidents (in all states, both no-fault and tort) was \$32.6 billion, with 55 percent being paid from health insurance sources.⁸⁷ If one updates those figures using the CPI–Medical Care increases over the intervening 10 years, the total auto medical costs are approximately \$48 billion. The 55 percent insurance portion of that would be approximately \$26 billion, which would be the base amount against which to measure savings.

Consumer savings would be the difference between the portion of the \$26 billion represented by PIP payments paid by auto insurers and what private health insurers would have paid for the same services. These PIP changes would not eliminate fraud and chicanery; just reduce them to the levels experienced by private health insurers.

Of course, excessive auto accident medical costs occur in tort states as well. Requiring injured persons to use their health insurance to be primary in those states would increase savings. For example, an IRC study on hospital cost shifting and auto insurance claims compared the cost of hospital care for tort bodily injury claims in Maryland, where a state commission sets all such costs, to the cost of such claims in the 38 states classified as tort or add-on states.

The study found the costs in the other states to be almost 150 percent greater

than in Maryland. From this finding, the IRC estimated the cost of excess hospital charges due to cost shifting in all tort and add-on states at approximately \$1.2 billion in 2007.⁸⁸ Obviously, that figure would be much higher if similar controls also applied to all medical providers.

► **Going much further to reduce premiums: Give motorists the option to limit suits for pain and suffering beyond existing law in return for lower premiums.** Any statute allowing one's health insurance to be applicable to one's auto accident medical claims entails the contractual and other complexities of coordinating motorists, auto insurance, health insurers, and healthcare providers under such a scheme. As well, trying to control health costs under any system will remain problematic.

A much simpler change would be to allow motorists to eliminate claims for pain and suffering.

That brings us back to the nettlesome issue of thresholds. While it is easier to identify ways to tighten inadequate no-fault-law thresholds than to fix faulty PIP systems, accomplishing these solutions has been politically challenging. And even when adequate thresholds are achieved, courts have not hesitated to undermine them. Note where a recent New Jersey Supreme Court decision,⁸⁹ like the one in Michigan, has undermined that state's realistic threshold.

So, apart from the opportunities and challenges of focusing on PIP's medical costs, we turn to what could be done relatively quickly and easily about excessive auto insurance costs to the extent they are caused by weak thresholds in no-fault states.

When Professors Keeton and O'Connell proposed no-fault auto insurance in 1965 it entailed two features: First, providing for (some) no-fault compensation

for economic loss, and second for eliminating (some) compensation for noneconomic loss. If this first feature of no-fault, providing compensation for economic loss, can be seen as creating problems including the threat of adding unmanageable costs in some states, its second feature of reducing compensation for noneconomic loss can still be seen as effectively cutting costs, regardless of what is done (or not done) as to PIP medical benefits.

RAND points (though without enough emphasis) to this bright spot by referring to the experience of two no-fault states that allow – but not compel – motorists to choose to surrender claims for noneconomic loss except above a threshold. In New Jersey, one can choose between retaining one's unlimited right to claim for pain and suffering damages versus surrendering such rights under a New York-like threshold. With a surrender of such pain and suffering claims as the default position (*i.e.*, applicable to those who fail to make a choice), nearly all motorists (94.6 percent) have chosen to forego less serious claims for pain and suffering in return for lower premiums.⁹⁰

In Pennsylvania, where the default position retains full tort rights, the Pennsylvania Insurance Department reports that the percentage of motorists waiving claims for pain and suffering under a threshold has risen every year since the law was enacted in 1992, such that in 2010, 57 percent made that choice statewide with a much higher percent in Philadelphia. This experience can be seen as supporting the premise that insureds care most about costs.

If so, by no means must savings stop there. The Joint Economic Committee (JEC) of the U.S. Congress, based on prior work conducted by RAND,⁹¹ identified the huge savings in 2003 dollars that could accrue to motorists by allowing them a choice

between the current system in their state versus a system with PIP benefits plus a waiver by PIP insureds of *all* claims for pain and suffering.⁹²

The JEC study estimated that if all motorists elected to waive pain and suffering claims (except for punitive damages) in return for PIP benefits, the aggregate national savings would total \$47.7 billion (\$33.7 billion for private passenger vehicles and \$14 billion for commercial vehicles).⁹³ Dan Miller, the author of the JEC study, estimates the savings in 2011 for the identical plan would be \$34 billion.⁹⁴

Key to this approach is that it avoids the pitfalls associated with verbal thresholds, the vicissitudes of courts and legislatures impairing these thresholds (as in Michigan and New Jersey). Rather, motorists can inviolately create their own effective barriers to claiming for noneconomic losses, with concomitant even further savings than in New Jersey and Pennsylvania.

■ Allowing Motorist Choice to Forego Lawsuits for Pain and Suffering in Return for Lower Premiums in Tort States

So far we have talked about allowing motorists in no-fault states to reduce their premiums by permitting them to choose to limit or eliminate their potential recoveries for pain and suffering. But the choice allowed in New Jersey and Pennsylvania and in the federal Auto Choice legislation need not be limited to no-fault states.

Motorists in *either* a no-fault or tort state could benefit in cost savings from

a system in which motorists could choose to limit pain and suffering damages to cases of serious *and* permanent injury, or waive all claims for such damages. (Either system would also eliminate the historical inequity suffered under tort law by many women, children, and the aged to the extent pain and suffering has historically been determined roughly as a multiplier of economic loss, thus penalizing those with no or lower wages.) Many people may well be willing to forego coverage for most or all noneconomic damages in return for lower premiums.

Motorists in *either* a no-fault or tort state could benefit in cost savings from a system in which motorists could choose to limit pain and suffering damages to cases of serious and permanent injury, or waive all claims for such damages.

In thinking about noneconomic damages, tort liability coverage is a form of social insurance, though not often thought of in this way. Social insurance is usually mandated by the government for losses so destructive of well-being that society finds it impermissible for the populace not to be covered.

Obvious examples are workers' compensation, Medicaid, and Medicare, along with Social Security benefits. All these are mandated by state or federal legislation. Tort liability insurance for auto accidents being compulsory is also mandated by law – in this case in response to state common law duties, but law nonetheless.

The common law in every state mandates that those liable for causing injury by their substandard conduct (or product) pay the victims' losses. But in the case of auto accidents, liability insurance for misconduct as defined by common law is also expressly mandated by legislation in every state.⁹⁵ Also, mandatory auto insurance statutes not only protect the

assets of those who commit torts but impart to their victims rights to such insurance.⁹⁶ So, with states requiring compulsory auto insurance, it follows that it should be viewed as a form of social insurance.

Obviously, it is the obligation of every government mandating the purchase of social insurance to structure it as efficiently and economically as feasible. It thus makes sense for tort liability coverage to ensure the populace not be required to buy non-essential coverage; for example, for non-economic losses. Other forms of insurance, whether social or private, or for life, health, disability, fire, etc., do not try to cover noneconomic losses so why should auto?

■ Going Further Still

If, as RAND concludes, cost is the main test of reform, then perhaps motorists in no-fault states might be given the option of further savings, waiving even PIP benefits, at least for medical loss. For healthcare, one could rely solely on one's health insurance that, if the Affordable Health Care Act is fully implemented, will provide benefits to almost all people injured in auto accidents (steps would be required to deal with those uninsured for healthcare). If motorists combined waiving PIP benefits with waiving claims for noneconomic loss, the savings would be significant. The 2010 RAND report indeed cites the potential savings from such options, stating that "permitting consumers to elect to limit noneconomic damages without requiring first-party [PIP] insurance might substantially reduce insurance costs."⁹⁷

The federal government is not likely to prevent no-fault states from at least allowing choice for the above PIP options; for example, preventing a no-fault state from simply abolishing PIP benefits for medical expenses or at least allowing motorists a choice to

do so. Admittedly, just as the federal government could arguably take over workers' compensation, there's nothing constitutional to prevent it from taking over auto insurance under either tort or no-fault. But the states' rights argument looms large against such a move.

Granted the federal government – as it does for Medicare and Medicaid – can dictate that to the extent there exists other insurance, such insurance (including auto insurance) will be primary to its new health insurance. But assume a national insurance plan covers health costs, including those from auto accidents, and at the same time purports to prevent PIP coverage for auto accidents from being secondary to cover any gaps or limits in health insurance.

At that point, the incentive disappears for a state to require, or for motorists to buy, PIP insurance for auto-induced health costs.⁹⁸ In other words, why buy expensive no-fault insurance covering auto accidents' health expenses if the principal effect is to displace probably less expensive health insurance one has already been required to purchase?

Indeed, it would seem feasible to allow even those in *tort* states to waive their rights to sue in tort not only for noneconomic damages but for health costs in order to save further dollars. (An even further choice could be available for any motorists making the above choices not to sue for any difference between what is covered by available health insurance and what health costs would otherwise be available from a tort suit.)⁹⁹

By allowing such choices, to the extent the choices are exercised, health insurance

ipso facto would become primary. If people have waived their rights to receive healthcare costs from either PIP or tort bodily injury liability auto insurance, only health insurance would cover

such losses. Nor would the health insurer be subrogated to payees' tort right because the payees would arguably have no tort rights to be subrogated to.

The same considerations mentioned earlier as to states' rights argue against preventing a state from altering not only PIP coverage for health costs but tort rights as to such coverage.

Especially with high costs of health insurance (shortly, as at least

foreseen, to be required of almost everybody), relief from needlessly high auto insurance premiums becomes all the more necessary, at least to the point of allowing choices as outlined above.

Indeed this raises the point that to the extent auto insurance need not cover health costs, either now for the well insured or for all in the future, auto insurance coverage can be allocated to more automobile-induced wage loss that, unlike health costs after national health coverage is effected, will remain woefully underinsured.

■ Conclusion

Two immediate reforms would allow consumers to save billions of dollars on the cost of insurance: electing to apply one's health insurance restraints to medical costs from auto accidents, and foregoing suits for pain and suffering from such accidents (as indicated earlier, if all motorists elected to forego suits

for pain and suffering, Dan Miller has estimated the savings for reform option at \$34 billion). Combining the two obviously saves all the more. In this paper, we have identified other ways for consumers to save money through a variety of options. One would hope such savings in both no-fault and fault states would more than meet the cost-savings test for consumer (and political) support of auto insurance reform legislation.

In the final analysis, it is a question of whether, when families are squeezed between rising prices for food, energy, and medical care and efforts by governments to rein in deficits and debt, legislators see a different political calculus that will enable them to defy players invested in the present wasteful system, and thereby permit their citizens to take advantage of these opportunities to help offset these new economic burdens.

Some encouragement for a new political calculus can be drawn from the recent comment by Chicago Mayor Rahm Emanuel about the analogous concern of the need for practical, not political, solutions to his city's economic problems: "The cost of putting political choices ahead of practical solutions has become too expensive. . . . [In addressing Chicago's financial problems,] we will be guided by principle, pragmatism and progress – not politics."¹⁰⁰

In closing, from a long-range political and economic point of view, it has often been asserted that adoption of no-fault auto insurance coincided with a redistributive thrust in American society.¹⁰¹ As a corollary, interest in no-fault faltered with a turning away from such a societal approach.¹⁰²

But the approach herein of allowing consumer choice to prudently reduce coverage in return for reduced premiums would seem to coincide with current market-driven forces. They bring the

Just as the federal government could arguably take over workers' compensation, there's nothing constitutional to prevent it from taking over auto insurance under either tort or no-fault. But the states' rights argument looms large against such a move.

choice of no-fault reform back into accord with today's political and social inclinations.

■ Endnotes

¹ See, for example, Stephen J. Carroll and Allan F. Abrahamse, *The Effects of an Enhanced Choice Auto Insurance Plan on Auto Insurance Costs and Premiums* (Santa Monica, CA: RAND Institute for Civil Justice, April 2002), p. 6. The study estimated savings on the personal injury premium of 51 percent in tort states and 62 percent in no-fault states. Automobile insurance policies have two general components, personal injury and property damage. The personal injury coverages provide compensation for people's physical injuries and associated pain and suffering, when the legal requirements for such recoveries are met. Property damage coverages are used to repair damage to the vehicle. In tort states, the personal injury coverages are bodily injury liability, uninsured motorist and underinsured motorist, as well as medical payments. In no-fault states, the personal injury coverages consist of the same first three but substitute no-fault or PIP (personal injury protection) benefits for medical payments coverage. [Hereinafter, "Effects"]

² Stephen J. Carroll, James S. Kakalik, Nicholas M. Pace, John L. Adams, *No-Fault Approaches to Compensating People Injured in Automobile Accidents* (Santa Monica, CA: RAND Institute for Civil Justice, 1991), p. xiv. [Hereinafter, "No-Fault Approaches"]

³ Ibid, pp. x – xiii.

⁴ Ibid, p. xiv.

⁵ James M. Anderson, Paul Heaton, Stephen J. Carroll, *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective* (Santa Monica, CA: RAND Institute for Civil Justice, 2010).

[hereinafter "Retrospective"] For another article on the history of no-fault auto plans, see Nora Engstrom, *An Alternative Explanation for No-Fault's Demise*, forthcoming in *DePaul L. Rev.*

⁶ Ibid, p. 2.

⁷ Ibid, pp. xiv – xv.

⁸ Ibid, p. xvi.

⁹ Between 1971 and 1975, the following 16 states adopted some form of no-fault insurance law, i.e., one that included both no-fault benefits and a "threshold," a restriction on the right to sue for pain and suffering: Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Pennsylvania, and Utah. Since then, four states – Colorado, Connecticut, Georgia, and Nevada – have repealed their laws.

¹⁰ In 2009, there were 10.8 million motor vehicle accidents in the United States. U.S. Census Bureau, *The 2012 Statistical Abstract: The National Data Book, Transportation: Motor Vehicle Accidents and Fatalities, Table 1103 – Motor Vehicle Accidents – Number and Deaths* (Washington, DC: September 2011).

¹¹ Estimate of Dan Miller using the most recent data from the same sources he used in 2003 to estimate savings from adoption of the federal Auto Choice Act. For a detailed description of Miller's methodology, see Joint Economic Committee, *Choice in Auto Insurance: Updated Savings Estimates for Auto Choice* (U.S. Congress, Washington, DC: July 2003), pp. 8-9. [Hereinafter, *Savings Estimates for Auto Choice*]

¹² See, e.g., Columbia University Council for Research in the Social Sciences, *Report by the Committee to Study Compensation for Automobile Accidents* (Philadelphia,

PA: Press of International Printing Co., 1932), p. 217.

¹³ Boston, MA: Little, Brown and Company, 1965. For a recent thoroughly researched condemnation of tort law as applied to personal injury, see Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (Cambridge, MA: Cambridge University Press, 2011).

¹⁴ Roger C. Henderson and William Cohen, co-reporters, UMVARA (Chicago, IL: National Conference of Commissioners on Uniform State Laws, August 1972).

¹⁵ See, e.g., H.R. 13048 in the 95th Congress (1978). Section 102(b) required insurers to offer coverage of at least \$100,000 for medical expenses.

¹⁶ Arkansas, Delaware, Maryland, New Hampshire, Oregon, South Dakota, Texas, Virginia, Washington, and Wisconsin.

¹⁷ *Retrospective*, *supra* note 5, at p. xiii.

¹⁸ Ibid, pp. 69-70.

¹⁹ "RAND researchers projected that the proposal would have allowed drivers willing to waive their tort rights to buy personal injury coverage [PIP and tort bodily injury liability coverage for uncompensated economic loss only] for 54 percent less than coverage under their state's current system." *Retrospective*, *supra* note 5, at p. 56.

²⁰ Ibid, p. 69.

²¹ The New York law has separate categories for "permanent loss" and "significant limitation." The Florida law permits a lawsuit for an injury that is "permanent." Unlike the UMVARA and federal bill standards, the two terms are not combined in either law.

²² U.S. Department of Transportation, *Compensating Auto Accident Victims: A Follow-Up Report on No-Fault Auto Insurance Experiences* (Washington, DC: May 1985), p. 95.

²³ *Retrospective*, *supra* note 5, at p. 74.

²⁴ Miller, Herbers, Lehmann, & Associates, Inc., *Colorado No-Fault Automobile Insurance: Actuarial Study* (Bloomington, IL: December 2002), p. 5.

²⁵ “Since the mid-1990s, costs have fallen steadily in small no-fault states.” *Retrospective*, *supra* note 5, at p. 74.

²⁶ *Ibid*, pp. 73-74.

²⁷ All PIP and bodily injury pure premium figures cited in this paper come from *Fast Track Monitoring System – Automobile Report, Private Passenger, First Quarter, 2010* [hereinafter, “*Fast Track*”] collected by Independent Statistical Service, Inc. (ISS), Insurance Services Office, Inc., and National Independent Statistical Service. These statistical reports are prepared quarterly reflecting multi-year trends. They provide data on a state-by-state basis for the different automobile insurance coverages as well as on a nationwide aggregate basis. According to ISS, “Approximately 50 of the largest companies (fewer in any given state) representing about 70 . . . percent of the nationwide personal auto . . . premium volume . . . participate in the voluntary report. Contained in *Fast Track* generally are exposure, paid loss and paid claim data, from which claim frequency, average loss (severity) and loss cost (pure premium) experience is generated. . . . [A]verage loss and loss cost data are presented for bodily injury liability, property damage liability, all comprehensive, all collision, and personal injury protection, if applicable. . . . The purpose of *Fast Track* is to monitor trends over time, as to provide a good

indication of how claiming and loss patterns are increasing, decreasing, or remaining stable.” [http://www.iss-statistical.net/iss/web/home.nsf/lcallcontent/116/\\$FILE/2Q2008%20FT%20PLUS%20Description.pdf?open](http://www.iss-statistical.net/iss/web/home.nsf/lcallcontent/116/$FILE/2Q2008%20FT%20PLUS%20Description.pdf?open)

²⁸ *Kreiner v. Fischer*, 681 N.W. 2d 765 (Michigan Supreme Court, 2004), where the court held, “to determine whether one has suffered a ‘serious impairment of body function,’ the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment ‘affects the person’s general ability to conduct the course of his or her normal life.’”

²⁹ The court undermined the concept of permanency contained in the *Kreiner* decision by stating that “the statute does not create an express temporal requirement as to how long the impairment must last in order to have an effect on ‘the person’s general ability to live his or her normal life.’” *McCormick v. Carrier*, 2010 WL 3063140 (Michigan Supreme Court, July 31, 2010), p. 21. In short, the injury may be serious but need not be permanent.

³⁰ Insurance Research Council, *Trends in Auto Injury Claims 2008 Edition*, (Malvern, PA: January 2008), p. 46. [Hereinafter “*Trends*”]

³¹ *Retrospective*, *supra* note 5, at p. 70.

³² *Ibid*.

³³ To do this calculation, Kinzler took the ratio of tort bodily injury to PIP in Michigan in 2000 – before the cost of catastrophic PIP claims exploded and before the *Kreiner* decision that tightened the threshold (only to be overturned in 2010). This approach avoids the distortion of these two events and seems fair in that no other no-fault state has

unlimited PIP benefits and so was not subject to the same kinds of PIP increases as Michigan over the last 10 years.

³⁴ The savings were calculated by Kinzler using *Fast Track* data, changing the actual 2010 ratio in these states of 47 percent PIP to 53 percent tort bodily injury to 75 percent PIP to 25 percent tort bodily injury, to reflect the ratio in Michigan in 2000.

³⁵ The new RAND report, *Retrospective*, *supra* note 5, p. xv, says that total injury costs per insured vehicle have risen dramatically over time in no-fault states versus tort states, “Whereas injury costs under no-fault were only 12 percent higher in 1987 than those under tort, this difference had ballooned to 73 percent in 2004.” Unfortunately, this key finding is not footnoted where it appears in the summary and neither the statement nor any supporting data appear in the text later on. As a result, it is impossible to know if this is a comparison of all no-fault states versus all tort states or just of some no-fault states versus some tort states. If the former is the case, then the data fail to reflect the wide variety of no-fault laws and the different demographics of such states. If the data are based on some comparison of no-fault and tort states, then what are those states and how do they compare demographically?

³⁶ *Retrospective*, *supra* note 5, at pp. 120-130.

³⁷ *Ibid*, p. 119.

³⁸ Some states, such as Florida, discourage insurers from investigating even highly suspicious claims by providing that if the injured person is found to be entitled to *any* of the PIP claim amount, no matter how small the portion, the insured is still entitled to recover attorneys’ fees. Also, none of the no-fault laws permit insurers to recover attorneys’ fees if the claimant loses the case.

³⁹ In that connection, the RAND study tries to address the expected differences between low- and high-density states by using an injury index that divides injury costs by property damage costs. *Retrospective supra* note 5, pp. 66ff. RAND believes this approach addresses the demographic differences including climate, road configuration, and usage patterns. However, the injury index does not solve the problems caused by (1) using aggregate data from nine no-fault states (RAND excludes Pennsylvania, New Jersey, and Kentucky that allow motorists to choose to lessen claims for noneconomic loss) and then (2) comparing such data to aggregate data from the far larger number of tort states. It also does not tell us what the effectiveness is of different cost controls, such as medical fee schedules, nor how states with similar demographic patterns compare, nor whether the no-fault regime in particular states is more or less costly than the pre-existing tort system (or a modernized version of it) would have been.

⁴⁰ *Retrospective, supra* note 5, at pp. 71-72. The RAND figures measure “the degree to which costs for medical care (and PIP claim payments) have outstripped general inflation between 1980 and 2006.”

⁴¹ Insurance Research Council, *PIP Claiming Behavior and Claim Outcomes in Florida* (Malvern, PA: February 2011), p. 1.

⁴² *Ibid*, pp. 12-14.

⁴³ *Ibid*, pp. 15-16.

⁴⁴ *Ibid*, p. 17.

⁴⁵ *Ibid*, p. 4.

⁴⁶ *Ibid*, p. 7.

⁴⁷ *Ibid*, p. 3.

⁴⁸ Insurance Research Council, *Claiming Behavior in New York’s No-Fault Auto Insurance System: An Analysis of Closed PIP Claims* (Malvern, PA: December 2001), pp. 6, 7 and 11. For a detailed analysis of New York PIP experience in the late 1990s and early 2000s, see Peter Kinzler, *Auto Insurance Reform Options: How to Change State Tort and No-Fault Laws to Reduce Premiums and Increase Consumer Choice* (Indianapolis, IN: National Association of Mutual Insurance Companies, August 2006), pp. 21-22. [Hereinafter, “*Reform Options*”]

⁴⁹ Statement by August D’Aureli, Supervising Investigator of the Insurance Frauds Bureau in the New York State Insurance Department, before the New York Senate Standing Committee on Insurance (February 9, 2004); See *No-Fault Fraud in New York State*, fn 166 at p. 2; *The 2000 Report to the Governor and the Legislature of the State of New York on the Operations of the Insurance Frauds Prevention Act* (New York Insurance Frauds Bureau: January 15, 2001).

⁵⁰ Insurance Research Council, *New York’s No-Fault System: Preliminary Findings from Closed Auto Injury Claims*, (Malvern, PA: December 2010), p. 2.

⁵¹ *Ibid*, p. 11.

⁵² *Ibid*, p. 12.

⁵³ *Ibid*, p. 18.

⁵⁴ *Ibid*, p. 20.

⁵⁵ *Ibid*, p. 1.

⁵⁶ Thus both states could benefit from changes in the PIP system. (At the same time, it is hard to explain why the cost of a \$10,000 PIP benefit in Florida is more expensive than a \$50,000 PIP benefit in New York.)

⁵⁷ Total personal injury costs in Michigan were \$108 as contrasted with \$117 in Florida. While PIP costs were higher in Michigan, tort bodily injury costs were far lower, resulting in similar total personal injury costs.

⁵⁸ Insurance Research Council, *Fraud and Buildup in Auto Injury Insurance Claims, 2004 Edition* (Malvern, PA: December 2004), p.48.

⁵⁹ Insurance Research Council, *Analysis of Auto Injury Claims from Four No-Fault States: Colorado, Florida, Michigan, New York* (Malvern, PA: October 2004), pp. 24-26.

⁶⁰ *Trends, supra* note 30, p. 21. Florida and New York were ranked first and sixth, respectively, but first and second among the no-fault states.

⁶¹ *Ibid*, pp. 21, 39.

⁶² Kinzler’s estimate based on MCCA and 2007-2008 *Fast Track* data. Sharon Tennyson, *The High Costs of Michigan’s No-Fault Auto Insurance: Causes and Implications for Reform*, (Ithaca, NY: April 22, 2011), prepared for the Michigan Chamber of Commerce, p. 12.

⁶³ <http://www.michigancatastrophic.com/ConsumerInformation/HistoricAssessmentData/tabid/2939/Default.aspx>

⁶⁴ http://www.michigancatastrophic.com/Portals/71/paid_per_year20081231.pdf

⁶⁵ For the period from July 1, 2011, to June 30, 2012, the MCCA assessment is \$145. The reason it is not possible to pinpoint the exact percentage cost of catastrophic claims in the PIP pure premium is because, according to one large property/casualty insurance trade association whose members report *Fast Track* data, “some of the companies

include MCCA losses, but since the *Fast Track* data call instructions do not specifically address whether MCCA loss data should be reported, it is likely that some do not include MCCA.”

⁶⁶ <http://www.michigancatastrophic.com/Portals/71/ExpectedFutureCosts20080630.pdf>

⁶⁷ Any of these PIP reforms raises the further question: Who should pay for any uncompensated medical losses? If all auto injury costs are run through the cost controls of the health system, how should medical losses be handled that are not compensated by the health policy (because of deductibles or copayments or because the health policy does not cover or limits the amount of coverage for medical costs) but would have been covered under a PIP policy?

One approach would be to permit an insured to pay an additional premium to have the full PIP coverage. A second would be to permit an injured party to sue for amounts unpaid because of any limits of the person’s health insurance (as happens today in no-fault states where people can sue for any uncompensated economic loss not compensated by PIP benefits). By putting these losses back into the tort system, recovery for them would be subject to all the vagaries of the tort system, such as establishing the other driver’s fault, one’s own freedom from fault and, of course, the amount of the at-fault driver’s tort bodily injury liability coverage. A third approach, at a time when high costs are of acute concern, would be to limit an injured person’s recovery to whatever medical losses are covered by the new, more expansive national healthcare system (or, in the alternative, give the insured the option of a lower premium in return for giving up the right to sue for additional medical losses).

⁶⁸ *Reform Options*, *supra* note 48, at p. 10.

⁶⁹ Some states permit an insured to recover additional sums similar to the amount of available tort bodily injury liability coverage under his/her underinsured motorist policy. Even where that is possible, the injured person could receive far less than the unlimited medical and \$5,000 a month of work loss benefits available to injured motorists in Michigan.

⁷⁰ *Retrospective*, *supra* note 5, at p. xv.

⁷¹ *Ibid*, p. 72.

⁷² *Ibid*, p. 66

⁷³ *Ibid*, p. xv.

⁷⁴ *Ibid*, p. 119 fn 45.

⁷⁵ *Ibid*, p. 119: “[I]n no fault states, auto insurance almost certainly pays for a larger proportion of auto accident-related medical costs than in tort states, where first-party medical insurance pays for a higher proportion.”

⁷⁶ Insurance Research Council, *Auto Injury Insurance Claims: Countrywide Patterns in Treatment, Cost, and Compensation 2008 Edition* (Malvern, PA: January 2008), p. 44. [Hereinafter, “*Countrywide Patterns*”]

⁷⁷ *Ibid*, p. 52. The 2007 closed-claim data collected by the IRC supports the proposition that a far higher percentage of injured persons were represented by attorneys in serious injury cases. Overall, 49 percent of tort bodily injury claimants were represented by attorneys. Breaking down the numbers, 44 percent of claimants who were unable to perform their usual daily activities for fewer than 10 days following their injuries were represented by an attorney, rising to 71 percent for those unable to perform their usual daily activities for 10 days to 89

days and then 84 percent for those who could not perform such activities for 90 or more days.

⁷⁸ Insurance Research Council, *Auto Injury Insurance Claims: Countrywide Patterns in Treatment, Cost, and Compensation* (Malvern, PA: December 2003), pp. 23-24.

⁷⁹ *Reform Options*, *supra* note 48, at p. 10.

⁸⁰ RAND includes an appendix that appears to suggest that drivers in tort states carry enough tort bodily injury liability coverage to compensate injured people for even the most serious injuries. The study, which RAND derived from 2002 IRC closed-claim data, indicates that the median tort bodily injury liability coverage was \$100,000 or more. However, the coverage was *per accident*, not *per individual*. This explains the seeming difference between the RAND chart and the work Kinzler did using policy limits drawn from the same IRC study. Historical data, including that collected by RAND, shows a consistent pattern of underpayment for seriously injured persons in the tort system. For example, in 1991, RAND found a decline in the percentage of economic loss an injured person recovered as the amount of economic loss mounted. People with minor losses recovered in excess of their economic loss (for pain and suffering). For example, people with losses between \$500 and \$1,000 recovered on average 250 percent of their economic loss. On the other hand, people with major losses recovered less and less as their losses rose. People with economic losses between \$25,000 and \$100,000 recovered on average 56 percent of their economic loss while those with losses of more than \$100,000 recovered only 9 percent. *No-Fault Approaches* *supra* note 2, at p. 187. These numbers were for insurer payments *before* the injured person paid his/her attorney. It is also inconsistent with data in the new RAND study that

shows a slight *decline* in the percentage of economic losses reimbursed in tort states between the period of 1986 to 1992 and 1998 to 2002. *Retrospective, supra* note 5, at p.87. See, also, *Retrospective*, at p. 136: “[T]here is no evidence that the well-documented disproportionality between a victim’s economic loss and recovery in the tort system has been reduced.”

⁸¹ This choice to allow surrender of noneconomic claims as originally formulated presented motorists with two choices. Those who want to exit the personal injury tort liability system with its payment for pain and suffering could do so by buying PIP insurance. Thereupon, instead of suing other motorists based on fault for economic damages plus pain and suffering based on who was at fault in the accident, motorists who elect PIP would be compensated automatically without regard to fault for all economic losses up to their PIP policy limits by their own insurance company, with nothing available for pain and suffering. PIP motorists would nonetheless retain the right to claim in tort for economic losses above policy limits against any at-fault driver. In turn, other motorists could claim in tort against motorists for economic losses above their own PIP policy limits. In sum, PIP motorists could neither sue nor be sued for noneconomic losses, except for injuries inflicted intentionally or, depending on the terms of the statute, as the result of, say, abuse of alcohol or drugs.

In the alternative, motorists could essentially retain their tort rights by buying tort maintenance coverage (TMC). But for accidents involving PIP and TMC motorists, TMC motorists would claim for both economic and non-economic losses against their own insurer much as they do under existing uninsured motorist’s coverage. If losses exceed TMC policy limits, TMC motorists could claim against negligent PIP motorists for

such excess economic loss. For accidents involving two or more TMC motorists, remedies would be unaffected.

For an extensive discussion of differing means of adjusting the costs of collisions between motorists choosing different coverages, see Jeffrey O’Connell and Robert Joost, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 Oh. St. L. J. 948-51 (1990). For the terms of a federal bill, H.R. 1704, 107th Congress, First Session (2001), (with extensive commentary, readily adaptable for state enactment) implementing this choice system, see Jeffrey O’Connell, Peter Kinzler and Hunter Bates, *A Federal Bill with Commentary to Allow Choice in Auto Insurance*, 7 Ct. Ins. L. J. 12 (2000-01).

For a description of how much compensation injured people would receive under the auto choice option as opposed to the tort system, see Peter Kinzler and Jeffrey O’Connell in “More for Less Under Auto Choice,” in *The Economics and Politics of Choice No-Fault Insurance*, Edward L. Lascher, Jr. & Michael R. Powers, Eds., (Boston, MA: Kluwer Academic Publishers, 2001), pp. 303-24.

⁸² The tort compensation gaps occurred not only as a result of the requirement to prove fault but also because of other legal doctrines that denied compensation to many people who were either free of fault or only slightly at fault. These doctrines included family immunities, host/guest statutes, and contributory negligence, whereby a person who was even slightly at fault could not recover. Of course people injured in single car accidents could not recover because there was no tortfeasor to claim against. Even people who were entitled to recoveries were limited by the realities of insurance, i.e., that some at-fault drivers were uninsured or underinsured. For a detailed examination of the reasons why people

receive inadequate compensation under the tort system, see *Reform Options, supra* note 48, at pp. 8-10.

⁸³ For the year 2000, the National Highway Traffic Administration (NHTSA) of the U.S. Department of Transportation estimated the total medical care costs for motor vehicle injuries at \$32.6 billion. *The Economic Impact of Motor Vehicle Crashes 2000*, (Washington, DC: May 2002), Table 1, p. 8 (Hereinafter, “*Economic Impact*”). For the same year, the National Health Expenditure Accounts, which establishes the official estimates of total healthcare spending in the United States, estimated total healthcare spending at \$1.378 trillion. Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group; U.S. Department of Commerce, Bureau of Economic Analysis; and U.S. Bureau of the Census. Thus medical costs attributable to motor vehicle accidents in 2000 were 2.35 percent. Not all of the \$32.6 billion figure would move into the healthcare system as NHTSA estimates that auto insurance pays only 54.85 percent of the cost. The rest comes from federal payments (Medicare and Medicaid), state payments, self-payment, and “other,” such as charity). *Economic Impact, supra*, Table 22, at p. 59. Of course, health insurance would pick up some of the self-payment and other expenses.

⁸⁴ The 94 percent figure is the Congressional Budget Office estimate for 2019 under the Patient Protection and Affordable Care Act. *Letter to Speaker John Boehner* (Washington, DC: January 6, 2011), p 9. The 15 percent figure for uninsured motorists assumes the continuation of the figure for uninsured motorists estimated by the RAND Institute for Civil Justice in 1999. Stephen J. Carroll, Allan F. Abrahamse, *The Effects of a Choice Automobile Insurance Plan on Insurance Costs and Compensation: An Analysis Based on 1997 Data*, (Santa

Monica, CA: RAND Institute for Civil Justice, 1999), p. 25. Similarly, the Insurance Research Council estimated the figure at 14 percent in an August 12, 1999, press release, *Uninsured Motorists*. Some, but not all, uninsured motorists – as well as uninsured pedestrians – would also be covered.

⁸⁵ Insurance Research Council, *Hospital Cost Shifting and Auto Injury Insurance Claims* (Malvern, PA: February 2010), p.1. [Hereinafter “*Hospital Cost Shifting*”]

⁸⁶ But when anybody sues for economic loss under tort law, tort recovery can never be primary because of its uncertainty and long delays. So maybe this is an additional argument that all of auto insurance, PIP as well as tort, should be secondary.

⁸⁷ See note 83, *supra*.

⁸⁸ *Hospital Cost Shifting*, *supra* note 85, at p. 6.

⁸⁹ In 1998, New Jersey adopted a new threshold the courts interpreted as requiring both a serious impact *and* permanent injury. However, the Legislature’s intent was thwarted by a 2005 New Jersey Supreme Court case. In *DiProspero v. Penn*, 183 N.J. 477, 874 A.2d 1039 (2005), the court reversed the line of cases that supported a serious and permanent injury standard and held that the “serious impact” requirement was no longer required.

⁹⁰ Insurance Services Office data for 2009 showed that 4,933,427 motorists selected the verbal threshold and only 280,245 selected the full pain and suffering option. This data was provided by the general manager of the Auto Insurance Risk Exchange for New Jersey in a January 14, 2011, conversation.

⁹¹ See note 1, *supra* at p 6.

⁹² *Savings Estimates for Auto Choice*, *supra*, note 11, p. 7.

⁹³ *Ibid*.

⁹⁴ See note 11, *supra*.

⁹⁵ Jeffrey O’Connell *et al.*, *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 Md. L. Rev. 160, 214 (App. C), (1996).

⁹⁶ E.g., Mass. Gen. Laws Ann., Ch. 175, §113A (5).

⁹⁷ *Retrospective*, *supra* note 5, at p. 138.

⁹⁸ Also states could choose for PIP to be written to cover services not covered by the health insurance plan, e.g., rehabilitation treatment.

⁹⁹ See *supra* note 80 and accompanying text for a description of, and citations to, the various basic mechanisms for dealing with corrective allocation of losses upon a collision between motorists with and without waiver of claims.

For a most thoughtful, provocative scholarly article opening one’s eyes to new and innovative means of tailoring insureds’ purchases to their actual needs, rather than through the present restricted overly theoretical and often outmoded legalisms of what is and is not desirably insurable, see Lee Ann Fennell, *Unbundling Risk*, 60 Duke L.J. 1285, e.g. 1334, 1345 (2011) (questioning, among other things, mandatory coverage for noneconomic loss).

¹⁰⁰ Mayor Rahm Emanuel’s 2012 Budget Address, Remarks as Prepared (Chicago, IL: October 12, 2011).

¹⁰¹ G. Edward White, *The Unexpected Persistence of Negligence*, 54 Vand. L.Rev. 1351 (2001).

¹⁰² Professor Nora Engstrom of the Stanford University Law School has written a recent telling description of the gross abuses of “settlement mills,” whereby lawyers settle tort cases *en masse*. While the cases are resolved relatively promptly, they are done so without reference to any realistic value of the underlying individual cases (which is especially disadvantageous to the seriously injured) and without proper disclosure to abused and hapless clients. The lawyers also charge unconscionably high fees totally disproportionate to the amount of effort expended. Nora Freeman Engstrom, *Sunlight And Settlement Mills*, 86 NYU Law Review 805 (2011).

■ Selected Readings about No-Fault Insurance and Auto Choice

► No-Fault Source Material

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Peter Kinzler, *Auto Insurance Reform Options: How to Change State Tort and No-Fault Laws to Reduce Premiums and*

Increase Consumer Choice (Indianapolis, IN: National Association of Mutual Insurance Companies, August 2006).

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Jeffrey O'Connell and Robert Joost, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 Oh. St. L. J. 948-51 (1990).

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Jeffrey O'Connell, Peter Kinzler and Hunter Bates, *A Federal Bill with Commentary to Allow Choice in Auto Insurance*, 7 Ct. Ins. L.J. 12 (2000-01).

Edward L. Lascher, Jr. and Michael R. Powers, *The Economics and Politics of Choice No-Fault Insurance* (Norwell, MA: Kluwer Academic Publishers, 2001).

Dan Miller, *Choice in Auto Insurance: Updated Savings Estimates for Auto Choice* (Joint Economic Committee, U.S. Congress, July 2003). Available at: <http://www.house.gov/jec/tort/07-24-03.pdf>

Dan Miller, *Auto Choice: Relief for Businesses & Consumers* (Joint Economic Committee, U.S. Congress, July 1998). See <http://www.house.gov/jec/tort/relief/relief.pdf>

Dan Miller, *Auto Choice: Impact on Cities and the Poor* (Joint Economic Committee, U.S. Congress, March 1998). See <http://www.house.gov/jec/tort/cities/cities.pdf>

Dan Miller, *Benefits and Savings of Auto Choice* (with Joseph Engelhard; Joint Economic Committee, U.S. Congress, April 1997). See <http://www.house.gov/jec/tort/auto/auto.pdf>

► Data on No-Fault

The Insurance Research Council (IRC) regularly collects data on the performance of both no-fault and tort states through the use of closed claims studies. The data show how the laws are performing with respect to such issues as trends in claim frequency and severity and utilization of medical providers and attorneys. For a recent list of IRC publications available for purchase, go to: <http://www.ircweb.org/IRCProducts/Publications.htm#Auto>

All PIP and bodily injury pure premium figures cited in this paper came from *Fast Track Monitoring System – Automobile Report, Private Passenger, First Quarter, 2010* collected by Independent Statistical Service, Inc., Insurance Services Office, Inc., and National Independent Statistical Service. These statistical reports are prepared quarterly reflecting multi-year trends. They provide data on a state-by-state basis for the different automobile insurance coverages as well as on a nationwide aggregate basis.