

No-Fault Insurance—The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, ch. 362, 1983 N.J. Sess. Law Serv. 2029 (West).

Introduction

The New Jersey Legislature recently enacted legislation making significant changes in the current automobile insurance law.¹ This article will describe the major provisions of the new law and explain the various ways in which the present automobile insurance reparations system is to be altered. In order to understand the aims of the amendatory act, it is necessary to examine the New Jersey Automobile Reparation Reform Act,² the automobile insurance law enacted in 1972. First, the goals and the major provisions of the original statute will be discussed. Then, a number of reforms which have been proposed as alternatives to the existing no-fault law will be presented. Finally, the provisions of the recently enacted reform bill, the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984,³ will be explained and analyzed.

Aims of No-Fault Auto Insurance

In January, 1973, the New Jersey Automobile Reparation Reform Act⁴ (1973 Act) went into effect. This legislation eliminated the existing fault-based system of automobile insurance reparations, and instituted a no-fault concept for the satisfaction of expenses incurred by an insured resulting from an automobile accident.⁵ These benefits were to be paid without regard to fault or negligence.⁶

The law's overall objective was to streamline the automobile insurance reparations system. According to the New Jersey Department of Insurance, this objective was to be achieved in four ways.⁷ First, the 1973 Act provided a "mechanism for the prompt payment of benefits for all

¹ The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, ch. 362, 1983 N.J. Sess. Law Serv. 2029-65 (West).

² Ch. 70, 1972 N.J. Laws. 216 (codified as amended at N.J. STAT. ANN. §§ 39:6A-1 to -20 (West 1973 & Supp. 1983-84).

³ Ch. 362, 1983 N.J. Sess. Law Serv. 2029-65 (West).

⁴ N.J. STAT. ANN. §§ 39:6A-1 to -20 (West 1973 & Supp. 1983-84) (amended 1983).

⁵ *Id.* § 39:6A-4 (West 1973 & Supp. 1983-84).

⁶ *Id.*

⁷ NEW JERSEY DEPARTMENT OF INSURANCE, ASSESSMENT OF THE NEW JERSEY NO-FAULT AUTO REFORMATION ACT 1 (1982) [hereinafter cited as *No Fault Report*]. See also Rybeck v. Rybeck, 141 N.J. Super. 481, 492, 358 A.2d 828, 834 (Law Div. 1976), *appeal dismissed*, 150 N.J. Super. 151, 375 A.2d 269 (App. Div.), *certif. denied*, 75 N.J. 30, 379 A.2d 261 (1977).

accident injury victims";⁸ second, it intended to make automobile insurance costs less expensive and consequently more affordable to the motor-ing public;⁹ third, it intended to make insurance coverage available to all motorists, regardless of risk categories;¹⁰ and finally, the law intended to reduce the ever burgeoning case load in the courts by eliminating the fault concept and the attendant need to litigate fault or negligence.¹¹

Before addressing the effectiveness of the 1973 Act, it is necessary to review its major provisions. Certain coverages were made compulsory under the Act. Every automobile¹² principally garaged or registered in New Jersey was required to carry Personal Injury Protection (PIP) coverage¹³ (the no-fault section of the bill), liability insurance against loss "imposed by law for bodily injury, death and property damage,"¹⁴ and uninsured motorist coverage.¹⁵ Under this law, PIP payments were made to the "named insured and members of his family residing in his household who sustained bodily injury in an accident involving an automobile," and such benefits were paid "without regard to negligence, liability or fault of any kind. . . ." ¹⁶ The insured was also entitled to payment of

⁸ *No Fault Report, supra* note 7, at 1. N.J. STAT. ANN. § 39:6A-5 (West 1973) provides that payment will be made within 30 days of written notice of claim. This was thought to be a desirable alternative to the long delays inherent in tort litigation under the fault-based system.

⁹ *No Fault Report, supra* note 7, at 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² "Automobile" is defined as a "private passenger automobile of a private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; and a motor vehicle with a pick-up body, a delivery sedan or a panel truck or a camper type vehicle used for recreational purposes. . . ." N.J. STAT. ANN. § 39:6A-2(a) (West 1973).

¹³ *Id.* § 39:6A-4 (West 1973 & Supp. 1983-84).

¹⁴ *Id.* § 39:6A-3 (West 1973). This section sets minimum liability coverage limits at \$15,000 for death or injury to one person, \$30,000 for death or injury to more than one person, and \$5,000 for property damage.

¹⁵ *Id.* § 39:6A-14.

¹⁶ *Id.* § 39:6A-4 (West 1973 & Supp. 1983-84). "Named insured" is defined as "the person or persons identified as the insured in the policy and if an individual, his or her spouse." *Id.* § 39:6A-2(q) (West 1973). As originally enacted in 1973, PIP coverage included unlimited reasonable medical expense benefits. *Id.* § 39:6A-4(a). However, the section was amended, effective January 1977, to "provide that an insurance company's liability on any one medical expense claim not exceed \$75,000. The remainder of the payment would be made from the Unsatisfied Claim and Judgment Fund, to which insurers contribute in proportion to their percentage of the market." Assembly Commerce, Banking and Insurance Comm., Statement to S.1380, 197th N.J. Leg., 2d Sess. (1977), *reprinted in* N.J. STAT. ANN. § 39:6A-4 app. (West Supp. 1983-84). Procedurally, the insurer actually pays the excess of \$75,000 and is subsequently reimbursed from the Unsatisfied Claim and Judgment Fund. This fund was established to provide protection for victims of uninsured or otherwise financially

reasonable medical expenses, including costs of medical, surgical, and dental treatment; nursing, hospital, and rehabilitative services; and x-rays, medication, and other diagnostic services.¹⁷ In addition, PIP coverage included income continuation benefits of up to \$100 per week, subject to a limit of \$5,200.¹⁸ An injured person could also receive daily remuneration of up to \$12 as reimbursement for the loss of "essential services," subject to a maximum recovery of \$4,380.¹⁹ These services were defined as acts "performed not for income which are ordinarily performed by an individual for the care and maintenance of such individual's family or family household."²⁰ If an insured died as a result of injuries sustained in a car accident, a surviving spouse or child was entitled to survivor benefits,²¹ and a funeral expense benefit of up to \$1,000.²² With the exception of medical benefits, additional coverage could be purchased at the insured's option.²³

The 1973 Act retained the fault-based concept for bodily injury liability coverage.²⁴ Compulsory liability coverage had to be purchased in minimum amounts of \$15,000 for death or bodily injury to one person in one accident, \$30,000 for death or bodily injury to more than one person, and \$5,000 for property damage.²⁵ In order to collect insurance for bodily injury under this section, the issue of fault had to first be litigated. The insurer of the adjudged tortfeasor was required to pay liability benefits to the injured person. Before an injured plaintiff could bring suit for damages, however, a \$200 tort threshold had to be met.²⁶

A plaintiff was denied the right to sue unless he had incurred more than \$200 in medical expenses for "soft-tissue" injuries.²⁷ No tort thresh-

irresponsible motorists. See N.J. STAT. ANN. §§ 39:6-61 to -91 (West 1973 & Supp. 1983-84). See also *id.* § 39:6A-2(e) (West 1973) (definition of medical expenses).

¹⁷ N.J. STAT. ANN. § 39:6A-2(e) (West 1973).

¹⁸ *Id.* § 39:6A-4(b).

¹⁹ *Id.* § 39:6A-4(c) (West 1973 & Supp. 1983-84).

²⁰ *Id.* § 39:6A-4(b) (West 1973).

²¹ *Id.* § 39:6A-4(d) (West 1973 & Supp. 1983-84).

²² *Id.* § 39:6A-4(e).

²³ *Id.* § 39:6A-10.

²⁴ *Id.* § 39:6A-3 (West 1973).

²⁵ *Id.*

²⁶ *Id.* § 39:6A-8. In calculating the threshold amount, hospital expenses, x-rays, and diagnostic services may not be included. *Id.*

²⁷ Such injuries are defined as "sprains, strains, contusions, lacerations, bruises, hematomas, cuts, abrasions, scrapes, scratches, and tears confined to the muscles, tendons, ligaments, cartilages, nerves, fibers, veins, arteries and skin of the human body." *Id.* § 39:6A-8.

old had to be met in the event of a fracture or more serious injury, such as a permanent disability, significant disfigurement, loss of a bodily function or body member, or death.²⁸ It was believed that the tort threshold would not only reduce the amount of liability claims being filed in the courts, but also reduce premium costs.²⁹ Finally, the 1973 Act mandated that "all insureds obtain uninsured motorist coverage in the same amount as for basic liability insurance, subject to a deductible of \$100 for property damage."³⁰

From the debate that has ensued in the Legislature, and among New Jersey's insurance companies, the State's trial attorneys, and the motoring public, it appears that the anticipated goals of the 1973 Act have not been met, especially the reduced cost objective. In February, 1983, *Best's Insurance Management Report*,³¹ (*Best Report*) reported that New Jersey has the highest average premium rate in the country.³² The average premium paid in New Jersey per car in 1981 was \$412, in contrast to a national average of \$275.³³ The New Jersey Department of Insurance, in its report of December, 1982, disclosed that the average mandated premium costs for automobile liability insurance, including property damage, bodily injury, and no-fault PIP coverage, increased by 248 percent since 1973.³⁴ Translated into dollar amounts, the Department reported

²⁸ *Id.*

²⁹ *No Fault Report*, *supra* note 7, at 3.

³⁰ *Id.*; see N.J. STAT. ANN. § 39:6A-14 (West 1973). "No liability policy . . . shall be issued in this State unless it includes coverage . . . for payment of all or part of the sums which the insured . . . shall be legally entitled to recover as damages from the operator or owner of an uninsured automobile, or a hit and run automobile. . . ." *Id.* § 17:28-1.1 (West Supp. 1983-84). An uninsured motor vehicle is defined as "a motor vehicle as to which there is not in force a liability policy meeting the requirements of . . . the Motor Vehicle Security-Responsibility Law of this State. . . ." *Id.* § 39:6-62 (West 1973). Hit and run cases are described in *id.* § 39:6-78.

³¹ 1981 PRIVATE PASSENGER AUTO INSURANCE EXPERIENCE BY STATE, BEST'S INSURANCE MANAGEMENT REPORTS, February 21, 1983, at 1 [hereinafter cited as *Best Report*]. But see *Public Hearings Before the Assembly Banking and Insurance Committee on State Department of Insurance Procedures and Practices in Reviewing and Approving Automobile Insurance Rate Filings, and Disseminating Information to the Legislature and the Public*, 200th N.J. Leg., 2d Sess. (1983) [hereinafter cited as *Hearings*]. The *Best Report* makes no distinction between fault and no-fault states, and does not indicate what coverages are available in return for the premium dollar. Although New Jersey is represented to have the highest premiums in the country, New Jersey also offers the most comprehensive coverage. Accordingly, the *Best Report* may just be comparing apples and oranges and is therefore not a proper basis on which to rely. *Id.* at 9-17 (May 4, 1983) (Statement of Michael Aduabato, Chairman).

³² See *Best Report*, *supra* note 31.

³³ *Id.*

³⁴ *No-Fault Report*, *supra* note 7, at 21.

that the average mandated coverage policy cost \$96 in 1973, and \$335 in 1982.³⁵ Relying on the Best Report, the Department stated that New Jersey motorists pay 50 percent more in premiums than the national average.³⁶

Inflationary trends have certainly had an impact on the increased costs of insurance for medical benefits and property damage. The average insurance claim for bodily injury and property damage has also increased dramatically since 1973,³⁷ another factor contributing to high insurance premiums. Rising attorney's fees may also have increased premium rates, although there is some dispute as to how much attorneys actually cost the premium payer.³⁸

Another objective of the 1973 Act was to make auto insurance available to all motorists, including those individuals who had difficulty in procuring insurance because they were considered a high risk.³⁹ Insurance companies are permitted to charge higher premiums for individuals in certain risk categories. Although insurance is theoretically available to all motorists, including those in high risk categories, ever-increasing costs make it unavailable to those individuals who simply cannot afford the coverage. The Department of Insurance estimated that there were approximately 300,000 registered, but uninsured motor vehicles traveling on New Jersey's roads in 1982.⁴⁰ With such a large number of uninsured vehicles on the road, and so many of those involved in accidents, there is a great demand placed on the Unsatisfied Claim and Judgment Fund.⁴¹ This growing pool of uninsured motorists is another factor contributing to increasing insurance costs.

The prompt reparations objective of the 1973 Act has been met insofar as PIP claims are concerned.⁴² The Act required payment of PIP benefits within thirty days after written notice of loss was received by the insurer.⁴³ This provision was intended as an improvement to the fault-

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 23-25.

³⁸ *Id.* Compare *Hearings*, *supra* note 31, at 4-5 (May 2, 1983) (Comments of Assemblymen Aduato and Karcher).

³⁹ See generally *No-Fault Report*, *supra* note 7, at 5-7.

⁴⁰ *Id.* at 5. The Department reports that the increase in uninsured vehicles in the state is evidenced by the amount of claims received by the Unsatisfied Claim and Judgment Fund which has doubled since 1976.

⁴¹ *Id.*

⁴² *Id.* at 9-15.

⁴³ N.J. STAT. ANN. § 39:6A-5 (West 1973).

based system under which litigation of claims could take months or even years. The Department of Insurance, however, reports that "approximately one-third of New Jersey's PIP claimants also qualify for tort recovery," and that "an excessive number of [bodily injury] claims are being made. . . ." ⁴⁴ These claims take longer to litigate and reimbursement is necessarily delayed:

While PIP claims are settled promptly and apply primarily to reimbursement for hospital charges, physician's fees and loss of wages, Residual Bodily Injury (RBI) liability claims, for non-economic losses and those economic losses not covered by PIP, require a much longer time to settle, causing inconvenience and in some cases severe hardships. . . . Clearly, the individuals who obtain reparations under PIP are the beneficiaries of a more timely payment than those who seek redress as third party claimants under RBI. . . . ⁴⁵

If the final objective of reduced docket congestion had been met, the aim of prompt reparation would also have been achieved. With so many liability claims being filed in the Superior Courts of New Jersey, there is an inherent delay in recovery by claimants.

Although the legislators responsible for passage of the 1973 Act and its accompanying tort threshold provision envisioned a reduction in the number of claims being litigated, precisely the opposite has occurred:

Automobile negligence cases outstanding as of September 1, 1974 in Superior Court totaled only 17,930 whereas, today, they are 46% higher under a system that was intended to reduce the caseload. The outstanding cases have increased constantly from 1974 until the present time and there appears to be no change in the trend as the number of new complaints filed reaches an all time high. A comparison of the automobile negligence cases added during the court year ending August 31, 1981 with that of 1974 reveals an increase of 55% from 15,591 cases in 1974 to 24,161 cases added in 1981. ⁴⁶

If the Department's analysis of the policy objectives of the 1973 Act is correct, then the law has been a miserable failure. There has ensued a heated debate over the cause of the Act's failures, and numerous proposals have been suggested to cure the defects of the 1973 Act. A brief discussion

⁴⁴ *No-Fault Report*, *supra* note 7, at 9.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.* at 17; *see also id.* at 16, 18. *But see No-Fault—Which Way?* 105 N.J.L.J. 84, 103 (1980). (Editorial in support of psychological threshold maintains that the goal of reducing the claims has been achieved.)

of some of these proposals will be undertaken before the provisions of the new measure are addressed.

Suggested Reforms

The Kean Administration and the Department of Insurance blame the \$200 tort threshold as the primary cause of the 1973 Act's failure.⁴⁷ The Department of Insurance has stated that the low tort threshold has actually been responsible for the increase in insurance costs, the continually congested court docket, and increased delays in prompt recovery for non-economic losses.⁴⁸ Ironically, the very provision that was enacted to combat docket congestion, reparations delays, and high premium rates is now being attacked as exacerbating these problems.

There is no question that given today's economy and the soaring cost of medical services, it is easy to meet the \$200 tort threshold. "From 1973 to June 20, 1982 medical costs increased 137%, further weakening the effectiveness of a 'tort threshold' that was inadequate at its inception. Based on 1973 dollars, the No-Fault threshold now stands at a mere \$84.39."⁴⁹

A low tort threshold may invite abuse by encouraging unnecessary physicians' visits in order to exceed the threshold and gain the right to sue for pain and suffering.⁵⁰ "Once the magic number is reached, the bodily injury claim becomes the subject of litigation with all the attendant ills no-fault was intended to eliminate."⁵¹ The Department of Insurance claimed that the low threshold sabotaged the entire reparations system by allowing PIP benefits to be "parlayed" with ease into a liability claim.⁵² The Department suggested three ways to lower insurance premium rates. First, it recommended that the number of cases qualifying for tort reparation be reduced; second, it suggested that a schedule be established fixing the maximum amount physicians may charge for services rendered for injuries sustained in automobile accident cases; and finally, it suggested that fraud be eliminated from the system.⁵³

⁴⁷ NEW JERSEY DEPARTMENT OF INSURANCE, AUTO INSURANCE IN NEW JERSEY 4 (1983) [hereinafter cited as *Insurance Department Report*].

⁴⁸ See generally *No-Fault Report*, *supra* note 7, at 9-14.

⁴⁹ *Id.* at 3.

⁵⁰ *No-Fault—Which Way?* 105 N.J.L.J. 84 (1980).

⁵¹ *Id.*

⁵² *No-Fault Report*, *supra* note 7, at 15.

⁵³ See *Insurance Department Report*, *supra* note 47, at 5.

The Kean Administration supported a measure that would have increased the tort threshold for soft tissue injury from \$200 to \$1,500.⁵⁴ The \$1,500 threshold would be linked to the hospital-medical components of the Consumer Price Index (CPI) and would be "adjusted annually . . . to reflect increases or decreases" in the CPI.⁵⁵ Under the measure, a person would be exempt from tort liability for noneconomic loss (pain and suffering) as a result of bodily injury if the injury was "confined solely to the soft tissue of the body and the medical expenses incurred by [the] injured person . . . [were] less than \$1,500."⁵⁶ That measure also included the Insurance Department's recommendation of a schedule of maximum medical charges.⁵⁷

The Administration also supported the Insurance Fraud Prevention Act.⁵⁸ That measure, which was signed into law on August 30, 1983, creates a Division of Insurance Fraud Prevention within the Department of Insurance.⁵⁹

A number of other interesting proposals which have been suggested merit attention. Senator Lee Laskin advocated the abolishment of the no-fault system altogether in his statement before the Assembly Banking and Insurance Committee on May 4, 1983.⁶⁰ Laskin said that paying a premium for "someone else's fault . . . makes no sense."⁶¹ He contended that reversion to the fault-based system would reduce the average pre-

⁵⁴ A. 1747, 200th N.J. Leg., 1st Sess. (1982). This legislation would have amended various sections of the automobile no-fault insurance law.

⁵⁵ *Id.* § 8.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Ch. 320, 1983 N.J. Sess. Law Serv. 1748-60 (West) (to be codified at N.J. STAT. ANN. §§ 17:3A-1 to -14).

⁵⁹ *Id.* § 8(a), 1983 N.J. Sess. Law Serv. 1753-54 (West) (to be codified at N.J. STAT. ANN. § 17:3A-8(a)). The Division was created to "uncover and eliminate fraudulent claims" in a further effort to reduce premium costs. Governor Kean is quoted as saying that insurance fraud accounts for 15 to 20 percent of the premium dollar. The potential savings for premium payers is projected as \$500 million. The Act creates a fund into which fines will be paid. Fines of \$2,500 for a first offense, \$5,000 for a second offense, and \$10,000 for each subsequent offense will be levied for failure to disclose pertinent information, for making misleading claims or statements, for knowingly receiving benefits which were fraudulently obtained, and for permitting a hospital to be used in any plan to violate the law. *Id.* §§ 4-5, 1983 N.J. Sess. Law Serv. 1949-52 (West). See also *Division of Insurance Fraud Prevention Created*, 112 N.J.L.J. 291 (1983).

⁶⁰ *Hearings*, *supra* note 31, at 30-34 (May 4, 1983) (Statement of State Senator Lee Laskin).

⁶¹ *Id.*

mium by 50 percent.⁶² Laskin also suggested the institution of arbitration to help reduce docket congestion; the imposition of criminal, as opposed to regulatory sanctions on car salespersons taking kickbacks in exchange for directing individuals to certain insurance agents or companies; and the imposition of criminal sanctions on insurers who steer people to particular automobile body shops in exchange for illegal kickbacks.⁶³ With respect to these collision shops, Laskin recommended that the Commissioner of Insurance "promulgate a schedule of costs for body repairs" in an effort to reduce premium costs, and also require that all automobile body repair shops be licensed.⁶⁴

Other recommendations were offered by Mario A. Iavicoli, counsel to the initial no-fault commission whose proposals gave rise to the 1973 Act.⁶⁵ He suggested that no-fault coverage be offered on a strictly voluntary basis.⁶⁶ A voluntary no-fault system, he contended, would afford insurers a fair premium for the coverage offered, and would result in a savings to insureds on premium rates because they could then look to their medical insurance for reimbursement.⁶⁷ Mr. Iavicoli further suggested that abolishing compulsory no-fault coverage and liability insurance would eliminate the need for a tort threshold.⁶⁸ In addition, he maintained that if elective liability coverage limits were reduced from the current \$15,000/\$30,000/\$5,000 to \$10,000/\$20,000/\$5,000, premium payers would realize additional savings.⁶⁹ Among Iavicoli's other proposals were the elimination of mandatory uninsured motorist coverage, and a requirement that motorists who elect to drive without auto insurance pay a fixed annual fee of \$200 into the Unsatisfied Claim and Judgment Fund.⁷⁰ Mr. Iavicoli's somewhat radical approach focuses on the reduction of premium rates.

⁶² *Id.* See also Letter from Senator Laskin to all Senators (June 13, 1983) (reiteration of criticisms of no-fault legislation and suggested improvements).

⁶³ *Hearings, supra* note 31, at 30-34 (May 4, 1983) (Statement of State Senator Lee Laskin).

⁶⁴ *Id.*

⁶⁵ M. Iavicoli, Report to Legislators on Present No-Fault Laws (Summer 1983) (unpublished manuscript).

⁶⁶ *Id.* at 1-2.

⁶⁷ *Id.* at 2. He recognizes that any savings realized would be illusory. Since Blue Cross currently does not cover injuries sustained in automobile accidents, additional medical coverage would have to be purchased. Therefore, any automobile insurance premium savings would be offset by increased medical insurance costs.

⁶⁸ *Id.*

⁶⁹ *Id.* at 6.

⁷⁰ *Id.*

Adoption of these proposals would certainly reduce, if not completely eliminate costly premiums, if one opts out of all coverage.

These proposals should not, however, be countenanced by a responsible government. If coverage were made optional, given the growing number of uninsured vehicles, many more individuals would probably elect to remain uninsured. Such a situation would leave many motorists completely unprotected and create a crisis previously unimagined. There is also no doubt that New Jersey's insurance companies would oppose these proposals. Insurers would stand to lose hundreds of thousands of dollars if insurance coverage was made entirely optional.

Finally, the recommendations of Joseph Rodriguez, Public Advocate of the State of New Jersey, merit attention. Enumerating additional automobile insurance reform proposals in his testimony at a public hearing before the Assembly Banking and Insurance Committee, Rodriguez mentioned, but did not elaborate on, the need for addressing no-fault and the tort threshold with an eye toward cost containment.⁷¹ He maintained that the state government stands in a fiduciary relationship to the public with respect to auto insurance. Specifically cited was the need for anti-fraud legislation to impose sanctions on anyone who commits fraud on the system, including attorneys, physicians, and insurers.⁷² He also mentioned the need for reanalyzing the "way the premium is constructed" to ensure that it reflects true costs and that insureds are getting a fair return for their dollar.⁷³ Finally, Commissioner Rodriguez cited the need for insurer accountability and a system of disclosure which would inform the public as to how its premium dollars are being utilized.⁷⁴

With respect to the tort threshold, over which much of the reform legislation debate has raged, there have been other proposals that favor neither increasing, nor abolishing the threshold. Some have advocated what is known as a verbal threshold. Under this concept, an injured person or decedent's estate could bring a tort action for non-economic loss only if the individual died or sustained serious injury, such as loss of a bodily function or permanent disfigurement.⁷⁵ Proponents of the verbal thresh-

⁷¹ *Hearings*, *supra* note 31, at 35 (May 4, 1983) (Statement of Joseph H. Rodriguez, Public Advocate of the State of New Jersey).

⁷² *Id.*

⁷³ *Id.* at 36.

⁷⁴ *Id.* at 46.

⁷⁵ *No-Fault Report*, *supra* note 7, at 25.

old maintain that it would achieve the goals the 1973 Act was supposed to have attained, namely, the elimination of nuisance suits and unnecessary doctor visits, and reduced cost of economic benefit protection.⁷⁶ Critics of the verbal threshold contend that it would deny plaintiffs their common law right to seek compensation for pain and suffering.⁷⁷ Its advocates counter this objection by stating that there is "no inalienable right to a substantial and disproportionate share of the judicial processes."⁷⁸

Still others advocate a psychological threshold. Under this approach, the coverage for economic losses, medical bills, loss of wages, etc. would be compulsory "as it is now in New Jersey, but there is no restriction on the right to sue. However, when the victim does sue, he must pay back everything he has received from his own insurance carrier out of recovery from the driver at fault."⁷⁹

The insurance reform legislation which was ultimately passed by the New Jersey Legislature culled its provisions from many of these proposals, retaining some and rejecting others. Aimed primarily at cost containment, the package preserves the basic no-fault concept, but reforms the 1973 Act by making certain coverages optional to the motoring public. The package is composed of five separate legislative initiatives.⁸⁰ The major reforms were embodied in the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984,⁸¹ which amends certain provisions of the prior law including those concerning uninsured motorist coverage, the Unsatisfied Claim and Judgment Fund, and the current no-fault law.⁸² Only the reforms which affect the provisions of the 1973 Act will be addressed.

The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984

The most important change in the no-fault law which will affect all insured motorists in New Jersey is that certain economic loss coverage,

⁷⁶ *No-Fault—Which Way?*, 105 N.J.L.J. 84, 102, 103 (1980).

⁷⁷ *Id.*

⁷⁸ *Id.* Indeed, the common law right to sue has been eliminated in many states, including New Jersey, by such "no-fault" statutes as Worker's Compensation. See, e.g., N.J. STAT. ANN. §§ 34:15-1 to -127 (West 1959 & Supp. 1983-84).

⁷⁹ *No-Fault—Which Way?* 105 N.J.L.J. 84, 103 (1980).

⁸⁰ A. 3820, A. 3822, A. 3896, A. 3898, A. 3981, 200th N.J. Leg., 2d Sess. (1983).

⁸¹ Ch. 362, 1983 N.J. Sess. Law Serv. 2029-65 (West).

⁸² *Id.* See also N.J. STAT. ANN. § 17:28-1.1 (West 1970 & Supp. 1983-84) (amended 1983) (uninsured motorist coverage); N.J. STAT. ANN. §§ 39:6-61 to -91 (West 1973 & Supp. 1983-84)

compulsory under the 1973 Act, will now be optional.⁸³ Under the no-fault provisions of the 1973 Act, coverage for personal injury protection benefits, including medical expenses, income continuation, essential services, survivor benefits and funeral expenses, was mandatory.⁸⁴ This section is now amended to make income continuation, essential services, survivor, and funeral expense benefits entirely optional.⁸⁵ It is estimated that an insured could save ten dollars in premiums by opting out of coverage for these economic expense benefits.⁸⁶ The theory underlying the change from mandatory to optional coverage for such expenses is that many insureds are either adequately covered under other insurance, or that such coverage is simply not needed: "There are insureds, including senior citizens, who are not working and would never be eligible to collect for income losses, or who may not have a need for or want essential service benefits, and have adequate funeral expense benefits under other insurance coverage."⁸⁷

In addition to making these particular PIP benefits optional, the new law makes an important change in the medical expense category of PIP coverage. The amendatory act still makes coverage for medical services mandatory and allows unlimited recovery; however, motorists may now elect medical expense deductibles in amounts of \$500, \$1,000, or \$2,500.⁸⁸ This option was included on the theory that motorists could have their health insurance companies pay the amount of the deductibles.⁸⁹ "All motorists will be able to direct their health insurance carriers—Medicare, Blue Cross and Blue Shield and other plans—to pay either the first \$500, \$1,500 or \$2,500 of medical expenses, with the car insurance companies paying the balance."⁹⁰ The administration estimates that if the highest deductible is elected, the premium payer could realize

(amended 1983) (Unsatisfied Claim and Judgment Fund); N.J. STAT. ANN. §§ 39:6A-1 to -20 (West 1973 & Supp. 1983-84) (amended 1983) (current no-fault law).

⁸³ See *infra* notes 84-107 and accompanying text.

⁸⁴ N.J. STAT. ANN. § 39:6A-4 (West 1973 & Supp. 1983-84).

⁸⁵ The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, ch. 362, § 13(b), 1983 N.J. Sess. Law Serv. 2050 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3) [hereinafter referred to as *Insurance Reform Act*].

⁸⁶ Zarate, *Car Policy Reform Advances*, The Newark Star-Ledger, Oct. 4, 1983, at 1.

⁸⁷ See Introductory Statement to A. 3981, 200th N.J. Leg., 2d Sess. (1983), reprinted in 1983 N.J. Sess. Law Serv. 2064-65 (West).

⁸⁸ *Insurance Reform Act*, *supra* note 85, § 13(a), 1983 N.J. Sess. Law Serv. 2050 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

⁸⁹ See Zarate, *supra* note 86.

⁹⁰ Zarate, *Auto Insurance Package Signed Into Law*, The Newark Star-Ledger, Oct. 5, 1983, at 1.

savings of \$40 annually.⁹¹ The danger inherent in this amendment is that some motorists will elect to save money by choosing one of these deductibles when they are not adequately protected by any health insurance plan. If their motive in opting for the deductible is premium savings, their savings objective will be lost in the event of an accident, since they will be held personally responsible for the deductible. Even if motorists purchase health insurance to cover these deductibles, any auto insurance premiums saved will be offset by the increased costs of health insurance. Senior citizen motorists, however, are among those who will benefit by electing one of the deductibles. It is estimated that 300,000 senior citizen drivers who receive Medicare will be able to have that insurance cover the deductible. The 50 percent discount on PIP premium rates currently available to seniors will be continued only if the highest deductible of \$2,500 is chosen.⁹²

A third option concerning PIP benefits allows insureds to repay the insurer up to 20 percent of any award the motorist receives by way of a court judgment, arbitration award, or voluntary settlement.⁹³ The new law requires automobile insurers to allow motorists

a setoff option entitling an automobile insurer paying medical expense benefits . . . to reimbursement from, and a lien on, any recovery for noneconomic loss by an injured party pursuant to an arbitration award, judicial judgment or voluntary settlement for the amount of the medical expense benefits paid, not to exceed 20% of the amount of the award, judgment or settlement⁹⁴

The Kean administration estimates that election of this option could result in a \$40 to \$50 annual savings on PIP premiums.⁹⁵

Another major amendment to the 1973 Act concerns the tort threshold provision.⁹⁶ The amendment represents a compromise between the administration's proposal,⁹⁷ which would have raised the tort threshold for soft tissue injury from the current \$200 to \$1,500, and the Democrats'

⁹¹ *Id.*

⁹² *Id.* See also Zarate, *Insurance Agents Braced as Driver's Weigh Value of First Rate-Cutting Option*, The Newark Star-Ledger, Dec. 5, 1983, at 9.

⁹³ *Insurance Reform Act*, *supra* note 85, § 13(c), 1983 N.J. Sess. Law Serv. 2050-52 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

⁹⁴ *Id.*

⁹⁵ Zarate, *supra* note 86.

⁹⁶ See *Insurance Reform Act*, *supra* note 85, § 14, 1983 N.J. Sess. Law Serv. 2052-54 (West) (amending N.J. STAT. ANN. § 39:6A-8).

⁹⁷ A. 1747, § 8, 200th N.J. Leg., 1st Sess. (1982).

package which would have repealed the no-fault insurance system and thereby eliminate the need for a tort threshold entirely.⁹⁸

Under the new law, motorists will be required to choose between two tort options. The first option retains the \$200 threshold and precludes the insured from suing for noneconomic loss for soft tissue injuries unless his medical expenses exceed this amount. Under this option, the right to sue for pain and suffering remains unimpaired.⁹⁹ The alternate option provides that

every person . . . legally responsible for his acts or omissions, is hereby exempted from tort liability for noneconomic loss to a person who is subject to this subsection . . . as a result of bodily injury arising out of the ownership, operation, maintenance or use of such automobile in this State, if the medical expenses incurred or to be incurred by that injured person . . . for the reasonable and necessary treatment of the bodily injury, is less than \$1,500 which amount shall be adjusted annually . . . to reflect increases or decreases in the national Consumer Price Index¹⁰⁰

Insureds selecting the \$1,500 tort threshold would be barred from bringing suit for noneconomic loss unless the medical expenses incurred as a result of the accident exceed that amount. This option is not statutorily limited to soft-tissue injury as is the \$200 option, however, there is "no exemption from tort liability . . . if the injured party has sustained death, permanent disability, permanent significant disfigurement, [or] permanent loss of a body member in whole or in part. . . ." ¹⁰¹ Motorists electing the \$200 threshold will not realize any premium savings; however, selection of the higher threshold could mean an annual premium reduction of about \$50.¹⁰²

The amendatory act requires that election of a tort option be in writing.¹⁰³ The higher tort option will not be available until July 1,

⁹⁸ A. 3674, 200th N.J. Leg., 2d Sess. (1983).

⁹⁹ *Insurance Reform Act*, *supra* note 85, § 14, 1983 N.J. Sess. Law Serv. 2052-54 (West) (amending N.J. STAT. ANN. § 39:6A-8).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.* It is unclear from the statutory language or legislative history whether fractures or similar injuries are exempt from the application of this section. This question will most likely be resolved on a case-by-case basis.

¹⁰² See Zarate, *supra* note 90.

¹⁰³ *Insurance Reform Act*, *supra* note 85, § 14.1, 1983 N.J. Sess. Law Serv. 2054-56 (West) (to be codified at N.J. STAT. ANN. § 39:6A-8.1).

1984,¹⁰⁴ and the failure of an insured to make an election under this section will give rise to the presumption that the \$200 threshold has been chosen.¹⁰⁵ New policies may not be issued after July 1, 1984, unless a tort option has been selected by the insured.¹⁰⁶ Motorists currently carrying automobile insurance policies which will be in force as of July 1, 1984, will be notified of the two tort options available.¹⁰⁷

The amendatory act imposes detailed notice requirements on insurers.¹⁰⁸ Insurers must notify policy holders and prospective insureds in writing of "all available policy coverages and limits."¹⁰⁹ They must indicate which coverages are voluntary, which are mandatory, and must identify the new deductibles, exclusions, set-offs, and tort options.¹¹⁰ Each policy must indicate the premium credits allowed for the respective deductibles, exclusions and options for PIP coverage, and the tort option for non-economic liability coverage.¹¹¹ The premium credits are to be calculated and disclosed as a percentage of the total premium dollar.¹¹²

The new law leaves intact the requirement that motorists carry liability insurance to cover the cost of injuries to another person or property.¹¹³ Nor has there been a change in the requirement that motorists carry uninsured motorist coverage.¹¹⁴

The PIP option allowing motorists to elect deductibles in amounts of \$500, \$1,000 or \$2,500 took effect in December, 1983.¹¹⁵ The remaining options will take effect on July 1, 1984.¹¹⁶ The Kean Administration estimates that motorists could realize \$150 in annual premium savings if

¹⁰⁴ *Id.* § 14, 1983 N.J. Sess. Law Serv. 2052-54 (West) (amending N.J. STAT. ANN. § 39:6A-8).

¹⁰⁵ *Id.* § 14.1(b), 1983 N.J. Sess. Law Serv. 2054-56 (West) (to be codified at N.J. STAT. ANN. § 39:6A-8.1(b)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 14.1(d), 1983 N.J. Sess. Law Serv. 2055 (West) (to be codified at N.J. STAT. ANN. § 39:6A-8.1(d)).

¹⁰⁸ *Id.* § 17(a), 1983 N.J. Sess. Law Serv. 2058 (to be codified at N.J. STAT. ANN. § 39:6A-23).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* § 18, 1983 N.J. Sess. Law Serv. 2059 (West) (to be codified at N.J. STAT. ANN. § 17:29A-15.1).

¹¹² *Id.*

¹¹³ See N.J. STAT. ANN. § 39:6A-3 (West 1973).

¹¹⁴ *Id.*

¹¹⁵ *Insurance Reform Act, supra* note 85, § 24, 1983 N.J. Sess. Law Serv. 2063 (West) (to be codified at N.J. STAT. ANN. § 17:28-1.1 note).

¹¹⁶ *Id.*

all of the new options are chosen.¹¹⁷ Notwithstanding the potential savings in premium costs, if drivers elect all of the new options, they are essentially choosing less coverage and less protection in exchange for reduced cost.

The remaining portions of the automobile insurance reform package are also aimed at cost containment. As part of the reform package, the New Jersey Legislature passed a measure which institutes a system of compulsory, non-binding arbitration for the settlement of automobile accident claims.¹¹⁸ The measure's purpose "is to establish an informal system of settling tort claims arising out of automobile accidents in an expeditious and least costly manner, and to ease the burdens and congestion of the State's courts."¹¹⁹ Claims filed in the Superior Court will be referred to arbitration by the assignment judge of the court in which the claim is filed, if the judge determines that the amount in controversy for noneconomic loss or uncompensated economic loss, excluding property damage, is \$15,000 or less.¹²⁰ Claims involving both economic and noneconomic loss will also be submitted to arbitration "if the court determines that the amount in controversy for noneconomic loss is \$15,000 or less. . . ."¹²¹ If the amount in controversy in an action for noneconomic loss is greater than \$15,000, the assignment judge may still refer the claim to arbitration if it is determined that the issues involved are not too complex, and the parties give their written consent to arbitration.¹²² The arbitration decision will be confirmed by the Superior Court and be binding upon the parties unless one of the parties objects to the decision within 30 days after it has been filed.¹²³ This compulsory, non-binding arbitration system will reduce docket congestion and may help achieve the cost containment objectives in the other portions of the reform package.

Consistent with the proposals set forth by New Jersey's Public Advocate, Joseph Rodriguez,¹²⁴ the Legislature also enacted a measure requiring

¹¹⁷ See generally Zarate, *supra* note 90.

¹¹⁸ Act of Oct. 4, 1983, ch. 358, 1983 N.J. Sess. Law Serv. 2018 (West).

¹¹⁹ *Id.* § 1 (to be codified at N.J. STAT. ANN. § 39:6A-24).

¹²⁰ *Id.* § 2(a) (to be codified at N.J. STAT. ANN. § 39:6A-25(a)).

¹²¹ *Id.*

¹²² *Id.* § 2(b), 1983 N.J. Sess. Law Serv. 2018-19 (West) (to be codified at N.J. STAT. ANN. § 39:6A-25(b)).

¹²³ *Id.* § 8, 1983 N.J. Sess. Law Serv. 2020-21 (West) (to be codified at N.J. STAT. ANN. § 39:6A-31).

¹²⁴ See *Hearings*, *supra* note 31, at 35-39 (May 4, 1983).

detailed annual disclosure statements by insurance companies.¹²⁵ Insurers will now be required to file certain financial information concerning private passenger automobile coverages, as well as information disclosing their excess profits, with the Commissioner of the Department of Insurance.¹²⁶ Although this measure will not contribute directly to the cost containment objective of the entire package, it is important that insurers be held accountable to the motoring public in a state which has the highest automobile insurance rates in the country.

Another measure in the package increases the outside limits of deductibles for collision and comprehensive insurance coverages from \$1,000 to \$2,000.¹²⁷ The measure also allows insureds to pay a percentage of the collision claim after the deductible, with the insurance company responsible for the balance.¹²⁸ Presumably, those motorists who elect the highest deductible limit and the coinsurance plan would pay a reduced rate for collision and comprehensive coverages.

The final measure in the package is an anti-fraud provision, aimed at eliminating fraud in the form of illegal kickbacks or misrepresentations to insurers concerning auto body repairs.¹²⁹ The measure requires that auto repair facilities be licensed and authorizes the imposition of civil penalties for violations.¹³⁰

Conclusion

There is no doubt that the 1973 Act was sorely in need of reform. The Act failed to meet the policy objectives it was designed to accomplish. Whether the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984 will reduce premium costs and improve judicial economy remains to be seen; however, it appears unlikely that these worthwhile goals will be achieved under the reform measure.

Making certain economic protection benefits optional may be advantageous to certain classes of individuals. For example, those individuals

¹²⁵ Act of Oct. 4, 1983, ch. 357, 1983 N.J. Sess. Law Serv. 2013 (West) (to be codified at N.J. STAT. ANN. §§ 17:29A-5.2 to -5.5).

¹²⁶ *Id.*

¹²⁷ Act of Oct. 4, 1983, ch. 359, 1983 N.J. Sess. Law Serv. 2023 (West) (amending N.J. STAT. ANN. § 17:29A-39).

¹²⁸ *Id.*

¹²⁹ Act of Oct. 4, 1983, ch. 360, 1983 N.J. Sess. Law Serv. 2024 (West) (to be codified at N.J. STAT. ANN. §§ 39:13-1 to -7).

¹³⁰ *Id.* §§ 2, 6.

who do not work would never have received benefits for lost wages under the 1973 Act. Consequently, premiums were being paid unnecessarily. Under the new law, individuals such as senior citizens, the unemployed, students, and stay-at-home spouses, may opt out of such coverage and pay a reduced premium. Similarly, some insureds may be adequately protected by other insurance plans for loss of wages or funeral expenses, making coverage for these benefits superfluous. Opting out of the economic expense benefits, however, is predicted to yield a savings of only ten dollars annually, and the option represents only a slight advancement over the prior law.

The infirmity in the option for higher PIP deductibles has already been alluded to. If, in exchange for reduced premiums, the insured elects one of the deductibles allowed under the new law, he must either pay for the deductible himself, or have his medical insurer pay the balance. The projected savings from this option will hardly offset the cost of even the lowest deductible (\$500) in the event that the insured sustains injuries in an accident. It is estimated that savings as high as \$50 could be realized only if the highest deductible (\$2,500) is chosen.¹³¹ Thus, an insured without a medical insurance plan which covers automobile-related injuries stands to lose much more than can be saved by choosing one of the \$500, \$1,500, or \$2,500 deductibles. Alternatively, an individual who is covered under medical insurance will be paying a premium for medical coverage that will at least partially offset any savings realized by the option. Senior citizens are the most obvious beneficiaries of this option, since Medicare will cover the deductible if the highest deductible is chosen.¹³²

The setoff option which allows insureds to save \$40 to \$50 annually in exchange for a promise to reimburse their insurers up to 20 percent of any award or settlement, represents an improvement over the 1973 Act only insofar as the insured feels comfortable with taking the chance that 80 percent of the award or settlement will be adequate compensation for the damages he has suffered. If the insured who has elected this option sues for pain and suffering and recovers a \$20,000 judgment or settlement, \$4,000 must be remitted to the insurer. Whether this result is preferred to the option of paying \$40 to \$50 more in premiums and keeping the entire

¹³¹ Zarate, *Insurers, State Ready Auto Reform Options*, The Newark Star-Ledger, Oct. 12, 1983, at 28.

¹³² Zarate, *Insurance Agents Braced as Drivers Weigh Value of First Rate-Cutting Option*, The Newark Star-Ledger, Dec. 5, 1983, at 9.

amount of any judgment recovered depends entirely on the subjective desires of the insured. While not an overwhelming policy reform, the set-off option permits an insured to choose the alternative that best accommodates him or her.

It is doubtful that the new tort threshold option will correct the deficiencies in the original no-fault law. To the extent that insureds elect to retain the current \$200 limit, all of the infirmities inherent in the 1973 Act remain. Reaching the \$200 limit is little or no obstacle to court access, and will do nothing to reduce docket congestion. Moreover, no premium savings can be realized by choosing the \$200 threshold.

There is little evidence that the second tort option will cure any of the current problems. Indeed, the \$1,500 threshold may introduce additional defects into the system. During the public hearings before the Assembly Banking and Insurance Committee in May, 1983, Assemblyman Michael Aduato questioned Mr. Warren Cooper, the Chief Actuary of Property and Liability for the New Jersey Department of Insurance, about the effect of the \$1,500 tort threshold on premium rates. Mr. Cooper could not say definitively whether rates would go down. The new law does not require insurers to reduce rates, rather, any reduction is purely discretionary. In fact, no reductions are contemplated unless there is a 20 to 25 percent savings in claim costs.¹³³ It appears that any savings to be realized from the higher tort threshold are purely speculative. Moreover, the effect, if any, that the \$1,500 option will have on premium rates and judicial economy remains in doubt. Factors which will affect the actual result include the discretion of insurers to adjust premium rates, the volume and severity of future automobile accidents, and the propensity to sue.

The higher threshold may also be the subject of a constitutional challenge. In *Rybeck v. Rybeck*,¹³⁴ the plaintiffs challenged, *inter alia*, the constitutionality of the \$200 tort threshold as violative of the Equal Protection Clause. The plaintiffs argued that the threshold created unlawful and arbitrary classifications, since it essentially permitted civil suits for noneconomic loss in a case where major injuries were sustained, but allowed only economic loss benefits (PIP) for minor injuries. The court reasoned that since no suspect classification or fundamental right was involved, only the "rational basis" test had to be satisfied. The 1973 Act

¹³³ *Hearings*, *supra* note 31, at 9 (May 4, 1983).

¹³⁴ *Rybeck v. Rybeck*, 141 N.J. Super. 481, 358 A.2d 828 (Law Div. 1976), *appeal dismissed*, 150 N.J. Super. 151, 375 A.2d 269 (App. Div.), *certif. denied*, 75 N.J. 50, 379 A.2d 261 (1977).

sought to compensate all accident victims, regardless of fault. Minor injury claims were removed from the fault-based system. Since higher costs for insurance must result when compensation of *all* accident victims is to be made, the automatic reparation provision for minor injuries was seen as a way to reduce these costs. The court found that the distinction was constitutionally permissible. In the course of its analysis, it stated that "[a] suitable place for adjustment was in the area of minor claims for injuries of no permanent consequence to the victim."¹³⁵

It is uncertain whether the higher tort threshold could withstand the same type of analysis. If a person incurs \$1,499 in medical expenses as a result of injuries sustained in an accident, it may no longer be a "minor claim" of no "permanent consequence." The \$1,500 limit makes an arbitrary, subjective determination that one who incurs \$1,499 in medical costs has not also suffered damages for pain and suffering. If the goal of no-fault insurance is to compensate all accident victims, and the tort threshold is necessary to meet this goal and keep premiums down, then perhaps the rational basis test is still met, notwithstanding the distinction. The argument can be made, however, that the higher tort limit is an impermissible bar to court access. The \$1,500 threshold could most likely withstand an attack on that basis because it is offered as an option and insurers are required to give actual notice to insureds of the consequences of their choice. Assuming that the higher tort threshold is not constitutionally infirm, there is still little evidence that it will reduce the number of claims being filed, and even less evidence that it will reduce the cost of premiums.

The only criticism that can be made of the remaining measures of the reform package is that they do not go far enough toward the stated goal of cost containment. The institution of accident arbitration should ease docket congestion, and there can be no quarrel that the disclosure requirements placed upon insurance companies or the licensing of collision shops are important consumer protections. These changes will further the anti-fraud objectives articulated by the Legislature, and are consistent with the recently created Division of Fraud Prevention. These same requirements, however, may also result in increased charges for services offered by insurers and auto body repair facilities, a result contrary to the stated goals of the measure. Finally, with regard to the increased collision deductible

¹³⁵ 141 N.J. Super. at 497, 358 A.2d at 837.

or coinsurance plan, it is elementary that less coverage should result in reduced cost. In exchange for lower premiums, the insured receives less coverage and less protection.

Although the main objective of the package is cost containment, absent mandatory rate reductions it remains questionable at best that this objective will be met.

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