

NO MORE NO-FAULT: BEYOND THE RHETORIC TOWARD TRUE REFORM OF THE NEW JERSEY AUTOMOBILE INSURANCE SYSTEM

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Introduction

The New Jersey experiment in mandatory no-fault automobile insurance has been a failure. More than ten years after the institution of the no-fault system in New Jersey, a system intended to reduce insurance costs, that State's 3.5 million private passenger motorists are paying the highest average insurance rates in the nation.¹ Between the years of 1975 and 1982, insurance premiums in New Jersey have increased by 162 percent.²

New Jersey is not unique with respect to its experience with no-fault insurance. Other no-fault states have experienced similar upward trends in the cost of insurance. Pennsylvania and Michigan, no-fault States affording benefits comparable to those mandated in New Jersey, have had premium increases of 206 percent and 108 percent respectively.³ In contrast, those states without a system of mandatory no-fault automobile insurance have experienced a much lower rate of increase during the corresponding period.⁴ In Nevada, premium costs actually decreased by 50 percent following the repeal of mandatory no-fault insurance in that State.⁵

The effectiveness of a law should be measured by its ability to achieve its stated purpose. If a law ceases to be effective, or more

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¹ 1982 *Average Private Passenger Automobile Insurance*, BEST'S INSURANCE MANAGEMENT REPORTS (Property/Casualty), Dec. 5, 1983, at 1 [hereinafter cited as *Best Report*].

² B. WEBB & C. LILLY, NO-FAULT — THE RECORD: PROMISE V. PERFORMANCE, MYTH V. REALITY 100 (Pennsylvania Trial Lawyers Association 1983).

³ *Id.* at 87, 117.

⁴ See, e.g., *id.* at 47 (California bodily injury premium rose 74 percent); *id.* at 110 (Ohio bodily injury premium rose 54 percent); *id.* at 68 (Illinois bodily injury premium rose 53 percent).

⁵ *Id.* at 96. It should be noted that Pennsylvania, too, has repealed its no-fault law. See The Motor Vehicle Financial Responsibility Law, ch. 11, 1984 Pa. Legis. Serv. 46-91.

significantly, does the opposite of what it is designed to do, it should be altered. This is true even if such an alteration involves a radical departure that amounts to an admission that the law, however noble its intent, is a failure.

This article will demonstrate that the New Jersey experiment in no-fault automobile insurance has failed to accomplish its goals. It is more costly than the system it hoped to reform. It is unnecessary. A more efficient, less costly system of automobile insurance reparations is possible. Statistical evidence, as well as common sense, mandate a radical change in the no-fault law. The New Jersey motorist should no longer be burdened with an ineffective no-fault insurance system.

History and Development of the Fault System

In primitive, pre-common law societies, people who had been wronged sought redress through retaliation and physical force.⁶ One commentator has noted that "the first business of the law is to find some means to suppress self-help if utter chaos is to be avoided."⁷ Eventually, a system of damages developed whereby an offender would pay off his victim in "blood money."⁸ This type of arrangement evolved into the common law system of torts. Prosser has defined a "tort" as "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages."⁹ Gradually, the negligence standard became accepted as a factor limiting an aggrieved person's ability to recover damages for unintentional injuries.¹⁰ Finally, it was believed that there should be no liability imposed in the case of a purely accidental injury, where no one is considered truly at fault "in the sense of being chargeable with a wrongful intent or with negligence. With rare exceptions, actions for injuries to the person or to tangible property now require proof of an intent to inflict them, or a failure to exercise proper care."¹¹ This requirement of some finding of fault before liability is imposed was eventually applied to automobile accident injury claims. A motorist, under the fault system, is required to compensate an injured victim only if he or she is guilty of some wrongdoing.

⁶ 4 M. BELL, MODERN TRIALS 121 (1959).

⁷ *Id.*

⁸ *See generally id.* at 120-37.

⁹ W. PROSSER, THE LAW OF TORTS 2 (4th ed. 1971).

¹⁰ *See Brown v. Kendall*, 60 Mass. (6 Cush.) 297 (Mass. 1850).

¹¹ W. PROSSER, *supra* note 9, at 30.

Automobile negligence law has the dual purpose of deterring irresponsible driving behavior and compensating the victims of irresponsible motorists. Automobile insurance, on the other hand, is based on business principles, including profitability. It is designed to protect the negligent motorist from insolvency in the event that liability is imposed upon him or her. It not only attempts to compensate the victim for his or her injuries, but also allocates the risks associated with operating automobiles over a large group, thereby limiting the cost which may fall on any one individual. Automobile insurance was never intended to, and should not, interfere with the tort system or restrict the common law rights of innocently injured victims to seek redress in the courts.

Origins of No-Fault Automobile Insurance

The no-fault concept was first introduced in the United States in 1932.¹² It began to achieve popularity in 1965 with the publication of the no-fault plan authored by Professors Robert E. Keeton and Jeffrey O'Connell.¹³ These men are considered forerunners in the battle to reform the fault-based automobile insurance reparations system.

Professors Keeton and O'Connell attributed the need for automobile insurance reform to several alleged inadequacies and injustices which prevailed under the tort system. First, they claimed that the system frequently resulted in unfair out-of-court settlements.¹⁴ In most instances, the victim was compensated for much less than his out-of-pocket expenses.¹⁵ Second, the system was "cumbersome and slow," with protracted litigation causing long delays in the compensation of victims.¹⁶ Third, the system was extremely wasteful; less than 50 percent of all premiums paid ever reached the hands of injured persons.¹⁷ Finally, they claimed that the system encouraged dishonesty, primarily due to the need of the parties to overstate their

¹² See COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

¹³ R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

¹⁴ Keeton & O'Connell, *Basic Protection Automobile Insurance*, 1967 U. ILL. L. F. 400, 401.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 402.

claim or defense.¹⁸

The Keeton-O'Connell Plan was aimed at remedying these claimed flaws in the tort system. The plan was premised on two basic concepts: establishing a minimum dollar limit, or threshold, for instituting negligence claims,¹⁹ and providing payment for medical expenses up to a moderate limit regardless of who was at fault.²⁰ After the Keeton-O'Connell Plan was published, it became the focal point for many state legislatures which later adopted no-fault laws.

The first no-fault automobile insurance law in the fifty states went into effect in Massachusetts on January 1, 1971.²¹ Since the Massachusetts plan was adopted, only fourteen additional states and the District of Columbia have adopted no-fault laws.²² Nevada, which adopted no-fault in 1973, repealed its law effective January 1, 1980.²³ More recently, Pennsylvania joined Nevada and became the second State to repeal its no-fault law.²⁴ Except for the District of Columbia, no jurisdiction has enacted a no-fault law since 1975. Six other states have so-called "add-on" laws, which offer or mandate certain no-fault coverage, but do not restrict the right to sue for pain and suffering.²⁵

New Jersey's no-fault law was adopted in the midst of a crisis in the then existing automobile insurance system. This system was attacked on the grounds that:

- 1) It was slow in producing payment of necessary medical bills and lost income to victims of automobile accidents;
- 2) Premiums were high and going higher;
- 3) Courts were overburdened, particularly by so-called nuisance cases; and,

¹⁸ *Id.* at 403.

¹⁹ *Id.* at 404; see also Keeton & O'Connell, *Alternative Paths Toward No-Fault Automobile Insurance*, 71 COLUM. L. REV. 241, 254 (1971).

²⁰ Keeton & O'Connell, *supra* note 14, at 403; see also Keeton & O'Connell, *Alternative Paths Toward No-Fault Automobile Insurance*, 71 COLUM. L. REV. 241, 245 (1971).

²¹ MASS. GEN. LAWS ANN. ch. 90, § 34M (West Supp. 1984-85).

²² They are Colorado (\$500 threshold), Connecticut (\$400 threshold), the District of Columbia (\$5,000 threshold), Florida (verbal threshold), Georgia (\$500 threshold), Hawaii (annually adjusted threshold), Kansas (\$500 threshold), Kentucky (\$800 threshold), Michigan (verbal threshold), Minnesota (\$4,000 threshold), New Jersey (optional threshold—\$200 or \$1,500), New York (verbal threshold), North Dakota (\$1,000 threshold), and Utah (\$500 threshold).

²³ See Act of June 5, 1979, ch. 660, 1979 Nev. Stat. 1513.

²⁴ See *supra* note 5.

²⁵ They are Arkansas, Maryland, Oregon, South Dakota, Texas, and Virginia.

4) A large proportion of victims were not compensated because of the harshness of the doctrine of contributory negligence.²⁶

In February of 1968, New Jersey's Commissioner of Banking and Insurance denied an application filed by the National Bureau of Casualty Underwriters and National Automobile Underwriters Associations for a 20.6 percent rate increase. On the basis of data submitted by a special counsel appointed to represent the public interest, the Commissioner found that the automobile insurance industry was entitled to only a slight increase, not the requested 20.6 percent. In reaction to the Commissioner's denial, the industry began to cancel and deny renewals of automobile insurance policies, and also engaged in restrictive underwriting practices.²⁷

Rate increases were allowed by the Commissioner of Insurance early in 1970, which, it was hoped, would restore the market to its normal level. Despite these increases, it became necessary for the Commissioner of Insurance to declare a 90-day moratorium on terminations of insurance policies. The Commissioner noted the imminent peril of an unprecedented constriction in the New Jersey market.²⁸ This crisis highlighted the need for automobile insurance reform in New Jersey. In response to this emergency, the New Jersey Legislature, in 1970, created the Automobile Insurance Study Commission (AISC).²⁹ Specifically, the AISC was empanelled to investigate all aspects of automobile insurance premium costs, to evaluate the feasibility and adaptability of no-fault automobile coverage in New Jersey, to consider and recommend alternatives to the then-existing requirement of resort to the courts for compensation of victims, to assess the costs and desirability of compulsory medical coverage, and to recommend appropriate legislation.³⁰

Following a study which spanned one and one-half years, the AISC issued its final report.³¹ This report made 16 recommendations designed to accomplish the following four objectives:

²⁶ See LEGISLATIVE STUDY COMMISSION, STATE OF NEW JERSEY, REPORT TO THE LEGISLATURE ON NO-FAULT AUTOMOBILE INSURANCE REFORM IN NEW JERSEY 2 (1977) [hereinafter cited as *1977 Report*].

²⁷ See *id.* at 1-2.

²⁸ *Id.*

²⁹ S.J. Res. 4, 194th N.J. Leg., 1st Sess., 1970 N.J. Laws 1054-56.

³⁰ *Id.*

³¹ AUTOMOBILE INSURANCE STUDY COMMISSION, STATE OF NEW JERSEY, REPORT TO THE GOVERNOR AND THE LEGISLATURE, REPARATION REFORM FOR NEW JERSEY MOTORISTS (1971) [hereinafter cited as *AISC Report*].

- (1) prompt reparation of benefits (*reparation* objective);
- (2) reduced or stabilized cost (*cost* objective);
- (3) increased availability of coverage (*availability* objective); and,
- (4) judicial economy (*judicial* objective).³²

The New Jersey Automobile Reparation Reform Act (1973 Act) was enacted soon after the release of the AISC report, and was based primarily on the recommendations contained therein.³³ This Act established a no-fault automobile insurance system which provides for the prompt payment of medical expenses, lost wages, and certain other costs resulting from injuries suffered in an automobile accident. It also mandates that every private passenger automobile registered or principally garaged in New Jersey carry no-fault insurance.³⁴

Under the program of no-fault insurance recommended by the AISC, every automobile insurance policy must provide Personal Injury Protection Coverage (PIPC), under which the insured will receive compensation for economic loss directly from his or her own insurer, without regard to fault.³⁵ The legislation also mandates liability insurance coverage, under which the insurer pays any damages for which the insured becomes legally liable because of his or her involvement in an automobile accident.³⁶

Under PIPC, the insured is to receive prompt payment for the following expenses on a first-party basis on his own behalf, on behalf

³² *Id.* at 7.

³³ 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)).

³⁴ N.J. STAT. ANN. §§ 39:6A-3, -4 (West 1973 & Supp. 1983-84) (amended 1983). The law provides that:

Every automobile liability insurance policy insuring an automobile as defined in this act against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of ownership, operation, maintenance or use of an automobile *shall provide . . . coverage . . . for the payment of benefits without regard to negligence, liability or fault of any kind*, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an accident involving an automobile, to other persons sustaining bodily injury while occupying the automobile of the named insured or while using such automobile with the permission of the named insured and to pedestrians, sustaining bodily injury caused by the named insured's automobile or struck by an object propelled by or from such automobile.

Id. § 39:6A-4 (emphasis added). See *infra* text accompanying note 37 for a description of this coverage.

³⁵ *Id.*; see also AISC Report, *supra* note 31, at x-xi.

³⁶ N.J. STAT. ANN. § 39:6A-3 (West 1973).

of a member of his household, guest passengers and other authorized drivers of the automobile, as well as pedestrians struck by the automobile:

1. All reasonable expenses for ambulance, hospital, nursing, medical, surgical, dental and rehabilitation services, including prosthetic devices, made necessary by injuries sustained;

2. Funeral, burial or cremation expenses not in excess of \$1,000 per occurrence;

3. Disability benefits of up to \$100 a week for loss of income due to inability to work caused by an injury, subject to an aggregate payment of \$5,200 per person for any one disability. Insureds with a weekly income in excess of \$100 are able, at an additional premium charge, to purchase coverage to provide for loss of income benefits in excess of the basic \$100 weekly benefit provided in the policy;

4. Reasonable reimbursement of up to \$12 a day for one year for household services interrupted by the injury of a person who otherwise would have performed such services.³⁷

These benefits are payable without regard to secondary benefit sources available to the injured person, but benefits recoverable under Workmen's Compensation and the Temporary Disability Benefits statute are considered primary, and therefore must be collected before an insured may collect PIPC benefits.³⁸ Prior to a federal rule change in 1983, Medicare benefits were also considered primary. Under the new regulation, however, Medicare benefits will not be collectible to the extent that an insured is able to collect PIPC benefits.

With respect to other voluntary insurance programs available to an automobile owner, it is left to those who pay the premiums for such coverage to decide on the course of action they wish to take. Assured of compensation for economic loss due to automobile accidents under the PIPC program, they might "eliminate duplicate benefits" from such voluntary insurance programs for the purpose of premium savings or for the purpose of substitution of other needed insurance protection. In this connection, the AISC was aware of the possible reduction in Blue Cross and Blue Shield costs through a no-

³⁷ *Id.* § 39:6A-4 (West 1973 & Supp. 1983-84); see also *AISC Report*, *supra* note 31, at xii-xiii.

³⁸ N.J. STAT. ANN. § 39:6A-6 (West 1973 & Supp. 1983-84); see also *AISC Report*, *supra* note 31, at xi.

fault automobile insurance system.³⁹

In New Jersey, between 85 and 90 percent of all motorists carried liability insurance at the time of the Commission's study, and approximately 90 percent of these motorists carried uninsured motorist and medical payments coverage, a first party type of insurance covering medical expenses of the insured, members of his household, and guests of his car.⁴⁰ Thus, the overwhelming majority of New Jersey motorists already carried a broad program of automobile bodily injury insurance. There was, however, an uninsured gap of approximately 300,000 motorists and their family members. The AISC concluded that the reparation purpose of the proposed program would fall short of its objective of giving compensation for economic losses to all victims of automobile accidents unless every motorist was included in the insurance program.⁴¹ Consequently, the Commission recommended that automobile insurance be made mandatory.⁴²

The original no-fault law remained intact, with minor adjustments, from its enactment in 1973, until October 4, 1983. On that day, Governor Kean signed into law Assembly Bill No. 3981, which retains no-fault, but offers private passenger automobile insureds various options to suit their needs and finances.⁴³ It offers an insured the option to choose from among the following insurance coverages, all of which are available as of July 1, 1984, except for medical expense deductibles, which became available after December 3, 1983:

1. *No-Fault Medical Benefits*: While unlimited medical expense benefits remain mandatory, insureds have the option to choose, at

³⁹ *AISC Report*, *supra* note 31, at 50-51; *see also 1977 Report*, *supra* note 26, at 25-35. Both of these legislatively-appointed commissions believed that a self-contained no-fault auto insurance system should be the primary source of these benefits.

⁴⁰ *AISC Report*, *supra* note 31, at 42. "[S]omewhere between 85 and 90 percent of all New Jersey motorists carry automobile insurance liability coverage. Furthermore, about 90 percent of the policies on insured cars provide medical payments and uninsured motorist coverages." *Id.*

⁴¹ *Id.* at xiii.

⁴² *Id.* The Commission felt that:

[i]n the interests of equity toward insured motorists as well as for the protection of injured persons, this "uninsured gap" should be closed.

The Personal Injury Protection aspect of the recommended program will provide strong motivation for many of the present day uninsureds to obtain this coverage. In order to reduce further the number of uninsured motorists in this State, a compulsory insurance requirement is indicated.

Id.

⁴³ 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).

reduced premiums, medical expense deductibles in amounts of \$500, \$1,000, and \$2,500.⁴⁴ The deductible is applicable only to the named insured and members of his immediate family residing in his household. Guest passengers will not be subject to the deductible.⁴⁵ Moreover, the deductible will apply on a per accident, as opposed to a per injury basis. Therefore, if more than one person is injured in an accident, the deductible will only be taken once.⁴⁶

2. *No-Fault Non-Medical Benefits*: Although the original no-fault law mandated coverage for loss of income, essential services, and funeral expenses as a result of an injury or death sustained in an automobile accident, the new law offers an insured, in exchange for reduced premiums, the option not to purchase these coverages.⁴⁷

3. *Set-Off*: An insured is now offered the option to choose, at reduced premiums, to entitle his insurer, when it has already paid medical expense benefits on his behalf, to reimbursement for the amount of such benefits from any recovery of general damages for injuries sustained in an auto accident and received by the insured. The reimbursement cannot exceed 20 percent of the amount of the recovery. Attorneys' contingent fees will be computed on the amount of recovery minus the set-off. An attorney will also be entitled to reimbursement out of the set-off for out-of-pocket legal expenses, not to exceed 10 percent of the total amount of the set-off.⁴⁸

4. *Optional Tort Threshold*: Insurers must offer all insureds the option to maintain the current \$200 monetary threshold or to elect a \$1,500 monetary threshold. While both monetary thresholds would be exclusive of hospital, x-ray, and other diagnostic medical expenses, the \$1,500 option will cover both soft tissue injuries and fractures, and will be adjusted annually in accordance with a specified consumer index. In return for electing the \$1,500 tort limitation option, an insured will receive a reduction in his bodily injury liability premium. Only the named insured and immediate family members of his or her household will be bound by the named insured's election

⁴⁴ *Id.* § 13(a), 1983 N.J. Sess. Law Serv. 2050 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

⁴⁵ *Id.*

⁴⁶ Act of May 15, 1984, ch. 40, 1984 N.J. Sess. Law Serv. 54 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

⁴⁷ *Id.* § 13(b), 1983 N.J. Sess. Law Serv. 2050 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

⁴⁸ *Id.* § 13(c), 1983 N.J. Sess. Law Serv. 2050 (West) (to be codified at N.J. STAT. ANN. § 39:6A-4.3).

of a \$1,500 threshold. An uninsured motorist also will be subject to the \$1,500 threshold, but passengers and pedestrians not covered under any insurance policy will only be subject to the \$200 threshold.⁴⁹

5. *Notice of Available Options and Premium Credits*: Every automobile insurer will be required to show a breakdown of all coverages in plain language. After the operative date of the law, every insurer must also indicate the dollar amount an insured has been paying for each coverage under his insurance policy, in addition to stating the percentage of savings for each option or combination of options.⁵⁰

6. *Method of Selecting Options*: The Commissioner of Insurance will determine the manner and form for an insured to make his selection of options. If the options are listed in a statement other than an insurance policy, a copy of it must be returned to the policyholder.⁵¹

7. *Clean-Up Provisions to the Existing No-Fault Law*: The bill contains a number of provisions to clarify who is eligible for no-fault benefits in the wake of court decisions extending benefit eligibility beyond the intent of the original law. For example, PIPC benefits will apply only to victims occupying or struck by an automobile, such as a pedestrian.⁵²

8. *Uninsured Motorists Who Are in Violation of the Law*: Motorists who are in violation of the law will be barred from recovering PIPC benefits under another motorist's coverage.⁵³

According to New Jersey Department of Insurance estimates, election of the \$1,500 threshold can result in a \$50 savings in premiums; the 20 percent set-off can save an insured \$46; the \$2,500 medical expense deductible can save an insured \$40; and the provisions subjecting uninsured motorists to a \$1,500 threshold and barring them from receiving PIPC benefits under another insured's policy can save a motorist \$33.

⁴⁹ *Id.* § 14, 1983 N.J. Sess. Law Serv. 2052-54 (West) (amending N.J. STAT. ANN. § 39:6A-8).

⁵⁰ *Id.* §§ 17-18, 1983 N.J. Sess. Law Serv. 2058-59 (West) (to be codified at N.J. STAT. ANN. §§ 39:6A-23, -15.1).

⁵¹ *Id.* § 14.1, 1983 N.J. Sess. Law Serv. 2054-56 (West) (to be codified at N.J. STAT. ANN. § 39:6A-8.1).

⁵² *Id.* §§ 1-10, 1983 N.J. Sess. Law Serv. 2029-49 (West).

⁵³ *Id.*

Experience versus Expectations

Ten years after the enactment of mandatory no-fault insurance in New Jersey, New Jersey's insureds were paying an above average annual policy premium in comparison to other states. There were several reasons for this development. First, New Jersey insureds were receiving the richest package of benefits in the country; second, the entire cost of an automobile injury was kept within the automobile insurance system; and third, the New Jersey Legislature failed to enact a number of other AISC recommendations aimed at cost containment. Most notable in this regard was the recommendation of the Joint New Jersey Supreme Court and the New Jersey State Bar Association Committee on Expediting the Civil Calendars, which called for mandatory arbitration of all matters certified to have an approximate value of \$5,000 or less.⁵⁴

The AISC was also concerned with measures to reduce the incidence of losses, and made a number of recommendations to this end which, unfortunately, were never enacted into law. Among them were the adoption of anti-damageability standards for automobiles manufactured after a certain date,⁵⁵ rehabilitation measures for drunken drivers,⁵⁶ and emphasis on highway safety.⁵⁷ It also recommended penalties for false and fraudulent representations regarding insurance or insurance claims.⁵⁸

⁵⁴ See *AISC Report*, *supra* note 31, at xv. The Commission made the following recommendation:

Recommendation 5. Mandatory Arbitration

(5.0) With respect to actions in tort for damages, the Commission recommends that a mandatory settlement conference and arbitration program be instituted for automobile accident cases following the recommendations contained in the Report of the Joint New Jersey Supreme Court and the New Jersey State Bar Association Committees on Expedition of the Civil Calendars (March, 1971). In brief—

"All matters certified to have an approximate value of \$5,000 or less shall be listed for arbitration with one of the arbitration panels sitting in the county of venue. The arbitrators shall conduct a hearing and make an award. The award may, in fact, be in excess of \$5,000 or may state that there is no reasonable basis for a claim. A dissatisfied party may appeal in accordance with the provisions made herein and have this matter decided de novo by a jury trial."

Id.

⁵⁵ *Id.* at xix.

⁵⁶ *Id.*

⁵⁷ *Id.* at xx.

⁵⁸ *Id.* at xviii.

While the Commission realized that adoption of the direct reparation provisions of the no-fault program would increase the number of automobile accident victims who would be reimbursed for their losses, it also believed a reduction in bodily injury liability premiums was a distinct possibility, although it made no recommendation in this regard.⁵⁹ A 15 percent reduction in the Bodily Injury portion of the premium, however, was adopted by the Legislature as a supplement to the Act.

Although the original premise of no-fault was that it could pay more dollars to more accident victims, and still reduce or at least stabilize premiums, this has not been the case anywhere. There is not a single no-fault plan with a tort threshold restriction which has kept premiums from rising rapidly. The actuarial fact is that no threshold can do that unless it places a total ban on recovery of any damages, no matter how serious the injury. This, of course, is an untenable position which the public would never accept, and which goes against hundreds of years of common law. The actuarial fact is that in 1982, seven of the eighteen states with automobile insurance rates above the national average were no-fault states. Conversely, only eight of the thirty-three states (including the District of Columbia) with automobile insurance rates below the national average were no-fault states.

The experience of no-fault automobile insurance programs in New Jersey and elsewhere has been a failure to prevent high premiums from going even higher. It is apparent that escalating medical expenses and automobile repair costs—which the no-fault concept has never addressed—have caused the greatest increase in the insurance premium. According to the Department of Insurance, the two portions of the premium which have increased much more substantially than the bodily injury liability portion of the premium are personal injury protection coverage, and property damage, collision, and comprehensive coverage. Although the latest reforms to the no-fault law offer motorists some relief, they do not go far enough.

⁵⁹ *Id.* at 120-21. The Commission observed that in order for any costs to be reduced, there must be a reduction in either the frequency of claims or the average cost of claims. Since each of these possibilities were subject to highly speculative judgments, the Commission declined to make any definitive statement in this regard. *Id.*

True Reform

Reform efforts to date have compared New Jersey to other no-fault states. Yet it is a mistake to compare no-fault states to each other for the purpose of evaluating the achievements of no-fault insurance. No-fault states should be compared with tort states for a true determination of what is the best system to stem rising automobile insurance rates. From 1975 to 1982, insurance premiums in New Jersey increased by 162 percent. In Pennsylvania and Michigan, no-fault states with benefits comparable to those under our law, premiums increased by 206 percent and 108 percent, respectively. In the same period, premiums in non no-fault states increased much less. For example, California's premiums rose 74 percent; Ohio's rose 54 percent; Illinois' rose 52 percent; and Indiana's rose 47 percent. In Nevada, the only state to scrap no-fault, premiums actually decreased by 50 percent after the repeal took effect on January 1, 1980.⁶⁰

The author has introduced and supported a package of bills which will result in true reform of the New Jersey automobile insurance system. These bills will lower average premiums by as much as 50 percent without denying an injured automobile accident victim necessary coverage. The package consists of three measures, described more fully below.

A. Financial Disclosure by Insurers

Because information is the most powerful tool, the first measure in the package, which was signed into law on October 4, 1983, provides for full financial disclosure by insurance companies that come to legislators with reports of enormous losses, while informing their stockholders of record profits.⁶¹ This law mandates that insurance companies provide certain financial data regarding their revenues and expenses to the Department of Insurance.⁶² If the Commissioner

⁶⁰ See *supra* notes 2-5.

⁶¹ Act of Oct. 4, 1983, ch. 357, 1983 N.J. Sess. Law Serv. 2013-17 (West) (to be codified at N.J. STAT. ANN. §§ 17:29A-5.2 to -5.5). The Act applies to those insurance companies holding at least 0.5 percent of the market share of private passenger automobile policies in New Jersey. This percentage is calculated by dividing the current premiums written by the insurer by the total premiums written for the preceding year by all insurers. *Id.* § 1(b), 1983 N.J. Sess. Law Serv. 2015 (West) (to be codified at N.J. STAT. ANN. § 17:29A-5.2(b)).

⁶² *Id.* § 1(a), 1983 N.J. Sess. Law Serv. 2013-14 (West) (to be codified at N.J. STAT.

determines that there are excess profits, they will be returned to the consumer.⁶³ The measure is modeled on the Florida disclosure law, which resulted in the payment of \$25 million in rebates to consumers during the first year that it was in effect.

B. *Mandatory Arbitration*

The second measure in the package, also signed into law on October 4, 1983, is designed to reduce both court costs and the number of cases that are clogging court calendars.⁶⁴ It provides for flexible arbitration of claims for non-economic loss under \$15,000.⁶⁵ According to statistics from the New Jersey Administrative Director of the Courts, it will eliminate 35 percent of all automobile negligence cases from court dockets.⁶⁶ The law will also eliminate the expenses of a judge, salaried at \$70,000 per year, the time of a jury, and the salaries of a court clerk, court stenographer, court attendants, and various officers to attend to the jury. These costly services will be replaced by

ANN. § 17:29A-5.2(a)). Specifically, all affected insurers must provide the following information:

- (1) Premiums earned;
- (2) Policyholder dividends incurred;
- (3) Expenses for acquisition and general expenses;
- (4) Expenses for agents' commissions, taxes, licenses and fees;
- (5) Profit and contingency factors as utilized in the insurer's automobile rate filings for the applicable years;
- (6) Losses paid;
- (7) Losses unpaid stated at the final settlement value;
- (8) Loss adjustment expenses paid; and
- (9) Loss adjustment expenses unpaid stated at the final settlement value.
- (10) Actuarial gain or loss, equal to the difference between paragraph (1) and the sum of paragraphs (2) through (9), inclusive.

Id.

⁶³ *Id.* § 2, 1983 N.J. Sess. Law Serv. 2015 (West) (to be codified at N.J. STAT. ANN. § 17:29A-5.3). Excess profits shall be deemed to exist "if the combined underwriting gain for the three most recent calendar-accident years of an insurer transacting automobile insurance in this State is greater than the insurer's anticipated underwriting profit, plus 5 percent of earned premiums for those calendar-accident years." *Id.*

⁶⁴ Act of Oct. 4, 1983, ch. 358, 1983 N.J. Sess. Law Serv. 2018-22 (West) (to be codified at N.J. STAT. ANN. §§ 39:6A-24 to -35).

⁶⁵ *Id.* § 2, 1983 N.J. Sess. Law Serv. 2018-19 (West) (to be codified at N.J. STAT. ANN. § 39:6A-25). It should be noted that in any action where the amount in controversy "for non-economic loss is in excess of \$15,000, the court may refer the matter to arbitration, if all of the parties to the action consent in writing to arbitration and the court determines that the controversy does not involve novel legal or unduly complex factual issues." *Id.*

⁶⁶ *Supreme Court Orders Compulsory Arbitration in Auto Negligence Cases*, 113 N.J.L.J. 76 (1984).

those of a single arbitrator.⁶⁷ In an effort to balance the interests of society against the rights of the individual, the measure contains tremendous disincentives to sue if the plaintiff is dissatisfied with the arbitrator's decision;⁶⁸ however, the arbitrator's decision is appealable, thereby preserving the constitutional right to due process.⁶⁹ This major cost containment measure will be carried out by the rules of both the American Arbitration Association and those promulgated by the New Jersey Supreme Court.⁷⁰

C. *Repeal of Mandatory No-Fault: A. 3743, 200th N.J. Leg., 2d Sess. (1983)*

The third measure in the package is in the mainstream of the free enterprise system, where the rules of the marketplace prevail.⁷¹

⁶⁷ It should be noted that

[t]he number or selection of arbitrators may be stipulated by mutual consent of all the parties to the action. . . .

If the parties fail to stipulate the number or names of the arbitrators, the arbitrators shall be selected, in accordance with the rules of court adopted by the Supreme Court of New Jersey, from a list of arbitrators compiled by the assignment judge, to be comprised of retired judges and qualified attorneys in this State with at least seven years negligence experience and recommended by the county or State bar association.

Act of Oct. 4, 1983, ch. 358, § 4, 1983 N.J. Sess. Law Serv. 2019 (West) (to be codified at N.J. STAT. ANN. § 39:6A-27).

⁶⁸ Among these disincentives are that "the party petitioning the court for a trial de novo shall pay to the court the fees of the arbitrators." *Id.* § 9, 1983 N.J. Sess. Law Serv. 2021 (West) (to be codified at N.J. STAT. ANN. § 39:6A-32).

⁶⁹ *Id.* § 8, 1983 N.J. Sess. Law Serv. 2020-21 (West) (to be codified at N.J. STAT. ANN. § 39:6A-31) ("Unless one of the parties to the arbitration petitions the court, within 30 days of the filing of the arbitration decision . . . the court shall, upon motion of any of the parties, confirm the arbitration decision. . .").

⁷⁰ In December of 1983, the Supreme Court of New Jersey issued rules to implement two pilot arbitration programs in New Jersey, one in Burlington County, the other in Union County. Each pilot program is proceeding according to its own distinct procedural rules. In Burlington County, hearings are conducted before a panel of two attorneys, one who has specialized in prosecuting negligence claims, the other, in defending such claims. In contrast, only one attorney presides at the arbitration hearings in Union County. The time schedules in the two counties are also different. In Burlington County, a hearing must be scheduled no later than seven months after the defendant's answer is filed, while in Union County the hearing must be scheduled within four months of this date. See Order of the Supreme Court of New Jersey (December 27, 1983), printed in *Compulsory Arbitration of Automobile Negligence Cases, Notice to the Bar*, 113 N.J.L.J. 25 (1984). The differences in the two programs were intentional, "[i]ndeed, both programs will be closely monitored and professionally evaluated so that a smooth transition may be made to an effective statewide arbitration program." *Id.*

⁷¹ A. 3743, 200th N.J. Leg., 2d Sess. (1983).

The measure passed in the Assembly on July 11, 1983, but the legislative session expired before the Senate acted on it.⁷² It would eliminate compulsory insurance, and force insurance companies to compete for the consumer dollar.⁷³ This measure would make no-fault insurance optional, with a wide range of options and deductibles from which the consumer may choose.⁷⁴ If the proposal becomes law, New Jersey will return to a tort system, but with stronger safeguards for responsible motorists, as well as opportunities for long-term meaningful premium reductions without diminished coverage or benefits. Even the most severe critics of this proposal agree that it would reduce current premiums by up to 50 percent. New Jersey now has the nation's highest insurance rates; this proposal would put its premiums among the nation's lowest.⁷⁵

The greatest concern raised by opponents of the proposal is that it may leave automobile accident victims without medical and hospital benefits. This would not be the case. The proposal allows motor-

⁷² 70 N.J. LEGIS. INDEX No. 18, at A81 (January 17, 1984).

⁷³ *Id.* § 2(a):

No application for or renewal of an automobile liability insurance policy shall be taken by an insurer . . . unless personal injury protection coverage . . . is offered to the applicant or named insured. *The applicant or named insured shall have the right to reject, in writing, the personal injury protection coverage.* The personal injury protection coverage shall provide for the payment of benefits without regard to negligence, liability or fault of any kind. . . .

Id. (emphasis added). *Cf. supra* note 34 (current mandatory coverage requirement).

⁷⁴ Under the measure, if an insured elects to purchase personal injury protection coverage, such coverage

shall provide compensation to injured persons for reasonable or necessary expenses incurred from the date of the automobile accident for:

- (1) Medical expenses;
- (2) Net lost earnings;
- (3) Expenses for personal services which would have been performed by the injured person had he not been injured; and
- (4) Funeral expenses of not more than \$2,000 per person.

Id. § 2(a). Personal injury protection coverage must be purchased in minimum amounts "of \$10,000 for any one person and \$20,000 for all persons injured in any one accident."

Id. § 2(b). An insured is given the option, however, of purchasing up to \$1 million per person per accident. *Id.* Finally, an insured may elect deductibles from his various personal injury protection coverages in amounts of \$200, \$500, \$1,000, \$2,500, and \$5,000.

Id. § 2(d). The various combinations of options available under this measure gives the consumer the flexibility he or she needs and deserves.

⁷⁵ According to *Best's Insurance Management Reports*, the 1982 average automobile premium in New Jersey was \$455.80. A 50 percent reduction in this figure would make the average New Jersey premium \$227.90, considerably below the 1982 national average of \$298.30. *See Best Report, supra* note 1, at 1.

ists the option of buying up to \$1 million in first-party hospital benefits.⁷⁶ Both the benefits and the deductibles would have a schedule to inform the consumer of his or her premium savings.⁷⁷ In addition, motorists would be protected in most of their auto injury losses by health insurers.

There are also those who feel threatened by the provision in the proposal that would make liability insurance optional for private passenger automobiles.⁷⁸ Liability insurance reimburses automobile accident victims for so-called non-economic damages, oftentimes termed pain and suffering. In theory, mandatory liability insurance assures each motorist that he or she is protected because he or she is guaranteed that all other motorists have the same coverage. But in reality, there are more uninsured motorists on New Jersey's roads today—almost 600,000—than there were in 1973, when New Jersey had no mandatory liability insurance provision.⁷⁹ Statistics show that prior to 1973, at least 85 percent of the driving public bought insurance.⁸⁰ Today, although required by law to do so, only 87 percent do so.⁸¹ Why? Because it is not affordable. When rates are reduced, more people will buy insurance.

Under the proposal, motorists would still be protected from uninsured drivers. The legislation specifies that drivers electing not to

⁷⁶ See *supra* note 73.

⁷⁷ A. 3743, § 2(d), 200th N.J. Leg., 2d Sess. (1983) ("All applications, initial or renewal policies, and renewal notices shall set forth the deductibles available . . . and the premium rate for each deductible.").

⁷⁸ *Id.* § 6. The measure does retain a compulsory liability coverage requirement for motor vehicles; however, excluded from the definition of "motor vehicle" are private passenger automobiles, various recreational vehicles not customarily used in the occupation, profession or business of the insured, and various vehicles owned by a farm family and used in the business of farming or ranching. The obvious and intended effect of this exclusion is to retain compulsory liability insurance coverage for commercial vehicles.

⁷⁹ See NEW JERSEY DEPARTMENT OF INSURANCE, AN ASSESSMENT OF THE NEW JERSEY NO-FAULT AUTOMOBILE REFORMATION ACT 7 (December 1982):

A comparison of private passenger motor vehicles registered . . . with the number of insured car years confirms that there is an uninsured vehicle problem. Based on the latest available data in 1980 when there were 3,994,117 private passenger motor vehicles registered the insured exposure units in terms of car years totaled only 3,454,795, a difference of 539,196 units or 13 percent.

Id. The number of Notices of Intention to Make Claims against the Unsatisfied Claim and Judgment Fund, which increased by 84 percent between 1976 and 1982, also evidences the growing number of uninsured vehicles on New Jersey roads. *Id.* at 5.

⁸⁰ See *AISC Report*, *supra* note 31, at xiii.

⁸¹ See *supra* note 79.

carry liability insurance would be required to pay an annual \$100 fee to the Unsatisfied Claim and Judgment Fund.⁸² This fund pays for damages and injuries to victims of accidents involving uninsured and hit-and-run motorists. Furthermore, the bill specifies that any motorist who chooses not to carry liability insurance, and who is subsequently involved in an accident in which he or she is at fault, would lose his or her license until all claims against the individual are satisfied.⁸³ Such drivers also would have to purchase liability insurance to insure against further accidents before a new license would be issued.⁸⁴ Finally, the proposal gives insureds the option to purchase coverage to insure oneself against the underinsured or uninsured driver.⁸⁵

People should not be forced to pay twice for what they already have. Why should the elderly, who are adequately covered by Medicare, be forced to buy Personal Injury Protection Coverage? This is double coverage and double expense. Furthermore, today more than 90 percent of all Americans have other insurance or benefits that pay medical expenses immediately, and more than 80 percent of all employed Americans have a wage continuation plan. This proposal would give consumers the freedom to choose the types and amounts of coverages they need and can afford.

The measure also would have an obvious salutary effect upon competition in the New Jersey insurance market, dormant since the day that insurers, agents, and brokers were statutorily relieved of the

⁸² A. 3743, § 28, 200th N.J. Leg., 2d Sess. (1983) ("A person registering a motor vehicle on or after the operative date of this Act, without liability insurance coverage in the [required minimum] amounts . . . shall, in addition to any other fees required by law, pay to the Division of Motor Vehicles a fee of \$100 at the time of registration of the motor vehicle.").

⁸³ *Id.* § 13.

⁸⁴ *Id.* Proof of financial responsibility would consist of providing proof of a policy insuring against liability

imposed by law for bodily injury, death, and property damage sustained by a person arising out of the ownership, maintenance, operation or use of a motor vehicle of at least \$15,000 exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident, and \$30,000, exclusive of interest and costs, on account of injury to, or death of, more than one person, in any one accident and \$5,000, exclusive of interest and costs, for damage to property in any one accident; and (b) coverage for protection against uninsured motorists. . . .

Id. § 20.

⁸⁵ *Id.* § 7.

duty to compete for the motorists' premium dollars. New Jersey would at last become a buyer's market.

To date, the Legislature has initiated, and the Governor has approved, major reform to the automobile insurance system. In addition to the financial disclosure and arbitration laws, there now exists an anti-fraud insurance bureau,⁸⁶ a requirement that automobile repair facilities be licensed by the Department of Insurance,⁸⁷ higher deductibles for automobile property damage insurance,⁸⁸ more equitable rating procedures for all insureds, a new underwriting association which replaced the assigned risk plan for hard to insure drivers,⁸⁹ and more options under the no-fault law to reduce premiums.⁹⁰ Although the cumulative effect of these reforms is the chance for greater premium savings than previously existed, the author's proposal offers the greatest potential for cost reduction, and remains the most efficient reform.

Conclusion

President Woodrow Wilson championed state governments, and felt that they were truly the "laboratories of democracy." No-fault automobile insurance began in those laboratories. Over a decade ago, New Jersey and 14 other states took the lead in experimenting with no-fault automobile insurance. Those experimental efforts are praiseworthy for their courage, but the findings are conclusive: the well-intentioned, but misguided experiment in no-fault insurance is a failure, and a luxury that New Jersey motorists can no longer afford.

The proposal which the author advocates would offer the New Jersey motorist what he or she wants at a price that he or she can afford. Good drivers would no longer be burdened with the costs of poor drivers. The elderly on Medicare would no longer be forced to buy coverage that they already have. The driving public would no

⁸⁶ The New Jersey Insurance Fraud Prevention Act, ch. 320, 1983 N.J. Sess. Law Serv. 1748-60 (West) (to be codified at N.J. STAT. ANN. §§ 17:33A-1 to -14).

⁸⁷ Act of Oct. 4, 1983, ch. 360, 1983 N.J. Sess. Law Serv. 2024-26 (West) (to be codified at N.J. STAT. ANN. § 39:13-1 to -7).

⁸⁸ Act of Oct. 4, 1983, ch. 359, 1983 N.J. Sess. Law Serv. 2023 (West) (amending N.J. STAT. ANN. § 17:29-39).

⁸⁹ New Jersey Automobile Insurance Reform Act of 1982, ch. 65, 1983 N.J. Sess. Law Serv. 386-427 (West) (revising certain parts of title 17 (Corporations, Finance, and Insurance) of the New Jersey Statutes).

⁹⁰ 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).

longer be forced by the state to purchase what it already has and/or does not need. Substantial cost reduction is what is needed, and that is precisely what would be accomplished by this legislation.

No-fault is an idea whose time has come and gone. It is time to go forward to true reform, and to re-establish a free marketplace where the consumer can choose what he or she wants and needs. The state should not mandate that consumers buy a deluxe insurance package. A consumer should be allowed to choose, from a competitive industry, what is best suited for his or her situation and needs. No more no-fault. No-fault no more.