Choosing The Best Auto Insurance Choice System

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I. INTRODUCTION

In 1986, Professor Jeffrey O'Connell and I recommended giving motorists a choice between fault and no-fault insurance.[1] We saw advantages in allowing individual motorists to choose either (1) insurance that pays for a tort lawsuit remedy, or (2) insurance that pays for a contract no-lawsuit remedy:

> [A choice system] will permit consumers to decide . . . for themselves [what kind of auto insurance they want] rather than surrendering the decision to politicians in the state legislature. Those who prefer traditional insurance and who value the right to sue can purchase traditional liability insurance, and those who desire coverage providing timely compensation without resort to a lawsuit can purchase no-fault insurance. The proposal will enhance efficiency by expanding the range of consumer choice and by creating competition between two systems in the marketplace.[2]

We developed a system in our article[3] which we said would permit consumers to decide for themselves whether they wanted to purchase tort liability insurance or contract no-fault insurance. The system

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1. O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986).

2. *Id.* at 89.

3. The motivation to develop such a system came in part from the following federal government recommendation: "In the opinion of the Department, additional voluntary or choice systems deserve to be developed and tried." U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 124 (1985).

would accommodate the simultaneous use of both kinds of auto insurance and would, therefore, be workable. It would allow tort liability (a third party remedy) to co-exist with contract no-fault compensation[4] (a first party remedy). The key to its workability was a new form of supplemental insurance that would be made a part of each liability policy, and that would "connect" the third party and the first party systems, making the two kinds of insurance compatible, and assuring that each was priced competitively. Each person covered by insurance under either system (an "insured") would be compensated from the financial resources of that system alone.[5]

At the time, only one state, Kentucky, had enacted an auto insurance law under which motorists could choose for themselves whether they wanted to be covered by no-fault insurance or by tort liability insurance. Since the article was published, choice in auto insurance laws have been enacted in two additional states: New Jersey and Pennsylvania. In 1988, New Jersey enacted amendments to its auto insurance law that gave motorists a choice between a full lawsuit system and a no-lawsuit (except for serious injuries) system.[6] In 1990, Pennsylvania enacted a law that gives all motorists a choice, effective July 1, 1990, between a limited tort option and a full tort option.[7]

There has been a significant amount of recent legislative activity in other states as well. In 1989, bills permitting choice in auto insurance were introduced in the legislatures of seven other states: Ari-

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4. In this article, the terms "no-lawsuit," "no-fault," and "compensation" are all used to designate an insurance system that compensates accident victims without a lawsuit and without regard to fault. The term preferred by the author to designate such a system is "compensation" because that term is better known in all fifty states and more accurate. All fifty states have laws with respect to industrial accidents that compensate victims without a lawsuit and without regard to fault. They are uniformly called workmen's or worker's compensation laws, rather than workmen's or worker's no-fault laws. Less than half the states have such laws with respect to automobile accidents. The term "no-fault" is less accurate than the term "compensation" because it suggests that a person who is at fault will not be sanctioned. This suggestion is incorrect since most insurers increase the premiums charged motorists (and employers) who are at fault in causing or contributing to an accident.

5. The liability insured would recover only from the pool of money created by the collection of premiums from liability insureds, and the no-fault compensation insured would recover benefits only from the pool created by the collection of premiums from no-fault compensation insureds. The liability insured would recover full (economic and noneconomic loss) damages (1) from another liability insured upon proof that such person was at fault and responsible for his or her injury or (2) from the connector coverage under his or her own liability policy, upon proof that a no-fault compensation insured was at fault and responsible for the injury. The no-fault compensation insured would recover economic loss damages from his or her own insurer without having to prove fault.

6. For details of the New Jersey choice system, see *infra* text accompanying notes 38-40.

7. Act of Feb. 7, 1990, § 8 (adding 75 PA. CONS. STAT. §§ 1705(a)(1), 1791.1(b)).

zona,[8] California,[9] Delaware,[10] Hawaii,[11] Maryland,[12] Nevada,[13] and Washington.[14] Many of these states, and one Canadian province,[15] took significant action on the concept of choice in auto insurance. A bill with choice elements passed one House of the California Legislature, and a choice bill was reported out of committee in Nevada. Hearings were held on choice bills in at least two additional states (Arizona and Maryland).

In 1988 and 1989, articles about choice in auto insurance appeared in several nationwide publications,[16] and choice was the subject of numerous meetings and conferences. A new nationwide consumer organization, Project New Start, formed to promote consumer choice in auto insurance. One industry trade association was so moved by all the activity that it issued a bulletin entitled *No-Fault Reborn*.[17]

The concept of choice in auto insurance is simple. Give individual motorists the right to choose for themselves whether they want liability or compensation insurance. Make government surrender in part its right to decree the kind of insurance motorists must have. Make sure there will be no unfair advantages, windfalls, or burdens to any consumer, regardless of the choice he or she makes.

The auto insurance system today is widely perceived as rigid and overly expensive; it appears to be highly unpopular; and state legisla-

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8. Amendments of H.B. 2059, 1989 Sess. (Ariz. 1989).
9. A.B. 744, 1989-90 Sess. (Cal. 1989); A.B. 2315, 1989-90 Sess. (Cal. 1989); S.B. 1232, 1989-90 Sess. (Cal. 1989).
10. H.B. 206, 135th Sess. (Del. 1989).
11. S.B. 214, 1989 Sess. (Haw. 1989).
12. H.B. 1434, 1989 Sess. (Md. 1989).
13. S.B. 520, 1989 Sess. (Nev. 1989).
14. H.B. 2218, 1989 Sess. (Wash. 1989).
15. Choice in auto insurance was the subject of hearings and reports by a special commission and by the Automobile Rating Board of the Province of Ontario, Canada. The Provincial Government decided to recommend to Parliament that Ontario shift from an add-on mandatory no-fault system to a no-lawsuit (except for death or serious and permanent injury) mandatory no-fault system. The government rejected choice because it did not have a working model bill and because, even if it had such a bill, it believed it would take longer to implement a choice system than a traditional threshold system.
16. *E.g.*, Paulson, *The Compelling Case for No-Fault Insurance*, CHANGING TIMES, July 1989, at 49; Quinn, *Car Drivers in Revolt*, NEWSWEEK, Feb. 13, 1989, at 55; Sloane, *Car Insurance: Two Choices*, N.Y. Times, Apr. 1, 1989, at 52, col. 1; Passell, *Selling No-Fault Insurance*, N.Y. Times, Nov. 23, 1988, at D2, col. 1.
17. "Despite the fact that virtually no state has permanently enacted a new auto no-fault law since the mid-1970s, the concept has experienced a rebirth in legislative, industry, and academic circles. The concept of 'optional no-fault' or 'freedom of choice' has also surfaced." ALLIANCE OF AMERICAN INSURERS, BULLETIN TO CHIEF EXECUTIVES, BULLETIN NO. 89-35 (July 21, 1989).

tures and governors have not been able to change it enough to win public approval. If consumers of auto insurance could choose (and reject) insurance service products the same way they choose (and reject) automobiles, stereos, and other consumer products, auto insurance might be less expensive and consumers might be more satisfied.[18] Making consumer choice available as to auto insurance, by permitting individuals to give up the right to litigate in tort in return for lower insurance premiums, might also lead to the United States becoming less of a "litigious society."[19]

The right to choose the type of auto insurance would be of special benefit to the urban poor because, for them, liability insurance, the only kind of insurance available in more than one-half the states, is never a good value. It charges poor drivers a higher percentage of their annual income than it does middle-class and wealthy drivers,

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18. There has also been opposition to the idea of choice. Professor George Priest of the Yale Law School, for example, opposes choice on the ground that accident-prone drivers would be induced, under a choice system, to select the no-fault choice rather than the fault choice because rates under the no-fault system would be lower.

> [N]o-fault coverage is likely to be preferred by drivers that are relatively more claims- or accident-prone. In contrast, fault coverage is likely to be preferred by drivers that are relatively less likely to have negligence claims filed against them. Though the vast majority of drivers may be ignorant of their claims proclivity . . ., the systematic preference for specific insurance coverage by some conscious few will skew the respective no-fault and fault insurance pools.

G. Priest, Allowing Drivers a Choice Between No-Fault and Fault-Based Auto Insurance: An Analytical Critique 6 (Nov. 17, 1988) (unpublished manuscript). Priest also said:

> [D]rivers that are relatively more accident-prone in general, as well as those relatively more likely to inflict injury on others, will systematically prefer no-fault to fault-based insurance. Drivers conscious of their greater accident proclivity at the time the choice option is introduced will choose no-fault immediately. . . . All drivers with greater than average accident proclivity will face lower expected auto insurance premiums in the no-fault insurance pool.

Id. at 28. Professor Priest offers no evidence in support of his predictions as to marketplace behavior and he does not show (or even allege) that selection by poor drivers of the lowest cost auto insurance system would increase the number of auto accidents or otherwise be contrary to public policy.

Other arguments against choice in auto insurance are set forth in this symposium: see Carr, *Giving Motorists a Choice Between Fault and No-Fault Insurance: An Economic Critique*, 26 SAN DIEGO L. REV. 1087 (1989); Little, *Reducing Noneconomic Damages by Trick*, 26 SAN DIEGO L. REV. 1017 (1989). The negative consequences of choice predicted by Professors Priest, Carr, and Little have not been observed in the two jurisdictions that have actually enacted and implemented auto insurance choice systems, Kentucky and New Jersey. The absence of empirical verification of the predictions of the opponents of choice, in the jurisdictions that have implemented consumer choice mechanisms, makes me doubt, as to the choice mechanisms in these jurisdictions, whether the theoretical objections of the professors are valid.

19. American litigiousness has an impact on many aspects of national life, including, perhaps, on American international competitiveness. There are now more graduates from law school each year in the United States than the total number of lawyers in Japan. There are 365 people for each lawyer in the United States, whereas there are approximately 1,250 to 1,500 people per lawyer in the countries of Western Europe. Between 1967 and 1983, the number of lawyers in the United States more than doubled. *See generally* Silber, *The Litigious Society*, in STRAIGHT SHOOTING 212-42 (1989).

and it does not give them anything they need if they are injured in an accident. Liability insurance pays amounts a policyholder is liable to pay another, but it does not, unlike health insurance or fire insurance, pay the policyholder anything. Well-to-do people need liability insurance because it protects them from the risk of losing their property if they cause a loss while they are at fault. Poor people do not need it, because they do not own property that can be attached and taken. What they need, which liability insurance does not provide, is money to replace their own lost wages, and money to pay their own hospital and medical bills.

The government, in thirty-nine of the fifty states, requires everyone to buy liability insurance as a condition of operating a motor vehicle.[20] Most of the laws are relatively easy to evade,[21] and thus, it is not surprising that many motorists are not complying with these laws.

Since liability insurance is of little personal value to a motorist who does not own substantial property, it would be good public policy to allow motorists to choose an alternate type of motor vehicle insurance that does have value to them. Allowing motorists to choose a type of insurance that has value to them would probably increase the rate of voluntary compliance with the compulsory insurance laws.[22]

Although there is growing interest in the concept of choice in auto insurance, for the foregoing reasons, no consensus has developed yet

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20. The following states, plus the District of Columbia, had compulsory liability insurance laws as of January 1989: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming.

21. For example, a motorist can present the motor vehicle department with a receipt showing that he or she paid the first installment on an automobile insurance policy, as proof of compliance with the insurance requirement. After the car is registered, the owner can cancel that policy or default on further premium payments under it. The motor vehicle department may get a notice of cancellation from the insurance company, but it is unlikely, because of lack of resources, to investigate and commence proceedings against that owner. The motor vehicle department will probably not be involved with this motorist until the next time his or her automobile is required to be registered.

22. There are other ways to encourage voluntary compliance with the compulsory insurance laws. If the owner of a motor vehicle who is required to maintain insurance fails to do so, that owner should be prohibited from claiming against or suing any other person in tort, and he or she should be prohibited from collecting either tort/liability insurance damages or automobile compensation insurance benefits. One reason for the high cost of auto insurance today may be that there are a large number of motor vehicle owners who collect judgments but never pay premiums.

as to the best mechanism to use to assure that consumers can make an informed and rational choice, and to guarantee them a real chance to reduce their auto insurance bills. The next section of this Article is devoted to examining eight different possible choice mechanisms. The final section of this Article will summarize the issues and problems that ought to be addressed in any choice law.

II. Choosing Among Alternative Choice Systems

A. Choosing Tort Insurance or Compensation Insurance: OJ Choice

Professor O'Connell and I developed a choice mechanism that we believed would be fair to all consumers, give consumers an opportunity to reduce their rates, and be acceptable to motorists and their legislators.[23] The O'Connell-Joost Plan (OJ choice) provided that each owner of a motor vehicle would be free to choose whether to buy fault insurance or no-fault insurance. If he or she chose no-fault insurance (contract compensation insurance) the owner, any resident member of his or her family, and any occupant of the owner's car (a compensation insured) would be compensated for their medical expenses, any wage losses, and any other economic loss resulting from a motor vehicle accident. Each compensation insured would be compensated for his or her economic loss up to the limits set forth in the insurance policy. The compensation insured would not, however, be able to sue the person who caused the accident, nor would he or she be able to obtain any tort damages from that person or that person's insurance company. Furthermore, the compensation insured would not be able to obtain any money under any auto insurance policy for noneconomic losses such as "pain and suffering."

If, on the other hand, the owner of a motor vehicle chose fault insurance (tort insurance), tort liability and tort damage rules would apply. If such owner, any resident member of his or her family, or any occupant of his or her car (a tort insured) could prove that he or she was injured in a motor vehicle accident as a result of the fault of another person, they could recover their medical expenses and any other economic loss and, in addition, a sum for their pain and suffering and other noneconomic loss. If a tort insured were sued by an eligible litigant who alleged that the tort insured's fault caused an injury, the tort insured would be defended by his or her own insurance company. That insurance company would be obligated to pay any lawful claims against him or her, up to the dollar limits of the policy.

Under OJ choice, each victim of a motor vehicle accident would

23. O'Connell & Joost, *supra* note 1, at 77.

receive the same measure of damages/benefits that he or she would under either a mandatory tort/liability system or a mandatory no-fault/compensation system, depending upon which system he or she chooses. There is, however, one procedural difference. This difference occurs when the accident involves a person who is a tort insured *and* a person who is a compensation insured. Under OJ choice, the accident victim who is a tort insured cannot claim against and sue a compensation insured. The victim must file his or her claim against his or her own insurance company. The victim would recover, under the connector insurance policy which would be part of each tort insurance package, exactly the same elements of damage, under the same conditions and the same or more money[24] as he or she would have obtained under the tort system today. The recovery, however, would be from the victim's own insurance company.

The mechanism of connector insurance was deemed necessary to avoid giving the tort insured an undeserved windfall at the expense of the compensation insured. If a compensation insured could be sued by a tort insured, the compensation insured who had attachable assets would have to buy tort insurance, in addition to compensation insurance, and his total insurance premiums would therefore be larger. At the same time, the premiums paid by a tort insured would be smaller, because the tort insured would be immune from a lawsuit by a compensation insured, because compensation insureds cannot bring lawsuits. Connector insurance eliminates this unfairness by providing that a tort insured will recover tort damages from his or her own company, if the at-fault party is a no-fault compensation insured. Connector insurance assures that the tort insured's premiums will not be unfairly reduced and that the compensation insured's premiums will not be unfairly increased.

Bills based on the OJ choice model were introduced in a number of states in 1989. None were enacted. Although other reasons can be given to explain this failure,[25] the requirement that a tort insured

24. A 1984 study of compensation paid to uninsured motorists found that accident victims were recovering about 10% more money under uninsured motorist insurance, from their own insurers, than they were recovering under liability insurance from the at-fault driver's insurer. ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, UNINSURED MOTORIST FACTS & FIGURES INSURANCE (1984). Since connector insurance is very similar to uninsured motorist insurance, the victim who recovers tort damages under it may also recover more money than he or she would have recovered from another motorist's insurance policy.

25. Choice in auto insurance is a new concept; state legislative sessions are too short to make enactment of any new proposal likely the first time it is considered; and vigorous opposition by a strong special interest prompts legislators to be cautious.

always recover damages from his or her own insurer may be partly to blame. If a victim is injured by a compensation insured who was at fault, it seems unfair to make that victim file a claim with his or her own insurance company and risk being surcharged on the basis of accident involvement. Why require accident victims to seek tort damages from their own insurance companies when their injuries are caused by the fault of someone else?

A consumer group study conducted in August 1989 on the "Freedom of Choice" concept[26] showed distrust of insurance companies:

> One aspect of the Freedom of Choice idea that "did not compute" with people was the idea that if one chooses tort, but is hit by an at-fault driver, one can still collect for pain and suffering *from one's own* company. "You mean we sue our own company. Then we'd be dropped."[27]

It would be a mistake to draw too many inferences from this limited study, but it would also be a mistake to ignore it, in light of other evidence of widespread distrust of insurance companies. For example, in the November 1988 California election, an auto insurance initiative labeled as the "all industry initiative" received less than one vote out of every three cast.

The OJ choice model could be changed to respond to this public concern. Each owner of a motor vehicle could be given a choice which does not involve choosing between receiving compensation benefits from his own insurance company or tort damages from his or her own insurance company (if the at-fault driver is covered by no-fault insurance). It is not necessary to require a person to choose between alternatives, each of which might require accident victims to file some or all claims with their own insurers.[28] To avoid giving tort insureds a windfall, an auto insurance risk exchange would be established to moderate or eliminate both overpayment and windfall.[29]

Alternatively, the OJ choice model could be changed by establishing a government fund to pay all of the valid claims that tort insureds have against people who cannot be sued, instead of requiring

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26. Participants in the focus groups were selected at random from a pool of people each of whom was the major financial decisionmaker for his or her family and held a valid driver's license. Prior to the interviews, the participants were not told the topic of the discussion. The leading insurer who sponsored them was never identified. State Farm Insurance Companies, Research Department, Consumer Focus Groups on the Freedom of Choice Concept (Aug. 1989) [hereinafter Consumer Focus].

27. *Id.* at 3 (emphasis added).

28. An auto insurance choice bill should include provisions that prohibit the practices that have given rise to distrust of insurance companies. It should include: (1) a provision that makes it clear that a consumer cannot be punished (surcharged, canceled, or denied renewal) merely for making a claim against his own insurance company; and (2) a provision that requires an insurance company to pay treble damages and attorneys' fees and to reinstate a policy if the company is found to have violated clause (1).

29. For a discussion of the risk exchange concept, see *infra* note 46 and accompanying text.

tort insureds to sue their own insurance companies to recover such amounts. One consultant has suggested that "the premium that the selector of the tort system pays for [tort liability] coverage [could be] paid into a state fund by the carriers [less acquisition costs]."[30] Claimants in tort who are entitled to receive money against compensation tortfeasors could then be paid the amount of those claims from that state fund. "Those people who choose the tort system would not have to sue their own carrier; they would make claims against the State managed fund established for just that purpose."[31]

B. Choosing To Reject Compensation Benefits and Choosing to Sue to Recover Tort Damages: The Lawsuit Choice

The system described in the caption to this section has been in effect in Kentucky since 1975.[32] Every motorist in that state is required to buy compensation insurance, unless he affirmatively rejects the compensation system. Every motorist has the right to reject the compensation system and choose instead the right to sue in tort, provided he or she maintains tort liability insurance for the protection of others. The key to the Kentucky choice law is the following provision:

> Any person may refuse to consent to the limitations of his tort rights and liabilities as contained in this section. Such rejection must be in writing in a form to be prescribed by the department of insurance and must have been executed and filed with the department at a time prior to any motor vehicle accident for which such rejection is to apply. . . .[33]

The mechanism of the Kentucky choice law is the same as that of the Arizona Worker's Compensation Law.[34] The Arizona industrial accident law, which was enacted in 1925 and has been in effect for far more than half a century, sets up a choice system. It provides for the payment of compensation benefits to all injured workers in Arizona, providing that "it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law."[35] An Arizona worker, in other words, has the right, prior to injuries, to choose whether to sue his employer in an action for negli-

30. Letter from Eric S. Tachau to Robert H. Joost (Nov. 2, 1989) [hereinafter Tachau Letter].
31. *Id.*
32. KY. REV. STAT. ANN. §§ 304.39-010 to 304.39-340 (Baldwin 1987).
33. *Id.* at 304.39-060(4).
34. ARIZ. REV. STAT. ANN. §§ 23-901-1091 (1983).
35. ARIZ. REV. STAT. ANN. §§ 23-906(A) (1983).

gence or to accept compensation benefits. If the worker elects to sue, he "takes his chances," in the words of the Supreme Court of Arizona, "of whether he will recover" at all, but if he does recover, his damage award will include "the element of pain and suffering [as determined by] the sound discretion of the jury."[36] If he accepts compensation benefits, he will obtain benefits, but the amount of the benefits will be limited. If he elects to sue, he has the "burden of proving negligence on the part of the employer," but his damage award will not be limited, if he wins, to schedule amounts or formulas, and there will be no limitation, based on the amount that an Industrial Commission might award, on the amount of his recovery.[37]

This choice approach has worked well for a great many years, in both Kentucky and Arizona. It has never been repealed, significantly amended, or the subject of major amendment efforts. Neither state has declared it unconstitutional, in whole or part. Virtually everyone, in both states, chooses to remain in the compensation system, which means there is no need to create a special mechanism to assure the equitable reallocation of premium dollars.

C. Choosing to Reject the Right to Sue and Choosing to Obtain Compensation Benefits: The No-Lawsuit Choice

The No-Lawsuit Choice system is the opposite of the Lawsuit Choice system. Under this system, every motorist would be entitled to reject the right to sue another person in tort, provided he or she chose to maintain a policy of compensation insurance.

New Jersey has come close to putting this system into effect. All New Jersey motorists are required to maintain a policy of tort liability insurance and a policy of compensation insurance that provides for payment of unlimited medical expenses in case of accident. As of January 1, 1989, they have been allowed to choose (1) to sue any alleged wrongdoer for injury resulting from a motor vehicle accident, or (2) to sue any alleged wrongdoer for injury resulting from a motor vehicle accident only if the injury:

> [R]esults in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.[38]

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36. Myers v. Rollette, 103 Ariz. 225, 233, 439 P.2d 497, 502-503 (1968).
37. *Id.*
38. N.J. STAT. ANN. 39:6A-8.a (West Supp. 1989). This language was taken ver-

If New Jersey motorists choose the second alternative (limited right to sue), they will not be able to obtain tort damages unless their injury fits within the description quoted above. They also will not have to pay as much for their auto insurance. Data for one town in New Jersey, for the first year of operation of this law, indicates that motorists who choose to give up suing in nonserious injury cases pay 23.8% less in premiums for the personal injury portion of their motor vehicle insurance.[39]

New Jersey had a form of tort choice law before this one. In 1983, the state amended its mandatory compensation law to give policyholders a choice between medical expense thresholds of $200 or $1,500 (plus inflation adjustment). An accident victim could bring a tort claim only if his or her medical expenses exceeded the threshold amount that he or she had chosen.[40] The 1988 law substituted more meaningful choices, but it did not allow New Jersey motorists to choose between tort recovery or compensation recovery.

On February 7, 1990 the Governor of Pennsylvania signed a no-lawsuit choice proposal into law. The new Pennsylvania law will give all motorists, effective July 1, 1990, a choice between a limited tort option and a full tort option.[41] A limited tort insured who is injured in an accident can "seek recovery for all medical and other out-of pocket expenses, but not for pain and suffering unless the injuries fall within the definition of 'serious injury' [or another defined exception]."[42]

Every motor vehicle liability insurance policy in Pennsylvania shall include compensation coverage for "required benefits" for up to $5,000 for medical expenses for each accident victim.[43] Each insurer must, in addition, make available for purchase up to $100,000 for medical benefits and up to more than one million dollars for ex-

batim from the New York auto insurance law. *See* N.Y. INS. LAW § 5102(d) (McKinney 1985).

39. The insurance premium for the average married couple in Red Bank, New Jersey was $502 for liability and $36 for uninsured motorist insurance if they chose the right to sue. The premium was $378 for liability and $32 for uninsured motorist if they chose to give up the right to sue in most cases. *See* Sloane, *Car Insurance: Two Choices*, N.Y. Times, Apr. 1, 1989, at 52, col. 1. Unfortunately, most of the New Jersey premium savings resulting from choice were offset by additional surcharges which were imposed on all policyholders for the benefit of the Joint Underwriting Association. Telephone interview with representative of Traveler's Insurance Co. (Oct. 24, 1989).

40. *See* N.J. STAT. ANN. §§ 39:6a-1 to -35 (West Supp. 1985).

41. Act of Feb. 7, 1990, § 8 (adding 75 PA. CONS. STAT. §§ 1705(a)(1), 1791.1(b)).

42. *Id.* (amending 75 PA. CONS. STAT. §§ 1705(a)(1)A, 1791.1(b)A).

43. *Id.* (amending 75 PA. CONS. STAT. § 1711(a)).

traordinary medical benefits. (New Jersey law, by contrast, requires each motorist to maintain coverage for unlimited required benefits for reasonable medical and rehabilitation expenses.)[44]

The far lower required compensation limits under the Pennsylvania law probably mean that there will be a significant number of lawsuits in Pennsylvania for uncompensated economic loss. The litigants in these lawsuits, who have elected the limited tort option, will not be eligible for pain and suffering (noneconomic loss) damages, but there is no mechanism to prevent a sympathetic jury from including an uncharacterized additional amount in a verdict for excess economic losses. The $5,000 Pennsylvania compensation benefit is, in fact, so low, when one considers the cost of hospital rooms and high technology medical tests, treatments, and therapies, that the number of lawsuits in Pennsylvania may not decline significantly under the new choice law. There is certainly no evidence to sustain the legislature in requiring insurers to reduce the premiums of all insureds who elect the limited tort option twelve percent more than the required premium reductions for full tort insureds.[45]

Existing New Jersey and Pennsylvania laws require all motorists to maintain *both* no-fault compensation insurance and tort liability insurance. The same right to choose to reject the right to sue others could be given to motorists in a state that only requires tort liability insurance, provided they voluntarily commit themselves to maintain compensation insurance.

Every motorist in a mandatory liability insurance state is already subject to an obligation to buy a tort/liability insurance policy. Each motorist in such a state would, under the system proposed in this section, be entitled to waive the right to sue others in tort if he bought the amount of insurance required by that state in the form of compensation insurance. Consideration has not yet been given by any legislature to granting such authority to the motorists in any tort/liability state, but it could easily be done.

The following provision, or its equivalent, should be at the heart of a law allowing motorists to choose by rejecting the right-to-sue law in a tort state:

> Each person who maintains a compensation insurance policy subject to the limits required under this law, and who maintains a policy of compensation insurance in accordance with those limits, may select the lawsuit reduction option. Each person who selects, or who is bound by the selection of, a lawsuit reduction option is barred from filing a claim or maintaining a lawsuit in tort, up to the limits set forth in that option, against any other person for bodily injury, death, or property damage arising out of the ownership, maintenance, or use of a motor vehicle except for injuries resulting

44. N.J. STAT. ANN. § 39:6A-4 (West 1973 & Supp. 1989).
45. § 1799.7(b).

from, for example, intentional action, driving under the influence of alcohol or drugs, or product liability.

To ensure that the person who chooses to surrender the right to sue realizes the savings he deserves, the legislation should have a provision like that in the New Jersey statute, which creates and sets forth the powers of an "Automobile Insurance Risk Exchange."[46] The risk exchange would require all insurers in the state to reallocate premium income to reflect actual system costs. Consider the relative positions of two insurers in the absence of such a reallocation mechanism. The first insures *X*, who gives up the right to sue others in tort. *X*'s insurer will neither save any money because of that waiver, nor be able to lower the policyholder's premiums because it will still have to defend and pay any liability judgments against *X*. However, savings are enjoyed by the insurer of *Y*, another policyholder, whose negligence causes serious injury to *X*, because *Y* is immune from suit by *X*. A risk exchange would require *Y*'s insurer to reimburse *X*'s insurer, which could in turn lower *X*'s premiums.

The difficulty of creating a risk exchange and workable exchange rules should not be permitted to obfuscate the importance of creating a mechanism that will reward motorists who give up, in whole or in part, the right to sue: the reward being lower premiums.

D. Choice Limited to the Amount of Insurance Required by the State to Operate a Motor Vehicle: First Party Zone Choice

Each state in the United States requires each owner of a motor vehicle to maintain financial responsibility in an amount set by the state, or it requires each such owner to maintain a policy of insurance or self-insurance in an amount set by the state.

It would be a reasonable extension of the governmental policy underlying these laws to allow each owner of a motor vehicle to choose whether he or she wishes to be covered, up to the amount set by such

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46.
> There shall be created . . . the New Jersey Automobile Insurance Risk Exchange. . . . Every insurer licensed to transact private passenger automobile insurance in this State shall be a member of the exchange and shall be bound by the rule of the exchange as a condition of the authority to transact insurance business in this State. . . . The exchange shall be empowered to raise sufficient moneys (1) to pay its operating expenses, and (2) to compensate members of the exchange for claims paid for noneconomic loss, and associated claim adjustment expenses, which would not have been incurred had the tort limitation option . . . been elected by the injured party filing the claim for noneconomic loss . . . .

N.J. STAT. ANN. §§ 39:6A-21 to -22 (West Supp. 1989).

law, by compensation insurance or tort insurance. It would be a further reasonable extension to allow each motorist to pick, on the basis of personal experience, the comments of friends, or advertising, the insurance company that would be obligated under either policy.

The financial responsibility or compulsory coverage law of any state that wishes to offer choice on a first party zone basis should be amended to provide that a motorist can satisfy the provisions of the law by either:

(a) purchasing first party tort/liability insurance covering the owner of a vehicle, resident family members, occupants of the owner's car, and certain strangers, in the amounts specified in the existing state law; or

(b) purchasing first party personal injury and collision no-fault/compensation insurance for the owner of the vehicle, resident members of his family, occupants of his car, and any strangers injured by a named insured, in the amounts specified in the existing state law.

Above the zone (that is, above the amounts specified in existing state law), no insurance would be required. Individuals who own homes or other attachable assets would, of course, be free to buy above-the-zone tort/liability insurance.

E. Choice Limited to One Segment of the Market

Another variation of the choice theme calls for limiting the right to choose to one defined segment of the auto insurance market. It has been suggested that the choice system be adopted only with respect to low income drivers, only with respect to specified urban areas with many uninsured drivers, or only with respect to senior citizens.

To date, only one jurisdiction, California, has acted on legislation providing choice for only one segment of the population. The California Assembly, in June 1989, passed a bill that provided for choice throughout the state, but only for low income drivers.[47] This bill granted low income applicants[48] who are good drivers[49] and who are

47. A.B. 2315, 1989-90 Sess. (Cal. 1989). The choice element of the bill was later eliminated by the California Senate. The remainder of the bill was passed by the Senate on September 15, 1989. It was vetoed by the Governor on October 2, 1989.

48. The term was defined to mean a person who is "qualified for universal telephone service under . . . [Art. 8 commencing with section 871 of chapter 4 of part 1 of division 1 of] the California Public Utilities Code." *Id.* (proposed amendment to CAL. INS. CODE § 11605(d)). The relevance of this definition to motor vehicle insurance is difficult to determine.

49. A good driver was defined as one who had been licensed to drive the previous three years and who had never, during the preceding three years, been convicted of drunk driving, had more than one violation point, or been the driver of a motor vehicle that was involved, as a result of the driver's fault, in an accident involving bodily injury or more than $1,000 of property damage. *Id.* (proposed amendment to CAL. INS. CODE § 11605(c)).

unable to obtain insurance through the voluntary market the right to choose the kind of insurance they want.

California law required all motorists to satisfy the state's financial responsibility requirements: a tort insurance policy that pays for damages to others up to $15,000/$30,000 for bodily injury or death and up to $5,000 for damage to property other than a motor vehicle. Assembly Bill 2315 provided that an eligible driver could also satisfy the financial responsibility requirements by purchasing a compensation insurance policy[50] that provides benefits up to $15,000 for the policyholder and any other covered person for medical and rehabilitation treatment, loss of earnings from work, and certain other expenses.[51]

There were serious, but correctable, problems with Assembly Bill 2315. After the proposed program's first year, the premiums for one alternative would have been subsidized while the premiums for the other alternative would have been unsubsidized. Over time, the subsidized alternative would be significantly and artificially cheaper than the unsubsidized alternative. It would, therefore, probably be the choice that more and more low income drivers would make. The total cost of the subsidy, which would undoubtedly be paid by all Californians in the form of higher insurance costs or higher state debt, would probably grow from year to year.

The source of the lack of fairness was the proposed section 11609(c) of the California Insurance Code. Subdivision (a) would have provided that the initial maximum annual premium for a person eligible to choose a liability policy would be $220. Subdivision (b) would have provided that the initial maximum annual premium for a person eligible to choose a personal injury protection policy would be $180. Proposed subdivision (c) of that section then created the inequity, as follows: "(c) The rates prescribed by this section shall remain in effect until July 1, 1991, and thereafter shall be adjusted so as to be actuarially sound, *except that for that rate established by subdivision (a), no adjustment shall exceed that permitted*

50. It is termed a "personal injury protection" policy. *Id.* (proposed amendment to CAL. INS. CODE § 11605(f)).

51. Proposed section 11618.1 of the Insurance Code provided an additional $3,000 death benefit for the death of a person covered by a compensation policy, if the death arose out of the use or operation of a motor vehicle. *Id.* (proposed amendment to CAL. INS. CODE § 11618.1(a)(3)).

The Assembly-passed bill would have added a new section 16020.2 to the California Vehicle Code. According to this section, compensation insurance coverage "shall for all purposes satisfy the financial responsibility requirements. . . ." *Id.* (proposed amendment to CAL. INS. CODE § 16020.2).

by Section 11610."[52] Section 11610 did not require that future rates for the liability policy be "actuarially sound." It only authorized future rates for the liability policy to be adjusted to the amount necessary to avoid enormous losses pursuant to a complicated formula,[53] and "to reflect any inflation."[54]

The unfairness that would result from subsidizing one alternative but not the other is inconsistent with the idea of choice. Unless a choice system applies the same standards to each alternative, it should never be supported. Proposed sections 11609 and 11610 of the California bill could have been amended to make both choice alternatives "actuarially sound" or subsidized. All that was needed to make both policies unsubsidized was to delete the portions of section 11609(c) italicized above and minor changes in section 11610(b).[55]

Unfortunately, the California Senate chose to delete the entire choice mechanism from the bill, leaving only a compulsory subsidized liability insurance bill. The baby was thrown out, one might say, with the bathwater.

The choice provisions of Assembly Bill 2315 were removed by the California Senate, but the idea of limiting choice to a single segment of the market, such as a specified urban area or the poor, may occur again. The idea, as indicated, is interesting, provided the choice it offers is fair. Any such choice system will probably be confronted with one argument that will not be raised as to other choice models: the argument that it is unconstitutional as a denial of equal protection.

F. Choosing a Noneconomic Loss Benefit under Compensation Insurance: Pain and Suffering Choice

One of the features of no-fault compensation insurance which most troubles nonpartisan observers is that it denies an accident vic-

52. *Id.* (proposed amendment to CAL. INS. CODE § 11609(c)).

53. Rates can be increased if "the [initial] premium has resulted in an aggregate loss to insurers that exceeds the aggregate loss to insurers under the assigned-risk plan in 1989, by more than 40 percent of the savings realized by insurers in uninsured motorist loss costs for that years. . . ." *Id.* (proposed amendment to CAL. INS. CODE § 11610(b)). The California assigned risk plan deficit for 1989 is projected to be approximately $262 million, which means that the premium charged for a choice liability policy cannot be increased unless the loss to insurers exceeds that amount plus an additional percentage.

54. *Id.* (proposed amendment to CAL. INS. CODE § 11610(c)).

55. Specifically, "subdivision (a) of" would have to be deleted from section 11610(b) at two places. Alternatively, "for the rate established by subdivision (a)," could have been deleted from section 11609(c), and "subdivision (a) of" could have been deleted on two occasions from section 11610(b). Both choice alternatives would still be subsidized during the first year of the program, but that result may be unavoidable because there is no actuarial experience in California for a no-fault or compensation insurance policy.

tim any compensation for intangible or noneconomic losses. Pain and suffering, the term usually used for such losses, is undeniably real for an accident victim. It is also extremely difficult to quantify in dollar terms.

Any choice model could deal with this problem if it offered an insured a "pain and suffering" choice supplement. If the motorist who is injured in an accident caused by the fault of another chooses the tort option, he or she would, as a basic right, be eligible to recover a sum for pain and suffering, in addition to damages for economic loss. If the motorist chooses the compensation option, on the other hand, he or she could be given additional coverage for pain and suffering, in addition to the basic coverage for economic loss.

The worker's compensation statutes of each of the fifty states and the District of Columbia provide for additional benefits to victims who suffer from specified types of injury. State legislators, state insurance commissioners, and insurance companies could copy and apply these provisions with respect to auto accident victims who choose compensation insurance. If society is able to provide additional benefits for all industrial accident victims with specified types of injury, it could do the same for auto accident victims.

Alternatively, the compensation insured who is injured in a motor vehicle accident could be paid a lump-sum amount for his or her pain and suffering, calculated by multiplying the amount of his or her medical expenses by an arbitrary number. The advantage of the multiplication method is that it is easy to use and avoids any need for a commission, board, or court in case of disagreement. The disadvantage is that it could be unfair because some inexpensive-to-treat injuries are very painful. In addition, it would give persons who are treated by more expensive doctors and hospitals a higher amount for pain and suffering, and it might encourage victims to pursue unnecessary treatments.

The right to choose between (1) economic loss benefits plus noneconomic benefits, and (2) only economic loss benefits will be a meaningful choice for consumers only if it is offered in conjunction with one of the other choice models set forth in this article. Allowing motorists a choice *only* as to pain and suffering benefits, while permitting accident victims the unrestricted right to sue others in tort for any economic losses sustained in excess of required compensation benefits will not be a meaningful choice if the amount of required benefits is low. If the required benefits are low, most victims will be able to sue alleged tortfeasors. If most victims can file tort lawsuits,

most jury verdicts will probably include an unidentified amount for pain and suffering if the victim's plight was compelling and if plaintiff's counsel was persuasive. Since settlement amounts generally reflect jury awards, the total payout in no pain-and-suffering cases may be only slightly lower than the payout in full damages cases.

G. Choosing Tort or Compensation After an Accident

All of the choice mechanisms described in this article, so far, require the policyholder to decide *before* a motor vehicle accident which choice shall be operative, in the event of an accident. The policyholder must decide in advance, for example, whether he or she wishes to be compensated under tort liability rules or under compensation rules, in case of an accident, or whether he or she wishes to be able to bring a tort lawsuit in all cases or only in a few.

A different choice mechanism is proposed in another article in this symposium. It would not require a policyholder or other accident victim to choose until *after* an accident had occurred.[56] If a practical postaccident choice auto insurance policy could be developed, it would be free of the element of uncertainty which is inherent in any pre-accident choice system. No one knows, for example, until after an accident, which alternative would be the best for a victim of that accident.

> The liability option would pay relatively more money than the no-fault option if the accident victim involved is one who has suffered only moderate injuries, such as back sprain, whiplash, or fracture. Moderate injuries cause only limited medical expense and work loss, but they can cause a great deal of pain and suffering, compensable under liability insurance but not under no-fault insurance. . . .[On the other hand, the] no-fault option would assure relatively more money than the liability option to an accident victim who suffers very severe injuries such as a severing of the spinal cord or a serious brain concussion.[57]

The concept of postaccident choice deserves study.

H. Three Way Choice

Most suppliers of goods and services in the United States offer more than two basic choices to their customers. The home heating industry, for example, offers at least three choices: gas heat, electric heat, or oil heat.

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56. Brown, *A Choice of Choices: Adding Postaccident Choice to the Menu of No-Fault Models*, 26 SAN DIEGO L. REV. 1095 (1989). Postaccident choice could itself be made optional, as an additional choice alternative to pre-accident choice: "What about an option that allows the choice whether to make a claim under [c]ompensation or tort to be made after the injury occurs? Obviously, the premium is higher but why not? . . . The additional premium for this third choice should not be too great." Tachau Letter, *supra* note 30, at 3.

57. O'Connell & Joost, *supra* note 1, at 82-83.

The auto insurance industry should consider supporting a three way choice system also, if it can find three compatible alternatives[58] and a system that is both workable and in the public interest. In my opinion, a choice system (whether it offers two or three choices) is in the public interest if a consumer's choice of one authorized alternative will not give the insured an unfair advantage over, or measurably diminish, the benefits or increase the costs of, consumers who elect any of the other alternatives.[59]

A three-choice system that would be workable, involve compatible choices, and be in the public interest would be one that allowed each motorist to buy one of the following three options:

(1) "Current Law Option" would offer accident victims the same benefits as the law that was in effect in the state prior to the enactment of the choice law;

(2) "High Limits-Compensation Option" would provide the maximum possible personal injury insurance protection for each insured motorist and his or her family or guests.

(3) "Low Limits Compensation Option" provides "bare bones" personal injury insurance protection for each insured motorist, his or her family or guests, and costs less than any other option.

A person covered by the "Current Law Option" would receive substantially the same damages for similar injuries as he or she would receive under current tort law. The source for recovery might be different, but the standards for liability, measure of damages, and

58. Some incompatibility between alternatives is probably inherent in any auto insurance system that allows consumers to choose between liability and compensation options. A liability system is normally a third party system, and a first party system is normally incompatible with a third party system. Professor O'Connell and I, in 1986, converted the liability component in our choice proposal into inverse liability, except as to other persons with liability insurance. The conversion made the liability option in the system functionally compatible with the compensation or no-fault option inasmuch as inverse liability and compensation are both systems of first party insurance.

59. Allowing consumer choice as to a universally mandated service such as auto insurance is different from allowing choice as to an optional service such as gas, electric, or oil heat. The buyers of motor vehicle insurance are going to have an effect on each other whenever there is an accident, whereas the buyers of alternative heating systems will not. A choice system should not be authorized as to a mandated service when consumers of different choice alternatives will interact, unless the system is in the public interest. All of the alternative choice mechanisms set forth in this article, except the low income driver proposal in California, are, in my opinion, in the public interest. The California proposal is not because the low income driver who chooses its compensation option would have to pay extra to subsidize the low income driver who chooses its liability option. The liability chooser would thus be imposing a measurable burden on the compensation chooser. The likelihood of external costs and burdens seems to increase with the number of options available.

bottom line recovery would be the same. Victims covered by this option would be assured that they would receive payment for economic and noneconomic losses up to the amount required by the applicable state's financial responsibility or compulsory coverage auto insurance statute, if the injury was caused by the fault of another person. If the insured party's damages exceeded those limits, he or she could sue the wrongdoer personally, except that the settlement or verdict amount awarded or granted after such a lawsuit or settlement would be automatically reduced by the amount of the state's financial responsibility limits.[60]

Motorists who preferred not to be covered by the rules of current law would be able to choose between the "Low Limits Compensation Option" or the "High Limits Compensation Option." The former policy would charge the lowest possible premiums for bodily injury protection and would provide economic loss compensation benefits up to the per-victim/per-accident amount now required by the state's financial responsibility limits, including medical but not vocational rehabilitation. The latter policy would provide the most comprehensive protection and rehabilitation: economic loss compensation benefits up to $250,000 per victim, including vocational as well as medical rehabilitation benefits.

The option that would be in effect, under a three-way system, for individuals who failed to indicate a choice, should be the option selected by the owner of the motor vehicle that struck the injured person, or that was occupied by the injured person at the time of the accident, if such owner had selected an option. If the owner had motor vehicle insurance but had not indicated his or her choice, his or her policy choice should be deemed to be the option which the state's commissioner of insurance determines to be the cheapest.[61]

The three options would relate to each other as follows:

a) *High Limits Compensation*: The person covered by this option would recover up to $250,000, or more if optional extras were selected, but he or she could not sue any other driver in any case, unless the other driver was drunk or intentionally caused the injury. A person injured as a result of an auto accident involving this in-

60. Each state's financial responsibility limits would function as the deductible for its consumer choice auto insurance system.

61. To reduce the need to use these rules, insurance agents should be encouraged to obtain the names of each likely occupant of a motor vehicle owned or controlled by each client who elects the same choice option. Agents should be encouraged to issue "master" policies and renewal notices for households in which the occupants select different options. The name of each person insured under a particular option should be written on the policy and on each renewal notice. Agents should record the choices, but they should never seek to influence them. If individuals have questions or want advice on what is the best option for them, agents should send them a brochure prepared by the commissioner of insurance, or direct them to call the state insurance department, so that there will be statewide uniformity as to standards for choice.

sured could sue him or her in tort, but the amount of the recovery would be automatically reduced by the amount of the deductible. An injured person could sue at any time without a deductible being applied if he or she could show that this insured was driving drunk or had intentionally caused the injury.

b) *Low Limits Compensation Option*: The person covered by this option would recover up to $25,000 in economic loss benefits. He or she could maintain a lawsuit in tort against any driver who caused the injury, subject to the deductible. This insured could be sued in tort under the same circumstances as the insured who was covered by the "High Limits Compensation Option."

c) *Current Law Option*: The person covered by this option would recover up to the amount of the state's financial responsibility limits, or applicable policy limits if higher, if the person who caused the injury was insured under the "Current Law Option" and if the injury was proximately caused by the fault of that person. Alternatively, if the person who caused the accident and injury is not insured under the same option as the victim, the victim would recover from his or her own insurer, if he or she can show that the injury was proximately caused by the fault of a specified other person. An insured under the "Current Law Option" would, as a practical matter, be immune from suit in tort by an "Low Limits Compensation" insured up to the amount of the deductible. He or she would also be immune from suit in tort by a "High Limits Compensation" insured at any time, unless he or she was driving drunk or intentionally caused the injury.

Allowing a three-way, rather than a two-way, choice would increase the authority of the individual motorist and decrease the authority of the government. It would offer the consumer more freedom than a two-way choice.

A two-way choice system allows the motorist to reject the compensation and insurance system which is currently in effect in his state, but it forces that person to buy whatever else the state government has authorized. A three-way choice system, by contrast, allows the consumer who rejects the current system to determine for herself what coverage she will buy, and she will have a choice between two alternatives. In the proposal set forth in this section, the consumer who rejects current law can decide for herself whether she wants to pay the lowest possible price for auto insurance, or whether she wants the greatest possible protection in case of accident, regardless of cost.

III. Key Ingredients in Any Choice System

There are a number of issues or problems which should be addressed in any choice bill, regardless of which mechanism is used to provide choice to the consumer. Complete answers have not yet been found for all of these questions, but I think it will be helpful to set forth the following problems and suggested answers, even if the answers are incomplete, in hopes that others may find better solutions.

A. Establishing a Workable Relationship Between the Components

There must be a harmonious relationship between each option in an auto insurance choice system. Assuring that no system is unfairly prejudiced by the available choices and assuring that no system enjoys a windfall, may require that each tort insurance policy include a connector or inverse liability insurance policy so that the tort insured will not enjoy an unfair benefit at the expense of the compensation insured. Alternatively, fairness may require that a state establish a premium reallocation exchange to prevent unfair burdens and unjustified windfalls. No adjustment mechanism may be necessary to prevent unfairness with respect to some choice mechanisms (see Lawsuit Choice and No Lawsuit Choice), but there will always be a need to monitor the system to assure continued maintenance of a workable relationship.

The logical person to monitor a choice system is the official designated to oversee insurance matters: the commissioner of insurance. The commissioner should be directed to observe and evaluate the system continuously and to make recommendations for improvement at least once every two years.

Each major feature of each option in a choice system must work as intended, if the option itself is to be cost-effective. Responsibility should be assigned to certify and examine key decisions. For example, a choice option that allows a policyholder to sue in tort, if a specified threshold has been met, should authorize the commissioner of insurance (or a judge in motions session) to certify that the tort lawsuit threshold has been met and that the prerequisite to a tort lawsuit has been met. For another example, a choice option that prohibits a policyholder/victim from recovering pain and suffering damages should authorize an executive or judicial officer to examine disputed awards, and to annul settlements or order new trials if the damages awarded exceeds a victim's total economic loss.

B. Mandatory Compensation Benefit Level and Mandatory Tort Damage Level

The level of maximum benefits for a victim covered by a basic compensation insurance policy can be high ($100,000 or more), moderate ($20,000 to $100,000), or low ($15,000 or less). The level of maximum tort damages which a liability insurer must pay to a victim injured as a result of the fault of its policyholder may also be high, moderate, or low. A state which authorizes choice in auto insurance must decide how much is enough with respect to each type of insurance.

One measure of adequacy is need. A recent study found that the expected lifetime cost of caring for and rehabilitating the average catastrophically injured auto accident victim is $722,300.[62] In 1986, Professor O'Connell and I recommended a "high ceiling on no-fault benefits (for example at least $500,000)"[63] to meet the needs of the catastrophically injured.

Another measure of adequacy is cost. All of the choice laws introduced in state legislatures in 1989 provided for low mandatory compensation levels. Most required insurers to offer to sell additional compensation coverage, but consumers who chose that no-fault alternative were not required to buy any additional coverage. All of the financial responsibility and compulsory coverage laws in effect in the states set low to moderate required insurance levels with respect to the payment of tort damages to persons injured as a result of the fault of an insured.[64] All of the motor vehicle no-fault laws which have been enacted, with the exception of the laws in New Jersey and Michigan, require far less coverage than the AIRAC study indicates will be needed by catastrophically injured victims.

It is arguable that the required amount of auto insurance should be high enough so that each beneficiary will be assured enough

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62. ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, CATASTROPHIC NO-FAULT AUTO INJURY CLAIMS (1989).

63. O'Connell & Joost, *supra* note 1, at 80. It was noted that the amount was high but that it was not, like the amount of medical benefits available under worker's compensation insurance, unlimited. We did not recommend unlimited benefits, despite the similarity between auto and industrial accidents, because unlimited auto compensation insurance might be significantly more expensive than unlimited worker's compensation. "Auto accident victims. . .tend to be much more seriously injured and are younger than seriously injured industrial accident victims." *Id.*

64. Of the 50 states, 21 require a motorist to be able to provide $25,000 for any victim and $50,000 for all of the victims of a motor vehicle accident. The lowest limits set by any state are $10,000/$20,000 (Florida, Louisiana, Massachusetts, Mississippi, New York, and Oklahoma) and the highest are $50,000/$100,000 (Alaska).

money to pay for lifetime treatment and rehabilitation if he or she is catastrophically injured. It is not surprising, however, to see that the required amount has usually been set far lower than the catastrophic cost. The number of catastrophic injury cases each year is very small by comparison with the total number of auto accident cases. In 1982, for example, only 17,000 motor vehicle accident injuries were rated as "severe" (AIS-4)[65] and only 6,000 such injuries were rated as "critical" (AIS-5) out of a total of approximately 3,327,000 auto accident injuries. These figures indicate that only 0.0007% of all motor vehicle accidents in the United States were catastrophic in nature in 1982.[66]

It is arguable that the operators of automobiles should pay all of the costs they impose on society. According to this argument, the required amount of auto insurance should be high enough to assure adequate treatment and rehabilitation for the seven out of 100,000 victims whose injuries are catastrophic.

Unfortunately, requiring each insured to maintain even $100,000/$300,000 of tort liability or compensation insurance would substantially raise, not lower, average motor vehicle insurance premiums. Since premium reduction is the engine that is pulling the insurance reform train, legislation that would raise rather than lower insurance premiums is not likely to be enacted in any state.

The financial responsibility/compulsory coverage auto insurance laws in each of the fifty states set forth a low to moderate amount ($10,000 to $25,000 for any one victim and $10,000 to $50,000 for all of the victims of any one accident) as the amount which an owner of a motor vehicle must be able to pay to a victim. Why not require the same amount of insurance for a person who chooses compensation insurance? If a state decides that $25,000 is the amount that a responsible driver should be able to pay for injuring or killing another person, that judgment ought not to change merely because the mode of payment changes. Of course, the owner of a motor vehicle should be able to buy excess limits coverage, regardless of whether he or she chooses tort insurance or compensation insurance. The legislature should determine how high those excess limits should be.

It seems unlikely that many states will follow the example of Michigan and New Jersey and set required insurance limits high

65. The acronym AIS stands for the Abbreviated Injury Scale developed by the American Association of Automotive Medicine.

66. "The average lifetime cost per person injured by a motor vehicle is $9,062. The average cost . . . for a hospitalized person, $43,409, and for a person injured but not hospitalized, $1,570." "Motor vehicle crashes are the leading cause of injury death resulting in 45,923 deaths in 1985. They also comprise the second leading cause of both injury hospitalizations (523,028) and less severe, nonhospitalized injuries (4.8 million)." D. RICE, E. MACKENZIE & ASSOC., COST OF INJURY IN THE UNITED STATES: A REPORT TO CONGRESS 1989, at xxvii, 19 (1989).

enough to pay for lifetime treatment of the catastrophically injured. Much long-term medical and rehabilitation for the catastrophically injured will probably continue to be financed under Social Security, Medicare, and Medicaid.[67] The source of payment may not be a significant issue of public policy if the more than 100 million Americans who own motor vehicles prefer to have the care and treatment of catastrophic motor vehicle accident victims paid for by the more than 100 million Americans who pay Social Security taxes. Is it not the citizens' right to decide which "pocket" should be used to pay for particular expenditures?

C. Compensation Benefits for all Accident Victims?

It has been suggested that coverage for a limited amount of compensation benefits for medical expenses should be a compulsory part of the tort insurance alternative, as well as an integral part of the compensation insurance alternative. This suggestion is inconsistent with the rationale behind a choice system. Consumers should be allowed to select for themselves which system they prefer and then to add, on an optional basis, such other coverages as they want and can afford. There is no real choice if the consumer is forced to buy compensation insurance whether he or she chooses the tort system or the compensation system. Adding compensation insurance benefits to the tort insurance choice, and then allowing the motorist to choose between it and the compensation system, vitiates the choice concept. There is no choice, in practice, if both of the alternatives are substantially the same.

67. Another way of financing care and treatment for the catastrophically injured would be to create a special nonprofit fund authorized to receive the amount collected by an increase in the federal tax on gasoline. Such a fund could be established to pay for the medical and rehabilitation treatment and care of catastrophically injured auto accident victims. Andrew Tobias proposed a mandatory no-fault system for all losses which would be financed by adding auto insurance "premiums" to the cost of gasoline and which would be managed by private insurance companies who would "bid" for the business. *See* A. TOBIAS, THE INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW (1982); Tobias, *Fill 'Er Up With No-Fault, Please: A Solution to the Auto Insurance Mess: Coverage by the Tankful*, TIME, Feb. 27, 1989, at 52. The idea of "pay at the pump no-fault" for all losses, however, would probably be opposed by both trial lawyers *and* insurance companies, while a law creating a fund to provide medical and rehabilitation benefits, above a designated amount, to auto accident victims, might be acceptable to both trial lawyers and insurance companies.

D. Choice if Motorist Makes No Choice (Default Position)

If the owner of a motor vehicle does maintain auto insurance but does not indicate whether he or she wants the liability (or unrestricted lawsuit) alternative or the compensation (or no lawsuit) alternative, which choice alternative shall he or she get? If a motor vehicle owner ignores media barrages, insurance agent telephone calls, and insurance company mailings, which alternative should he or she be deemed to have selected? In 1986, Professor O'Connell and I recommended that such a person be deemed to have selected liability insurance because it is the traditional type of auto insurance. In light of the pressure to lower insurance premiums, I have changed my position. I now recommend that the default position be the alternative which the insurance commissioner says will offer the lowest premium charges to consumers.

E. Agent/Broker Immunity?

Insurance agents and brokers might be sued for negligence in failing to advise their policyholder clients as to the best-for-them type of insurance to buy in a state which permits motorists to choose. If they are not protected from liability in such a circumstance, it is likely that they would always recommend the traditional choice.

New Jersey has guarded against this danger with an enactment that should be seriously considered by any state considering a choice proposal:

> Notwithstanding any other provision of law to the contrary, no person, including, but not limited to, an insurer, an insurance producer as defined. . ., a servicing carrier or non-insurer servicing carrier acting in that capacity pursuant to. . ., and the New Jersey Automobile Full Insurance Underwriting Association created pursuant to. . .shall be liable in an action for damages on account of election of a tort option by a named insured or on account of the tort option imposed pursuant to subsection b. of this section [default position] or otherwise imposed by law. Nothing in this subsection shall be deemed to grant immunity to any person causing damage as the result of his willful, wanton or grossly negligent act of commission or omission.[68]

F. Residual Liability?

To what extent, if any, should a victim who is covered by a compensation policy be permitted to sue a person whose alleged fault caused the injury? Should a victim be permitted to sue an alleged wrongdoer for economic loss sustained by the victim which is in excess of the benefits available under the victim's compensation insurance policy? Or, should a victim who is covered by a compensation

68. N.J. STAT. ANN. § 39:6A-8.1.1.e (West 1989).

policy be responsible for all of his or her economic losses so long as they are less than the amount which the insurer was required to offer to sell that person before he or she became a victim (the mandatory offer)?

Professor O'Connell and I recommended that "a no-fault insured [should be barred] from suing another motorist in tort to recover for injuries suffered in an auto accident," except for intentional injuries and other specific categories of malfeasance.[69] That recommendation has not, unfortunately, been followed in legislation enacted since 1986. The choice laws enacted in New Jersey and Pennsylvania, the choice bills passed by one legislative chamber in California, and the bill introduced in Maryland[70] permit a victim who is a compensation insured to sue any alleged wrongdoer in tort if he or she suffers serious and permanent injury or death.

The allowance of claims and suits in tort for seriously injured victims is not cost-beneficial for such victims. Seriously injured victims could generally obtain the same or a larger amount of money, if they had bought added compensation insurance, including pain and suffering insurance, than they would receive after a verdict or settlement in a tort lawsuit, after deducting attorneys' fees and other collection costs. The allowance of tort claims for the seriously injured increases the cost of auto insurance for any prudent motorist who owns real property. Any such motorist would, if such claims were allowed, have to buy liability insurance to protect that property. The annual premium could be substantial.

A person who selects the compensation policy alternative should not be allowed to sue another person in tort for noneconomic damages,[71] unless that other person intentionally caused the accident, was operating a motor vehicle under the influence of alcohol or drugs, or was the manufacturer, designer, or repairer of the motor

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69. O'Connell & Joost, *supra* note 1, at 81.

70. *E.g.*, Maryland H.R. 1434, 1989 Sess. (1989). The 1989 Maryland choice bill was sharply criticized by HALT, a consumer law reform organization, for allowing some victims to have both no-fault benefits and the right to bring a tort lawsuit.

> Allowing drivers who select no-fault to sue and be sued *at all* keeps lawsuit costs high enough to require either low benefits . . . or high premiums, or both . . . . [T]o be safe, the prudent no-fault consumer must also purchase liability insurance to protect themselves from lawsuits, thereby increasing their total premiums.

D. Chalfie, Legislative Director of HALT Testimony before the Economic Matters Committee of the Maryland House of Delegates (Feb. 14, 1989).

71. Noneconomic damages means pain, suffering, inconvenience, and other intangible loss.

vehicle which caused the injury. A person who selects the compensation policy alternative should also not be allowed to sue another person in tort for economic loss, in excess of amounts recovered under the compensation policy or which would have been available under the compensation policy, if the policyholder had purchased the full amount of compensation coverage which insurers in that state were required to offer for sale.[72]

H. Property Claims for Damage to Motor Vehicles

The question of whether to include motor vehicle property claims in a choice system is a difficult one. It would probably not enable the average motor vehicle owner to save much money on his or her insurance premiums, it would add complexity to an already complicated system, and it might cause resentment on the part of motorists who feel strongly that motorists who cause "fender benders" ought to be sued.

Property damage could, from a technical point of view, be included in a choice system. A motorist could be allowed to choose to make his or her collision insurance policy the only mode of personal redress in case of property damage following an auto accident. That choice would give the motorist immunity from property damage claims. A motorist could also be allowed to buy property damage liability and inverse liability insurance, which would be his or her only mode of redress in case of a property claim. The property liability policy would pay any claim made against the motorist or a person driving a car owned by the motorist (directly or via subrogation) for damage caused to the motor vehicle of another by his or her negligence. Such a policy would pay the claimant for any damage to his or her own vehicle as a result of an accident, if the claimant could establish that another person was at fault in causing that accident. A motorist would be permitted, as at present, to choose deductibles, which would reduce the cost of insurance, and the motorist could decline, as in most states today, to buy any property insurance.

I. Dealing with the Multicar Household

Different members of many families may want different kinds of motor vehicle insurance. Also, more and more American families own more than one automobile. Should the owner of each motor vehicle be the person who is authorized to decide whether to choose tort insurance or compensation insurance, or should any person be authorized to buy either kind of policy for himself? Should it matter,

72. This means the amount of compensation insurance which each insurer is required to offer to each insured.

in a multicar household, whether the vehicles are insured by different insurance companies?

I think the commissioner of insurance should have broad authority over such questions. Minor children should be bound by the choice made by their parents, or by the parent with whom they are residing at the time of an accident. Teenagers who are minors but who are eligible to drive under state law should be deemed to have chosen the kind of insurance chosen by their parents, if their parents pay the premiums on their insurance. Such teenagers should be authorized to make their own choice if they own their own vehicle and pay their own premiums.

J. Relating to Noncar Owners

What about pedestrians? Treatment of the motor vehicle owner who is injured while he or she was a pedestrian will, like the rights of members of a multicar household, have to be spelled out carefully by the legislature. In my opinion, such a pedestrian should be compensated under the terms of his or her own motor vehicle insurance policy, if the pedestrian is a compensation insured. Conversely, such a pedestrian should be free to sue the motor vehicle owner or operator involved, if the pedestrian is a tort insured.

The best way to treat pedestrians who are not covered by personal motor vehicle insurance policies is probably to decree by statute that they receive tort damages if the motor vehicle which struck them is covered by tort insurance, and that they receive compensation benefits if the motor vehicle which struck them is covered by compensation insurance.[73]

K. Fairness

The relationship between the average basic premium that will be charged for each alternative in a choice system should be fair and honest and actuarially sound. The premium charged will be a very important determinant in the making of insurance choice decisions.

The insurance choice which is cheaper, or which has a reputation for being cheaper, will probably be the one that is selected by most

73. In our 1986 article, Professor O'Connell and I proposed that the uninsured pedestrian be permitted to choose his or her mode of payment after an accident. "[T]he statute could provide that he be paid under the no-fault insured's coverage under either no-fault or tort coverage, whichever the victim chooses." O'Connell & Joost, *supra* note 1, at 81 n.56.

eligible motorists. Accordingly, it is very important that the available choices not be "rigged" to result in an artificially low premium for one of the choice alternatives. In this article, I discussed a California bill that would have unfairly "tilted" the choice decision by requiring that only one of the options be actuarially sound. A choice system such as that should be rejected or reformed on the ground that it is not fair.

In 1987, I drafted a choice bill for Delaware. It would have provided a minimum of $15,000/$30,000 in economic and noneconomic damages for the victim/victims covered by a tort insurance policy and up to $300,000 in economic loss damages for each victim covered by a compensation insurance policy. The draft bill was informally submitted to a leading insurer, prior to introduction, for an estimated prediction as to average premium cost for each of the options. The insurer estimated that it would charge $149 for the liability option and $150 for the compensation option. If the draft bill had, however, provided a minimum of $15,000/$30,000 in economic loss damages for the victim/victims covered by a compensation policy (*i.e.*, the same amount as in the tort policy), the premium for the compensation option would have been significantly lower than $150. The bill as introduced was fair, in the sense that the premium cost of the two options was approximately the same. But the bill as introduced was not fair, in the sense that it required compensation insureds to buy more coverage than they would have obtained if they had chosen the tort option.

Does fairness, in the context of consumer choice in auto insurance, mean that the premium for compensation insurance coverage should be essentially the same as the premium for liability insurance coverage, or does it mean the consumer should be given a choice between substantially equivalent coverages? I favor the latter position.

L. Understandability

A choice proposal must be understandable. This might be difficult, but not impossible, if one of the findings of the focus groups referred to above is accurate. The researchers for the groups concluded that there are few people who understand the present system.

> There was a basic misunderstanding of how the present system works. People seemed to feel that somehow insurance always comes through. They had difficulty trying to collect from the at-fault driver or he went to court. It was foreign to them to think that the injured person would be left with unpaid medical bills in any circumstances.[74]

So long as many people think tort insurance, the dominant type now, *always* provides compensation, why would they be interested in hav-

74. Consumer Focus, *supra* note 26, at 2.

ing an alternative to that system, unless the alternative promises to decrease their premiums significantly? The "basic misunderstanding" found by the focus group study suggests it is unlikely that many citizens and legislators will ever really understand a proposal that gives motorists an alternative to the present system as it really is. To the extent possible, the legislatures and the government must be prepared to help minimize that confusion and misunderstanding.

A choice-in-auto-insurance law should also be readable, in other words, understandable to most policyholders. An advocate of "plain English" once wrote that insurance policies "are notorious for using endless, vastly complicated definitions of *everything*. If you have a car or homeowners insurance policy handy, look at it. You'll find that most of the coverage of the policy is buried in a definition of 'the insured' that runs for hundreds of words."[75]

IV. CONCLUSION

It is essentially more rational, more equitable, and more efficient to allow individuals to choose for themselves whether to be compensated quickly for their own economic losses and surrender their right to recovery for noneconomic losses, in case of accident, or whether to file a claim and sue another person for economic and noneconomic losses.

Well over a quarter of a century ago, Professors Keeton and O'Connell recommended an alternative compensation system for motor vehicle accident victims which was more rational, more efficient, and more equitable.[76] Experience, including several studies by the United States Department of Transportation, has confirmed their recommendations and their judgment. Their plan, however, was not cost driven. They visualized a system which was better, but not less costly, than the existing system. Today, any auto insurance reform proposal must be cost driven: it must offer real hope of significant premium reductions to those who find present automobile liability insurance costs unaffordable or unacceptably high. That is why, in the development of a choice system in 1986, Professor O'Connell and

75. R. FLESCH, HOW TO WRITE PLAIN ENGLISH 63 (1979). Flesch developed a readability formula and then applied it to various materials. On a scale of 100, he rated consumer ads in magazines 82, *Time* magazine 52, the *Harvard Law Review* 32, and the standard auto insurance policy 10. According to Flesch, one must be a college graduate to understand material that scores zero to 30. *Id.* at 26.

76. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1964).

I concluded that the best way to achieve acceptable premium cost reductions would be to offer consumers a true choice between a basic no-fault/compensation system and a basic tort/liability system.

It is my hope that this article illustrates the complexity of the issues involved in reforming auto insurance law and shows the possibility of achieving essentially similar objectives by markedly different approaches.