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No-Fault vs. The Present Reparations System — A West Virginia Insurance Executive's View

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In discussing no-fault insurance in any Law Review article, undoubtedly one with legal training undertakes the task with more than ordinary trepidation as, unfortunately, no one is able to fortify any position he might take with elaborate legal citations. Nonetheless, as a West Virginia lawyer, as president of a West Virginia-domiciled insurance company predominantly writing what future historians might some day call auto fault insurance, and as a citizen, this legal dissertation might be more properly classed as a sharing of some of my thoughts as to where we stand, and what legislative steps might ultimately prove in our best interests.

The logic of using the fault system as the basis for automobile accident reparations is the subject of intense controversy today, and the future of the tort liability system as the basis for compensating the motor vehicle victim awaits the judgment of the American public. Basic to either the partial or complete abandonment of the traditional fault system is the selection of a substitute method of compensating accident victims. A suggested substitute is a "no-fault" insurance system of one form or another.

To date, the States of Delaware, Massachusetts, Illinois, Florida and Oregon have enacted legislation in the no-fault area, each state adopting a somewhat differing statutory approach.

The activity of these states has been largely prompted by public sentiment.

I. DEPARTMENT OF TRANSPORTATION—A STUDY OF THE PRESENT SYSTEM

Criticisms of the existing system are adequately crystallized in the U. S. Department of Transportation's (hereinafter referred to as DOT) study. The heart of this federally subsidized study indicated that:

1. Too many people are ineligible or unable to recover anything, even basic economic losses, under the present fault liability

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system. They may be barred by their own negligence (even slight), or they may be injured in accidents where fault cannot be established.

2. There is inequity and inadequacy of recovery in cases where tort liability operates. Generally speaking, those with minor injuries fare proportionately better in settlements and awards than those with serious injuries.

3. There is too much delay in recovery of tort claims, especially for the more seriously injured.

4. There are cost inefficiencies under the existing system.

The DOT contends, as have previous critics of the system, that over one dollar in "system expenses" (insurance company expenses in selling and underwriting auto insurance and investigating and defending claims; claimants' lawyer fees and court costs; public costs of courts, etc.) is consumed in order to deliver another dollar of net claim payments into the hands of injured persons. Part of the net dollar received by injured persons duplicates compensation received from other benefit systems, and part is for intangible damages. To rectify such weaknesses, the Department of Transportation has urged reform but feels the insuring function should continue to be performed by private enterprise, with auto insurance as the primary source of compensation. The DOT has also recommended that the states, and not the federal government, institute reforms, although interstate compatibility of state systems would naturally be desirable. Thus, DOT left the door open to approaching the reform process in stages, with an opportunity for experimentation, adjustment and correction based on actual state-by-state experience.

II. A NEW SYSTEM—SOME CONGRESSIONAL "GUIDELINES"

After release of the DOT report, the United States House of Representatives, by virtue of House Concurrent Resolution 241, has declared it to be the sense of Congress that "there must evolve at the state level a rational, equitable and compatible reparation system for motor vehicle accident victims supported and sustained by a similarly rational, equitable and compatible private insurance . . . built upon the following principles[:]"

1. Basic benefits to be forthcoming to injured parties on a first-party, contractual basis, payable regardless of fault to all accident victims except those who willfully injure themselves.

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2. Such benefits should provide compensation for all economic loss, subject to reasonable deductibles and limits. The tort lawsuit should be eliminated, at least pro tanto, avoiding the adversary process for the bulk of automobile accidents.

3. Benefits obtainable by the accident victim from other sources should be coordinated with those from the auto accident reparations system by making automobile insurance the primary benefit source wherever feasible.

4. Maximum choice should be afforded the motorist in selecting his insurance source provided the coverage complies with the principles for required minimum coverage.

5. Rehabilitation should be a primary function and objective of the compensation system.

Little or no perceptible disagreement exists between the White House and the key Congressmen of both political parties over the question of whether changes are needed in the present reparations system. The only real disagreement arises over the means of accomplishing reforms.

Secretary of Transportation Volpe has stated: "[T]here remains much legitimate uncertainty about how far and how fast the public wants or is willing to go in changing the reparations system. It is also clear that there exist genuine and warranted concern as to the unknown and essentially unknowable price and cost implications of any major change in the system"

The position taken by our national representatives has left a job to be performed at the state level, and the basic stance assumed by the administration has been viewed with deep disappointment by proponents of a federally dictated system of reparations reform.

III. NO-FAULT INSURANCE—SOME PERSONAL OBSERVATIONS

Neither this writer, nor my insurer employer, nor the majority of my insurance colleagues favor a complete abandonment of fault principles. We do favor prompt payment of benefits to insureds who may be injured or whose property may be damaged by motor vehicles, with the delivery of such benefits being made at economical cost. We also believe that changes not only will but must occur in our existing system of automobile tort law. Therefore, present automobile

casualty insurance, which is basically a by-product of our automobile negligence system, will change with the modifications which will be made in tort law. We believe that whether or not one favors any or all of the no-fault proposals is no longer the issue. The following quotation of Victor Hugo would seem appropriate: "There's one thing stronger than all the armies in the world, and that is an idea whose time has come." The idea for a change in the automobile reparations system is such an idea.

West Virginia and our sister states are "under the gun" to produce a revised compensation system. The major participants in the shotgun weddings which will surely occur are state insurance departments, lawyers, and casualty insurers. To have a reasonably successful marriage there must be compromises, and each of the aforementioned groups must and will compromise long-cherished beliefs and desires.

IV. THE RAMIFICATIONS OF NO-FAULT INSURANCE

A. The Legislative and Administrative Nightmare

Aside from obvious constitutional and conflicts of law problems that will arise with the adoption of nearly any type of no-fault laws, other legal, economic, and social ramifications are involved in the passage of various no-fault laws, particularly compulsory (all motorists affected) no-fault statutes. For example, were West Virginia to adopt a compulsory type of no-fault statute, our Uninsured Motorist Statute would no longer be needed, and our state's financial responsibility laws would have to be modified to blend with whatever no-fault provisions were enacted. Some of the state no-fault plans thus far adopted (the use of no-fault may be a misnomer as all plans retain some tort features) have incorporated arbitration into their systems. Should West Virginia pursue legislation embracing arbitration, our representatives in Charleston will have to contend with the holding in *Hughes v. National Fuel Company*, 121 W. Va. 392, 3 S.E.2d 621 (1939) that "[a] contract to submit future differences to arbitration is not binding."

Should a compulsory-type statute be adopted, the means and costs of enforcement must be considered. A successful compulsory plan in West Virginia would require greater state and local police efforts and manpower, greater Department of Motor Vehicles licensing control, and a system of insurer notification to the Depart-

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ment of Motor Vehicles of lapsed, unpaid or cancelled policy situations. The financial aspects of effective compulsory control measures, of course, must be weighed when considering voluntary (existing insured persons) no-fault plans as opposed to compulsory no-fault plans.

These possible legislative problems are not all inclusive, but they do point out that an auto insurance no-fault plan opens a Pandora's box of issues in other legislative areas.

B. Compulsory vs. Voluntary No-Fault?

While not favoring compulsory (all motorists affected) approaches to no-fault legislation as an initial step, realism dictates that insurers anticipate that the more sweeping compulsory type no-fault laws will come into countrywide vogue within the next decade. In the interim period, most states will probably adopt a voluntary (existing insured motorists) type of no-fault law as the more practical stop-gap measure. Considering the short time that our legislators will have to work on such a comprehensive creature as no-fault auto insurance, we accordingly feel there is considerable more logic in following a voluntary as opposed to compulsory approach, thus enabling the transition to a new reparations system to be gradual.

As a domestic insurer, we assume the stop-gap voluntary approach will be followed in West Virginia since it allows the legislature to simply require insurers to "add on" or "roll on" elaborate first-party accident coverage (essentially no-fault insurance benefits without total tort elimination) to already existing automobile insurance policies. Naturally, with any "add-on" approach, insureds continue to need their existing type of liability protection to cover operation of motor vehicles in fault system jurisdictions or where differing no-fault approaches exist. Unfortunately, under any voluntary type plan, a state in no measure diminishes its uninsured motorist population, which in West Virginia is felt to be somewhat larger than in many other jurisdictions.

C. The Danger in Borrowing Other Plans

A danger that we feel exists in West Virginia may be the tendency of our legislature to borrow some form of "no-fault" legislation uncritically from another state. We feel borrowing would be a mistake, as any legislative borrowing encompasses the bad features (and mistakes) along with the good features. Despite

geographic proximity, we believe our state is different in many respects from neighboring Virginia, Maryland, Pennsylvania and Ohio, and totally different than Florida, Illinois and Massachusetts (the states which have adopted the more sweeping changes to date).

Oregon, in June, 1971, passed "no-fault" legislation providing for mandatory extension of first-party coverage. It limited rights of insurers to cancel automobile property and casualty insurance policies and provided for contribution between joint tort-feasors in negligence actions in proportion to the negligence attributable to each and provided for joinder of actions and parties in the same court proceeding. It also set up legal rules for the use of advance payments techniques. The legislation did not substitute first-party compensation benefits in the place of tort liability rights to recover for negligence.

Massachusetts, the first state to adopt no-fault insurance, reports automobile insurance price reductions, but prior to enactment of its "no-fault" law, Massachusetts, a compulsory auto insurance state, had one of the highest car insurance costs in the nation. Also auto insurance experience and pricing data is generally developed over a time span of at least three years before it is considered actuarially sound.

D. Cost Reductions Largely Illusory

Regardless of the form of no-fault statute adopted, any potential insurance cost reductions or economic benefits to West Virginians are largely illusory. Some proponents of no-fault plans are doing a disservice in claiming that economic benefits will be realized with passage of no-fault legislation.

To illustrate the fallacy of any large economic benefits being a by-product of no-fault, assume the existing Clarksburg (W. Va.) rates to be a medium for the state. Assume further that the average insured with a 1970 model vehicle has present minimum limits of liability of \$10/20/5 bodily injury and property damage, \$100 deductible collision, comprehensive, \$500 medical payments, and the required uninsured motorists coverage. For such coverages and exposures, the annual premium rate is approximately \$174, with the bodily injury portion being roughly \$42 of the total premium dollar cost.

If one assumes that under our existing tort insurance system that presently one-fourth of all bodily injury premium dollars ultimately wind up in the hands of claimant's attorneys (auto insurers

presently settle some bodily injury claims without legal involvement), and if one assumes that insurance adjusters, investigators, claims examiners and defense attorneys absorb another one-fourth of the bodily injury premium dollar, our Clarksburg friend could achieve a theoretical *maximum* annual savings of \$21 of his present auto insurance dollar by the adoption of a no-fault insurance plan. As this theoretical annual savings must be offset to some degree by the cost of no-fault's new first-party benefits involving insurer payments regardless of negligence, it is more logical to predict that auto insurance will cost more, not less.

V. SOME ALTERNATIVES AND COMPROMISES TO NO-FAULT

A. The Threshold Approach

One of the compromise plans being offered at the state level where fault principles are partially retained, but tort recovery rights are reduced, is the so-called "threshold" approach by which, with a few exceptions, no recovery for general damages is permitted at all unless medical expenses exceed a certain level. The Massachusetts plan embodies this concept, with a threshold of \$500 in medical expenses. The DOT Report suggests some such approach "might. . . perhaps" be followed, but with "a rather high dollar threshold," the amount of which is not spelled out. This suggestion appears to have been advanced only as an illustrative possibility. It is to be noted that no specific mention of it is made in the Administrations' Resolution, House Concurrent Resolution 241.

If tort is partially retained and a threshold approach followed in West Virginia, a percentage-of-medical-expense method of dealing with general damages is more equitable, more sensible, and more likely to satisfy the public than a pure dollar threshold mechanism. Illinois adopted such a percentage method in its approach to eliminate tort handling of the less serious injury cases. The pure dollar threshold mechanism creates an incentive for claimants to build their medical treatment expenses up high enough to jump the threshold and enter the area of unlimited general damages. Additionally, under the inflationary economy in which we live, a fixed dollar threshold will necessitate constant legislative modification and change as medical and hospital expense costs rise.

B. NCCUSL Model Proposal

The National Conference of Commissioners of Uniform State Laws (hereinafter referred to as NCCUSL) was recently granted

\$100,000 by the Department of Transportation to draft a model no-fault reparations law and a tentative draft is expected by December 1, 1971. NCCUSL is an organization consisting of judges, practicing lawyers and law professors selected by the 50 state governors to draft legislation to simplify and improve laws. Since NCCUSL has had meetings with representatives of insurers, car manufacturers and bar associations, their recommendations and efforts should be given careful consideration by legislative representatives. Hopefully, the work product of this group may serve as a basic planning tool or legislative guideline for many states, including West Virginia.

C. Fault but No-Fault Compromise

Although reform of the auto insurance system is needed, a total or substantial elimination of fault principles could prove to be a detriment to society. We as citizens (lawyers and insurance men particularly) should encourage rather than discourage individual personal responsibility. The principle of fault should be retained—but retained in the quasi-criminal field or traffic law field as opposed to the existing civil field involving tort-auto insurance interrelationships. By retaining the desirable principles of fault which have been molded and developed over centuries of common law history, yet divorcing or separating auto insurance recovery or auto insurance benefits from the fault system, we would continue and perhaps strengthen the beneficial deterrent effects that the tort system was originally intended to provide. At the same time we would resolve the valid criticism of the DOT study relative to delayed insurance benefit delivery and insurance cost inefficiencies.

The various no-fault proposals made to date in no way encourage safety and in no way create an incentive to curtail or reduce the highway carnage that is a tragic problem in our nation. In West Virginia, our motorists killed, maimed and injured approximately 16,200 persons during 1970, and no thinking person would oppose improvements in the quasi-criminal traffic control field. While self-preservation should motivate defensive driving techniques, a personal responsibility system such as the tort or fault system is needed to deter those in society more prone to take risks. If fault is partially or totally removed or separated from auto insurance, then a reformed motor vehicle code with violations or license revocation based upon existing tort principles should be adopted. Thus, there should be a redirection of tort principles rather than an abandonment, and a partial, if not

total, separation of insurance benefits (independent of tort) from the retained but redirected tort field.

IV. CONCLUSION

In formulating any West Virginia reparation law change, we should realistically examine the basic benefits provided under any proposed plan, since if the benefits are set too high the cost of the program could saddle too great a burden on the public. In any revision of our present system, we should continue to plan for the primacy of automobile insurance so that the motoring public would continue to pay its own way rather than be subsidized by some other entity of society.