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Kentucky No-Fault: An Analysis and Interpretation

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NOTE

KENTUCKY NO-FAULT: AN ANALYSIS AND INTERPRETATION

I. INTRODUCTION

In 1972, the Kentucky legislature considered seven no-fault insurance proposals.[1] By the start of the 1974 session, the field of proposals had been narrowed to three,[2] each very controversial. Finally, with only one day remaining in the session, the General Assembly appointed still another conference committee. The present no-fault legislation[3] is the result of those efforts and was frantically passed on the evening of the last day of the 1974 session. At the time of passage the legislators had access to only a modified copy of the Uniform Motor Vehicle Accident Reparations Act[4] [hereinafter cited as UMVARA] with revisions typed between the lines,[5] because a final copy of the proposed act was not yet available. State Senator Michael Moloney is reported to have said "legislators did not generally understand what they were voting for . . . . and the legislature should not have passed the bill."[6] It comes as no surprise, that few Kentuckians, citizens as well as practitioners, understand what was finally enacted.

While the General Assembly relied chiefly upon the UMVARA, it made significant departures from the Uniform Act to satisfy several special interest groups and to cope with a potential constitutional roadblock. These changes were implemented by special drafting and by borrowing selected provisions from Florida's No-Fault Act.[7] As a result of this aberation, Ken-

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[1] Cummings, *Kentucky Goes No-Fault,* THE REVIEW 9, (Summer, 1975).

[2] *Id.*

[3] KY. REV. STAT. §§ 304.39-010 *et seq.* (Supp. 1976) [hereinafter cited as KRS] (originally enacted as H.B. 314, effective July 1, 1975).

[4] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MOTOR VEHICLE ACCIDENT REPARATION ACT (Official Draft with Prefatory Note and Comments, 1972) [hereinafter cited as UMVARA]. *See also* O'CONNELL & HENDERSON, TORT LAW, NO-FAULT AND BEYOND, Appendix I (1975) for a copy of the UMVARA.

[5] Cummings, *supra* note 1,at 10.

[6] *Id.*

[7] FLA. STAT. ANN. § 627.730 *et seq.* (1971). *See also* Fann v. McGuffey, 534 S.W.2d 770, 774 (Ky. 1975).

tucky's Act, which covers only personal injury and not property damages, has never been tested as a whole. Practitioners are wholly without precedent; the inherent problems of implementation, therefore, must be approached on a case by case basis.

This Note is an attempt to analyze and interpret the Kentucky No-Fault Act with special emphasis on its unique areas. Due to the overwhelming absence of judicial interpretation, however, it is not inconceivable that courts as well as other interpreters may arrive at different conclusions in particular situations.

A. *No-Fault Generally*

Despite the bar's widespread criticism[8] articulately expounding the legal and moral dangers of the no-fault concept, no-fault insurance is here to stay. Presently, 24 states in addition to Puerto Rico have enacted no-fault legislation,[9] with between 50[10] and 76 percent[11] of this country's population subject to the various plans. No two plans, however, are identical and attempts to enact a federal plan have been repeatedly

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[8] AMERICAN TRIAL LAWYERS ASSOC., NO-FAULT INSURANCE - A PRIMER (1972). *See also* David, *A Summary Appraisal of "No-Fault" Today*, 38 KY. BAR J. 35 (1974).

[9] XXI THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 365 (1976-77). In alphabetical order the states are: Arkansas, ARK. STAT. ANN. § 66-4014 *et seq.* (Supp. 1975); Colorado, COLO. REV. STAT. ANN. § 10-4-701 *et seq.* (1974); Connecticut, CONN. GEN. STAT. REV. § 38-319 *et seq.* (1975); Delaware, DEL. CODE ANN. tit. 21 § 2118 (1973); Florida, FLA. STAT. ANN. § 627.730 *et. seq.* (1971); Georgia, GA. CODE ANN. § 34016 *et seq.* (Supp. 1976); Hawaii, HAWAII REV. STAT. § 294-1 *et seq.* (Supp. 1975); Kansas, KAN. STAT. ANN. § 40-3101 *et seq.* (Supp. 1975); Kentucky, KRS § 304.39-010 *et seq.* (Supp. 1976); Maryland, MD. ANN. CODE art. 48A, § 538 *et seq.* (Supp. 1972); Massachusetts, MASS. ANN. LAWS ch. 90, § 34A *et seq.* (1973); Michigan, MICH. COMP. LAWS ANN. § 500.3101 *et seq.* (Supp. 1973); Minnesota, MINN. STAT. ANN. § 65B.41 *et seq.* (Supp. 1975); Nevada, NEV. REV. STAT. § 698.010 *et seq.* (1973); New Jersey, N.J. STAT. ANN. § 39:6A-1 *et seq.* (1972); New York, N.Y. INS. LAW § 670 *et seq.* (McKinney Supp. 1975-76); North Dakota, N.D. CENT. CODE § 26-41-01 *et seq.* (Supp. 1975); Oregon, ORE. REV. STAT. § 743.786 *et seq.* (1972); Pennsylvania, PA. STAT. ANN. tit. 40 § 1009.101 *et seq.* (Supp. 1974); South Carolina, S.C. CODE ANN. § 46-750.101 *et seq.* (Supp. 1974); South Dakota, S.D. COMPILED LAWS ANN. § 58-23-1 *et seq.* (Supp. 1970); Texas, TEX. REV. INS. CODE art. 5.06-3 (Pamphlet Supp. 1973); Utah, UTAH CODE ANN. § 31-41-1 *et seq.* (1973); Virginia, VA. CODE ANN. § 38.1-380.1 (1972).

[10] XXI THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 365 (1976-77).

[11] *Auto Reform in No-Fault Moves Ahead - 76% of U.S. Population Covered*, 9 TRIAL 5 (1973).

defeated.[12] As a result, the United States is a "crazy-quilt" of no-fault legislation.[13] With this in mind it is appropriate to review the basic no-fault concept and the principal forms taken in its legislative implementation.

While the principal purposes of no-fault legislation are still disputed, the dispute is not whether one purpose excludes another, but rather which purpose should take precedence.[14] Some say that "[t]he fundamental basis for a no-fault system is the abolishment of tort liability in automobile accidents, with each driver or owner accepting responsibility for some or all losses sustained by pedestrians and by occupants of his own vehicle in return for which he would enjoy immunity from liability for those losses."[15] Another position is advocated through the "Delaware" plan where no-fault benefits are paid but tort liability is not abolished.[16] The common thread in all the plans, however, is the desire to provide a method of compensating automobile accident victims without regard to fault. The main distinction among the plans, therefore, is the extent to which this method of compensation eliminates the traditional tort system.

B. *Three Basic No-Fault Concepts*

Existing plans run the gamut from complete or partial elimination of traditional or fault remedies, "true" plans, to plans of first party benefits in addition to traditional remedies in tort, "modified" no-fault plans. While plans are generally termed either "true" or "modified,"[17] a more concise classification has been developed by F. Lawrence Matthews,[18] who divides the plans into the "Massachusetts," "Delaware" and "South Dakota" type plans.

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[12] Kozyris, *No-Fault Insurance and the Conflict of Laws—An Interim Update,* 1973 DUKE L.J. 1009, 1010 at n.2.

[13] Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style,* 1972 DUKE L.J. 331, 334.

[14] At least one commentator feels that no-fault is not the only answer. Eldred, *Is No-Fault the Only Answer for the Uncompensated Motorist?* 1974 INS. COU. J. 185. *See also* Ring, *The Fault with No-Fault,* 49 NOTRE DAME LAWYER 796 (1974).

[15] W. ROKES, NO-FAULT INSURANCE 3 (1971).

[16] DEL. CODE. ANN. tit. 21, § 2118(a) (Supp. 1975).

[17] U.S. NEWS AND WORLD REPORT, Jan. 5, 1976, at 37.

[18] F. MATTHEWS, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 275.4 (3rd ed. 1976 Supp.) [hereinafter cited as BLASHFIELD].

The "Massachusetts" plan, in force in 16 states,[19] is the basic "threshold" approach which absolutely bars an injured person's nonpecuniary tort remedies unless certain conditions result from the accident. Suits for nonpecuniary damages may be allowed for example, when the accident causes death or serious personal injury or when medical expenses reach a certain threshold amount. The conditions and threshold amounts vary from state to state.[20]

Under the "Delaware" approach there is no restriction on the injured person's recovery in tort. Delaware, Oregon, Maryland, Texas, and South Carolina have enacted this type of plan, which allows for complete recovery, including damages for pain and suffering, and provides arbitration for the settlement of small claims.[21]

The "South Dakota" plan is similar to the "Delaware" approach in that no restriction is placed on the injured person's tort remedy. Under this approach, however, no-fault coverage

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[19] COL. REV. STAT. ANN. § 10-4-706(b) (1974) $25,000 BRP limit, § 10-4-714(1)(e) (1974) $500 tort threshold; CONN. GEN. STAT. REV. § 38-320(d) (1972) $5,000 BRP limit, § 38-323 (1972) $400 tort threshold; FLA. STAT. ANN. § 627.736(1) (1971) $5,000 BRP limit, § 627.737 (2) $1000 tort threshold; GA. CODE ANN. § 56-3403b(b)(1) (Supp. 1974) $2,500 BRP limit, §§ 56-3402b(j) and 56-3410b(a) (Supp. 1974) $500 tort threshold; HAWAII REV. STAT. § 294-2(10) (Supp. 1974) $15,000 BRP, §§ 294-6(2) and 294-10(b) (Supp. 1974) the threshold limit is determined each year by the Commissioner of Insurance in order to exclude 90 percent of automobile tort claims. KAN. STAT. ANN. § 40-3103(k) (Supp. 1974) $2,000 BRP limit, § 40-3117 (Supp. 1974) $500 tort threshold; KRS § 304.39-010(a) (Supp. 1976) $10,000 BRP limit, § 304.39-060(b) (Supp. 1976) $1,000 tort threshold; MASS. ANN. LAWS ch. 90 § 34(A) (1973) $2,000 BRP limit, § 34(M) (1973) $500 tort threshold; MICH. COMP. LAWS. ANN. § 500.3107 (1973) no limit on BRP coverage, § 500.3135 (1973) no dollar threshold but there must be a serious injury; MINN. STAT. ANN. § 65B44(1) (Supp. 1975) $30,000 BRP limit, § 65B51(3)(a) (Supp. 1975) $2,000 tort threshold; NEV. REV. STAT. § 698.070 (1973) $10,000 BRP limit, § 698.280(1)(i) (1973) $750 tort threshold; N.J. STAT. ANN. § 39:6A-4 (1972) no limit on BRP, § 39:6A-8 (1972) $200 threshold on soft tissue injury; N.Y. INS. LAW § 671(1), (McKinney Supp. 1975-76) $50,000 BRP limit, § 671(4)(b) (McKinney Supp. 1975-76) $500 tort threshold; N. D. CENT. CODE § 26-41-03(2) (1975) $15,000 BRP limit, §§ 26-41-03(18) and 26-41-03(12)(1)(a) (1975) $1,000 tort threshold; PA. STAT. ANN tit. 40 §§ 1009.103 and 1009.202 (1974) unlimited BRP coverage, tit. 40 § 1009.301(a)(5)(B) (1974) $750 tort threshold; UTAH CODE ANN. § 31-41-6(a) (1973) $2,000 BRP limit, § 31-41-9 (1973) $500 tort threshold. *See also* BLASHFIELD §§ 275.5 -.57A; I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, §§ 8.01 -.23 (1st ed.1975) [hereinafter cited as SCHERMER].

[20] *See* statutes cited in note 19 *supra.*

[21] DEL. CODE ANN. tit. 21 § 2118 (1973); ORE. REV. STAT. § 743.786 *et seq.* (1972); MD. ANN. CODE art. 48A § 538 *et seq.* (Supp. 1972); TEX. REV. INS. CODE art. 5.06-3 (Pamphlet Supp. 1973); S.C. CODE ANN. § 46-750.101 *et seq.* (Supp. 1974).

is not mandatory and there is no scheme of compulsory insurance. This version of no-fault is in force in South Dakota, Arkansas, and Virginia.[22]

Although the Kentucky no-fault plan does not exactly fit any of these categories, it resembles the "Massachusetts" plan to the extent that it includes the basic "threshold" approach.[23] This "threshold" approach was Kentucky's most significant departure from the UMVARA, a plan which virtually abolishes tort liability.[24]

II. KENTUCKY'S NO FAULT INSURANCE ACT

A. *Constitutionality of No-Fault*

One major objection to the adoption of "true" no-fault plans is their denial of access to the courts and the resulting limit on an injured person's ability to pursue traditional remedies in tort.[25] This problem was compounded in Kentucky and Pennsylvania by constitutional limitations.[26] Section 54 of the Kentucky Constitution provides that: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

When no-fault was originally considered in Kentucky, it was thought that any plan would necessarily violate this constitutional mandate. As one commentator concluded:

> [I]t seems likely that a no-fault threshold plan would face serious constitutional problems in Kentucky unless a constitutional amendment were passed. Sections 14 and 54 of the constitution present serious obstacles to the implementation of a no-fault threshold plan which apparently could not be overcome even if an attempt were made to uphold the plan on the theory of implied consent. Before a no-fault plan is adopted for Kentucky, all possible constitutional problems

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[22] S.D. COMPILED LAWS ANN. § 58-23-1 *et seq.* (Supp. 1970) ARK. STAT. ANN. § 66-4014 *et seq.* (Supp. 1975); VA. CODE ANN. § 38.1-380.1 (1972).

[23] KRS § 304.39-060(5) (Supp. 1976).

[24] UMVARA at § 5.

[25] *See, e.g.*, 2 FLA. ST. U.L. REV. 178, 180 (1974).

[26] PA. CONST. art. III, § 18, provides that "The General Assembly may enact [workmen's compensation laws] . . . but in no other cases shall the General Assembly limit the amount to be recovered . . . for injuries to persons . . . ."

> should be carefully considered and serious thought should be given to the possibility of adopting a no-fault plan without a threshold, such as the Delaware plan, or the possibility of first proposing a constitutional amendment and letting the people decide for themselves which type of protection they would prefer.[27]

In response to an inquiry from the Kentucky Legislative Research Commission, the Attorney General concluded that "any compulsory no-fault automobile law which restricts or abolishes the right to bring an action in tort for damages, would be unconstitutional in Kentucky."[28]

The authors of these opinions, however, did not consider modifications of existing plans. The commentator based her opinion on the Keeton-O'Connell Basic Protection Plan,[29] while the Attorney General made his analysis based on the adoption of the UMVARA as proposed by the ABA's National Conference of Commissioners on Uniform State Law.[30] In addition, these authors did not foresee the Kentucky Supreme Court holding a noncompulsory no-fault scheme or one based on implied consent[31] constitutional.

Recognizing the obstacle created by section 54 of the Kentucky Constitution, the General Assembly inserted an "implied consent" provision into the Act. Under this provision any person who registers, operates, maintains, or uses a motor vehicle on Kentucky's highways does so on the condition that such conduct constitutes an acceptance of the limitation on his traditional rights in torts.[32] Much like the Kentucky Work-

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[27] Comment, 62 KY. L.J. 590, 603 (1974).

[28] 73 OP. KY. ATT'Y GEN. 310 (1973) [hereinafter cited as OAG].

[29] Comment, *supra* note 27, at 591. The author noted that:

> The Basic Protection Plan and its derivatives have two main features: (1) auto accident victims are reimbursed by their own insurance company for all out-of-pocket losses connected with bodily injury (medical bills, wage loss, funeral bills, etc.) without regard to who was at fault; and (2) the traditional tort recovery for pain and suffering is available only to those who can cross a certain threshold established by the statute. The threshold may be stated in terms of injuries within a specific category or in terms of expenses above a specified level. For example, a plan that abolishes the right to recover for pain and suffering unless the injury results in permanent disability or unless the medical bills are at least $500 is a threshold plan.

[30] 73 OAG 310.

[31] Comment, *supra* note 27, at 603.

[32] KRS § 304.39-060(1) (Supp. 1976).

men's Compensation Act[33] the no-fault legislation provides that any person may affirmatively reject this limitation.[34]

In *Fann v. McGuffey*,[35] the Kentucky Supreme Court held in a 4 to 3 decision that the No-Fault Act did not violate section 54.[36] In this case it was argued that imposing the tort restrictions on persons who do not affirmatively reject the restrictions because they use, operate, or maintain a motor vehicle in the state, took away their right of access to courts as well as their traditional tort remedy protected by section 54 without a "knowing, intelligent and voluntary" waiver of their constitutional rights.[37] The Court, however, held that the proper test of implied consent is "whether under all the circumstances, considering the public purpose sought to be accomplished and the nature and extent of detriment to the individual, it is reasonable for [the Court] to presume a consent where none exists in fact."[38] Recognizing the state's interest in making and enforcing regulations to protect both resident and nonresident users of the state's highways, the Court drew support from the implied consent provisions of nonresident motorist statutes which were upheld by the United States Supreme Court in *Hess v. Pawloski*.[39]

The Kentucky Court found further support for its decision in *Wells v. Jefferson County*.[40] In *Wells* the Court held that the Workmen's Compensation Act, which provided that an employee who failed to file a written notice of rejection accepted the Act's provisions, did not violate section 54. In addition, the Court hinted that they would be inclined to give judicial deference to the General Assembly.[41]

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[33] KRS § 342.395 *et seq.* (Supp. 1976).

[34] KRS § 304.39-060(4) (Supp. 1976).

[35] 534 S.W.2d 770 (Ky. 1975).

[36] *Id.* at 776.

[37] Brief for Ky. Assoc. of Trial Lawyers as Amicus Curiae at 5-16, Fann v. McGuffey, 534 S.W.2d 770, 776 (Ky. 1975).

[38] 534 S.W.2d at 776.

[39] 274 U.S. 352 (1927).

[40] 255 S.W.2d 462 (Ky. 1953).

[41] Fann v. McGuffey, 534 S.W.2d 770, 777 (Ky. 1975): "The responsibility of pronouncing life-or-death judgment on a piece of legislation so important as this cannot be discharged by an exercise of legal virtuosity. It would be all too easy to tear it down and look brilliant in the execution, but it is the duty of the court to save it if possible, and not to condemn it if there is a reasonable doubt of its unconstitutionality."

It should be pointed out that the Court could have easily declared Kentucky no-fault unconstitutional. The decision was four to three with Chief Justice Reed providing the determining vote. The Chief Justice was not unmindful that *Wells* squarely held that sections 54 and 241 of the Kentucky Constitution were not offended by the workmen's compensation statute. Reed, however, felt that to be an erroneous decision, and reconciled his position in his concurring opinion:

> I seriously question the correctness of that decision, but I am not prepared to declare the entire Workmen's Compensation Law unconstitutional in view of the reliance placed on the decision. Although I am mindful of the judicial oath to support the Constitution of this State regardless of personal judgments concerning the wisdom of some of its provisions, I am, nevertheless, also so influenced by the legal principles of stability and predictability of judicial constitutional constructions that I am unable in this case to ignore a constitutional construction made by this court and on which affected parties, including the legislature, should be able to rely.[42]

B. *Purposes of the Kentucky No-Fault Act*

As it is with the enactment of other new legislation, the purposes of the Kentucky No-Fault Act are specifically enumerated in Kentucky Revised Statutes § 304.39-010 [hereinafter cited as KRS].[43] These purposes reflect a desire

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[42] *Id.* at 779 (Reed, C.J., concurring). While Fann rendered the constitutionality of Kentucky's threshold provision moot, there is a wealth of cases and commentary on the subject in other jurisdictions. *See, e.g.*, Martel, *No-Fault Automobile Insurance in Pennsylvania—A Constitutional Analysis*, 17 VILL. L. REV. 783 (1972); Ruben & Williams, *The Constitutionality of Basic Protection*, 1 CONN. L. REV. 44 (1968); Note, *Equal Protection: No-Fault and the Poor*, 36 ALBANY L. REV. 727 (1972); Note, *No-Fault Automobile Insurance in Utah—State Constitutional Issues*, 1970 UTAH L. REV. 248; Comment, *No-Fault Automobile Insurance in New Jersey: Constitutional Problems*, 3 SETON HALL L. REV. 386 (1972); Comment, *No-Fault Motor Vehicle Insurance: A Constitutional Perspective*, 46 ST. JOHN'S L. REV. 104 (1971).

[43] KRS § 304.39-010 (Supp. 1976):

> Policy and Purpose. The toll of about 20,000,000 motor vehicle accidents nationally and comparable experience in Kentucky upon the interests of victims, the public, policyholders and others require that improvements in the reparations provided for herein be adopted to effect the following purposes:
>
> (1) To require owners, registrants and operators of motor vehicles in the commonwealth to procure insurance covering basic reparation benefits

for prompt and liberal recovery to accident victims without regard to fault. While this section does not emphasize the abolition of tort liability, it does express the desire to reduce litigation. This observation is important because many citizens and practitioners *overemphasize* the limitation of a person's tort remedies. As the analysis and interpretation of the Kentucky Act progresses, it should become apparent that this orientation toward benefits with the resulting limitation is a greater benefit than detriment to the Kentucky practitioner.

The Act's purposes are implemented principally through KRS § 304.39-030, basic reparation benefits, KRS § 304.39-060, limitation of tort rights, and KRS § 304.39-090, required insurance coverage. While the concepts "basic reparation benefits" [hereinafter cited as BRB] and "limitation of tort rights" are often used interchangeably,[44] the concepts are different and their applicability should be determined by different criteria. In a particular situation, neither or only one may apply. Although the combination of possible fact patterns that trigger these different concepts are obviously too numerous to treat, it is desirable to discuss several basic assumptions inherent in the Kentucky Act.

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and legal liability arising out of ownership, operation or use of such motor vehicles;

(2) To provide prompt payment to victims of motor vehicle accidents without regard to whose negligence caused the accident in order to eliminate the inequities which fault-determination has created;

(3) To encourage prompt medical treatment and rehabilitation of the motor vehicle accident victim by providing for prompt payment of needed medical care and rehabilitation;

(4) To permit more liberal wage loss and medical benefits by allowing claims for intangible loss only when their determination is reasonable and appropriate;

(5) To reduce the need to resort to bargaining and litigation through a system which can pay victims of motor vehicle accidents without the delay, expense, aggravation, inconvenience, inequities and uncertainties of the liability system;

(6) To help guarantee the continued availability of motor vehicle insurance at reasonable prices by a more efficient, economical and equitable system of motor vehicle accident reparations;

(7) To create an insurance system which can more adequately be regulated; and

(8) To correct the inadequacies of the present reparation system, recognizing that it was devised and our present Constitution adopted prior to the development of the internal combustion motor vehicle.

[44] David, *supra* note 8, at 37.

C. *Basic Reparation Benefits*

The first assumption implicit throughout the Act is that everyone sustaining personal injuries in an automobile accident in Kentucky will be entitled to basic reparation benefits. KRS § 304.39-030(1) is very explicit in including "every person" *except* one who has rejected the limitation upon his tort rights as provided in KRS § 304.39-060(4). In addition, converters of motor vehicles[45] and those intentionally causing injury to themselves or to other persons[46] are also excluded from BRB by other provisions of the Act. On the other hand, it is possible for a person who rejects the limitation on his tort rights to be entitled to BRB because he purchased this as additional coverage on his automobile insurance policy.[47] The second assumption implicit throughout the Act and explicit in KRS § 304.39-040(1) is that the injured party is entitled to BRB payments without regard to fault. A more complete analysis of BRB necessarily includes what basic reparation benefits are, who is entitled to receive them, who is exempted, and from what source are benefits paid.

1. *What is Paid Under BRB*

KRS § 304.39-020(2) broadly defines basic reparation benefits to be

> benefits providing reimbursement for net loss suffered through injury arising out of the operation, maintenance or use of a motor vehicle, subject, where applicable, to the limits, deductibles, exclusions, disqualifications and other conditions provided in this subtitle.

According to the Comment to section 1(5) of the UMVARA, the starting point in calculating BRB is the understanding of the concept of "loss."

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[45] KRS § 304.39-190 (Supp. 1976).

[46] KRS § 304.39-200 (Supp. 1976).

[47] KRS § 304.39-140(5) (Supp. 1976):

> Reparation obligors shall make available upon request to those persons who have rejected their tort limitations, in accordance with KRS 304.39-060(4), basic reparation benefits coverage and added reparation benefits.

Id.

> Loss is defined in a sense which is limited to economic detriment, and is further defined to include accrued loss only, consistent with the provision on reparation obligor's duty to respond to claims (Section 23) that "loss accrues not when injury occurs, but as . . . loss . . . is incurred."[48]

Like the UMVARA, the Kentucky Act includes in BRB coverage reasonable and necessary "medical expense,"[49] but the Kentucky Act broadens "medical expense" by definition to include expenses incurred in the performance of healing arts[50] according to recognized religious methods. The Kentucky Act also increases the allowance for burial expenses to $1000,[51] which the UMVARA limits to $500.[52]

One of the troublesome aspects of the Act involves the word "reimbursement" in the definition of BRB. While most states require the insurer to pay the injured person even though he has not personally paid for any services,[53] Massachusetts specifically requires that the injured party pay for the services as a condition to the recovery of benefits.[54] Maryland reaches a similar result by using the word "reimbursement."[55] Although KRS § 304.39-020(2) also contains the word "reim-

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[48] UMVARA at § 1(5), Comment.

[49] *Id.*

> [U]nless intensive care is medically required, coverage for a hospital room is limited to a "reasonable and customary charge for semi-private accommodations." The limitation applies only to the cost of an ordinary hospital room, and is inapplicable to charges for use of such hospital facilities as surgery and recovery rooms.

KRS § 304.39-020(5)(a) (Supp. 1976). "There shall be a presumption that any medical bill submitted is reasonable." *Id. Contra,* Victum v. Martin, 326 N.E.2d 12 (Mass. 1975). Plaintiff's testimony, itemized bills, and supporting affidavit of doctor were considered sufficient to infer that the medical expense was necessary.

[50] Ky. Dept. of Ins. Bulletin from Harold B. McGuffey to All Automobile Liability Insurers 1 (March 4, 1975) [hereinafter cited as Bulletin].

> The term "all healing arts professions licensed by the Commonwealth of Kentucky," as used in KRS 304.39-020(5)(a), shall be interpreted to include all practitioners of such healing arts whether actually licensed in Kentucky or similarly licensed in some other state.

Id.

[51] KRS § 304.39-020(5)(a) (Supp. 1976).

[52] UMVARA at § 1(a)(5)(i).

[53] SCHERMER, *supra* note 19, at § 2.03.

[54] MASS. GEN. LAWS ANN. ch. 90 § 34A (1975). This necessity of initial payment appears to apply only to those services which the injured party would have provided for himself had he not been injured but which he must now purchase. *Id.*

[55] MD. ANN. CODE art. 48a, § 539 (Supp. 1972).

bursement," hopefully Kentucky's courts will not accept this interpretation. The policy expressed by the Kentucky Act in favor of prompt payment of benefits without regard to fault[56] and the Act's overall orientation towards recovery indicate that an injured person need not pay out-of-pocket expenses before the insurer is obligated to make payment. This would discriminate between those who are able to pay in advance and those who are not. Kentucky courts can find support for this interpretation in KRS § 304.39-210(1) which allows an insurance company to make payments directly to the provider of products, services, and accommodations, and in KRS § 304.39-240(b) which allows assignment of benefits only for medical expense "to the extent the benefits are for the cost of products services, or accommodations provided *or to be provided* by the assignee."[57]

In addition to medical expenses, BRB also includes "work loss," which the Kentucky Act defines as "loss of income from work the injured person would *probably* have performed if he had not been injured . . . ."[58] Because section 1(5)(ii) of the UMVARA refers to income from the work the injured person would have performed, there is an indication that the drafters of the Kentucky Act, by adding the word "probably," intended that the unemployed could also receive work loss benefits.[59] Arguably, this recovery is for loss of "earning capacity" and not a loss of "actual earnings."

Kentucky differs in one other respect. It leaves out the UMVARA provision which requires the insured to mitigate damages and allows an offset for "income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake."[60]

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[56] KRS § 304.39-010(2) (Supp. 1976).

[57] KRS § 304.39-240(b) (Supp. 1976) (emphasis added).

[58] KRS § 304.39-020(5)(b) (Supp. 1976) (emphasis added).

[59] This is contrary to the intent of UMVARA § 1(5). *See, e.g.*, UMVARA at § 1(5), Comment, which expresses the intent to completely foreclose BRB payment for "work loss" to unemployed persons.

> "Work loss," as are the other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury.

Id.

[60] UMVARA at § 1(5)(ii). The Kentucky approach statutorily adopts the collateral source rule in KRS § 304.39-250 (Supp. 1976):

This recovery, however, is not without limit. KRS § 304.39-130 restricts the amount recoverable for work loss to $200 per calendar week, prorated for any lesser period, and further provides that "[i]f the injured person's earnings or work are seasonal or irregular, the weekly limit shall be equitably adjusted or apportioned on an annual basis." Because BRB payments, like workmen's compensation and Social Security benefits, are not subject to federal income tax, the injured person receiving payment for work loss could receive more than his regular take-home pay. Since the Act is designed to indemnify the injured person and not provide a windfall, there is a presumption that the value of the tax advantage is 15 percent of the loss of income. This presumption, however, can be rebutted by a showing that the claimant's tax advantage was less than this amount.[61] In addition, work loss benefits are exempt from garnishment, attachment, execution and any other process or claim,[62] and with some exceptions, assignments are unenforceable.[63]

BRB also includes "replacement services loss" which are expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured."[64]

> Except as otherwise provided in this subtitle, [KRS § 304.39-120: (1) covering benefits from workmen's compensation and social security, and (2) covering income tax savings] basic reparation benefits shall be paid without deduction or setoff.

The Department of Insurance has issued at least two opinions stating that the common law collateral source rule is applicable to the no-fault benefits; therefore, employee sick leave benefits are not deductible from BRB payments. The Department based its opinion on Davidson v. Vogler, 507 S.W.2d 160 (Ky. 1974) and 22 AM. JUR. DAMAGES § 208 (1965). Letters from Edward L. Fossett, General Counsel, Ky. Department of Insurance to Fireman's Fund and Preferred Risk Mut. Ins. Co., Mar. 3 and 11, 1976, respectively. These grounds seem unnecessary if one considers the unequivocal mandate of KRS § 304.39-250.

[61] KRS § 304.39-120(2) (Supp. 1976). *See also* UMVARA at § 11, Comment.

[62] KRS § 304.39-260 (Supp. 1976).

[63] KRS § 304.39-240 (Supp. 1976).

[64] KRS § 304.39-020(5)(c) (Supp. 1976). For example UMVARA at § 1(5), Comment, states:

> [A] housewife whose injury prevented her from performing services in the home could not attribute loss to the incapacity itself, but loss would be suffered if domestic help were hired to perform those services.

The maximum amount of BRB payable for economic loss for any one person as the result of one accident is $10,000.[65] Although the UMVARA does not limit the total amount of benefits receivable, it does restrict recovery for work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss.[66] Even with this limit, however, Kentucky's Act, according to the U.S. Department of Transportation, will fully compensate 99.6 percent of all accident victims.[67] Unlike some states which provide for a per accident limitation similar to the traditional liability coverage of $10,000 per person and $20,000 per accident,[68] Kentucky's $10,000 per person limit applies to each individual regardless of how many persons were injured in the accident.[69]

"Survivor's economic loss"[70] and "survivor's replacement services loss"[71] provide the decedent's survivors[72] with benefits

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[65] KRS § 304.39-020(2) (Supp. 1976).

[66] UMVARA at § 13.

[67] DEPT. OF TRANS. REPORT AUTOMOBILE PERSONAL INJURY CLAIMS 30 (1970). This same report estimates that 89.1 percent of all accident victims will have less than $1000 economic loss (other than property damage).

[68] *See, e.g.*, DEL. CODE ANN. tit. 21, § 2118(a)(2)(b) (Supp. 1976), which limits BRB to $10,000 per person and $20,000 per accident.

[69] KRS § 304.39-020(2) (Supp. 1976). Some states provide for only $5,000 BRB coverage. CONN. GEN. STAT. § 38-320(d) (1975) and FLA. STAT. ANN. § 627.736 (1971).

[70] KRS § 304.39-020(5)(d) (Supp. 1976).

> "Survivor's economic loss" means loss after decedent's death of contributions of things of economic value to his survivors, not including services they would have received from the decedent if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of decedent's death.

Id.

[71] KRS § 304.39-020(5)(e) (Supp. 1976).

> "Survivor's replacement services loss" means expenses reasonably incurred by survivors after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of the decedent's death and not subtracted in calculating survivor's economic loss.

Id.

[72] KRS § 304.39-020(13) (Supp. 1976). "'Survivor' means a person identified in KRS 411.130 as one identified to receive benefits by reason of the death of another person." *Id.* KRS § 411.130 (Supp. 1976) reads:

> Action for wrongful death—personal representative to prosecute—distribution of amount recovered.
>
> (1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If

for the loss of compensation and services which the decedent would have provided if he had not died. Survivor benefits are similar to damages for wrongful death, except that "replacement services loss" is limited to actual economic loss.[73] Like the majority of wrongful death statutes, the No-Fault Act's measurement of damage is the survivors' loss.[74] Expenses saved by the survivors as a result of the decedent's death must therefore be deducted.[75]

The decedent's probable life expectancy,[76] had he not been killed, and the extent to which he would have contributed economic value to the survivors in the form of property or services are used to calculate the survivors' benefits. Kentucky practitioners should remember, however, that these benefits, although analogous to basic wrongful death statutes, cannot be

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the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including the attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

(a) If the deceased leaves a widow or husband and no children or their descendants, then the whole to the widow or husband;

(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased;

(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children;

(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother or father of the deceased, one moiety each, if both are living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother;

(e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

[73] KRS § 304.39-020(5)(2) (Supp. 1976).

[74] MCCORMICK ON DAMAGES § 98, at 344 (1935).

[75] *Id.*; KRS § 304.39-020(5)(d) (Supp. 1976).

[76] The Life Expectancy and Annuity Table found in 1 BANKS-BALDWIN KRS AND RULE SERVICE is normally accepted for use in Kentucky. Although it is not part of the official state laws, its existence was recognized in Morris v. Morris, 293 S.W.2d 243 (Ky. 1956). The current table was based on population figures from 1959-61, and does not differentiate among men, women, and racial groups even though there is a known difference in life expectancies among these groups.

reconciled with Kentucky's wrongful death statute which measures recovery by the loss to the estate.[77] Recovery under Kentucky's wrongful death statute is the amount which the deceased would have accumulated during his lifetime "but for" his wrongful death.[78] One of the principal differences between damage measurement based on the survivors' loss and the estate's loss is evidenced when determining damages or benefits for the death of a child. Under the survivors' economic loss coverage, used with Kentucky's no-fault, the surviving parents would be unable to prove economic loss because the cost of rearing a child is usually greater than any contributions the child may make to the family unit. This is significantly different from determining what the child's *estate* would have been worth had he not been killed in the accident.

The drafters of the Kentucky No-Fault Act apparently did not consider this distinction between recovery under no-fault and wrongful death for they defined "survivors" as those persons identified in KRS § 411.130,[79] which identifies those persons who are to receive damages owing to the decedent's estate. Of particular importance is subsection (e):

> If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.[80]

It is inconceivable that survivors' economic loss benefits would be paid to the personal estate of the deceased; only individuals and not the estate can suffer compensible losses. Therefore, subsection (e) should be either totally disregarded or the legislature should provide a section which designates additional persons, who because of their relationship with the deceased, would have likely received economic value and services from the deceased had he survived.[81]

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[77] MCCORMICK, *supra* note 74, at § 96.

[78] KRS § 411.130 (1972).

[79] KRS § 304.39-020(13) (Supp. 1976).

[80] *Id.*

[81] Kentucky should look at the elaborate scheme instituted by Minnesota. MINN. STAT. ANN. § 65 B.44(6) (1975) provides that:

2. *Who is Entitled to Basic Reparation Benefits*

BRB are paid only for injuries arising out of maintenance or use of a motor vehicle.[82] This includes the use of a "motor vehicle as a vehicle including occupying, entering into and alighting from it,"[83] but

> [i]t does not include (i) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (ii) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.[84]

Though "use" encompasses more than merely driving a car, it is limited to its use "as a vehicle." This makes BRB available primarily for activities for which the cost of automobile insur-

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Survivors economic loss benefits, in the event of death occurring within one year of the date of the accident, caused by and arising out of injuries received in the accident, are subject to a maximum of $200 per week and shall cover loss accruing after decedent's death of contributions of money or tangible things of economic value, not including services, that his surviving dependents would have received for their support during their dependency from the decedent had he not suffered the injury causing death.

For the purposes of definition under Laws 1974, Chapter 408, the following described persons shall be presumed to be dependents of a deceased person:

(a) a wife is dependent on a husband with whom she lives at the time of his death;

(b) a husband is dependent on a wife with whom he lives at the time of her death;

(c) any child while under the age of 18 years, or while over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he is living or from whom he is receiving support regularly at the time of the death of such parent. Questions of the existence and the extent of dependency shall be questions of fact, considering the support regularly received from the deceased.

Payments shall be made to the dependent, except that benefits to a dependent who is a child or an incapacitated person may be paid to the dependent's surviving parent or guardian. Payments shall be terminated whenever the recipient ceases to maintain a status which if the decedent were alive would be that of dependency.

[82] KRS § 304.39-030(1) and (2) (Supp. 1976).

[83] KRS § 304.39-020(6) (Supp. 1976).

[84] *Id.* The Kentucky Act does not specifically define "maintenance" of a motor vehicle. However, it defines "maintaining a motor vehicle" as having legal custody, possession or responsibility for a motor vehicle by one other than the owner or operator. KRS § 304.39-020(15) (Supp. 1976).

ance should be allocated.[85] For example, if a person falls inside a motor home while it is parked at a camp site, the resulting injury would not be due to the use of a motor vehicle "as a vehicle" and is therefore not covered.[86] Furthermore, injuries arising out of the operation of a garage are excluded if they occur on the business premises.[87] However, if the driver of a tow truck is injured on the highway while servicing or repairing an automobile, or if a mechanic is injured while road testing an automobile, they are within the definition of use of a motor vehicle "as a vehicle."[88]

The scope of this coverage corresponds to Kentucky's pre-no-fault insurance law. In *United States Fidelity and Guaranty Co. v. Western Fire Insurance Co.*,[89] the Kentucky Court of Appeals held that injuries sustained by a passenger in a moving automobile when another passenger was loading a pistol which discharged did not "arise out of the use" of an automobile within the meaning of the owner's insurance policy. In *Kentucky Water Service Co. v. Selective Insurance Co.*,[90] the Court held that where an insured was injured while helping a water company employee fill a water tank on the insured's truck, the water company and employee were not protected users even though the insured's liability policy defined "use" as including loading and unloading. Also in *Wirth v. Maryland Casualty Co.*,[91] a Federal court held that under Kentucky law an eye injury sustained when a person was struck in the face by a firecracker thrown from a parade float did not "arise out of the ownership maintenance or use" of the float within the meaning of the liability insurance policy.[92]

The unavailability of BRB for injuries arising out of the loading or unloading of vehicles unless they occur while occupying, entering, or alighting from the vehicle makes this coverage narrower than medical payments coverage under most automobile insurance policies. This limitation, however, is con-

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[85] UMVARA at § 1(6), Comment.
[86] *Id.*
[87] KRS § 304.39-020(6) (Supp. 1976).
[88] UMVARA § 1(6), Comment.
[89] 450 S.W.2d 491 (Ky. 1970).
[90] 406 S.W.2d 385 (Ky. 1966).
[91] 368 F. Supp. 789 (W.D. Ky. 1973), *aff'd*, 497 F.2d 925 (6th Cir. 1974).
[92] *Id.*

sistent with the basic philosophy of no-fault which is to provide compensation for losses resulting directly from motoring accidents.[93]

Under the Kentucky Act, basic reparation insureds, drivers, occupants of secured vehicles, and pedestrians and other non-users are expressly entitled to BRB. As will be explained, however, a fourth group, uninsured motorists, may also be eligible for BRB.

A basic reparation insured includes the named insured of an insurance contract complying with the Act's BRB coverage requirements, residents of the named insured's household who are not named insureds in another insurance contract, the spouse and other relatives of the named insured, and minors in the custody of the named insured or other relatives residing in the same household if they customarily make their home with the same family unit. This is true even though they temporarily live elsewhere.[94]

Courts have relied upon what has been called the "common roof" doctrine to further define this class of persons.[95] If separate living quarters are maintained, a person may be barred recovery of BRB even though the closest of relationships exist. For example, a brother-in-law, son-in-law, a married brother, a married sister, a married son, and a granddaughter have been denied coverage when it was found that they were not under the common roof of the named insured.[96] There are some exceptions to the "common roof" doctrine, however: an estranged husband or wife,[97] a minor child in the insured's custody,[98] a child who has left home for certain purposes,[99] and cases involving partnerships which are the named insured.[100]

It is important to determine who is a basic reparation insured because this group is entitled to broader coverage. BRB are available to basic reparation insureds while occupying the

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[93] UMVARA at § 1(6), Comment.

[94] KRS § 304.39-020(3) (Supp. 1976).

[95] SCHERMER, *supra* note 19, at § 3.02[2].

[96] *Id.* at n.19.

[97] Citizens Mut. Ins. Co. v. Community Services Ins., 238 N.W.2d 182 (Mich. 1975). *See also* SCHERMER, *supra* note 19, § 3.02[2], at 3-10, n.19.

[98] SCHERMER, *supra* note 19, at § 3.02[2].

[99] *Id.* at n.22.

[100] Hartford Accident & Idem. Co. v. Huddleston, 514 S.W.2d 676 (Ky. 1974).

secured or any other vehicle, or when struck as a pedestrian.[101] This coverage is available for both instate and out-of-state accidents as long as they occur within the United States, its territories and possessions, or Canada.[102] Although the Kentucky No-Fault Insurance Information Council, in a prepared talk given sometime between the Act's enactment and its effective date, indicated that the insured would be protected out-of-state only while occupying his own insured vehicle,[103] this is incorrect. This erroneous information was widely disseminated through insurance agency workshops and the news media, at a time when only the Delaware No-Fault Act restricted coverage to accidents involving the insured vehicle.[104] Kentucky has no such restriction.

The driver and occupants of a secured vehicle who are not basic reparations insureds, however, are afforded these same out-of-state BRB benefits *only* if they occupy a secured vehicle.[105]

A pedestrian or non-user is afforded BRB coverage any time the injury results from an automobile accident in Kentucky.[106] The source of these BRB payments will be discussed later.[107] Only a basic reparation insured will be afforded BRB coverage if the accident occurs while the insured is a pedestrian outside of Kentucky.[108] A pedestrian, as used in the No-Fault Act, "means any person who is not an operator or user of a motor vehicle at the time his injury occurs."[109] Traditionally, a "pedestrian" was one traveling by foot rather than in a conveyance.[110] The Act's definition of motor vehicle, however, makes Kentucky's definition much broader. KRS § 304.39.020(7)(a)

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[101] KRS § 304.39-030(2)(b) (Supp. 1976).

[102] KRS § 304.39-030(2) (Supp. 1976).

[103] Kentucky No-Fault Insurance Information Council, 727 Starks Building, Louisville, Kentucky 40202.

[104] DEL. CODE ANN. tit.21 § 2118(a) (1973).

[105] KRS § 304.39-030(2)(b) (Supp. 1976). The definition of "occupying" is within the definition of the use of a motor vehicle. This has had extensive judicial interpretation in Kentucky. *See supra* notes 89 to 91 and accompanying text.

[106] KRS § 304.39-030(1) (Supp. 1976).

[107] *See infra* text accompanying notes 135 to 164.

[108] KRS § 304.39-030(2)(a) (Supp. 1976). In Kentucky a pedestrian is not considered a separate category of insured.

[109] KRS § 304.39-050(1) (Supp. 1976).

[110] SCHERMER, *supra* note 19, § 3.04, at 3.14, n.5.

defines a motor vehicle as one "required to be registered under KRS Chapter 186."[111] Therefore, if a person is in a conveyance not required to be registered, he is a pedestrian. In Utah, an appellate court held that an insured was a pedestrian within the meaning of his accident policy when he was crushed to death while tinkering with a tractor.[112] Likewise, when a snowmobile hit a secured vehicle in New York, the driver of the snowmobile collected benefits as a pedestrian since a snowmobile was exempted from the definition of a motor vehicle.[113]

An uninsured is also entitled to BRB coverage except when injured as an *occupant* of his own uninsured vehicle.[114] Nothing in the Act precludes an uninsured motorist from having BRB coverage when he is involved in an accident as a pedestrian, an occupant of a motor vehicle other than his own, or even an operator of a vehicle other than his own. The Department of

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[111] The basic statute covering registration of motor vehicles is KRS § 186.020 which requires registration of a motor vehicle other than a motor vehicle engaged in the transportation of passengers for hire operating under a certificate of convenience and necessity. "Motor Vehicle" is defined in KRS §§ 186.010(4) and (7). the Commissioner of Insurance further defined "motor vehicle" in accordance with KRS § 304.39-020(7). *See* § 806 KY. ADMIN. REG. 39:010 § 1 (1975) [hereinafter cited as KAR):

> Section 2(7) of the Act states that: "Motor vehicle means a vehicle of a kind required to be registered under KRS Chapter 186." The phrase, "vehicle of a kind," is interpreted to mean all vehicles which transport persons or property upon the public highways of the Commonwealth, propelled by other than muscular power, except road rollers, road graders, farm tractors, vehicles on which power shovels are mounted, such other construction equipment customarily used only on the site of construction and which is not practical for the transportation of persons or property upon the highways, such vehicles as travel exclusively upon rails, and such vehicles as are propelled by electric power obtained from overhead wires while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the city limit of any municipality.

[112] Peterson v. Continental Cas. Co., 483 P.2d 445 (Utah 1971). Because he was a pedestrian, this insured was entitled to double indemnity under his policy.

[113] McConnel v. Fireman's Fund Am. Ins. Co., 359 N.Y.S.2d 224 (Sup. Ct. 1974).

[114] KRS § 304.39-160(4) (Supp. 1976):

> A person who sustains injury while occupying a motor vehicle owned by such person and with respect to which seccurity is required by the provisions on security and who fails to have such security in effect at the time of an accident in this Commonwealth causing such injury, shall not obtain through the assigned claims plan basic reparation benefits, including benefits otherwise due him as a survivor, unless such person's failure to have such security in effect at the tme of such accident was solely occasioned by the failure of the reparation obligor of such person to provide the basic reparation benefits required by this subtitle.

Insurance has taken the position that coverage is denied only if the uninsured motorist is the *operator* of his own uninsured motor vehicle and not if he is only a passenger therein.[115] This position, however, is clearly erroneous given the unequivocal language of KRS § 304.39-160(4).[116]

Uninsured motorists are not so fortunate in other states. For example, in *Staley v. Florida Farm Bureau Mutual Insurance Co.*[117] the Florida Court of Appeals held that the owner of an uninsured motor vehicle who was injured while riding as a passenger in a secured motor vehicle could not recover BRB from the owner's insurer. Even in Florida, however, the minor children of the uninsured motorists are entitled to BRB coverage even if injured in their parents' uninsured vehicle.[118]

3. *Exemptions From BRB*

Although people who have affirmatively rejected the limitation upon their tort rights as provided for in KRS § 304.39-060(4) are not entitled to BRB,[119] they may purchase BRB coverage as part of their insurance policy.[120] Another class of persons is considered to have rejected the limitation on their tort rights and consequently is not entitled to BRB. KRS § 304.39-060(4) provides that

> any person, at the time of an accident, who does not have basic reparation insurance but has not formally rejected such limitations of his tort rights and liabilities and has at such

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[115] Interview with Mr. Tom Dixon, Chief Enforcment Officer, Department of Insurance, in Frankfort, Kentucky, Sept. 14, 1976.

[116] *See supra* note 113.

[117] 328 So. 2d 241, 242 (Fla. App. 1976), interpreting FLA. STAT. ANN. § 627.736(4)(d):

> The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:
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> . . .
>
> 4. Accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle . . . provided the injured person is not himself:
>
> a. The owner of a motor vehicle with respect to which security is required under [this Act]. . . .

[118] *See* Farley v. Bateway Ins. Co., 302 So. 2d 177 (Fla. App. 1974); Gateway Ins. Co. v. Butler, 293 So. 2d 738 (Fla. 1974).

[119] KRS § 304.39-030(1) (Supp. 1976).

[120] KRS § 304.39-140(5) (Supp. 1976).

> time in effect security equivalent to that required by KRS 304.39-110 shall be deemed to have fully rejected such limitations within meaning of this section for that accident only.

By necessity this section refers to a driver of an automobile from a state without no-fault who has $10,000/$20,000/$5,000 liability coverage consistent with KRS § 304.39-110.

KRS § 304.39-190 also disqualifies the converter of a motor vehicle from receiving BRB or added reparation benefits from any source other than his own insurance.[121] The converter who is also a basic reparation insured, however, will collect from his own policy, while other converters, who would normally recover from the security on the vehicle in which they were riding[122] or from the assigned claims plan,[123] are prohibited from so doing.

In addition, KRS § 304.39-200 provides that a person who intentionally causes or attempts to cause injury to himself or another person is disqualified from basic or added reparation benefits for any resulting injury. This section is more punitive than the exclusion for a motor vehicle "converter" in that a person who intends to cause injury is precluded from recovering benefits from any source including a policy under which he is a basic reparation insured.[124] Under this provision,

> [a] person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing the injury. A person does not intentionally cause or attempt to cause injury merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury, or if the act or omission causing the injury is for the purpose of averting bodily harm to himself or another person.[125]

Therefore, Kentucky, like Connecticut,[126] Minnesota,[127] and Pennsylvania[128] has provided the courts with guidelines. A

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[121] The test for "conversion" is whether the injured person used "the motor vehicle in the good faith belief that he [was] legally entitled to do so." KRS § 304.39-190 (Supp. 1976).

[122] KRS § 304.39-050(1) (Supp. 1976).

[123] KRS § 304.39-160(1) (Supp. 1976).

[124] KRS § 304.39-200 (Supp. 1976).

[125] *Id.*

[126] CONN. GEN. STAT. REV. § 38-332 (1975).

[127] MINN. STAT. ANN. § 65B.60 (Supp. 1975).

[128] PA. STAT. ANN. § 1009.208(b) (Supp. 1974).

specific intent to cause injury must exist unless the person knows that injury will follow as a consequence of his conduct.[129] "Whether intent or knowledge can be attributed to the insured on the basis that the nature of the act was of such a character as to imply intent or knowledge is an open question."[130]

In addition to excluding the injured party because of certain conduct, Kentucky also prohibits his survivors or beneficiaries from receiving benefits.[131] While the exclusion of the injured individual is designed to deter undesirable behavior in the operation of motor vehicles, it is not clear that this purpose is furthered by denying benefits to the survivors or beneficiaries of the person engaging in the wrongful conduct.

Although Kentucky has excluded BRB coverage for injuries resulting from certain specific conduct, it does not attempt to deter conduct to the extent done by other states. Some states withdraw BRB coverage for injuries received while committing a felony or seeking to avoid arrest,[132] driving under the influence of alcohol or narcotics,[133] and preparing for or participating in a drag race.[134]

4. *Source of BRB Coverage*

As indicated above, the vast majority of persons who suffer injuries arising out of an auto accident in Kentucky are entitled to BRB coverage. Once entitlement is determined, the source of BRB payments must be considered.

In Kentucky, the injured person looks primarily to the vehicle involved in the accident. If the person is injured while occupying a vehicle, BRB are recoverable from the security on that vehicle.[135] Likewise, a pedestrian struck by a vehicle receives coverage from that vehicle's insurance.[136] This priority for finding coverage primarily with the vehicle, however, is contrary to the emphasis established in UMVARA § 4(c)(1).[137]

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[129] SCHERMER, *supra* note 19, § 403, at 4-5, n.19.
[130] *Id.* § 4.02 at 5.
[131] KRS § 304.39-190 and 304.39-200 (Supp. 1976).
[132] FLA. STAT. ANN. § 627.736(2)(b) (1972); N.J. STAT. ANN. § 39:6A-7 (1973).
[133] FLA. STAT. ANN. § 627.736(2)(b) (1972).
[134] ORE. REV. STAT. § 523.5 (1971).
[135] KRS § 304.39-050(1) (Supp. 1976).
[136] *Id.*
[137] UMVARA at § 4(c)(1):

Under the UMVARA the coverage follows the person and not the vehicle. For instance, basic reparation insureds are covered by their own first party insurance, regardless of the place of injury, even if they are injured while occupying or struck by a vehicle owned by someone not a basic reparations insured.[138] This priority of coverage has been criticized by two insurance authorities,[139] a fact not unknown to the drafters of Kentucky's Act.[140]

In Kentucky a person injured by a vehicle not covered by no-fault may recover through any insurance contract under which he is a basic reparation insured.[141] In addition, if there is security on the responsible vehicle, but the insurer fails to pay the injured party within 30 days of receiving reasonable proof of the injury and the amount of the loss, the injured person can again recover benefits from his own basic reparation policy.[142] An injured party, however, except as provided in KRS § 304.39-140 (4) which allows recovery of benefits from more than one insurer where there is a disparity in the amount of the deductibles, cannot recover BRB from more than one repara-

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The security for payment of basic reparation benefits applicable to injury to a basic reparation insured is the security under which the injured person is a basic reparations insured.

[138] *Id.*

[139] Ghiardi & Kircher, *The Uniform Motor Vehicle Accident Reparations Act: An Analysis and Critique,* 23 FED. INS. COUNSEL Q. 47 (1973).

Coverage following the person under UMVARA will result in a change in present insurance practices, with the following results:

1. It will militate against developing a rating system even remotely tied to causation and exposure.
2. The number of claim files opened after an accident and, therefore, the amount of administrative expense will not depend upon the number of cars involved but upon the number of persons in the cars who are insured by different insurers. Every insurer will have to confirm coverage and record statistical data on the same claim for each person insured.
3. Smaller insurers operating on a sectional basis will be placed at a further disadvantage because they will not have the adjusting and administrative facilities available to those handling claims nationwide.

Id. at 64.

[140] Interview with Pat Able, Special Assistant to Governor Julian Carroll, in Frankfort, Kentucky, Sept. 19, 1976.

[141] KRS § 304.39-050(2) (Supp. 1976).

[142] KRS § 304.39-050(1) (Supp. 1976).

tions obligor or recover in excess of $10,000 as a result of any one accident.[143]

While this is true, there are situations where the injured person, though entitled to BRB because his injury is covered by the Act, is unable to recover from the above mentioned sources. In all situations where BRB is inapplicable, except when the injured person converted the vehicle or had the accident with the intent to cause injury, payment may be obtained through the assigned claims plan.[144] Payment is made through this plan when a person entitled to receive BRB coverage suffers a loss which no other insurance covers.[145] For example, a person injured in Kentucky while a passenger in a motor vehicle where neither he nor the owner is insured can recover under the assigned claims plan.[146] An uninsured pedestrian, struck by an uninsured vehicle can also recover from this plan.[147]

In addition, an injured person may recover from the plan if basic reparation insurance cannot be identified, even though it is possible or probable that some basic reparation insurance in fact exists.[148] This would be the case with hit-and-run drivers.[149]

Furthermore, recovery through the plan may be had when the insurer of the motor vehicle is financially unable to pay,[150] or if the claim for BRB is rejected for a reason other than the injured person not being entitled to benefits.[151] This section applies, for example, where an insurer refuses to pay on the belief that BRB should be paid by another source, or where an out-of-state insurer argues that it is unconstitutional for Kentucky to require payment of such benefits.[152] Where the insurance company refuses to pay on the grounds that the claimant is not entitled to benefits because no loss was suffered or be-

[143] KRS § 304.39-050(3) (Supp. 1976). A person can, however, purchase additional reparation benefits to supplement initial BRB. *See* KRS § 304.39-140(5) (Supp. 1976).

[144] KRS § 304.39-160(1)(a) (Supp. 1976).

[145] UMVARA at § 18, Comment. Kentucky has adopted UMVARA § 18(a)(1). KRS § 304.39-160(1)(a) (Supp. 1976).

[146] UMVARA at § 18(a)(1), Comment.

[147] *Id.*

[148] KRS § 304.39-160(1)(b) (Supp. 1976).

[149] UMVARA at § 18(a)(3), Comment.

[150] KRS § 304.39-160(1)(c) (Supp. 1976).

[151] KRS § 304.39-160(1)(d) (Supp. 1976).

[152] UMVARA at § 18(a)(5), Comment.

cause the loss did not arise through the ownership, maintenance, or use of a motor vehicle, however, the claimant cannot use KRS § 304.39-160(1)(d) to recover from the assigned claims plan.[153]

There is another exception to recovery under the plan. A person injured while "occupying" his own vehicle cannot recover benefits through assigned claims if he failed to carry the proper insurance as required by the Act.[154] If the security was not in effect only because the injured owner/occupant's insurance company failed to provide the basic reparation coverage, however, the injured person *can* recover through assigned claims.[155]

Upon receipt of BRB through the assigned claims plan, any benefits or advantages the claimant receives or is entitled to receive as a result of the injury are subtracted in calculating the net loss.[156] Benefits or advantages received by way of succession at death, death benefits from life insurance, or discharge of family support obligations, however, are not subtracted.[157]

The injured person must present his claim to the Assigned Claims Bureau within the time an action for benefits could have been commenced if identifiable coverage had been in effect.[158] Few people, however, are aware of the Assigned Claims Bureau and its procedures for presenting a claim. This is evident from a recent Bureau report to the Commissioner of Insurance. As of May 11, 1976, only 67 claims had been submitted and less than $28,000 in benefits had been paid.[159] These figures are not surprising considering the Bureau's lack of public visibility; only after seeing *two* officials of the Department of Insurance did these authors discover the address of the Assigned

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[153] *Id.*

[154] KRS § 304.39-160(4) (Supp. 1976).

[155] *Id.*

[156] KRS § 304.39-160(3) (Supp. 1976). This calculation of net loss does not apply where the injured person has assigned his claim because a reparation obligor has rejected his request for benefits for reasons other than his entitlement to benefits under KRS § 304.39-160(1)(d) (Supp. 1976).

[157] *Id.*

[158] KRS § 304.39-180(1) (Supp. 1976).

[159] Internal Report, dated May 11, 1976. Received from Mr. Tom Dixon, Chief Enforcement Officer, Kentucky Department of Insurance.

Claims Bureau. Further, although KRS § 304.39-300 empowers the Commissioner of Insurance to promulgate rules for the effective administration of the Act,[160] there is no mention of the Bureau in the Kentucky Administrative Register. The rules for the administration and operation of the Assigned Claims Plan and Bureau can be obtained only through a written request.[161] It is extremely doubtful that no-fault's purpose of providing prompt payment to victims for their economic damages can be furthered if the functioning of this Bureau continues at its present low profile.

The Kentucky Assigned Claims Plan is made up of reparation obligors, insurance companies as well as self-insureds who qualify with the Kentucky Department of Insurance to provide BRB coverage.[162] This membership is logical since the insurance companies are assessed to provide the plan's funds.[163] While the Commissioner of Insurance has the power to appoint no less than three nor more than eleven persons to a Governing Committee which is responsible for adopting rules and regulations and overseeing the plan,[164] there is no requirement that any public interest be represented in the plan. This may account for the low visibility of the assigned claims plan; the insurance companies responsible for its solvency are also responsible for its visibility and administration. This vested interest should be minimized by providing for representation by the public and practicing attorneys.

D. *Limitation of Tort Rights*

1. *Extent of Tort Limitation*

KRS § 304.39-060(1) provides that "[a]ny person who

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[160] Chapter 13 of KRS requires rules and regulations to be published in the Kentucky Administrative Register. Whether these regulations come within the ambit of KRS § 13.095 is not within the scope of this Note.

[161] A copy of the Assigned Claims Plan and the rules and regulations for its administration may be obtained by writing:

Kentucky Assigned Claims Plan
205 Marion E. Taylor Building
Louisville, Kentucky 40202

[162] Rules and Regulations to the Operation and Administration of the Kentucky Assigned Claim Plan and Bureau, *supra* note 161.

[163] Kentucky Assigned Claims Plan, *supra* note 161.

[164] *Id.*

registers, operates, maintains or uses a motor vehicle on the public roadways of this Commonwealth shall, as a condition of such registration . . . be deemed to have accepted . . . [the limitation of his tort rights]." This is a partial limitation, however, because it applies only to accidents occurring within Kentucky. Although the Kentucky legislature has no power to affect a person's conduct outside the state, parties involved in an accident in Kentucky have had sufficient contact with the state to enable its courts to apply Kentucky law.[165]

While this limitation is generally assumed, "[t]ort liability is not so limited for injury to a person who is not an owner, operator, maintainer or user of a motor vehicle . . . ."[166] These individuals are by necessity pedestrians[167] who do not own an automobile registered in Kentucky, maintain an automobile in Kentucky, and are not basic reparations insureds. Problems arise, however, because the meaning of the term "maintenance of an automobile" is not clear. It is defined in the Act as "having legal custody, possession or responsibility for a motor vehicle by one other than an owner or operator."[168] This is apparently intended to cover bailments for repair or the simple borrowing of another's automobile. The UMVARA, however, de-

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[165] For a more detailed analysis see the Conflict of Laws section, accompanying notes 267 to 280 *infra.*

[166] KRS § 304.39-060(2)(c) (Supp. 1976).

[167] A pedestrian is defined as one "who is not an operator or user of a motor vehicle at the time his injury occurs." KRS § 304.39-050(1) (Supp. 1976). This conclusion is somewhat more restrictive than the Court's interpretation in Fann v. McGuffey, 534 S.W.2d 770, 774 (Ky. 1975):

> This limitation upon recovery for pain, suffering, mental anguish and "inconvenience" does not apply if the plaintiff was not an "owner, operator, maintainer or user" of an automobile. Hence it does not apply to an injured pedestrian unless at the time of the accident he owns or maintains an automobile, or is an operator or user in the sense that upon occasion he drives, uses, or has driven or used an automobile on the roadways of this state.[19] In this special respect, one who "uses" an automobile (e.g., a passenger) is not a "user" unless he is a named insured in a policy with BRB coverage or is covered as a member of the named insured's household. [Other footnotes omitted].

In footnote 19, the Court left open the question of how much operation or use will suffice to make one an operator or user who is fully subject to no-fault limitations. Under KRS § 304.39-050(1), however, the time of the accident is determinative; if the injured party is a pedestrian at this time, he is treated as a pedestrian regardless of how often he might operate a vehicle.

[168] KRS § 304.39-020(15) (Supp. 1976).

fines use and maintenance together,[169] and both the Kentucky Act and the UMVARA define "use" in terms of use as a vehicle.[170]

The most confusing area involves whether a minor injured as a pedestrian is within the category of persons who are not registrants, operators, maintainers, or users of a motor vehicle. Obviously, a young child does not own, operate, or maintain a motor vehicle and when injured as a pedestrian is not using the motor vehicle at the time of the accident. KRS § 304.39-020(14), however defines "user" as "a person who is a basic reparation insured or would be a basic reparation insured if such person had not rejected the limitation upon his tort rights as provided in KRS § 304.39-060(4)." Therefore, if the minor is a basic reparations insured on his parents' insurance policy[171] or if the parents failed to reject their tort rights limitation in accordance with KRS § 304.39-060(4), the minor is a user and subject to the tort right limitation.

The extent of a person's tort rights limitations is defined in KRS §§ 304.060(2)(a) and (b).

> (a) Tort liability with respect to accidents occurring in this Commonwealth and arising from the ownership, maintenance, or use of a motor vehicle is "abolished" for damages because of bodily injury, sickness or disease to the extent the basic reparation benefits provided in this subtitle are payable therefor, or that would be payable but for any deductible authorized by this subtitle, under any insurance policy or other method of security complying with the requirements of this subtitle, except to the extent non economic detriment qualifies under subsection (2)(b) hereof.
> (b) In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required in this subtitle, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle

[169] UMVARA at § 1(6).

[170] KRS § 304.39-020(6); UMVARA at § 1(6). *See also* KRS § 304.39-020(6) (Supp. 1976).

[171] *See supra* text accompanying note 94.

> only in the event that the benefits which are payble for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars ($1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a weight-bearing bone, a compound comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death.

The importance of the phrase "arising from the ownership, maintenance, or use of a motor vehicle" cannot be overemphasized; this phrase establishes the scope of the tort liability limitation. Many people injured in a motor vehicle will not find their tort rights limited, because from the defendant's perspective, the accident did not arise out of the ownership, maintenance, or use of a motor vehicle.[172] One authority states that this would include: accidents caused by a defect in the manufacture or design of the automobile, car-train collisions, and highway contractors and other people who cause accidents through construction, installation, or maintenance of traffic control devices, or obstruction of roadways.[173]

Stated in overly simplistic terms, KRS §§ 304.39-060(2)(a) and (b) are important because a tortfeasor covered by these provisions is exempt from suit to the extent of the economic benefits available under BRB and is also exempt from damages for pain, suffering, mental anguish, and inconvenience unless the medical expenses exceed $1,000 or the injuries fall into those specifically enumerated categories.[174]

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[172] O'CONNELL & HENDERSON, TORT LAW, NO-FAULT AND BEYOND 397 (1975).

[173] *Id.*

[174] KRS § 304.39-060(2)(b) (Supp. 1976). The threshold requirement is jurisdictional in nature; before a court can hear the suit, the plaintiff must place in controversy, by a good faith complaint, the requisite elements which under the statute entitle him to bring suit. Wooten v. Collins, 327 So. 2d 795 (Fla. App. 1976); Sullivan v. Darling, 367 N.Y.S.2d 199 (Sup. Ct. 1975); *cf.*, Snyder v. Laffer, 367 N.Y.S.2d 454 (Sup. Ct. 1975). Some courts place the burden on the plaintiff to establish at trial that his injuries satisfy the threshold requirement; the defendant need not affirmatively plead the plaintiff's failure to meet the threshold. *See, e.g.*, Seskine v. Cone, 353 A.2d 558 (N.J. Superior Ct. 1976). *Contra*, Fennell v. Ferreira, 335 A.2d 84 (N.J. Superior Ct. 1975) (defendant must prove his exemption from tort liability as an affirmative defense); Snyder v. Laffer, 367 N.Y.S.2d 454 (Sup. Ct. 1975) (defendant's affirmative defense was defective; the issue of whether the plaintiff passed the threshold was to

The threshold requirement does not apply, however, when a person is injured by a motor vehicle operator who has properly rejected his tort right limitation. The injured person "may claim his full damages, including nonpecuniary damages, or if such injured person has not rejected his own tort limitations, he may also claim basic reparation benefits from the appropriate security on the vehicle . . . ."[175] On the other hand, the Act does not set out any exception to the threshold requirement when the person is injured by an operator of an uninsured vehicle who has not rejected his tort right limitation. This irony is apparent when one considers what happens to the out-of-state insured:

> any person who, at the time of an accident, who [sic] does not have basic reparation insurance but has not formally rejected such limitations of his tort rights and liabilities and has at such time in effect security equivalent to that required by KRS 304.39-110 shall be deemed to have fully rejected such limitations within meaning of this section for that accident only.[176]

Because it is highly unlikely that a Kentucky resident will have security equivalent to that required by KRS § 304.39-110, not have BRB coverage and not have had the opportunity to reject the limitation on his tort rights, this provision applies primar-

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be determined at trial). The issue of whether a plaintiff's injuries have put him over the threshold requirement is a mixed question of law and fact. Where the facts as shown in the pleadings are sufficiently clear to enable the court to decide the issues as a matter of law, it should do so, but where the facts show a genuine dispute as to whether the plaintiff has sustained the requisite threshold injury, the issue should be submitted to a jury for determination. Davis v. Pathe Cab Corp., 377 N.Y.S.2d 893 (Civil Ct. 1975); Sullivan v. Darling, 367 N.Y.S.2d 199 (Sup. Ct. 1975). One court has held that whether the plaintiff was "permanently injured" should be determined by the jury. Allstate Ins. Co. v. Ruiz, 305 So. 2d 275 (Fla. App. 1975). Another court has held that the phrases "serious injury" and "significant disfigurement" are unconstitutionally vague and therefore violate the equal protection clause. Montgomery v. Daniels, 367 N.Y.S.2d 419 (Sup. Ct. 1975).

Where the plaintiff's complaint sufficiently overcomes the threshold and shows his entitlement to maintain the suit, but the jury nevertheless finds that his injuries were not sufficient to meet the threshold, the plaintiff is barred from recovery in that suit; however, he is without prejudice to maintain the suit at a later time if his damages reach the threshold. Cole v. Berkowitz, 373 N.Y.S.2d 782 (Civil Ct. 1975); Wooten v. Collins, 327 So. 2d 795 (Fla. App. 1976) (the jury's finding that the plaintiff's injuries did not meet the threshold deprived the court of jurisdiction).

[175] KRS § 304.39-060(7) (Supp. 1976).

[176] KRS § 304.39-060(4) (Supp. 1976).

ily to nonresident motorists. It is very probable that a nonresident will have the required $10,000/$20,000/$5,000 coverage from an insurance policy issued in a state without no-fault. As a result, an injured party may not sue an uninsured Kentucky resident without meeting the threshold requirement although he can sue an insured nonresident motorist in addition to collecting BRB.

Confusion has also arisen concerning the extent to which the threshold requirement of KRS § 304.39-060(2)(b) limits an injured person's rights in tort. This question was clarified in *Fann v. McGuffey:*[177]

> KRS 304.39-060(2)(a) and (b) lack some degree of clarity, partially because, it is said, subsection (b) was lifted out of context from the Florida statute. Apparently there has been some thought that KRS 304.39-060(2)(b) not only restricts recovery for pain, suffering, mental anguish and "inconvenience" but also limits it to those items of damage, thus eliminating, for example, the element of destruction or permanent impairment of earning capacity. But we see nothing to call for such a construction. Read carefully in this aspect, the statute says only that unless the threshold requirement is satisfied there can be no recovery of these particular, enumerated elements of damage.[178]

As surprising as this interpretation may seem, it is not inconsistent with the interpretation given similar sections by courts in other states. For example, in *Barker v. Scott,*[179] a New York Supreme Court held that New York's no-fault legislation did not abrogate a spouse's common law right to sue for loss of services, society and companionship of his wife. Read in light of the limitation imposed by *Fann,* the threshold requirement would not limit a tort suit for aggravation of a pre-existing disease or physical condition, impairment of a physical or mental ability, fright and shock, humiliation, indignity and insult, loss of consortium, loss of earning capacity, and temporary disability.

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[177] 534 S.W.2d 770 (Ky. 1975) (footnotes omitted).

[178] *Id.* at 774.

[179] 365 N.Y.S.2d 756 (Sup. Ct. 1975).

2. *Option to Reject*

Any person may reject the limitation on his tort rights and liabilities by filing a written rejection with the Department of Insurance,[180] which takes effect upon receipt by the Department.[181] This rejection is effective for 5 years from the date of execution, but may be revoked at any time.[182] Members of the same household may indicate their rejection on the same form, but each individual must execute the form on his own behalf unless he is under legal disability,[183] at which time the limitation can be rejected by the natural parent or legal guardian.[184] A person whose legal disability is removed is not deemed to have accepted the limitation until 6 months have expired from the time the no-fault law would have otherwise become applicable to him.[185] The ability of a parent or guardian to reject or waive rejection on behalf of a minor or other person under legal disability came under sharp attack in *Fann.* The Court dismissed this criticism saying:

> The argument that a parent waives his child's right to sue by failing to exercise the right of rejection for him misses the point that it is the child's act in using an automobile; or the parent's act in causing or permitting him to do so, that subjects him to the limitations imposed by the no-fault law. As expressly stated in KRS 304.39-060(1), implied consent to the law hangs on one's use of the highways, not on the failure to reject, which really is in the nature of an added attraction.[186]

The Court further based its decision on the prerogative of the state to define the authority of a parent to act for a child.

> Parents and custodians of persons under disability necessarily have the liberty to exercise or forego many options affect-

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[180] KRS § 304.39-060(4) (Supp. 1976).

[181] 806 KAR 39:030 § 5 (1976). *But see* KRS § 304.39-060 (4) (1976) which implies that the rejection becomes effective when *executed* and *filed* with the Department of Insurance. This form, approved by the Department of Insurance, is to be furnished by the reparations obligor to each prospective applicant. KRS § 304.39-060(6) (Supp. 1976).

[182] KRS § 304.39-060(5) (Supp. 1976).

[183] 806 KAR 39:030 § 2 (1976).

[184] KRS § 304.39-060(4) (Supp. 1976).

[185] *Id.*

[186] Fann v. McGuffey, 534 S.W.2d 770, 778 (Ky. 1975).

> ing the rights and welfare of the child or ward. A next friend may file suit for an infant, waive trial by jury, and lose the case, all without let or hindrance.[187]

E. *Mandatory Insurance Coverage*

Except for governmental units, every owner of a motor vehicle registered or operated in Kentucky shall continuously provide insurance by contract or by self-insurance. This insurance must provide payment for personal injuries with minimum coverage of $10,000 per person and $20,000 per accident and property damage with minimum coverage of $5,000. The insurance must also provide BRB.[188] The definition of motor vehicle applicable here is the same as that discussed in consideration of BRB coverage and tort right limitations.

KRS §§ 304.39-080(3) and (4) provide that governmental units *may* provide such security.[189] Governmental units are not subject to the Act and need take no affirmative action unless and until they elect to become "obligated governments."[190] When this occurs the government may meet its obligations by providing security through an insurance contract or by obligating itself to pay BRB in accordance with the Act.[191] In *Fann* the Court held that the exclusion of governmental units was not an unreasonable classification and thereby did not offend section 59 of the Kentucky Constitution.[192]

Although self-insurance is allowed, it is not without restrictions. KRS § 304.39-080(7) empowers the Commissioner of Insurance to approve applications and to set standards which

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[187] *Id.* (footnote omitted).

[188] KRS § 304.39-110 (Supp. 1976) (minimum security); KRS § 304.39-080(5)(c) (Supp. 1976) (type of security).

[189] KRS § 304.39-080(3) and (4) (Supp. 1976):

> (3) This Commonwealth, its political subdivisions, municipal corporations, and public agencies may . . . .
>
> (4) The United States and its public agencies and any other state, its political subdivisions, municipal corporation, and public agencies may . . . .

The "may" was changed from "shall" by House Amendment 5 because the requirement that a government "shall" provide security was in conflict with the idea that such entities were exempt from the compulsory insurance requirements. *House Journal* for 1974 at 1537.

[190] 806 KAR 39.040 § 1 (1976).

[191] *Id.* at § 2.

[192] Fann v. McGuffey, 534 S.W.2d 770, 779 (Ky. 1975).

self-insurers must continually meet. The Kentucky Administrative Regulations further define the criteria that must be met by an applicant for self-insurance and the grounds on which the commissioner may revoke the self-insurer status.[193] The more important of these criteria require the applicant to agree in writing to pay all tort liability and BRB incurred and required by the Act, agree to become a member of the Kentucky Arbitration Association and Assigned Claims Plan, file annual financial statements with the Commissioner of Insurance, and furnish a bond to meet his obligations or deposit cash or other assets of the kind which may be deposited by a domestic insurer with the Custodian of Insurance Securities. The minimum self-insurance security requirement is $50,000 for one secured vehicle and $10,000 for each additional vehicle up to $200,000.[194]

Although Kentucky's insurance requirement is mandatory, it is not compulsory. Because it is not compulsory, it is not necessary to show proof of insurance before motor vehicle registration or the issuance of a license. The UMVARA § 7(j) provides that "[a] motor vehicle may not be registered in this State unless evidence satisfactory to the [registrar of motor vehicles] is furnished that security has been provided as required by this section." Kentucky opted for the less restrictive alternative,[195] as did many other states; only Massachusetts,[196] New York,[197] and North Carolina[198] have enacted compulsory insurance legislation.

The subject of compulsory insurance has been very controversial.[199] Although Kentucky's noncompulsory scheme is prob-

[193] 806 KAR 39:050 (1976).

[194] *Id.*

[195] KRS § 304.39-090. This provision coincides with UMVARA § 7(j), Comment.

[196] MASS. GEN. LAWS ch. 90, §§ 34A-34J; ch. 175, §§ 113A-113H (1971).

[197] N.Y. VEH. & TRAFF. §§ 310-321 (McKinney Supp. 1975-76).

[198] N.C. GEN. STAT. §§ 20-309-319 (1965).

[199] It has been argued that it is the compulsory nature of insurance and not just the existence of no-fault which is responsible for the lowering of insurance premium costs. Brainard, *Kentucky Bill Offers Motorists a Choice Between Tort and No-fault,* 41 INS. COU. J. 244, 246 (1974). This is the same analysis used, however, to support the argument that a more effective method of providing insurance is through the imposition of compulsory requirements on the traditional tort system insurance.

> Thanks to compulsory insurance, many more cars (it was assumed) would be insured under no-fault than under tort, a voluntary system in all

ably the most used and best reasoned approach, it may not be consistent with the expected rate reduction which the legislature made mandatory by KRS § 304.39-330.

Instead of compulsory insurance, Kentucky enforces its mandatory insurance by stating that:

> An owner of a motor vehicle registered in this Commonwealth who ceases to maintain security as required by the provisions on security may not operate or permit operation of the vehicle in this Commonwealth until security has again been provided as required by this subtitle. All other owners shall provide such security while operating a motor vehicle in this Commonwealth.[200]

KRS § 304.99-050 further provides a penalty for violation of this provision:

> An owner or registrant of a motor vehicle with respect to which security is required by this subtitle, who operates the motor vehicle or permits it to be operated in this Commonwealth without having in full force and effect security complying with KRS 304.39-110, shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

For the person who rejects the limitations on his tort rights pursuant to KRS § 304.39-060(4) to comply with these compulsory insurance provisions, he must provide the minimum liability and BRB coverage required by KRS § 304.39-110.[201] To

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three states. This raised a pertinent question. If the average per car rate could be lowered under no-fault by resort to compulsory insurance, what would happen to the average per car rate under tort if that system were made compulsory.

Id.

On the other hand, the claimed experience of the compulsory insurance states has not been good. *See, e.g.*, S. HASHMI, COMPULSORY AUTOMOBILE LIABILITY INSURANCE (1968).

[200] KRS § 304.39-090 (Supp. 1976).

[201] The 1976 session of the legislature added the requirement of BRB coverage to KRS § 304.39-110(1)(d) in order to make it consistent with KRS § 304.39-080(5).

> Except for entities described in subsections (3) and (4), every owner of a motor vehicle registered in this Commonwealth or operated in this Commonwealth by him or with his permission, shall continuously provide with respect to the motor vehicle while it is either present or registered in this Commonwealth, and any other person may provide with respect to any motor vehicle, by a contract of insurance or by qualifying as a self-insurer,

assure compliance with these requirements all reparation obligors are required to issue to each basic reparation insured or insured person who has rejected his tort limitations a certificate or other evidence that his policy meets the minimum requirements of KRS § 304.39-110.[202] The Commissioner of Insurance, by unofficial bulletin, clarified this evidence of insurance requirement by stating:

> An identification card, certificate, or policy of automobile liability insurance or any equivalent document, is deemed under KRS § 304.39-210 [*sic*] to provide prima facie evidence that insurance, required by this Act, is in effect.[203]

If the owner or registrant of a motor vehicle is involved in an accident and does not have the security required by KRS § 304.39-110, he is treated as a reparations obligor.[204] That is, when the injured person collects BRB from either another reparations obligor or the assigned claims plan, the payor of the benefits is subrogated to the rights of the injured person against the uninsured owner or registrant.[205] This section, however, does not relieve the insurer secondarily liable for the payment of his obligation to pay.[206]

Kentucky's no-fault legislation repealed KRS §§ 187.330-.390 which contained the security provisions of the Kentucky financial responsibility laws.[207] Security is now required under KRS § 304.39-110. Before its repeal, section 187.330(3) allowed the posting of a $10,000 bond after the accident. This type of security is no longer available; a person must either purchase an insurance policy with the minimum liability limits and BRB coverage or be approved by the Commissioner of Insurance as a self-insurer. This must be done *before the accident.*[208]

> security for the payment of basic reparation benefits in accordance with this subtitle and security for payment of tort liabilities, arising from maintenance or use of the motor vehicle.

KRS § 304.39-080(5) (Supp. 1976).

[202] KRS § 304.39-310(1) (Supp. 1976).

[203] Bulletin ¶ 9, at 3.

[204] KRS § 304.39-310(2) (Supp. 1976).

[205] *Id.*

[206] Commercial Union Ins. Co. v. Williams, 309 So. 2d 617 (Fla. App. 1975); Farley v. Gateway Ins. Co., 302 So. 2d 177, (Fla. App. 1974); Butler v. Gateway Ins. Co., 295 So. 2d 651 (Fla. App. 1974).

[207] KY. ACTS ch. 385, § 35 (1974).

[208] The new law, however, maintains the prior reporting requirement. Every opera-

Since the pre-no-fault financial responsibility law[209] was totally repealed, Kentucky has no provision which allows suspension of a vehicle license or registration in the event the person is without the required security. The only available remedy is a fine of not less than $50.00 and not more than $500.00.[210] Furthermore, the statute does not call for the automatic reporting of these violations to the appropriate prosecutorial agency for the initiation of the criminal action.

Although it may be said that requiring proof of insurance as a condition precedent to registration goes too far,[211] the lack of teeth in Kentucky's financial security requirements does not go far enough. In fact, it is more lenient than the law prior to no-fault, which required suspension of license and registration if security was not maintained.[212] Under UMVARA § 8 a person failing to maintain the required security must at least surrender his registration certificate and license plates.[213] It also requires the insurer to give notice to the registrar of motor vehicles when insurance is terminated. Kentucky's law is at best inconsistent. A person can be sentenced to 6 months in jail in addition to a fine of up to $500 for driving after having his license and registration revoked for not correctly reporting an accident,[214] but faces only a $500 fine for driving without the required security.

F. *Motorcycles*

Motorcycles, which have been involved in a great deal of litigation in other states, are treated separately because they

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tor (or owner if the operator is physically incapable of doing so) must submit an accident report to the Department of Transportation within 10 days of any Kentucky accident in which a person was killed or injured or property damage totaled at least $200. KRS § 187.320(1) (1972). If the operator fails to report the accident or fails to give the required information correctly, he is guilty of a misdemeanor. KRS § 187.320(2) (1972). Furthermore, if the injury or property damage occurred to another in the accident, the department could suspend or revoke the motor vehicle license or registration of the person in violation. If the violator is a nonresident, the department can revoke his operating privilege. *Id.*

[209] KY. ACTS ch. 118, § 5 (1946).

[210] KRS § 304.99-050 (Supp. 1976).

[211] S. HASHMI, *supra* note 199.

[212] KY. ACTS ch. 164, § 1 (1962) (repealed 1975).

[213] UMVARA at § 8.

[214] KRS § 187.990 (1972).

are the subject of a 1976 amendment[215] to the No-Fault Act. This amendment added KRS § 304.39-040(3), which explicitly excludes BRB from the operators and passengers of motorcycles unless coverage for the motorcycle or the individual injured has been purchased. KRS § 304.39-060(2)(c) was also amended to provide that tort liability was not limited for the injury to a motorcycle passenger. In addition, KRS § 304.39-100(2) was amended to eliminate the requirement that an insurer must provide BRB coverage in a liability insurance contract issued on a motorcycle, and KRS § 304.39-110(3) was added to eliminate the requirement of BRB coverage as minimum security on a motorcycle.

These specific statutory changes were implemented to exclude motorcycles, their operators, and passengers from the scope of the No-Fault Act. To that end, the General Assembly accomplished its intention. This has not been the case in other jurisdictions, as is evidenced by the amount of litigation in this area. New York offers a good example. The state legislature attempted to remove motorcycle coverage by defining "motor vehicle" to exclude motorcycles;[216] however, in at least four New York Supreme Court cases[217] the legislature's purpose was frustrated.[218] These cases generally involved the collision of a

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[215] KY. ACTS ch. 75 (1976).

[216] N.Y. INS. LAW § 671(6) (McKinney Supp. 1973).

> "Motor vehicle" shall have the meaning ascribed in section three hundred eleven of the vehicle and traffic law, except that . . . (b) it shall not include a motorcycle . . . .

N.Y. INS. LAW § 671(10) (McKinney Supp. 1973).

> "Covered person" means any pedestrian injured through the use or operation of, or any owner, operator, or occupant of a motor vehicle which has in effect the financial security required by article six or eight of the vehicle and traffic law or which is referred to in subdivision two of section three hundred twenty-one of such law, or any other person entitled to first party benefits.

N.Y. INS. LAW. § 672(1)(a) (McKinney Supp. 1973). This section mandates that the defendant, as an owner of a motor vehicle registered in this state, have in effect liability insurance coverage or its equivalent on his automobile. This coverage must guarantee the payment of first party benefits to those sustaining loss arising out of the use or operation in the state of such automobile unless such person is at the time an occupant of another motor vehicle.

[217] The New York Supreme Court is equivalent to Kentucky's Circuit Courts.

[218] Brown v. Crawford, 377 N.Y.S.2d 910 (Sup. Ct. 1975); Perkins v. Merchants Mut. Ins. Co. 368 N.Y.S.2d 141 (Sup. Ct. 1975); Jones v. Giordano, 366 N.Y.S.2d 534 (Sup. Ct. 1975); Glosson Motor Lines, Inc. v. Platt, 363 N.Y.S.2d 445 (Sup. Ct. 1974).

motorcycle and an automobile, with the motorcycle operator or passenger subsequently filing a claim with the automobile's insurer for BRB. The courts found coverage. Because a motorcycle is not considered a motor vehicle for purposes of "no-fault," a motorcycle operator injured in an accident with an automobile could not be considered an "occupant of another vehicle" within the purview of the no-fault statutory provision that a motor vehicle owner's policy shall provide for payment of first party benefits to persons "other than occupants of another motor vehicle."[219]

Only the Monroe County Supreme Court in *Cucinella v. Cooper*[220] gave the motorcycle issue the interpretation believed to be intended by the legislature. There the court stated, "I interpret the phrase 'persons, other than occupants of another motor vehicle' to mean any pedestrians."[221]

Not unlike Kentucky, the New York legislature exempted motorcycles from the scope of its no-fault act because of their belief that the frequency of personal injury claims resulting from motorcycle accidents would make the cost of no-fault insurance for motorcycles prohibitive.[222] If this belief is justified, it seems inconsistent that the courts of New York have shifted the cost of BRB coverage for motorcycles to automobile insurers.

Although Kentucky, through good draftmanship, has avoided the problem faced by New York, BRB coverage is still available to operators and passengers of motorcycles. The statute provides no BRB coverage "unless such reparation benefits have been purchased as optional coverage for the motorcycle *or by the individual so injured.*"[223] The last part of this quote can be interpreted to mean that a motorcycle passenger or operator who is a basic reparations insured on an automobile insurance policy will be entitled to BRB coverage. This interpretation is supported by *Harlan v. Fidelity & Casualty Co.*[224]

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[219] *See, e.g.,* Glosson Motor Lines, Inc. v. Platt, 363 N.Y.S.2d 445 (Sup. Ct. 1974).

[220] 371 N.Y.S.2d 620 (Sup. Ct. 1975).

[221] *Id.* at 621.

[222] Comment, 37 ALBANY L. REV. 664, 675 at n.71 (1973).

[223] KRS § 304.39-040(3) (Supp. 1976) (emphasis added).

[224] 353 A.2d 151, 152 (N.J. 1976). The Superior Court of New Jersey interpreted N.J.S.A. 39:6A-4 which provides that every automobile liability policy should provide benefits, without regard to negligence, liability or fault, to the named insured and

Regardless of the wisdom in excluding motorcycles from the full scope of the No-Fault Act, this distinction is within the power of the General Assembly. The Kansas Supreme Court addressed this question in its decision that the Kansas No-Fault Act, with a similar motorcycle exemption, was constitutional.[225]

> There is substantial reason for the Legislature to make a distinction in the No-Fault Act between automobile owners and operators and motorcycle owners and operators because (1) the general physical characteristics of the two types of vehicles considered in relation to the effects produced upon the operators or passengers of such vehicles by an accident; (2) a motorcycle operator involved in an accident will most surely be thrown from the vehicle onto the pavement, and since the weight of the vehicle is so much less than the weight of an automobile, a collision, even at reduced speeds, will obviously produce more serious personal injury to the motorcycle operator than the same collision would produce to the driver or passengers in an automobile; (3) while the automobile is used ordinarily as a family conveyance and is used primarily on the streets and highways, most motorcyclists use their motorcycles in addition to transportation, for pleasure and sports on and off the public ways, *[sic]* and (4) because of the difference in use, and primarily because of the vulnerability of the operator or passenger on the motorcycle to serious injury, the financial exposure for medical and hospital expenses, as well as loss of earnings, is much greater than it would be for an automobile driver under the same circumstances. Hence, the cost of procuring the personal injury protection benefits would be substantially greater for a motorcyclist than it would be for an automobile owner.[226]

As the court in *Manzanares* pointed out, the United States Supreme Court has supplied sufficient precedent for this type of classification.[227]

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members of his family residing in his household who sustain bodily injury as a result of an accident involving an automobile; a motorcyclist who collided with an automobile was entitled to recover even though the policy in question purported to limit benefits to those relatives who were injured while occupying, using, entering into or alighting from a private automobile.

[225] Manzanares v. Bell, 522 P.2d 1291 (Kan. 1974).

[226] *Id.* at 1310-11 (citation omitted).

[227] *Id.* at 1311.

G. *Statute of Limitations*

If no BRB payments have been made for personal injury, the injured party has 2 years to commence an action for their recovery. This period begins to run when the loss is suffered and the injured party knows or should have known that the injury was caused by the accident; in no event, however, can the action be commenced more than 4 years after the date of the accident.[228] On the other hand, if BRB payments have already been made to the injured person, an action for additional benefits may be commenced not later than 2 years after the last BRB payment was received.[229]

An action for survivor's benefits may not be commenced later than 1 year after death, or 4 years after the accident, whichever comes first; this is true, however, only if neither the

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In the area of economic and social legislation, a statutory plan does not violate the equal protection clause merely because the classifications contained therein are imperfect. (Village of Belle Terre v. Boraas, ___ U.S. ___, 94 S.Ct. 1536, 39 L. Ed.2d 797, 42 L.W. 4475; Jefferson v. Hackney, 406 U.S. 535, 92 S.Ct. 1724, 32 L. Ed. 2d 285.) Nor does the equal protections [*sic*] clause require a state to "chose between attacking every aspect of a problem or not attacking the problem at all. . . ." (Dandridge v. Williams, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, 503.)

The foregoing principles were stated by Mr. Chief Justice Hughes in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703:

". . . This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms. (Citations). . ." (300 U.S. at 400, 57 S.Ct. at 585-86, 81 L.Ed. at 703).

In Williamson v. Lee Optical, *supra*, Mr. Justice Douglas said:

". . . The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. *Evils in the same field may be of different dimensions and proportions, requiring different remedies.* Or so the legislature may think. (Citation). *Or the reform may take one step at a time,* addressing itself to the phase of the problem which seems most acute to the legislative mind. (Citations). *The legislature may select one phase of one field and apply a remedy there, neglecting the others.*" (348 U.S. at 489, 75 S.Ct. at 465, 99 L.Ed. at 573). (emphasis supplied.)

Id.

[228] KRS § 304.39-230(1) (Supp. 1976).

[229] *Id.*

decedent nor the survivor has received BRB.[230] When the decedent or the survivor has received BRB payments, an action for additional benefits may be commenced no later than 2 years after the last BRB payment.[231] If the decedent received BRB payments prior to his death, however, an action for survivor's benefits may be commenced not later than the earlier of 1 year after the death or 4 years after the last payment of BRB.[232]

In addition, a special statute of limitations applieswhere a claimant has brought timely action against a reparations obligor but has been denied benefits because another reparations obligor was responsible for payment. When the action is dismissed, the claimant has the later of 60 days or the last date on which the action could have been commenced to initiate an action against the correct reparations obligor or the assigned claims plan.[233]

KRS § 304.39-230(4) further extends the time for bringing action against the assigned claims plan in certain situations. A claimant denied benefits by the reparations obligor assigned to him under the assigned claims plan has an additional 60 days after receipt of written notice of the rejection to commence an action under the assigned claims plan. This provision does not apply if the above subsections provide for a longer period.

The statute of limitations as it relates to minors and other legally disabled persons does not start the period running anew when the disability is removed, such as reaching the age of majority, even though the individual is under a legal disability at the time the cause of action accrues.[234] This right was present before enactment of no-fault.[235] Currently KRS § 304.39-230(5)

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[230] KRS § 340.39-230(2) (Supp. 1976).

[231] *Id.* Pursuant to KRS §§ 304.39-050(1) and 304.39-210 (Supp. 1976) payments are made as expenses are incurred. If a demand is made on the reparation obligor, payment is to be made monthly unless the accumulated expense is less than $100.

[232] *Id.*

[233] KRS § 304.39-230(3) (Supp. 1976).

[234] KRS § 304.39-230(5) (Supp. 1976).

[235] KRS § 413.170(1) (1972):

> If a person entitled to bring any action mentioned in KRS 413.090 to 413.160, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant or of unsound mind, the action may be brought within the same number of years after the removal of the disability or death of the

states that the period of disability is included in the time provided for commencement of the action. The Court in *Fann* held this saving provision valid as a matter of legislative choice.[236]

These time limitations, however, affect only the actions brought under the No-Fault Act. While these limits appear quite liberal, they are consistent with the basic theme of the Act. They do not force a claimant into litigation without allowing sufficient time for maximum utilization of the Act's recovery provisions. The legislature, however, saw fit to add an additional statute of limitation which was unnecessary to no-fault's implementation. KRS § 304.39-230(6) provides that:

> An action for tort liability not abolished by KRS 304.39-060 may be commenced not later than two (2) years after the injury, or the death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.

Had this provision not been included, those not subject to the tort right limitations, either by classification or explicit rejection, would be subject to the 1 year statute of limitation as provided by KRS § 413.140(1). The courts must now determine whether KRS § 304.39-230(6) completely abrogates the 1 year statute of limitation for all personal injuries or applies only to automobile accidents which would be subject to no-fault were it not for KRS § 304.39-060.[237]

H. *Payment of Claims by an Insurer*

BRB insurers and the assigned claims plan are obligated, without regard to any immunity,[238] to pay BRB[239] for personal

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person, whichever happens first, allowed to a person without the disability to bring the action after the right accrued.

[236] Fann v. McGuffey, 534 S.W.2d 770, 778 (Ky. 1975).

[237] The Court in Fann v. McGuffey, 534 S.W.2d 770, 775 (Ky. 1975), held that KRS § 304.39-060 "remains subject to KRS § 413.170(1), which extends the limitation period for infants and persons of unsound mind."

[238] This phrase is directed primarily toward governmental and charitable immunities. The intent (at least with the UMVARA) was that no immunity from liability or suit shall affect the obligations to pay BRB. *See, e.g.*, UMVARA at § 3, Comment.

[239] KRS § 304.39-210(3) (Supp. 1976) provides that:

> A claim for basic or added reparation benefits shall be paid without deduction for the benefits which are to be subtracted pursuant to the provisions on calculation of net loss if these benefits have not been paid to the claimant before the reparation benefits are overdue or the claim is paid. The

injuries arising out of motor vehicle accidents.[240] The insurer providing security on the vehicle which was occupied by the injured party or which struck the injured person has a duty to respond with payment to the injured party within 30 days of receiving reasonable proof of the fact and amount of loss.[241] This duty of prompt response is based on the requirement that BRB is to be paid monthly as the loss accrues. Losses accrue not when the injury occurs, but as work loss, replacement services, or medical expenses are incurred.[242] The insurer, however, can accumulate the injured party's claims for up to 31 days after receiving notice of the loss, provided payment is made within 15 days after the period of accumulation.[243]

An insurer can also reject a claim for benefits, but if this is done, he is required to give written notice of the rejection along with his reasons.[244] This notice must also inform the claimant that he may file a claim with the assigned claims bureau; this latter information, however, is not required if the claim is rejected because the person is not entitled to the benefits.[245]

Insurers are encouraged to make periodic payments for accrued loss as promptly as possible. Overdue payments bear

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reparation obligor is entitled to reimbursement from the person obligated to make the payments or from the claimant who actually receives the payments.

See also, UMVARA at § 23(c), Comment, which provides:

> Subsection (c) is intended as a partial solution to the problem which may exist if the claimant's right to payment from a collateral source which is to be subtracted in calculating net loss (Section 11) or subtracted under a contingent exclusion (Section 14 (b)(2)), is itself a matter of dispute or is delayed in payment. For example, if there were substantial dispute whether a person's automobile accident injury or death occurred in the course of his employment, a claimant clearly entitled to benefits from some source might be faced with conflicting claims of a workmen's compensation insurer that the accident did not occur in the course of employment and by a basic reparation obligor that it did. There is an explicit provision that the reparation obligor is entitled to reimbursement from the collateral source or the claimant.

[240] KRS § 304.39-040(2) (Supp. 1976).

[241] KRS § 304.39-210(1) (Supp. 1976). This provision also states that, if reasonable proof is supplied as to only part of the claim and that part is at least $100, the payment for that part is overdue if not paid within 30 days.

[242] *Id.*

[243] *Id.*

[244] KRS § 304.39-210(5) (Supp. 1976).

[245] *Id.*

interest at the rate of 12 percent, but for delays without reasonable grounds, the rate of interest is 18 percent per annum.[246] Furthermore, the insurer must pay the attorney fees the claimant incurred to collect the overdue benefits.[247]

If an insurer pays benefits which it later discovers were not properly payable, it may sue to recover the payments.[248] Before recovery, however, the insurer must show that he relied on misrepresentation of a material fact and that this was intentionally made by the insured or a person providing the items of medical or other expense.[249]

I. *Subrogation and Settlement*

The basic subrogation provision is KRS § 304.39-070(2) which provides that:

> A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligation to all of the rights of the person suffering the injury against any person or organization other than a secured person.

The primary impact of this subsection is that a reparation obligor may not bring an action against a secured person.[250] Any

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[246] KRS § 304.39-210(2) (Supp. 1976). This provision is slightly different from UMVARA § 23(6) which provides an 18 percent interest rate for any overdue payment without regard to the insurer's reasons. The 18 percent figure was recommended because it was believed an insured would likely be required to pay 18 percent on most consumer credit transactions. They also believed the rate sufficiently high to encourage prompt payment.

[247] KRS § 304.39-220(2) (Supp. 1976):

> In any action brought against the insured by the reparation obligor, the court may award the insured's attorney a reasonable attorney's fee for defending the action.

This is consistent with KRS § 304.39-070(2) which provides that:

> A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.

[248] KRS § 304.39-210(4) (Supp. 1976).

[249] *Id. See also* UMVARA at § 23(d), Comment:

> If the supplier of the products or services for which allowable expense benefits have been paid has inflated his bill, but the insured has not been a party to the fraud, recovery is permitted only against the supplier.

[250] KRS § 304.070(1) (Supp. 1976) defines "secured person" as:

> the owner, operator or occupant of a secured motor vehicle, and any

subrogation effort must be directed at another reparation obligor or an uninsured motorist who by definition becomes a reparation obligor.[251]

KRS § 304.39-070(3) sets out two alternatives by which the reparation obligor may assert its right of subrogation. It may either join in a suit brought by the injured party to whom it paid BRB, or present its claim against another reparation obligor through the Kentucky Insurance Arbitration Association as provided for in KRS § 304.39-300. The reparation obligor's ability to join in an action against another secured person is not inconsistent with the mandate that it may not directly sue a secured person. The secured person exemption prevents reparation obligors from possible overreaching and predatory suits against those who have complied with the Act; however, once an injured party has initiated a suit in tort against a secured person this purpose is no longer furthered by forbidding the reparation obligor's joinder.

The injured party, however, will naturally not want the reparation obligor to join in his suit against the defendant. Just as defendants have successfully objected to the interjection of insurance into the trial, the plaintiff will argue that joinder will prejudice the amount of his recovery. The Delaware Supreme Court addressed this problem by reasoning that because of the widespread adoption of no-fault's mandatory insurance requirements, the jury would not be prejudiced.[252] Furthermore,

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other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.

[251] KRS § 304.39-310(2) (Supp. 1976):

An owner or registrant of a motor vehicle with respect to which security is required under KRS 304.39-110, who fails to have such security when the motor vehicle is involved in an accident shall have all the rights and obligations of a reparation obligor, and any other reparation obligor which has paid or may become obligated to pay basic or added reparation benefits to an injured person under a basic or added reparation contract or under the terms of the assigned claims plan shall be subrogated to the rights of the injured person against such owner or registrant.

[252] DeVincentis v. Maryland Cas. Co., 325 A.2d 610, 612-13 (Del. 1974).

It is true that prior to adoption of compulsory motor vehicle insurance law, Courts have endeavored to prevent the fact of insurance coverage from coming to the knowledge of juries. However, with the advent of no-fault insurance, every motor vehicle owner in this State has become apprised of the requirement that public liability insurance coverage be carried as a prerequisite to motor vehicle licensing. In view of this requirement, it is unrealistic

it held that the enactment of no-fault added nothing to the ordinary joinder rules, which typically allow joinder if there are identical bases of recovery and an identity of parties.[253]

Similar reasoning is applicable in Kentucky. Because KRS § 304.39-06(2)(a) prohibits liability suits instituted by an injured party for damages compensated for by BRB, a plaintiff would not be able to keep the fact of no-fault coverage from the jury even without joinder. Because most suits will be for pain and suffering without any claim for medical expenses, lost wages, or other economic damages, the jury will know that these payments were received through no-fault.

The second alternative available to the reparation obligor allows him to present his claim against another reparation obligor through the Kentucky Insurance Arbitration Association.[254] As it is with the assigned claims plan, however, the Commissioner has not promulgated the rules for this association in the Kentucky Administrative Register even though a plan of operation was submitted to the Commissioner of Insurance by the Association and approved on August 1, 1976.[255]

Other sections of the Act also cover subrogation and settlement. Under KRS § 304.39-050(1), when the insurer of the vehicle containing the injured person or the vehicle striking a pedestrian fails to make payment within 30 days, the injured party may recover through any contract of BRB insurance under which he is a basic reparation insured. The insurer making such payments is then entitled to full reimbursement from the reparations obligor providing security for the vehicle.

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to assume that any jury would be unaware of the statutory requirement, or that the jury would not proceed in the belief that the parties carried at least the required amount of insurance. In recognition of this, it has been common practice in this Court in cases arising since the effective date of the no-fault insurance law to inform the jury during the course of the trial of the fact that certain items which might otherwise be claimed for damages are covered under the no-fault insurance law. Hence, I find no reasonable justification for isolating a cause of action relating to recovery under the insurance policy from the cause of action involving the injuries themselves on the ground that the result would be to disclose insurance coverage to the jury.

Id.

[253] Webster v. State Farm Mut. Auto. Ins. Co., 348 A.2d 329, 331-33 (Del. 1975).

[254] KRS § 304.39-070(3) (Supp. 1976).

[255] A copy of the plan of operation may be obtained by writing the Department of Insurance, Commonwealth of Kentucky, Frankfort, Ky.

KRS § 304.39-060(7) applies when a basic reparation insured recovers BRB for injuries caused by an operator who has rejected his tort limitations. This BRB provider is subrogated to the injured person's rights against the operator. This creates no hardship for the legally insured operator—in 1976 the General Assembly required the minimum security on motor vehicles to include BRB coverage.[256]

In addition, KRS § 304.39-140(2) is applicable to injuries involving added reparation benefits. To the extent a reparations obligor has provided additional benefits, it is subrogated to the injured person's right to recovery from any responsible third party.[257]

Reparation obligors who provide payment to an injured person through the assigned claims plan are also entitled to subrogation in two instances. The reparation obligor to whom an injured party's claim is assigned when the claimant seeks payment through the assigned claims plan because the reparation obligor who should pay is financially unable to do so is subrogated to the rights of the claimant against the insolvent obligor.[258] In addition, the reparations obligor, assigned a claim which qualifies for the assigned claims plan because it was rejected for reasons other than "that the person is not entitled to the basic reparation benefits claim,"[259] is subrogated to the claimant's rights against the responsible obligor.

Insurers can also get subrogation when they make payments under an underinsured (as distinguished from uninsured) motorist provision; all insurers must make this coverage available. When a motorist with this coverage recovers a judgment which exceeds the insurance coverage on the other person's vehicle, the company providing the underinsured coverage pays the difference. This insurer is then subrogated to the rights of his insured against the other party.[260]

While the Act covers many areas of subrogation, questions remain. It is not clear from the Act, for example, to what extent

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[256] KRS § 304.39-110(1)(d) (Supp. 1976).

[257] The subrogation rights of reparation obligors are subject to the alternatives provided by KRS § 304.39-070(3). *See supra* text accompanying notes 252 to 255.

[258] KRS § 304.39-160(2) (Supp. 1976).

[259] *Id.*

[260] KRS § 304.39-320 (Supp. 1976).

a reparation obligor who has made no-fault payments may be reimbursed out of the insured's recovery from the third party responsible for the insured's injuries, nor is it clear whether the insurer is entitled to full reimbursement for benefits paid or only a pro rata share of the total recovery. The Act provides that the insurer is "subrogated to the extent of its obligation *to all of the rights* of the person suffering the injury, against any person . . . ."[261] While the Department of Insurance has attempted to clarify this provision,[262] the interpretation appears confined to situations where the reparation obligor proceeds by arbitration.

> Subrogation rights under basic benefits coverage shall be pro rata to the rights of the injured party for his residual claim. Subrogation rights under added benefits coverage shall be secondary to the rights of the injured party for his residual claim.[263]

It is unclear, however, whether this interpretation applies to an action brought by the insured against a tortfeasor. Suppose the insured asks for $2,000 economic damages (BRB covered expenses) and $8,000 noneconomic damages (pain, suffering, and mental anguish) and receives a judgment for $5,000. Would the insurer be entitled to $2,000, the full extent of his BRB payment less the applicable portion of court costs and attorney expenses, or would the insurer be entitled to only $1,000, the pro rata share of the entire claim? What would be the result had the insured sued for $100,000 noneconomic damages and only received $5,000?[264]

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[261] KRS § 304.39-070(2) (Supp. 1976) (emphasis added).

[262] Bulletin ¶ 7, at 3.

[263] *Id.*

[264] The position of the Department of Insurance is that such subrogation rights stand on an equal basis with the claim of an injured person and to the extent that his total plan is unsatisfied, the subrogated insurer must bear that loss in the same ratio as the injured person. For example, a judgment or an agreement by the parties that the total damages were $50,000, and if the defendant were judgment proof but had uninsured motorist coverage of $10,000,the subrogated insurers would be entitled to 20% or 1/5 of the recovery; In this case, $2,000. Therefore, the injured would have a subrogated claim against $2,000 of the $10,000 uninsured motorist coverage whether it was provided by the PIP insurer or by another insurer.
Letter from Edward L. Fossett, General Counsel, Department of Insurance to Mr. Timothy L. Nichols, March 11, 1976.

In Kentucky, this problem may be more apparent than real. "The reparation obligor *shall* elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) [through arbitration] . . . ."[265] This should limit the recovery of the reparation obligor to cases where he actually joins the injured person's suit if he elects that alternative. Once the reparation obligor is a party to the action, the court through its instructions should separate each party's claim and the subsequent jury verdict should leave little doubt as to the extent of recovery for each. This alone seems to be a compelling reason for not allowing the severance of the actions.[266]

J. *Conflict of Laws*

Application of the Kentucky No-Fault Act necessitates the examination of two conflicts of law principles. The courts will be forced to decide what law Kentucky is *allowed to apply* pursuant to the United States Constitution and out of this body of constitutionally permissible laws what law Kentucky should in fact apply.

The due process and full faith and credit clauses of the United States Constitution require that a state have sufficient contact with an incident or the involved parties before applying its own law.[267] Kentucky's No-Fault Act, however, does not take full advantage of its constitutional ability to impose the Act's provisions on nonresident motorists who have accidents in Kentucky.

Although KRS § 304.39-100(2), requiring BRB coverage and minimum security for tort liability from all insurers authorized to transact or transacting business in Kentucky, is similar to UMVARA § 9(c), the General Assembly omitted UMVARA § 9(b) which provides:

> Notwithstanding any contrary provision in it, every contract of liability insurance for injury, wherever issued, covering

[265] KRS § 304.39-070(3) (Supp. 1976) (emphasis added).

[266] *Contra,* Webster v. State Farm Mut. Auto. Ins. Co., 348 A.2d 329 (Del. 1975). For a treatment of Florida's problems in this area, see *Annot.,* 69 A.L.R.3D 826 (1976).

[267] Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *See also* Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).

> ownership, maintenance, or use of a motor vehicle, except a contract which provides coverage only for liability in excess of required minimum tort liability coverages (Section 10), includes basic reparation benefit coverages and minimum security for tort liabilities required by this Act, while it is in this State, and qualifies as security covering the vehicle.

UMVARA § 9(c) was designed to serve only as a safety valve in the event section 9(b) was held unconstitutional,[268] and it is doubtful that this will occur.[269] It has never been doubted, under either the vested rights or interest analysis approach, that an accident occurring within a state boundary gives that state sufficient contacts to constitutionally apply its own law. By omitting section 9(b) from the Kentucky act, many out-of-state residents injured in accidents involving out-of-state insurers not transacting business in Kentucky will be unable to collect BRB coverage from their insurers, although they will be able to collect from the assigned claims plan. The General Assembly, therefore, has perpetrated a situation which is grossly unjust to motor vehicle owners and the insurance companies transacting business in Kentucky who, because of the assigned claims plan, are forced to foot the bill. The General Assembly allows recovery for every person injured in a Kentucky accident,[270] but has limited the insurance companies who must make up the difference. This may account for and justify the fact that the assigned claims plan as well as the Bureau itself has purposely kept a low profile. The out-of-state insurer creates a problem as real as it is apparent.[271]

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[268] UMVARA at § 9(b), Comment.

[269] Given the ready ability of the owner of a motor vehicle to drive his vehicle from state to state within a few days over an interstate highway system, it is unreasonable for an insurer to argue that it could not contemplate out-of-state use of the motor vehicle, or that it could only contemplate or foresee use within a limited geographic area. Accordingly, operation of the insured vehicle within the State, standing alone, should be a sufficient contact allowing the State to impose its substantive laws upon the out-of-State insurer of an out-of-State vehicle.

Id.

This interpretation is supported by Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964). In a unanimous decision, the Court held that Florida had sufficient contact with a transaction to constitutionally nullify a limitation clause in the out-of-state insurance policy in favor of Florida law; this did not violate due process or full faith and credit.

[270] KRS § 304.39-030(1) (Supp. 1976).

[271] Interview with Tom Nixon, Chief Enforcement Officer, Kentucky Department

Kentucky could adopt the more liberal provisions of UMVARA § 9(b), and still meet the requirements of full faith and credit and due process. It would then be free to choose its own conflict of law rules.[272] Kentucky's existing conflicts rule may be as burdensome as not adopting section 9(b), however. The Kentucky Supreme Court has departed from the traditional vested rights approach[273] of *lex loci delicti,* that is, the law of the place of the accident controls the rights of the parties, and in lieu of this approach seems to have adopted the interest analysis.[274] This is evidenced in *Arnett v. Thompson.*[275]

> [T]he court has decided that the conflicts question should not be determined on the basis of a *weighing* of interests, but simply on the basis of whether Kentucky has *enough* contacts to justify applying Kentucky law.[276]

This would compel Kentucky to apply its own law in all true conflict situations.[277] Regardless of the wisdom of this ap-

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of Insurance, in Frankfort, Kentucky, Sept. 14, 1976.

[272] *See, e.g.,* Cyr v. Farias, 327 N.E.2d 890 (Mass. 1975).

[273] *E.g.,* Arnett v. Thompson, 433 S.W.2d 109 (1968). *See also* Leathers, *Dimensions of the Constitutional Obligation to Provide a Forum,* 62 KY. L.J. 2, n.30 (1973):

> Vested rights is that choice of law system espoused by Professor Beale, who was the reporter for the *Restatement (First) of Conflicts.* At the heart of the system is the concept of legislative jurisdiction. The basic idea is that at the moment a thing occurs, the rights surrounding it are vested and cannot thereafter be altered. Therefore, in an auto accident in State X, the rights of all the parties are vested under the law of X. Since the accident occurred within the physical boundaries of X, no other state law can determine the rights and liabilities of the parties. It is then the duty of whatever forum called upon to hear a suit involving the accident to apply the law of X to the case. It is said that this system is capable of uniformity and certainty due to this concept of attachment of rights and widespread enforceability thereafter. However, the system is subject to manipulation since the forum is required only to enforce the substantive rules of the state where the rights vested and may apply its own procedural rules. Furthermore, the forum is not required to enforce foreign rules which are contrary to its own public policy. Since the point of vesting will vary according to the type of case involved, the forum can manipulate the result by its characterization of the case, for example, denominating it as a contract case (or, for that matter, putting it into any one of numerous legal pigeon holes) rather than a tort problem.

[274] *See generally* B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAW (1963), for the establishment of interest analysis.

[275] 433 S.W.2d 109 (1968).

[276] *Id.* at 113 (emphasis in original).

[277] A true conflict is a situation where two states' conflicting laws will be furthered

proach, it is better than that taken by the No-Fault Act, which requires that Kentucky impose its law upon a nonresident motorist even in false conflict situations which under the interest analysis approach would not mandate choice of the forum's law.[278] There is only one commentator, P. John Kozyris, who has taken the conflict of law question seriously as it relates to no-fault insurance acts.[279] Other commentators, like Irvin E. Schermer, have approached the problem by dismissing it, saying:

> The controversy involves only the insurer and the insured under a contract written pursuant to specific statutory directives. It is difficult to visualize the court of any foreign state selecting as controlling the law of a state other than that to which the contract is required to be obedient.[280]

Undoubtedly Mr. Schermer has not analyzed the conflicts of law implications of the Kentucky No-Fault Act.

Professor Kozyris, on the other hand, presents what seems to be a better alternative. He argues that the conflicts question should be resolved in favor of the injured person's domicil. His reasoning seems persuasive. A state's jurisdictional power to control a person's *conduct* is unquestionable, but no-fault does

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by their application to the incident.

> The basic idea is that before one can make a choice of law, it is necessary to analyze the policies which underlie the rules in question. In the case of two competing rules, it is often possible to see that the policy behind one rule will not be furthered by its application to the facts at hand. Obviously, in this simple situation, the rule whose policies will be furthered is the correct one to apply. The situation is a bit more difficult when both rules have relevant policies but one clearly outweighs the other, and of course, is most difficult when both rules have strong policies and application of either rule will do violence to the policies of the other.

Leathers, *supra* note 273, n.31 at 7. Currie, however, argues that in a true conflict situation, a forum should apply its own law. His position is based on the idea that only the legislature, not the courts, may defer the legitimate interests of one state to the law of another state. *See generally* CURRIE, *supra* note 274.

[278] Even Currie believes that in a false conflict situation where the policy behind the state's law will not be furthered by the application of that law it should not be applied even though it is the law of the forum state. *See generally* CURRIE, *supra* note 274.

[279] *See* Kozyris, *No-Fault Insurance and the Conflict of Laws—An Interim Update*, 1973 DUKE L.J. 1009; Kozyris, *No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style*, 1972 DUKE L.J. 331.

[280] SCHERMER, *supra* note 19, § 7.01 at 7-1.

not involve conduct. Instead it provides remedies for injuries, and the only state which has a substantial interest in seeing that the injured person is compensated is the state of domicil, not the state in which the accident occurred. What legitimate purpose would Kentucky have in imposing its $10,000 BRB coverage limitation on an injured person who is domiciled in Michigan, when Michigan places no limit on recovery and would probably be the state to pay the injured person's welfare benefits if his disability is not compensated?

III. CONCLUSION

As evidenced by the purposes set forth in KRS § 304.39-101, the Kentucky Motor Vehicle Reparations Act was designed to be a significant advancement in social legislation. It is understandable, therefore, that various commentators and special interest groups sought to doom the Act in its primary stages and later to challenge its constitutionality in the courts. In spite of these attempts, the Kentucky plan withstood constitutional attack, and is now approaching its second year of implementation without the major problems or setbacks forecasted by its opponents; the Kentucky Act provides a realistic approach to the substitution of basic reparation benefits for the traditional remedy in tort.

Though it is relatively well understood that the Act does not cover property damage nor change the traditional tort remedy for property damages, many people do not realize the significance and scope of this legislation. As a general proposition the Kentucky Act provides BRB payments to *everyone* injured in automobile accidents occurring in Kentucky. The few exceptions to this proposition include converters, those intentionally causing injury, and uninsured owners injured in their own automobile. While these exceptions are very limited when compared with other no-fault acts, they nevertheless, are consistent with the recovery orientation of the Kentucky Act.

The tort limitation or threshold provisions of the Act are also misunderstood. This is not a total bar to all liability suits; actions are prohibited only when injuries are less severe or below the threshold amount and then only when they seek damages for such things as pain and suffering, mental anguish, inconvenience and those medical expenses under the threshold

which were paid by the reparation obligor. In contrast to these favorable comments, however, the Kentucky Act is not without faults. Although future case law and other interpretations of the Act will solve many of the problems, there are still areas which should be reconsidered by the General Assembly.

Even though compulsory insurance may not be the best answer because of its loopholes and high cost of administration, Kentucky's present enforcement of the insurance requirement appears to go too far to the other extreme. The Act would be better enforced with stiffer fines or revocation of the uninsured's registration and license. Broad BRB coverage coupled with the lack of strict enforcement provides no incentive for the present uninsured motorist to purchase the required coverage.

Another problem is the reference to the Kentucky wrongful death statute. This is inconsistent with Kentucky's loss to survivor approach in the payment of survivor's economic and service benefits. Kentucky should adopt a separate survivors statute to be used exclusively for payment of no-fault benefits. Such a statute could more accurately reflect the purposes of the Act.

Furthermore, information concerning the Assigned Claims Plan is not readily available. Few attorneys know where to refer clients who would not receive BRB outside of the plan. More importantly, many of the injured who are within the scope of the Act's protection but cannot afford legal counsel are without relief because they do not know about this method of recovery. The Department of Insurance should obviously publish their interpretation and guidelines in the Administrative Register. This, however, will provide the necessary information only to attorneys and not to all those who need it. If the Act's recovery orientation is to be implemented, a much broader method of information dissemination must be used.

While it may be desirable to extend basic reparation benefits to all nonresident motorists injured in Kentucky, one must realize that those insurance companies not registered or doing business in Kentucky are not paying their proportional share of the costs. Furthermore, there is no reason to believe that Kentucky's limits are better than the limits for which the injured motorist contracted in his home state. If Kentucky is to provide BRB on such a broad scale, the General Assembly should extend its requirement of security for BRB payments to

its full constitutional limit and include all contracts of liability insurance, wherever issued, covering an operator or owner involved in an accident in Kentucky and not just those issued by companies doing business in the state.

Even with these problems, however, it is clear that the no-fault idea is here to stay. Its importance can only increase as more states adopt one of its variations.

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