

Catholic University Law Review

Volume 21
Issue 2 *Winter 1972*

Article 11

1972

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Recommended Citation

Richard C. Leone & David T. Beale, *State Developments in Auto Insurance Reform: A Critical Survey*, 21 *Cath. U. L. Rev.* 386 (1972).

Available at: <https://scholarship.law.edu/lawreview/vol21/iss2/11>

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State Developments in Auto Insurance Reform: A Critical Survey

Richard C. Leone* and David T. Beale**

The movement for reform of the automobile negligence insurance system has gained strength in direct proportion to increasing premiums, court delays, and policy cancellations. Unfocused public dissatisfaction with the consequences of the tort, or fault, basis for accident compensation has led, in many states, to interest in a common remedy: institution of a no-fault or basic protection insurance system.

In the six months since Transportation Secretary John Volpe endorsed the state-by-state approach to automobile insurance reform, four states—Oregon, Delaware, Illinois, and Florida—have joined early convert Massachusetts in enacting “modified no-fault plans.” The four new statutes differ in scope and detail, but their legislative histories and major provisions indicate that the no-fault debate, which began in earnest a decade ago, has now changed significantly in focus and emphasis.

Opponents of no-fault insurance, principally the trial bar associations, have long argued that the negligence claims system is based on immutable moral, if not constitutional precepts. Today, however, preferring a series of limited state no-fault plans to congressional action on a tough minimum standards measure, such as the Hart-Magnuson Bill, lawyer lobbies are abandoning their traditional posture of unyielding resistance to all forms of no-fault protection. Instead, they are working to preserve major features of the present negligence system within the framework of “modified no-fault programs.”

The resulting legislation bears little resemblance to the original “unmodified” proposals—the Keeton-O’Connell plan of 1965; New York State’s Stewart Proposal of 1970; or the one-and-a-half-year old Puerto Rico Law. Bills pending today in a number of states are no-fault in name only. And in the four

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new no-fault states, close examination of the enactment suggests that no-fault proponents, having won the war, may be well on their way to losing the peace.

Oregon

The Oregon no-fault plan¹ will take effect January 1, 1972. It requires all motor vehicle insurers doing business in the state to provide each insured party with auto-accident hospital, medical, and disability benefits on a no-fault basis up to the following limits: \$3,000 per person for hospital and medical; 70 percent of lost income commencing 14 days after the accident; reasonable expenses incurred in providing essential services which an injured party would ordinarily perform. Benefits for hospital and medical expenses may be further limited: (a) if the insured elects a deductible policy up to \$250, (b) if the insured is "provided for under another motor vehicle liability policy" or under the workmen's compensation laws, or (c) if the injured person intentionally caused the accident or was engaged in a "racing or speed contest."

Beneath this new, first-party compensation provision, the old negligence claims system, with all its attendant waste and inefficiency, is alive and kicking. The new law does not restrict a claimant's ability to sue for damages; it does not contain a single word on the critical subject of "pain and suffering" and it is entirely silent on the matter of premium rates.

The essence of the original no-fault proposals was the abolition of the lawsuit as a means of recovering accident losses—with the savings in court costs and legal fees being passed on to the policy holders as lower premiums and expanded benefits. In Oregon, the injured driver will choose between several possible routes for compensation, any one of which may result in costly legal action.

In the simplest case, he may file a claim against his own insurer for benefits within the no-fault limits. The insurer may then, if it considers the injury was a result of another driver's negligence, demand reimbursement from that driver's insurer, with disputes as to liability and damages decided by arbitration. Even in this straightforward case where the claimant is willing to make do with reimbursement for actual damages within policy limits, the Oregon law may still allow for litigation. By the terms of Section 8(4) of the new statute, any claimant, if requested in writing by his insurer, "shall take such action as may be necessary or appropriate to recover [the no-fault benefits already paid by the insurer] from [the motorist 'legally responsible' for the injury]."

Further options are open to the claimant who wants to recover "general damages" for "pain and suffering." He may file a claim with his own insurer for actual damages under the no-fault levels and another with the responsible

1. ORE. REV. STAT. § 523 (1971).

party's insurer for general damages. Or he may combine both categories of damage in a claim against the negligent party with recovery for actual damages below the no-fault limits going to reimburse the first-party insurer. On the subject of general damages, it bears noting that the Oregon Law unlike the original no-fault plans does not require insurance companies to offer general damages benefits on a no-fault basis. Thus the "pain and suffering" of automobile accident injuries will continue to be of that selective sort experienced only by the non-negligent driver.

The Oregon claimant who avers actual damages above the no-fault level must, of course, proceed on a negligence basis to recover the excess. So, for that matter, may any claimant who wants to appeal to a jury for general damages—having first secured no-fault benefits for real losses.

Delaware

Governor Russell W. Peterson signed House Bill 270 into law on May 27, 1970 following unanimous passage by both sides of the legislature.² The Act requires auto insurers to provide, both \$25,000 bodily injury liability coverage and medical-hospital-income compensation, regardless of fault, at minimum levels of \$10,000 per person and \$20,000 for all persons injured in one accident. These limits may be varied by optional sublimits, deductibles and excess provisions approved by the state Department of Insurance.

Delaware insurers must also offer \$5,000-minimum coverage for damage to property in or upon or otherwise damaged in an accident involving the insured vehicle, and deductible collision insurance for damage to the vehicle itself.

Delaware's statute resembles Oregon's in a number of important respects: claimants may still proceed against a negligent party for compensation for pain and suffering; insurers who provide no-fault benefits inherit the beneficiary's rights to compensation from a negligent party to the extent of the benefits provided.

As with Oregon, the Delaware law makes no adjustment in premium rates. Insurance Commissioner Short told newsmen that the savings in litigation costs would not be sufficiently great to allow for a reduction in current rates but might be enough to stave off future increases. "Without the plan, insurance rates are likely to go up about 15 percent per year," Short said.

Illinois

The Illinois statute³ defines two categories of no-fault coverage—mandatory

2. DEL. CODE ANN. tit. 21, § 2118 (Supp. 1971).

3. ILL. ANN. STAT. ch. 73, § 1065.150 (Smith-Hurd Supp. 1971) eff. Jan. 1, 1972.

first-party benefits and optional extended benefits. In the first category, every auto insurer is required to provide hospital and medical compensation up to \$2,000 per person and income loss benefits, resulting from the "total disability" of the insured, up to \$150 per week for 52 weeks. In the optional category, each insured driver can elect further no-fault coverage for medical costs, income continuation and survivors benefits "at a total limit of not less than \$50,000 per person and \$100,000 per accident."⁴

Illinois insurers may exclude benefits for drivers who were driving: (a) under the influence of alcohol or narcotics; (b) with a suspended or revoked license; (c) in a race; (d) in the commission of a felony; (e) in a vehicle known to be stolen; or (f) with intent to cause injury to himself.

Like the other limited no-fault plans, the Illinois bill provides that insurance companies paying benefits described in the bill inherit the beneficiary's rights to sue an alleged wrongdoer for damages. Where Illinois parts company with Oregon and Delaware is over the extent of that right to sue. The Illinois Act directs that in counties where population exceeds 200,000, claims for auto accident damages under \$3,000 may not be prosecuted in the courtroom but must be referred to binding arbitration before a panel of volunteer local attorneys. In smaller counties, the Illinois Supreme Court *may* provide for arbitration—presumably on the basis of trial case backlogs.

When a claimant does choose to file a negligence action, for either courtroom or arbitration consideration, his prayer for pain and suffering damages may not exceed 50 percent of the first \$500 in medical expenses and 100 percent of expenses over \$500—except in cases of dismemberment, serious disfigurement or permanent disability, where no limitations apply.⁵ In both these respects—the out-of-court disposition of auto claims and the limitation on general damages—the Illinois Act is closer to original no-fault proposals than either Delaware or Oregon.

Florida

Closer still is the "Florida Automobile Reparations Reform Act"⁶ of 1971. That law, effective January 1, 1972, requires that every insured driver carry \$5,000 in first-party protection for medical-hospital-disability benefits. Benefits may be excluded for an injured party who: (a) intentionally caused the injury;

4. *Id.*

5. AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS 16 (1968). A 1968 nationwide study conducted by the American Insurance Association reported that benefits paid for pain and suffering average over one and a half times those paid for actual expenses.

6. FLA. STAT. ANN. § 71-252 (Supp. 1971).

(b) is convicted of driving while under the influence of alcohol or narcotics; or (c) was injured committing a felony. Policyholders may elect deductions in no-fault benefits in the amount of either \$250, \$500, or \$1,000.

Unlike the other limited no-fault statutes, the Florida law contains an explicit limitation on the right to sue for damages. Insured Florida drivers will be exempt from negligence liability in the case of claims below the no-fault limits. As for pain and suffering damages, a claimant may maintain a negligence action only if actual medical losses exceed \$1,000 or if the injury involved dismemberment, disfigurement, compound fracture, or "a fracture to a weight-bearing bone."

The Florida law also limits use of the lawsuit to recover for damage to the automobile itself. Every insurer is required to offer collision insurance coverage for damage to the policyholder's automobile, regardless of fault. In moving accidents involving parties who carry such insurance, each owner is exempted from tort liability for damage to the other's automobile. Where an owner does not have collision coverage, he may bring a negligence suit only if the damage to his automobile exceeds \$550.

Anticipating substantial savings from elimination of legal costs, the Florida legislature ordered a 15 percent cut in rates for minimum-limits coverage.

Conclusion

Advocates of state—as opposed to Federal—action on auto insurance reform argue that experimentation at the state level will lead eventually to a tested, workable no-fault system. Opponents are skeptical of the ability of state legislatures, with so many members benefiting financially from the present negligence system, to produce genuine no-fault reforms. Proponents of the first view may take some satisfaction from the Illinois and Florida enactments, while skeptics can justifiably cite the Delaware and Oregon laws as being little more than statutory advanced-payment schemes.

In each case, the enacting state has proved itself unwilling to consider two of the major defects which no-fault insurance was designed to correct. First, they appear to have left intact the collateral source evidence rule as it applies to other forms of private health insurance. Under the negligence claims system, an estimated 16 percent of all benefits paid go to compensate losses already reimbursed from some collateral insurance source. Most of the early no-fault plans called for elimination of this redundant-benefits system.

Second, the problem of the "catastrophe" claimant—the head-of-household who is permanently disabled—has not been treated in a straightforward fash-

ion. In each state, Bar Association lobbyists have successfully sold the notion that only the negligence system can provide this claimant with the kind of redress he deserves. It is difficult to reconcile this view with the negligence system's past treatment of the catastrophe victim.

In the first place, it is precisely this category of claimant that the negligence system is most consistently undercompensating. Empirical studies have estimated that three-fourths of automobile accident victims sustaining serious economic losses are receiving less than one-quarter of their losses back through the fault system.⁷ A 1969 study by the American Bar Association confirmed this trend, saying, "The worse the case, in terms of loss, the greater the statistical chance of receiving inadequate reparation."⁸

In the second place, whatever benefits do finally issue from the negligence system, they are usually preceded by long delays, during which a claimant's family may have no income support, and by the extraction of legal fees based on a percentage, usually one-third, without trial work, of the total award.

Finally, for the dependents of the catastrophe claimant, who cannot prove the negligence of another party to the accident, the negligence system does not provide a single cent. So much for the fault system's compassionate treatment of the seriously injured accident victim.

There are a variety of ways in which that victim *can* be equitably compensated within a no-fault system. He could collect benefits under an extended coverage provision, either mandatory or optional, like the one in Illinois' statute. Or he could claim unlimited benefits for net economic loss under the system proposed by the New York State Department of Insurance in the 1970 "Stewart Report." All these possibilities should be explored before a legislature submits to the strange suggestion that no-fault benefits are a good idea for the slightly injured driver but not for the seriously injured.

An encouraging development in this regard was the introduction of House Bill 1365 in the Pennsylvania Legislature. Though it has not won the approval of either legislative chamber, that bill is attracting national attention due chiefly to the energy and high standing of its author, Pennsylvania Commissioner of Insurance, Herbert K. Denenberg. Commissioner Denenberg, formerly Professor of Insurance at the Wharton School, was principal draftsman of the Puerto Rico Plan.

The Denenberg proposal for Pennsylvania includes unlimited no-fault re-

7. A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ AND R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATIONS* 196 (1964).

8. AMERICAN BAR ASSOCIATION, *REPORT OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS* (1969).

covery for actual medical, hospital and rehabilitative costs; with no-fault compensation for lost wages and services up to \$36,000. Victims may sue for lost income above that amount and for pain and suffering in cases of severe disfigurement, loss of limb, or permanent disability of 70 percent or more. The Pennsylvania bill mandates a ten percent reduction in premiums with its sponsors predicting savings of up to 40 percent for some drivers.

The Denenberg plan is the most ambitious no-fault scheme yet espoused by a state administration. As such, it represents a critical test for the policy of state implementation. Of the state's 253 General Assembly members, 77 are lawyers of whom 70 would suffer financially from enactment of the bill. The *Philadelphia Inquirer* has said that legislative action on the bill raises "an unprecedented potential conflict between public duty and private interest . . . crystallizing the immense problems wrought by the fact that so many legislators are practicing lawyers." The fate of the Denenberg bill will be watched closely in the Congress and in other state capitals as an indication of the states' capacity to achieve genuine reform of the auto insurance system.