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OVERCOMING LEGAL BARRIERS TO THE TRANSFER OF THIRD-PARTY TORT CLAIMS AS A MEANS OF FINANCING FIRST-PARTY NO-FAULT INSURANCE*

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JANET BECK***

Editor's Note: In an earlier article in this publication, the senior author proposed a system of financing first-party no-fault insurance, in whole or in part, through the transfer of insureds' third-party tort claims to no-fault insurers.¹ Part I of this article briefly outlines that proposal. Part II then explains how "approval of first-party no-fault contract would be consistent with a long history of judicial efforts to free the law from restraints on the transfer of interests in personal injury tort claims."²

I. THE PROPOSAL

"First-party insurance is coverage under which the policy-holder collects payments for his losses from his own insurance company rather than from the insurer of the other person who caused the accident. The latter is known as third-party insurance: the prototypical example being tort liability insurance.³

"Elective first-party no-fault insurance might work like this: An insurer could offer no-fault coverages in increments of \$10,000, up to any amount, payable for economic loss consisting principally of medical expenses (including rehabilitation) and wage loss stemming from per-

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1. O'Connell, *Harnessing the Liability Lottery: Elective First-Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U.L.Q. 693, adapted from J. O'CONNELL, *THE LAWSUIT LOTTERY* (1979).

2. *Id.* at 712.

3. *Id.* at 697.

sonal injury or death. In return, the insurer would receive an absolute assignment of the insured's tort claim (for both economic and noneconomic loss) against third-parties causing injury or death. The insurer would then use the recoveries on those tort claims to help pay no-fault benefits to *all* insureds. To prevent adverse selection, the parties [arguably, at least] would have to transfer the tort claim prior to any injury, *i.e.*, at the time the agreement for future payment of no-fault benefits is consummated. Otherwise, if a victim could choose after an accident whether to press a fault-based or a no-fault claim, those with valid fault-based claims [might conceivably] press them while others would collect no-fault benefits, leaving an insurer without fault-based claims to provide income to pay no-fault benefits.⁴

"The no-fault insurer would agree that upon injury to a no-fault insured the no-fault insurer would pay no-fault benefits periodically as economic losses accrue. Furthermore, the insurer would agree to pay the injured insured the equivalent of any amount, in excess of the no-fault benefits, recovered as economic losses in the tort action against third-parties without reduction for expenses incurred in recovering. This device guarantees that the insured will receive whatever level of no-fault benefits he wishes to purchase plus whatever amount of economic loss in excess of that limit he is eligible to recover in tort. But he would have assigned to the no-fault insurer any tort right that had accrued to him as a result of the injury.⁵

"Note the advantages to a no-fault insured under first-party no-fault insurance. He is assured of automatic payment of economic loss at whatever level he chooses in the event of accidental personal injury and of payment of whatever tort damages he would have received for his economic loss without the necessity of incurring attorneys' fees or other litigation expenses for either no-fault or fault-based payment. His net payment, therefore, will often be almost as great as, and sometimes greater than, the payment he would have received at common law, while suffering much less uncertainty and anxiety. . . . If *A* had a valid tort claim against *C* and recovered his entire loss of \$55,000 (\$30,000 economic loss plus \$25,000 noneconomic loss), he would normally pay at least one-third to a lawyer (or \$18,333), leaving him with a net of \$36,667. Under the elective first-party no-fault plan he receives a net of \$30,000 with \$10,000 (the amount he chose) payable automati-

4. *Id.* at 697-98 (footnotes omitted). *But see* notes 14-15 *infra* and accompanying text.

5. O'Connell, *supra* note 1, at 698 (footnotes omitted).

cally without the uncertainty and angst of tort litigation. Assuming litigation expenses of fifty percent, *A* would have received net payment of \$27,500 from tort liability insurance versus \$30,000 under elective first-party no-fault insurance.⁶

“Admittedly, the no-fault insurer and the insurer of the third-party who injured the no-fault insured would still have to settle the complex questions of fault and the value of pain and suffering. But those issues would now arise between two insurance companies, who would in all likelihood settle the matter expeditiously by informal means and without the expensive litigation that now occurs with many intercompany claims. And regardless of whether litigation results, an insurance company would not pay its lawyer a third or more of any recovery, as individual injury victims must do. Casualty insurance companies instead pay their lawyers the same way they pay their salaried executives—well, but not well enough to make them quick millionaires.⁷

“This plan for no-fault benefits will not be mandatory. Rather, it will be elective, allowing, but not compelling, any insurer to offer it by contract and similarly allowing any potential accident victim to refuse it. Given the apparent public preference, evidenced by many polls, for certainty of payment versus the gamble of a lawsuit, one can expect widespread acceptance of no-fault. Thus an automobile insurer could offer no-fault insurance benefits for accidents to insureds in states without, or with inadequate, no-fault automobile insurance laws. Workers’ compensation insurers could offer employees—pursuant to collective bargaining—benefits supplementing inadequate workers’ compensation benefits for all injuries in the course of employment and no-fault benefits to employees and their families for off-the-job accidents. Health and disability insurers, either writing individual or group policies, or casualty companies writing homeowners’ coverage, could offer no-fault coverage for all kinds of accidents. Professional trade associations could offer similar coverage to their members.⁸

“This plan for elective no-fault insurance permits the insurance industry to harness liability insurance both for its own and the public’s advantage. Insurers seem almost panicked over current trends in personal injury liability and their inability to control them through legislation or otherwise. But far from requiring vast, revolutionary and unpredictable changes dictated by often hostile or uninformed legisla-

6. *Id.* at 702-03 (footnotes omitted).

7. *Id.* at 703 (footnotes omitted).

8. *Id.* at 705-06 (footnotes omitted).

tures, elective contracts for no-fault insurance with a corresponding purchase of the payees' fault-based claims need not await statutory authorization. Further, the insurance industry can structure these contracts itself subject, of course, to input in the public interest through regulatory approval by insurance commissioners."⁹

II. OVERCOMING BARRIERS TO ACCEPTANCE OF THE PROPOSAL

A. *Insurance Industry Resistance*

In a way it is curious that the casualty insurance industry persists in concentrating its efforts on coverage that focuses on the least important part of the risks its customers face from accidents—namely, its customers' liability to others rather than its customers' own losses. If the typical insurance customer were asked what financial fear looms largest from accidents, the answer clearly would be the fear of unreimbursed medical expenses and wage losses for himself and his family members, not his tort liability to third parties. Yet, with the exception of almost derisory amounts of medical payments coverage under auto insurance, casualty insurers ignore those losses most important to their insureds.¹⁰

If casualty insurers offer no-fault collision coverage for losses to one's car, along with liability coverage for damages to another's car, why not do the same for the even more important losses to persons? It might be answered that first-party coverage—namely, health and disability insurance—is available from other kinds of insurers to protect against such loss. But the one point brought home dramatically by all studies in this area is the degree to which most Americans are inadequately covered for catastrophic accidental loss. According to a 1970 Department of Transportation study, those who suffered more than \$25,000 of economic losses from auto accidents incurred average total losses of \$76,341, but received on the average \$21,641 in compensation from all sources.¹¹

If it is argued that the remote chances of catastrophic accidental loss for any given insured explains the lack of casualty insurers' efforts in exciting their insureds' interest in coverage for such loss, why do casualty insurers try to increase their insureds' liability coverage up to, say,

9. *Id.* at 707 (footnotes omitted).

10. Even first-party uninsured motorist coverage is tied to the tort liability of the uninsured motorist.

11. 1 U.S. DEP'T OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 277-78 (Table 31 FS) (1970). The \$21,641 in benefits consisted of \$3,742 in tort recoveries and \$17,899 from other sources such as health insurance. *Id.*

limits of \$100,000 or even more (often selling \$1,000,000 umbrella policies)? Because casualty insurers can market coverage for such remote liability to others, why should they not interest themselves in marketing similarly remote—but essential—coverage for their customers *own* losses?

B. *Insureds' Objections*

There could be concerns about the conscionability of a contract by which a potential accident victim, before any accident, assigns his entire personal injury claim in return for first-party no-fault insurance benefits.¹² Unquestionably, some, but probably not many,¹³ insureds would be better off retaining their third-party tort actions rather than receiving first-party no-fault benefits—for example, an accident victim free from any blame, who is injured by an obvious tortfeasor and suffers relatively little out-of-pocket loss but large amounts of pain and suffering. It may well be that such an example will form the basis of a test case challenging the validity of a first-party no-fault insurance program.

To forestall this objection, however, the program could be amended to allow the insured (or his survivors, in the event of his death) to turn down the no-fault benefits *after* the accident in return for retaining the tort action. In other words, after the accident the no-fault insurer would offer the insured (or his survivors) the no-fault benefits, but the potential beneficiary could reject them if he has sufficient confidence in his tort recovery that he would rather pursue it.

This option raises the possibility of adverse selection,¹⁴ but given the marked preference of most people for certainty of benefits over the risks of a tort suit, most people—even those with good chances of a tort recovery—probably would prefer immediate, certain no-fault benefits to an uncertain, dilatory tort recovery. The results of a 1978 Michigan Insurance Bureau survey of Michigan residents on no-fault auto insurance are illustrative.

A key component of no-fault insurance is the compromise whereby the right to sue for pain and suffering injuries is limited in return for full payment of all economic loss. To test the consumer's acceptance to this compromise, people were asked to respond to the following statement:

To provide more money for medical and wage loss benefits, the right

12. O'Connell, *supra* note 1, at 707-08.

13. See note 6 *supra* and accompanying text.

14. See text accompanying note 4 *supra*.

to sue for pain and suffering resulting from an injury which is not permanent should be limited.

Since this statement capsulizes the no-fault compromise, the survey shows support for Michigan no-fault. The responses are summarized as follows:

Strongly Agree	27.6%
Agreed	51.1%
Neither Agree nor Disagree or Don't Know	11.9%
Disagree	6.0%
Strongly Disagree	3.5%

The public supports the basic compromise of Michigan no-fault by an overwhelming margin 78.9% to 9.5%.

. . . .

An alternative way of testing the support for the no-fault compromise is to ask whether or not individuals are personally willing to sacrifice their own right to sue for pain and suffering in return for full payment of economic loss. In order to test this attitude, the Insurance Bureau asked the following question:

Would you give up the right to sue for pain and suffering in all cases but the most serious, in return for prompt, complete payment of all medical bills and your lost wages?

A willingness on the part of individuals to give up their own right to sue for pain and suffering would reflect support for Michigan no-fault.

The following list of responses show that people were supportive of the no-fault compromise and would give up their own right to sue:

Yes	53.1%
Don't Know	28.9%
No	18.0%

. . . The responses to both questions show that people do not support the tort system as an effective means of providing accident reparations and that no-fault is clearly preferred.¹⁵

The device of offering the insured (or his survivors) a post-accident option of accepting or rejecting no-fault benefits, therefore, would greatly lessen any objection that the insured has been disadvantaged by his agreement to receive no-fault benefits.

This freedom to reject no-fault benefits might incline a no-fault insurer to offer only no-fault benefits without offering to pay any economic losses that exceed the no-fault level, because an insured (or his

15. INSURANCE BUREAU, MICHIGAN DEP'T OF COMMERCE, NO-FAULT INSURANCE IN MICHIGAN: CONSUMER ATTITUDES AND PERFORMANCE 16-17 (1978).
https://openscholarship.wustl.edu/law_lawreview/vol58/iss1/6

survivor) who, by his own choice, accepts no-fault's certain benefits in preference to the uncertainties of a tort action arguably need not be protected from recovering less for his economic loss under no-fault than under tort. In this way, the uncertainty faced by an insurer in allowing post-accident elections by insureds is counterbalanced by the insurer's having to pay only no-fault benefits without any addition of contingent benefits for economic losses above no-fault limits.

Even those insureds who refuse no-fault benefits would benefit greatly by the proposed first-party scheme. An insured who has been offered a sum certain under no-fault would be in a strong position to demand that his tort lawyer charge a contingent fee only on the excess of the tort recovery over the offer of the no-fault insurer. Furthermore, if the no-fault insurer's offer includes not only the no-fault limits, but also the economic losses recoverable from the tortfeasor, without any deductions for attorney's fees, then the plaintiff's lawyer should take his contingency only on the pain-and-suffering element of the awarded damages. Indeed, many personal injury lawyers might find pursuit of a tort action on this basis to be not worth the effort. At first blush, this result might seem to disadvantage the no-fault insured by sending him back to the no-fault benefits that he prefers to reject in favor of his tort rights; in fact, however, it is an indication of the relative value of the right to no-fault benefits over the uncertainties of a tort action.

C. *Legal Barriers*

Even with the inclusion of a post-accident choice for the no-fault insured into the first-party proposal, there remains the problem of whether an insured (or his survivors) can assign the entire tort claim to a no-fault insurer; *i.e.*, the problem of whether common-law or statutory restrictions on transfer of personal injury claims would impede implementation of first-party no-fault insurance accompanied by transfer of the insured's tort claim.

At common law choses in action generally were nonassignable and nondevisable. Many states have preserved the common-law rule prohibiting assignment of personal injury claims and a few have codified it.¹⁶ The retention of this rule has acted as an impediment to developments in various areas of the law. Modern events have outpaced

16. New York, California, Georgia, Virginia, and West Virginia statutorily prohibit assignment of personal injury claims. For a survey of state laws regarding assignment of personal injury claims, see Annot., 40 A.L.R.2d 500 (1955).

the circumstances that led to the development of the common-law prohibition of assignment of personal injury claims. Nevertheless, modern courts and legislatures sometimes blindly perpetuate the common-law rule.

In his great treatise on English legal history, Holdsworth discussed the development of the law of assignment. He posited that the origins of the nonassignability of choses in action lay in the personal nature of the incident giving rise to a cause of action.¹⁷ Because choses in action in both contract and tort arise from matters purely personal to the parties involved, common lawyers regarded assignment of such rights as "unthinkable."¹⁸ The conceptual basis for this attitude is somewhat difficult for us to grasp today, because it apparently proceeds from the same world view that required livery of seisin—the actual handing over from vendor to purchaser of a clod of earth—to effectuate transfer of title to land.¹⁹ Just as medieval lawyers did not separate the concept of title from the physical transmission of possession (albeit symbolic possession), they did not separate the idea of a claim for damages from the physical being of the injured claimant. Thus, if *A* struck and injured *B*, *B* had a right to recover the costs of his injury from *A*. But *C*, a third person, could not purchase this right from *B* because the right adhered to *B* and dissipated when *C* attempted to seize it.²⁰ Another barrier to assignability of such an unliquidated claim for damages was its indefinite value. As stated in one American case: "Until [value] is . . . established, [the claim] has no elements of property sufficient to make it the subject of a grant or assignment."²¹

Holdsworth also noted that nonassignability of tort claims comported with the medieval desire to discourage maintenance.²² Maintenance has been defined as "an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."²³ It is, of course, con-

17. 7 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 520 (3d ed. 1926).

18. *Id.*

19. See 3 T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 78-79 (1906). Actually, the term "chose in action," containing the French word "chose," meaning "thing," had long been understood by lawyers to include both tangible and intangible subjects. Thus, the law's distinction between abstract and concrete "choses"—with the latter transferable but the former not—was and is arguably inconsistent.

20. See *id.* at 77.

21. *Rice v. Stone*, 83 Mass. (1 Allen) 566, 570 (1861).

22. 7 W. HOLDSWORTH, *supra* note 17, at 520-21 n.5.

23. 14 C.J.S. *Champerty & Maintenance* § 1(b) (1939). Champerty, unlike maintenance, involves an element of compensation to the champertor—or purchaser of the claim—from the pro-

sistent with both theories that rights of action could be released to the person against whom the right of action existed, because release would both obviate the need for litigation and leave the matter personal between the original parties.²⁴ Holdsworth further contended that the desire to discourage maintenance caused “choses in action real” (primarily rights of entry) to be nonassignable.²⁵ As with personal injury claims, the idea that such rights were personal probably contributed to their nonassignability.²⁶ Holdsworth theorized that although the primary reason for the nonassignability of personal injury claims was their personal nature, the desire to discourage maintenance was the moving factor behind nonassignability of choses in action real. When the distinction between real and personal choses of action blurred, the differing policy reasons for the nonassignability of such rights disappeared, and the idea that assignment of all choses in action must be prohibited to discourage maintenance became established.²⁷ Wrote Holdsworth:

[N]o relaxation has ever been suggested in the rule that a right of action for unliquidated damages for a tort to property or to the person is unassignable. Such claims were not debts; and they were both too uncertain and too personal to [allow of the exceptions to the rule which developed in the areas of contractual and other proprietary rights].²⁸

ceeds of the litigation. *Sampliner v. Motion Picture Patents Co.*, 255 F. 242, 247 (2d Cir. 1918). Champerty has been termed an aggravated form of maintenance. 14 S. WILLISTON, *LAW OF CONTRACTS* § 1711 (3d ed. 1972). Both champerty and maintenance are distinguishable from barratry. See note 125 *infra*. For further discussion of these terms, see notes 124-28 *infra* and accompanying text.

24. W. HOLDSWORTH, *supra* note 17, at 525.

25. *Id.* at 524-25.

26. *Id.* at 525.

27. *Id.* at 526-27, 532.

28. *Id.* at 537. One long-acknowledged exception to this rule is in the area of proprietary rights. Courts have long permitted insurers to be subrogated to the property damage claims of their insureds. “An automobile collision insurer, after indemnifying its insured, is entitled to subrogation against the wrongdoer or tortfeasor who is legally responsible for the harm caused the insured.” 16 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 61:233 (2d ed. 1966) (footnote omitted). This right of subrogation arises regardless of whether a personal injury claim is pending. “When an insurer indemnifies the insured for the property loss sustained in a collision, it is subrogated to the insured’s claim with respect to such loss, although the insured also sustained personal injuries.” *Id.* § 61:234 (footnotes omitted).

As early as 1892, the South Carolina Supreme Court pronounced that the insurer’s right to subrogation in a property insurance case was not dependent on the existence of an express subrogation clause in the insurance policy, “for the right of subrogation rests upon well-settled general principles, and need not, therefore, be the subject of special contract.” *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S.C. 213, 267, 15 S.E. 562, 582 (1892). See also R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 3.10(a) (1971); note 35 *infra* and accompanying text.

Nevertheless, a rule developed that the fruits of the action in tort, "if and when recovered, are assignable."²⁹ In addition, the "bare right of action,"³⁰ when concretely identified and validated by a judgment, became a property right and, in turn, assignable.³¹

Present laws regarding assignment of personal injury claims originate from this historical basis,³² but courts have strained for centuries to escape the inequities generated by this archaic rule. One exception to the common-law rule against assignment was an outgrowth of rules permitting survival of personal injury tort actions to allow assignment of such rights of action before death.³³

The Michigan Supreme Court in 1869 interpreted an 1863 Michigan survival statute to permit "the assignee of any bond, note or other chose in action, to sue and recover the same in his own name" in an action for conversion.³⁴ Although the court held that the survival statute did not change the general rule against the assignability of an action in tort, it found that the rule continued to apply

only to those torts which are merely personal, and which, on the death of the person wronged, die with him; while torts for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may, it seems, be assigned so as to pass an interest to the assignee which he can enforce by suit at law.³⁵

The Michigan legislature amended the statute in 1897 to permit survival of actions for "negligent injuries to persons."³⁶ In 1970 a Michigan Court of Appeals, in *City of Detroit v. Bridgeport Brass Co.*,³⁷ reiterated the link between assignability and survivability: "[I]f the action survives the chose is assignable. It is generally held that the enact-

29. W. HOLDSWORTH, *supra* note 17, at 534 (citing *Glegg v. Bromley*, [1912] 3 K.B. 474).

30. *Glegg v. Bromley*, [1912] 3 K.B. 474, 490.

31. See T. STREET, *supra* note 19, at 76-89.

32. *North Chicago St. R.R. v. Ackley*, 171 Ill. 100, 111, 49 N.E. 222, 226 (1897).

33. W. HOLDSWORTH, *supra* note 17, at 584.

34. *Final v. Backus*, 18 Mich. 218, 231 (1869). In addition to outmoded concepts concerning the inalienability of intangibles, *see* notes 17-19 *supra* and accompanying text, theological considerations equally jarring to modern ears perhaps led to the rule against survival of actions. The Michigan Supreme Court in 1867, in denying recovery for accidental death, stated, "To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting." *Hyatt v. Adams*, 16 Mich. 180, 192 (1867).

35. 18 Mich. at 231.

36. 1897 Mich. Pub. Acts No. 148, § 5 (current version at MICH. STAT. ANN. § 27A.2921 (1980)).

37. 28 Mich. App. 54, 184 N.W.2d 278 (1970).

ment of statutes providing for survival of such actions operates incidentally to remove the restriction on [inter vivos] assignability."³⁸ The court observed that even under the older, less broadly worded statute, a chose in action in tort for personal injuries would survive and, therefore, would be generally assignable.³⁹

In states that restrict the applicability of survival statutes, courts have developed other means to circumscribe the effects of the nonassignability rule. Although the New York and California survival statutes expressly prohibit assignability of personal injury claims,⁴⁰ courts in both states have attempted, with varying success, to avoid the absolute prohibition of transfer of personal injury claims.

Article 13, section 101 of the New York General Obligations Laws states that any claim or demand can be transferred except:

1. Where it is to recover damages for a personal injury; [and]

. . . .

3. Where a transfer thereof . . . would contravene public policy.⁴¹

Section 13-101 is a codification of the New York common law as settled in 1837 by *Stanton v. Tioga Common Pleas*.⁴² The 1882 case of *Williams v. Ingersoll*,⁴³ however, provided a rationale by which New York courts have often managed to nullify the impact of the statutory prohibition. In *Williams* the New York Court of Appeals held valid a contract giving an attorney a lien on the proceeds of litigation in a personal injury suit. The attorney, who had represented his client in several ac-

38. *Id.* at 59 n.5, 184 N.W.2d at 281 n.5.

39. *Id.* See notes 106-11 *infra* and accompanying text. See also TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958). The Texas courts have consistently construed this statute to render personal injury claims assignable. The cases typically involve assignment of claims to attorneys. See, e.g., *Galveston, H. & S.A. Ry. v. Ginther*, 96 Tex. 295, 72 S.W. 166 (1903); *Gulf, C. & S.F. Ry. v. Miller*, 21 Tex. Civ. App. 609, 53 S.W. 709 (1899). Texas continues to recognize the connection between assignability and survivability of claims. See *Harding v. National Bank*, 387 S.W.2d 768 (Tex. Civ. App. 1965).

40. CAL. PROB. CODE § 573 (Deering 1974); N.Y. GEN. OBLIG. LAW § 13-101 (McKinney 1978). See also NEV. REV. STAT. § 41.100(3) (1973).

41. N.Y. GEN. OBLIG. LAW § 13-101 (McKinney 1978). The public policy referred to, *id.* § 13-101(3), is not the policy that prohibits champerty and maintenance. The common-law rationale underlying the express prohibition of assignment of personal injury claims, *id.* § 13-101(1), and the explicit statutory ban on champertous transactions, N.Y. JUD. LAW §§ 488, 489 (McKinney 1968), render this construction of § 13-101(3) improbable because the provision would then become superfluous. Courts have construed this provision to apply instead, for example, to the historical policy invalidating assignment by public officers of unearned salary. *DiLallo v. Fidelity & Cas. Co.*, 355 F. Supp. 519, 522 n.1 (S.D.N.Y. 1973) (citing *Bowery Nat'l Bank v. Wilson*, 122 N.Y. 478, 25 N.E. 855 (1890)).

42. 19 Wend. 73 (N.Y. 1837).

43. 89 N.Y. 508 (1882).

tions against different defendants, asserted a claim for the compensation due him from the various suits.⁴⁴ The court defined the lien in terms of an assignment of the judgment, rather than in terms of a traditional attorney's lien. Then, despite the legal prohibition of assignment of personal injury claims, the court upheld the lien as an equitable assignment of the proceeds of the litigation:

Every assignment of a chose in action is merely an executory contract which equity considers as executed, and which the law following equity regards as conferring certain rights which the assignor is bound to respect. If a contract to assign be good in itself and not inconsistent with public policy, it will take effect as an equitable assignment.⁴⁵

The court held that the agreement did not violate public policy because its terms were fair:

The assignment here could not even in equity operate upon the unliquidated claim for damages on account of the personal tort, but attached to the award the moment it was made. The damages had been suffered. An action had been commenced for their recovery, and hence the award had a potential existence and was not ever a mere possibility.⁴⁶

New York courts have consistently followed *Williams*.⁴⁷ In *Grossman v. Schlosser*,⁴⁸ a 1963 case, plaintiff brought action to enforce an assignment by defendant of the proceeds of a pending personal injury suit and to impress a lien on the proceeds in favor of plaintiff-assignee. The trial court held the assignment invalid as a violation of what is now section 13-101(1).⁴⁹ The appellate division reversed, citing *Williams*, but indicated its displeasure in having to do so:

We note . . . our reluctance to adhere to the principle of *stare decisis* in order to follow the decision in *Williams*—a decision which established an obvious anomaly, namely: that a person cannot transfer his cause of action but may transfer its potential proceeds, thereby allowing him to do by indirection what the common law and the statute expressly forbid. The distinction made is based on form rather than substance; it is devoid of all reality; in practical effect it fosters one of the very evils which both

44. The court refused to allow the attorney a lien on the proceeds in one of the actions as compensation for his service in all the actions because an attorney's lien "is confined to the judgment in the very action in which the compensation was earned for which the lien is claimed." *Id.* at 517. "When . . . an attorney has several actions, and recovers judgment in but one of them, he cannot, in the absence of a special agreement, have a lien upon that judgment for his compensation in all the actions." *Id.*

45. *Id.* at 519.

46. *Id.*

47. See notes 48-61 *infra* and accompanying text.

48. 19 A.D.2d 893, 244 N.Y.S.2d 749 (1963).

49. 39 Misc. 2d 473, 240 N.Y.S.2d 854 (1963). See note 41 *supra* and accompanying text.

the common law and the statute sought to avoid, namely: champerty and maintenance in personal injury actions.⁵⁰

Nevertheless, the court swallowed its distaste and upheld the assignment.⁵¹

Perhaps it is no surprise, therefore, that New York courts require strict adherence to the letter of the *Williams* formula to achieve a valid transfer. In *McCormack v. Bloomfield Steamship Co.*⁵² a seaman, injured while serving on a vessel, attempted to assign any potential third-party claims to plaintiff as attorney for the insurance company that paid the seaman's benefits. The federal district court, applying New York law, held the assignment invalid under section 13-101(1), because its express terms indicated it was an attempt to assign the cause of action itself rather than the proceeds of the claim when reduced to judgment.⁵³

Another method by which New York courts avoid the ill effects of the anti-assignment statute is by distinguishing subrogation from assignment.⁵⁴ "Subrogation is not a transfer of a cause of action. The cause of action still belongs to the [injured insureds], but plaintiff, having paid part of their claim under compulsion of its insurance contract, is entitled, *pro tanto*, to stand in their place."⁵⁵ New York courts thus recognize subrogation as a means of validating transfers of personal injury claims despite the seemingly absolute injunction of the statute.

It is worthy of note that *Grossman*⁵⁶ identified champerty and maintenance as the evils that prohibition of assignability of personal injury

50. 19 A.D.2d at 894, 244 N.Y.S.2d at 751. See also *Miller v. Liberty Mut. Fire Ins. Co.*, 29 A.D.2d 982, 289 N.Y.S.2d 726 (1968) (trust receipts held to be valid assignment of proceeds of personal injury cause of action).

51. The utility of *Williams*, notes 43-46 *supra* and accompanying text, as precedent for first-party elective no-fault insurance with pre-tort transfer of third-party tort claims, is limited, however, because the New York cases that follow the reasoning of *Williams* seem to preclude assignment of a claim before the commission of the tort and occurrence of injuries. The *Williams* court, in defining a rationale for permitting assignment of the proceeds of a personal injury claim, stressed that the party had suffered damages, and consequently, the award "was not ever a mere possibility." 89 N.Y. at 519. See notes 46 *supra*, 101-04 *infra* and accompanying text.

52. 399 F. Supp. 488 (S.D.N.Y. 1974). See also *Finnerty v. Consolidated Tel. & Elec. Subway Co.*, 82 N.Y.S.2d 529 (Sup. Ct. 1948).

53. 399 F. Supp. at 490. The court also invalidated the assignment on the alternative ground that it violated public policy. See N.Y. GEN. OBLIG. LAW § 13-101(3) (McKinney 1978), *supra* note 41 and accompanying text. The court found the assignment to be an attempt to avoid an arbitration agreement. 399 F. Supp. at 491.

54. See *General Acc. Fire & Life Assur. Corp. v. Zerbe Constr. Co.*, 269 N.Y. 227, 199 N.E. 89 (1935).

55. *Liberty Mut. Fire Ins. Co. v. Perricone*, 54 A.D.2d 975, 975, 388 N.Y.S.2d 670, 671 (1976).

56. 19 A.D.2d 893, 244 N.Y.S.2d 749 (1963); see note 48 *supra* and accompanying text.

claims was designed to alleviate.⁵⁷ The need for section 13-101(1) as a preventive device against champerty and maintenance is questionable, even if the statute were strictly enforced, because another statute specifically addresses these abuses:

[N]o corporation or association . . . shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon⁵⁸

New York courts have found the determinative element to be intent. According to the Court of Appeals, if the intent to sue is an "incidental and contingent" part of a substantial commercial transaction, an assignment is not in violation of this statute.⁵⁹ "[T]o fall within the statutory prohibition, the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose."⁶⁰ Thus, ample means exist to prevent or punish champertous assignments in New York. The statute purporting to prohibit transfer of personal injury claims serves only to stultify the growth of cohesive insurance doctrines. It is otherwise superfluous.⁶¹

California's courts, like New York's, have struggled to free themselves from a statutory restriction on assignability of personal injury claims. Before 1961 California's survival statute expressly provided for the survival of personal injury causes of action, but then declared: "Nothing in this article shall be construed as making such a thing in action assignable."⁶² The legislature amended this statute in 1961, but retained the ban: "Nothing in this section shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to the enactment of the 1961 amendment to this section."⁶³ The California Supreme Court has indicated that, in light of other statutes that expressly permit subrogation in particular cases,⁶⁴

57. 19 A.D.2d at 894, 244 N.Y.S.2d at 751.

58. N.Y. JUD. LAW § 489 (McKinney 1968).

59. *Sprung v. Jaffe*, 3 N.Y.2d 539, 544, 147 N.E.2d 6, 9, 169 N.Y.S.2d 456, 460 (1957).

60. *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*, 28 N.Y.2d 325, 330, 270 N.E.2d 691, 693, 321 N.Y.S.2d 857, 860 (1971).

61. The purpose of first party no-fault with transfer of tort claims is to pay accident victims expeditiously; thus, arguably, it is not champerty. See notes 124-32 *infra* and accompanying text.

62. CAL. CIV. CODE § 956 (West 1954) (repealed 1961); 1949 Cal. Stats. ch. 1380, § 2 (repealed 1961).

63. CAL. PROB. CODE § 573 (Deering 1974).

64. Subrogation is expressly permitted, for example, under the Uninsured Motorist Coverage statute. CAL. INS. CODE § 11580.2(g) (Deering 1977).

the legislature intended the survival statute to prohibit subrogation as well as assignment in personal injury cases.⁶⁵ But a series of cases arising from the California Supreme Court's ban on subrogation illustrates California's attempt to wrestle free of the codified common-law rule.

In 1960 the California Supreme Court announced its inflexible construction of legislative intent in *Fifield Manor v. Finston*.⁶⁶ Plaintiff in *Fifield* was a nursing home that had contracted with Ross to care for him for life. Ross was hit by a car negligently driven by Finston and died six weeks later of the resulting injuries. Plaintiff provided Ross with medical services pursuant to the contract and brought suit against Finston, asserting both conventional and legal subrogation rights.⁶⁷ The court upheld defendant's argument that subrogation, either by the express terms of the contract or by equitable principles, would operate as an equitable assignment⁶⁸ in violation of the anti-assignment statute. The ban on assignments included subrogation, ruled the court, because "[t]he Legislature where it has desired to give a right of subrogation in such cases, has done so in express language."⁶⁹ The Court based its decision in part on its understanding that the difference between assignment and subrogation is purely technical: "[E]ach operates to transfer from one person to another a cause of action against a third, and the reasons of policy which make certain causes of action nonassignable would seem to operate as forcefully against the transfer of such causes of action by subrogation."⁷⁰

The first criticism of *Fifield* came in 1963 in *Peller v. Liberty Mutual Fire Insurance Co.*⁷¹ A California District Court of Appeals, though following *Fifield* and invalidating a subrogation clause for medical coverage in an automobile insurance policy, stated:

A persuasive argument can be made that the reasons for holding the common law rule that chases in action for personal injuries arising in tort are unassignable, are obsolete and no longer applicable to reimbursement of medical and hospital expenses. These special damages, unlike general damages, are certain, or can be made certain, for the purposes of subroga-

65. *Fifield Manor v. Finston*, 54 Cal. 2d 632, 639-40, 354 P.2d 1073, 1077, 7 Cal. Rptr. 377, 381 (1960). Two years later, in *Bilyeu v. State Employees' Retirement Sys.*, 58 Cal. 2d 618, 624, 375 P.2d 442, 446, 25 Cal. Rptr. 562, 566 (1962), the court expressly affirmed this construction.

66. 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960).

67. Conventional subrogation is an express contractual right; legal or equitable subrogation arises by operation of law. R. KEETON, *supra* note 28, § 3.10(a).

68. 54 Cal. 2d at 638, 354 P.2d at 1076-77, 7 Cal. Rptr. at 380-81.

69. *Id.* at 639, 354 P.2d at 1077, 7 Cal. Rptr. at 381.

70. *Id.* at 640, 354 P.2d at 1078, 7 Cal. Rptr. at 382.

71. 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963).

tion. It is particularly significant that protection against fortuitous losses by indemnity insurance was unknown when this common law rule evolved, while today such insurance serves a beneficial social and economic purpose.⁷²

Acknowledging the power and obligation of courts to overrule anachronistic laws, the court nevertheless felt constrained to deny subrogation because—as was emphasized in *Fifield*—the law at issue derived from the legislature, not from the common law.⁷³

In 1966 another California District Court of Appeals wrote what has emerged as a seminal decision upholding subrogation. *Block v. California Physicians' Service (CPS)*⁷⁴ involved a group-health contract under which CPS agreed to furnish medical and hospital payments to its members. The relevant clause of the contract provided CPS with a right of reimbursement to the extent of its payments and also granted CPS an equitable lien to the extent of these payments on any recovery a member might receive. The court ruled *Fifield* inapplicable because there was no transfer of a personal injury cause of action.⁷⁵ The court reasoned that the agreement did not require CPS to be subrogated to the member's cause of action, nor did it require the member to enforce his claim against the tortfeasor. In addition, the agreement did not permit CPS to sue the tortfeasor in its own right. Thus, "if no claim is made or suit is filed against the tortfeasor and no recovery is effected there would be no lien."⁷⁶ The court also noted at length that CPS was not an insurance company, but an association organized to "provide medical and hospital services on a nonprofit basis at a minimum expense to those participating."⁷⁷ Because CPS did not assume a risk in exchange for the payment of premiums, but merely distributed funds among its members,⁷⁸ the court found the reimbursement clause to be

72. *Id.* at 611, 34 Cal. Rptr. at 42.

73. 54 Cal. 2d at 639, 354 P.2d at 1079, 7 Cal. Rptr. at 381.

74. 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966).

75. *Id.* at 270-71, 53 Cal. Rptr. at 53.

76. *Id.* at 272, 53 Cal. Rptr. at 54.

77. *Id.* at 273, 53 Cal. Rptr. at 55.

78. *Id.* at 269-70, 53 Cal. Rptr. at 53. In 1946 the California Supreme Court ruled in a declaratory judgment action that CPS was not in the insurance business. *California Physicians' Serv. v. Garrison*, 28 Cal. 2d 790, 172 P.2d 4 (1946). The California Insurance Commissioner had appealed a similar finding by a lower court, arguing that the nature of the services provided by CPS was indistinguishable from medical insurance, and that the Service, therefore, should be subject to regulation under the state's insurance laws. In holding that the Insurance Commissioner could not subject CPS to regulation, the court took notice of the "great social need for adequate medical benefits at a cost which the average wage earner can afford to pay." *Id.* at 801, 172 P.2d at 11. The court analyzed the structure of payment to and benefits provided by CPS and

“part of an over-all program sanctioned and encouraged by the Legislature and designed by defendant Service to provide [medical services to the indigent]. By becoming a member of the plan under a Group Health Service agreement plaintiff has voluntarily associated himself with the public policy of this state.”⁷⁹ The court thus concluded that it would be unfair for plaintiff to receive a double recovery at the expense of the association.⁸⁰

The court’s studied effort to distinguish CPS from an insurance company evidently arises from the rationale underlying the collateral-source rule in torts.⁸¹ This rule, of course, prohibits reduction of a damages award by the amount received from the injured party’s own insurance. The rule thus prevents the tortfeasor from receiving a windfall by virtue of the victim’s foresight in securing insurance. Because the insured has paid for his coverage, his insurance benefits are irrelevant to compensation due him by the tortfeasor.⁸² An arguable corollary to the collateral-source rule is the prohibition of subrogation by insurance companies. The reasoning assumes that because insurers charge premiums for accepting the risks of coverage, subrogation would result in a kind of double recovery.⁸³ In *Block* the court took pains to show that CPS was not paid to assume risks and, therefore, should be entitled to subrogation. The court’s rationale seems to have grown from a policy concern against double recovery.

Thus *Fifield*, which equated assignment with subrogation and forbade both, led the *Block* court to isolate a technical difference between the CPS insurance system and typical insurance to permit subrogation

determined that CPS was merely an agent for its member beneficiaries and doctors, and that the corporation itself did not assume risk of loss from, or shift loss among, the beneficiaries.

The court applied a second test in making its decision: “The question . . . is whether, looking at the plan of operation as a whole, ‘service’ rather than ‘indemnity’ is its principal object and purpose.” *Id.* at 809, 172 P.2d at 16. The court held that CPS’s low-cost medical services met a substantial social need, and constituted “service,” not “indemnity.” The court added that the statutory provision, CAL. CIV. CODE § 593a (West 1961) (regulation of nonprofit professional organizations by attorney general and professional board), indicated a legislative intent that such organizations be exempt from regulation by the Insurance Commissioner. In sum, the California Supreme Court’s holding seems to be not so concerned with risk-shifting as with finding a means by which CPS need not be regulated in the same way as ordinary insurance companies.

79. 244 Cal. App. 2d at 273, 53 Cal. Rptr. at 55.

80. *Id.*

81. See 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1343 (1956).

82. *Silinsky v. State-Wide Ins. Co.*, 30 A.D.2d 1, 4, 289 N.Y.S.2d 541, 546 (1968).

83. See *Lee v. State Farm Mut. Auto. Ins. Co.*, 57 Cal. App. 3d 458, 129 Cal. Rptr. 271 (1976) (Friedman, J., concurring).

under another name. The result effectively permitted subrogation despite the decision of the California Supreme Court in *Fifield*.

The distinction urged by the *Block* court as the basis for permitting subrogation for CPS was later ignored in *West v. State Farm Mutual Automobile Insurance Co.*⁸⁴ In *West* a subrogation clause expressly provided that the insurance company be subrogated to the extent of benefits paid, that the insured agreed to take all action necessary to enforce his rights against a tortfeasor, and that the insured agreed to do nothing to prejudice the rights of the subrogee. The district court of appeals distinguished *Fifield* and *Peller* and upheld the clause because it did not permit the insurer to bring suit in its own name.⁸⁵ The court cited *Block* as authority for the proposition that:

[A]n agreement to reimburse an insurer in the event of recovery of such damages by an insured from a third party tortfeasor by either judgment or settlement is valid and there is no legal prohibition against an insurer requiring its insured to provide it with a lien to the extent of benefits paid under the policy against any recovery by the insured from a third party.⁸⁶

The court emphasized that subrogation was to the proceeds of the action, not to the cause of action. Subrogation rights arise only after the proceeds are in existence.⁸⁷

*Lee v. State Farm Mutual Automobile Insurance Co.*⁸⁸ considered the same subrogation clause and followed the *West* decision in what the concurring judge declared to be an "erosion" of the *Fifield* rule.⁸⁹ The court reasoned that under California's collateral source rule the insured would receive compensation from both the tortfeasor and the insurer, and that this would constitute the form of double recovery declared unfair in *Block*.⁹⁰

84. 30 Cal. App. 3d 562, 106 Cal. Rptr. 486 (1973).

85. *Id.* at 565, 106 Cal. Rptr. at 488.

86. *Id.*

87. This concept of subrogation to the proceeds of a claim—similar to the so-called "trust receipt" theory—is the same device used by the New York Court of Appeals in *Williams v. Ingersoll*, 89 N.Y. 508 (1882), to permit assignment of personal injury claims. See notes 43-46 *supra*, note 96 *infra* and accompanying text.

88. 57 Cal. App. 3d 458, 129 Cal. Rptr. 271 (1976).

89. *Id.* at 469, 129 Cal. Rptr. at 278 (Friedman, J., concurring).

90. *Id.* at 465, 129 Cal. Rptr. at 275. Theoretically, the concept of double recovery is, in some measure, illusory. Insurance companies should consider state subrogation laws as one factor in determining premium rates. If subrogation is allowed, then premiums will be lower, and vice versa. Therefore, if the victim receives payment from both the insurance company and the tortfeasor in a nonsubrogation state, the insurance company in theory has been previously reimbursed through higher premiums, and the insured has already paid for his double recovery. This theory, however, does not solve the problem of discouraging victims, in cooperation with their

Thus, *Fifield* has been effectively circumvented to permit reimbursement of insurers to the extent of medical benefits paid. The California courts, which have gradually expanded what is in essence a right of subrogation, have been careful to indicate that assignments and subrogation in personal injury cases are invalid except as permitted by statute. The end result of attempts to achieve the intent of the legislature, however, bowing to modern insurance needs, is that subrogation is tacitly allowed in California. The judicial ingenuity that has been required to reach this pragmatic result highlights the need for a reappraisal of the whole doctrine of prohibition of assignment of personal injury claims.

Illinois is one of the states that prohibits assignment of personal injury claims by common-law decision,⁹¹ yet permits subrogation by distinguishing it from assignment. In the 1965 case of *Damhesel v. Hardware Dealers Mutual Fire Insurance Co.*,⁹² the court upheld a subrogation clause under automobile medical insurance payments coverage (med-pay) even though the injured party received no payment from his insurer. Plaintiff was a passenger in a car insured by defendant for \$500 of medical expenses for each passenger. Damhesel, the nonnegligent party in a collision, settled his personal injury claim with the negligent driver of the other car. He executed a general release and then sued the defendant-insurer for recovery under its med-pay policy with the host-driver. A clause in the policy provided that the insurer be subrogated to the rights of the injured party, and that the injured party should "do nothing after loss to prejudice such rights." An Illinois appellate court held that by executing a general release, plaintiff had prejudiced the insurer's rights and, therefore, could not recover. The court noted:

It is clear that the subrogation clause of the policy before us does not constitute an assignment of a personal tort. As was said in *Rensen v. Midway Liquors, Inc.*, 30 Ill. App.2d 132, 143, 174 N.E.2d 7, 12 (1961): "Subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under

lawyers and doctors, from running up excessive medical bills in the expectation of profit from multiple payment; nor does it address the problem of the costs of invoking subrogation rights; *i.e.*, litigation costs may be so great as to nullify the effectiveness of subrogation as a method of reimbursement. Furthermore, if insurers do not always act in accordance with theory, the savings, if any, attributable to subrogation may not necessarily be passed on to insureds.

91. *North Chicago St. R.R. v. Ackley*, 171 Ill. 100, 49 N.E. 222 (1897).

92. 60 Ill. App. 2d 279, 209 N.E.2d 876 (1965).

circumstances entitling him to contribution or indemnity while assignment necessarily contemplates the continued existence of the debt or claim assigned. Subrogation operates only to secure contribution and indemnity, whereas an assignment transfers the whole claim. . . ." In the case at bar . . . the insurance company would have paid the amount due [Damhesel] thus satisfying his claim. The company would then have sought contribution from [the negligent driver]⁹³

On similar facts in 1965, the court upheld a subrogation clause in *Bernardini v. Home & Automobile Insurance Co.*,⁹⁴ and thus circumvented Illinois' prohibition of assignment of personal injury actions, by finding a contractual lien on part of the insured's recovery.⁹⁵

It also should be emphasized how courts have often strained to bypass prohibitions against transfer of personal injury tort claims by use of, for example, the "trust receipt," by which an insured, in consideration for payment of his first-party claim, promises to hold in trust for the first-party insurer whatever amount of the first-party benefits he

93. *Id.* at 281, 209 N.E.2d at 878.

94. 64 Ill. App. 2d 465, 212 N.E.2d 499 (1965).

95. Subrogation operates only to secure contribution and indemnity whereas an assignment transfers the whole claim. In the instant case the medical subrogation clause does not purport to transfer or assign the entire claim of plaintiffs against the tort-feasor; it impresses a lien in favor of the insurer to the extent of its payment upon any recovery obtained by the plaintiffs from the tort-feasor. The subrogation does not deprive the insured of a recovery for pain and suffering

Id. at 467, 212 N.E.2d at 501. Of course, this last sentence indicates that the Illinois court might have been particularly hostile to transfer of the claimant's whole claim, including pain and suffering.

In one respect, that the proposal discussed in this article involves assignment rather than subrogation may make it more acceptable to the courts. Courts troubled by the split in the cause of action between the subrogor and subrogee would not face that difficulty if assignment of the entire cause of action takes place. See Ullam-Morse, *Medical Payments Subrogation Agreements: Valid Provisions in Indemnity Insurance Policies*, 7 CAP. U.L. REV. 255 (1977).

But the conclusion to this article suggests—theoretically, at least, and practically, to a large extent—that there is little reason to validate transfer of only part of a claim. Certainly, a primary effect of the contingent fee is, in effect, to transfer all or part of the claimant's pain and suffering claim to his lawyer. Yet, payment of attorneys in personal injury cases by means of contingent fees has long been an accepted practice. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 14-15, 18 (1964); J. O'CONNELL & R. SIMON, *PAYMENT FOR PAIN AND SUFFERING* 4-5 (1972). The policy reasons for prohibiting transfer of entire tort claims to lawyers are those underlying prohibitions against champerty and maintenance. *Id.* at 35-38; O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659, 682-83 (1977). See generally J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 37-53 (1971), also published in J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* 120-33 (1975); Donin, *England Looks at a Hybrid Contingent Fee System*, 64 A.B.A. J. 773 (1978); notes 128-32 *infra* and accompanying text. These policy considerations, however, have no bearing on the proposal discussed in this article and should not pose barriers to its implementation.

may recover from the tortfeasor.⁹⁶ The common-law ban against assignment of personal injury claims, as we have seen, has been vitiated by other approaches. Michigan⁹⁷ has adopted a relatively straightforward approach in tying assignability to survivability. New York⁹⁸ and California⁹⁹ courts, although statutorily barred from using Michigan's approach, have created chameleon-like "rules" that pay lip service to the statutes but achieve the very results that the statutes try to prevent.

Even apart from the apparent inconsistencies between statutory and case law in these states, the positions adopted by the New York and California courts to achieve flexibility in one area seem to deprive them of that flexibility in meeting new situations. New York's case law, as a result, appears to cast a cloud, to say the least, on a favorable judicial reception to pretort assignments.¹⁰⁰ As noted earlier, New York's courts recognize two exceptions to their general rule prohibiting the transfer of personal injury claims—assignment of proceeds and subrogation.¹⁰¹ In defining the assignability-of-proceeds exception, the New York Court of Appeals in *Williams v. Ingersoll*¹⁰² reasoned that an assignment operated in equity to give the assignee rights in a claim already in existence; equity caused the assignment to attach to an award "the moment it was made."¹⁰³ In *Williams* "[t]he damages had been suffered. An action had been commenced for their recovery, and hence the award had a potential existence and was not ever a mere possibility."¹⁰⁴ This reasoning allows the court to circumvent the (now statutory)¹⁰⁵ ban on assignability of personal injury claims. Nonetheless, it arguably presents a barrier to extension of the exception to pretort assignment of entire claims.

In contrast to New York, Michigan's approach to the issues of assignment and subrogation leaves its courts sufficient flexibility to deal

96. Procaccia, *The Effect and Validity of Subrogation Clauses in Insurance Policies*, 1973 INS. L.J. 573, 577. See notes 50, 67 *supra* and accompanying text. See generally Note, *Legal and Practical Problems Arising from Subrogation Clauses in Health and Accident Policies*, 34 MARQ. L. REV. 256 (1971).

97. See notes 36-39 *supra* and accompanying text.

98. See notes 41-61 *supra* and accompanying text.

99. See notes 62-90 *supra* and accompanying text.

100. Although nonessential to the first-party plan proposed in this article, pretort assignment may be preferable. See notes 4, 14 *supra* and accompanying text.

101. See note 41 *supra* and accompanying text.

102. 89 N.Y. 508 (1882).

103. *Id.* at 519.

104. *Id.*

105. N.Y. GEN. OBLIG. LAW § 13-101(1) (McKinney 1978).

with the issue of pretort assignment of an entire personal injury claim. In *City of Detroit v. Bridgeport Brass Co.*¹⁰⁶ a bus driver employed by the city was injured when his bus collided with an automobile driven by defendant's employee. The bus driver was entitled to and accepted disability pension benefits from the city, and the city intervened in his suit against Bridgeport Brass, claiming subrogation rights to the extent of benefits paid and payable. The city based its claim on a subrogation provision in its charter and on the charter's requirement that work-related injuries be compensated by a pension payable upon disablement in the line of duty. The defense asserted that the city, as a mere volunteer, had no subrogation rights, but the court held that the "mere volunteer" doctrine was inapplicable:

An assignment of a contingent unliquidated claim can be made in advance of the injury giving rise to the claim, at least in a case like this where the assignee obligates himself to pay a reasonable amount for the claim. By his acceptance of the pension benefits, [the bus driver] is deemed to have agreed to the *pro tanto* assignment or conventional subrogation of his rights against third-party tortfeasors provided for in the city's charter.¹⁰⁷

The court observed in a footnote that choses in action for personal injury are assignable in Michigan¹⁰⁸ and did not distinguish between assignment and subrogation. Although the opinion is phrased largely in terms of subrogation, the court—as is evident from the language quoted—used the term interchangeably with assignment.¹⁰⁹ The court thus had no need to become mired in the distinctions upon which New York and California courts (and other states such as Illinois) have

106. 28 Mich. App. 54, 184 N.W.2d 278 (1970).

107. *Id.* at 59-60, 184 N.W.2d at 281.

108. *Id.* at 59 n.5, 184 N.W.2d at 281 n.5.

109. Assignment operates to transfer an entire property, or the whole of any right or claim in property. *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 144, 174 N.E.2d 7, 12 (1961). Subrogation, however, involves the payment of a debt or claim by a party, who, by making payment, becomes entitled in equity to indemnity or contribution from the party originally liable for the payment. A subrogation clause in an insurance contract "impresses a lien in favor of the insurer to the extent of [the insurer's] payment [to the insured]." *Bernardini v. Home & Auto. Ins. Co.*, 64 Ill. App. 2d 465, 467, 212 N.E.2d 499, 501 (1965). See note 94 *supra* and accompanying text. If the tortfeasor and the insured effect a settlement prejudicial to the rights of an insurer, the insurer may have recourse to suit against one of those parties. See R. KEETON, *supra* note 28, at 158-60.

Michigan's Supreme Court has on occasion distinguished subrogation rights from assignment rights. See *Michigan Medical Serv. v. Sharpe*, 339 Mich. 574, 64 N.W.2d 713 (1954). This case considered the subrogor's (the injured insured's) impairment of contractual subrogation rights. The injured victim had settled with the tortfeasor and thus had destroyed the rights of the medical service to proceed against the tortfeasor. The court held that the service must proceed against its

seized. Michigan's policy of openly allowing assignment thus frees its courts to encounter new situations unencumbered by suffocating technicalities.

In fact, the validity of pretort assignment of claims is touched upon in the *Bridgeport Brass* decision, although the court's holding rendered ultimate decision on the point unnecessary. The court stated that "[a]n assignment of a contingent unliquidated claim can be made in advance of the injury,"¹¹⁰ but this statement becomes dictum in light of the court's analysis of the facts. The employee's rights may have derived from either his employment contract (not mentioned by the court) or his acceptance of disability benefits. If the court had determined that the agreement to transfer tort rights *pro tanto* to the city in exchange for inclusion in the disability pension plan occurred at the time that he entered into the city's employ, the case would demonstrate an effective pretort assignment. The court sidestepped this issue by pinpointing the agreement to transfer tort rights at the time of his acceptance of disability payments. The court intimated in a footnote, however, that it was cognizant of the former alternative, but did not deem this case appropriate for resolution of that issue.¹¹¹

insured and not against the tortfeasor because the service's rights were rights of subrogation, not of assignment. *Id.* at 578, 64 N.W.2d at 714.

The *Bridgeport Brass* court distinguished *Sharpe* in a footnote. 28 Mich. App. at 61 n.11, 184 N.W.2d at 282 n.11.

110. 28 Mich. App. at 59, 184 N.W.2d at 281.

111. The court stated that its "disposition of this case makes it unnecessary to consider whether the [contract] was entered into at some earlier time." *Id.* at 61 n.10, 184 N.W.2d at 282 n.10. Robert E. Keeton, the country's leading insurance law scholar before joining the federal bench, chided the courts for rather unthinkingly striking down assignments of potential insurance claims in a context analogous to the proposal in this article—when the possibilities of abuse seem greater, but there are corresponding advantages to letting people sell their uncertain rights to future insurance benefits in return for more certain benefits.

[C]ases have arisen in which it might be argued that . . . wagering involving insurance policies has performed a socially useful function [despite the law's disapproval of it]. For example, there was a time when industrial life insurance policies [a type written in small amounts, paid for in weekly modest installments] commonly contained no provision for cash surrender value. In some communities a business developed of purchasing assignments of these policies. [See, e.g., *Hack v. Metz*, 173 S.C. 413, 176 S.E. 314 (1935) (holding the assignment invalid).] It may well be that this was a form . . . [of] wagering, but enforcement of such assignments might have served a socially useful purpose in enabling poverty-stricken holders of industrial life insurance policies to realize something on the potential value of contracts they might otherwise have allowed to lapse. Provision for cash surrender value is an alternative way of making it possible for the insured to realize the value of the contract in the situation. But if the person whose life is insured has become uninsurable, the value of the contract is much greater than cash surrender value, and the insured would have no enforceable way of realizing that higher value during his lifetime if assignments were void.

R. KEETON, *supra* note 28, § 3.1(b).

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In recent years, courts have begun to free themselves from the strictures of anachronistic statutes. The California Supreme Court, in the 1975 case of *Li v. Yellow Cab Co.*,¹¹² has taken a step in this direction by abolishing statutory contributory negligence and replacing it with judicially created comparative negligence. In *Li* the contributory negligence rule would have barred all recovery to a badly injured plaintiff—a much criticized result. In making its ruling, the court noted that the state legislature had defeated many bills designed to ameliorate this harsh effect of contributory negligence,¹¹³ but seemed to feel that despite—or, indeed, because of—legislative inability to effectuate a remedy for this harsh and outmoded doctrine, the court must intervene.

The *Li* court noted that perpetuation of a notoriously inequitable doctrine would undermine public confidence in the legal system. “It is manifest that this state of affairs, viewed from the standpoint of the health and vitality of the legal process, can only detract from public confidence in the ability of law and legal institutions to assign liability on a just and consistent basis.”¹¹⁴ Thus, “logic, practical experience, and fundamental justice”¹¹⁵ overwhelmingly mandated a change.

The court also analyzed the history of California’s codification of the common law and reasoned that the Code clarified, but did not freeze development of, the common law. “[T]he intention of the Legislature in enacting [contributory negligence] was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance.”¹¹⁶ Accordingly, codification did not indicate a legislative intent to “restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability.”¹¹⁷

112. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). See also *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). The New York Court of Appeals ventured into the area of apportioning fault in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1973), but refused to adopt comparative negligence. The court indicated that the area was more appropriate for legislative action, in spite of its recognition that the contributory negligence rule was also of judicial origin. *Id.* at 151, 282 N.E.2d at 293-94, 331 N.Y.S.2d at 389-90. See *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973). Michigan’s court adopted comparative negligence in 1977. *Kirby v. Larson*, 400 Mich. 585, 256 N.W.2d 400 (1977).

113. 13 Cal. 3d at 810 n.1, 532 P.2d at 1230 n.1, 119 Cal. Rptr. at 862 n.1.

114. *Id.* at 812, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

115. *Id.*, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

116. *Id.* at 84, 532 P.2d at 1238, 119 Cal. Rptr. at 870.

117. *Id.* Finally, the court offered a traditional rationale for its decision, stating that the contributory negligence statute itself had been previously misconstrued and should be read as a comparative negligence statute. *Id.*

The Supreme Judicial Court of Massachusetts has recognized that statutes dealing with but not purporting to alter the common law should not be construed to hinder its development. In *Lewis v. Lewis*¹¹⁸ the court abolished the doctrine of interspousal tort immunity, which barred negligence suits between husbands and wives. A Massachusetts statute provided that “[a] married woman may sue and be sued in the manner as if she were sole, but this section shall not authorize suits between husband and wife.”¹¹⁹ The court, however, rejected the argument that this statute froze the common-law doctrine of interspousal immunity, holding instead that the statute “left the rule in its common law status susceptible to reexamination and alteration by this court.”¹²⁰ The court also rejected the argument that the age of the doctrine made it immune to all but legislative authority:

When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to reexamine its precedents rather than to apply by rote an antiquated formula.¹²¹

The reasoning of the Massachusetts court is applicable to California’s survival statute. The statute provides that “[n]othing in this section shall be construed as making assignable things in action which [were] not . . . assignable [before 1961].”¹²² Thus, the statute should be construed not to bar assignment necessarily, but rather to leave the issue in the domain of the courts. A much needed reappraisal of the anti-assignment *common law* by the California Supreme Court would not encroach on legislative turf.

One last policy issue must be clarified. One of the most commonly cited reasons for perpetuating the anti-assignment ban, as we have seen,¹²³ is the fear that champerty and maintenance would be fomented by its abolition. Apart from realizing that other laws adequately deal with these problems,¹²⁴ it should be stressed that these fears are irrelevant to the first-party no-fault plan under discussion. Champerty is defined as “the aiding of a litigation by a stranger having no interest . . . on an agreement with the party in interest, whereupon such stran-

118. 370 Mass. 619, 351 N.E.2d 526 (1976).

119. *Id.* at 624, 351 N.E.2d at 529.

120. *Id.* at 627-28, 351 N.E.2d at 531.

121. *Id.*

122. CAL. PROB. CODE § 573 (Deering 1978); see text accompanying notes 61-90 *supra*.

123. See notes 50, 57 *supra* and accompanying text.

124. See text accompanying notes 56-61 *supra*.

ger is to receive a part of the thing in dispute."¹²⁵

There are two essential elements of a champertous agreement: first, there must be an undertaking by one person to defray the expense of the whole or a part of another's suit; second, the agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event it proves successful.¹²⁶

That champerty is not involved in first-party no-fault insurance is perhaps best illustrated by the Michigan experience.

In Michigan, where the champerty offense has been generally pronounced "dead,"¹²⁷ it is retained for lawyers.¹²⁸ (It would be inapplicable, therefore, to bar transfer of personal injury claims to insurers, as proposed in this article.) According to the Michigan Supreme Court in the 1933 case of *Hightower v. Detroit Edison Co.*,¹²⁹ the reason for retaining the rule against solicitation by lawyers is to discourage "ambulance chasing":¹³⁰

The practice [of "ambulance chasing"] has developed recognized evils, the major of which are, (1) fomenting litigation with resultant burdens on the courts and public purse, (2) subornation of perjury, (3) mulcting of innocent persons by judgments, upon manufactured causes of action and perjured testimony, and by settlements to buy peace, and (4) defrauding of injured persons having proper causes of action, but ignorant of legal

125. *Worrell v. Roxana Petroleum Corp.*, 144 Okla. 297, 299, 291 P. 47, 48 (1930) (quoting 11 C.J.S. *Champerty & Maintenance* § 38 (1917)).

126. *Clark v. Harrison*, 182 Ga. 56, 56, 184 S.E. 620, 622 (1935).

127. *Grant v. Stecker & Huff*, 300 Mich. 174, 1 N.W.2d 500 (1942).

128. In 1918 the Texas Court of Criminal Appeals ruled in *Ex parte McCloskey*, 82 Tex. Crim. 531, 199 S.W. 1101 (1918), *aff'd*, 252 U.S. 107 (1920), that a statute making illegal the soliciting of claims by attorneys or others was constitutional and not in conflict with the law permitting assignment of claims. The statute in particular prohibited barratry, making it "an offense for any one, by personal solicitation to seek to be employed by another to prosecute or collect any claim such other may have." *Id.* at 536, 199 S.W. at 1102. Barratry is the "public policy which prohibits stirring up litigation. . . . This offense . . . consists in the repeated stirring up of lawsuits and quarrels by one who is a stranger to them. The target [of the statute] is the officious troublemaker and the essence is repeated action; a single instance of incitement does not constitute the crime." F. MACKINNON, *supra* note 95, at 37. The barratry offense at common law was not specifically directed at lawyers; nevertheless, lawyers convicted of the offense were not only subjected to the penalties assessed upon laymen, but were "disabled from practicing for the future." *Id.* at 54 n.8 (quoting 4 W. BLACKSTONE, COMMENTARIES 134-36 (3d ed. 1884)).

The difference between barratry and maintenance is largely historical. According to MacKinnon, maintenance was a "politically oriented crime," but barratry was related to crimes dealing with breach of the peace. F. MACKINNON, *supra* note 95, at 36-37. MacKinnon attributes the common-law prohibition of barratry to the English view that "litigation is a social ill, which, like other disputes and quarrels, should be minimized." *Id.* at 210. See note 23 *supra* and accompanying text.

129. 262 Mich. 1, 247 N.W. 97 (1933).

130. *Id.* at 7, 247 N.W. at 99.

rights and court procedure, by means of contracts which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlements made for quick return of fees and against the just rights of the injured persons.¹³¹

None of these abuses appear to be present in this article's first-party no-fault proposal.¹³² The effect of the proposal would be to assure payment to injured insureds and to provide private funding for payments to meet real needs. The benefit to society should outweigh academic concerns about champerty. Funding of the system by pursuing tort claims should not be regarded as officiousness because, to the extent of compensation paid to an injured party, the insurer has a direct interest in the proceeds of the claim; to the extent of recovery above compensation paid to an injured party in an individual case, both the insurer and the public have an interest in the program itself and in making it self-supporting. The other abuses fostered by champerty, *i.e.*, perjury, manufactured causes of action, and defrauding of persons innocent of the workings of the legal system, are not really of major concern under first-party no-fault insurance. Indeed, one purpose of such insurance, accompanied by assignment of fault-based claims, is to avoid "ambulance chasing" and its attendant evils.

III. CONCLUSION

All the permutations of prohibitions against transfer of personal claims discussed in this article highlight how inapplicable to first-party no-fault insurance, with concomitant assignment of third-party tort claims, are the fears that led to bans on champerty and on other means of transferring all or parts of personal injury claims. This historical perspective also shows the courts' long struggle to free themselves from bans no longer bottomed on contemporary considerations. In recent years the courts of this country have been ever more innovative in molding and designing new causes of action for personal injury (most notably in products liability claims), and yet these innovations have left us with a horrendously inadequate liability insurance system, especially as it applies to personal injury. It should not be beyond the power and imagination of these same courts to approve innovative steps allowing insurers and insureds to harness that wayward tort system fashioned by the courts. To guarantee surer, quicker, more efficient payment for ac-

131. *Id.* at 7-8, 247 N.W. at 99.

132. *But see* O'Connell, *supra* note 1, at 703-05, *adapted from* J. O'CONNELL, *supra* note 1, at

cidental injuries in this manner is especially feasible in states where the only purported bans on such schemes stem from common-law restrictions, which are not really applicable to first-party no-fault insurance with assignment of third-party tort claims. Even in states like California and New York, where statutory prohibitions against assignment of personal injury claims are bottomed on the common law, courts could uphold first-party no-fault insurance with assignment of third-party tort claims as consistent with the spirit of those laws. As a California appellate court admitted:

A persuasive argument can be made that the reasons for holding the common law rule that chases in action for personal injuries arising in tort are unassignable, are obsolete and no longer applicable. . . . It is particularly significant that protection against fortuitous losses by . . . insurance was unknown when this common law rule evolved, while today such insurance serves a beneficial social and economic purpose.¹³³

The statutory prohibitions against assignment should be no more formidable to the California and New York courts than arguably controlling statutory provisions on privity, notice, and disclaimers that those courts bypassed to formulate the rule of strict product liability.¹³⁴ Such innovation was followed throughout the United States by what Dean Prosser called "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."¹³⁵ The time has come to be similarly venturesome in helping to further advance personal injury law to assure payment for losses.

Professor Guido Calabresi of the Yale Law School recently delivered an *Oliver Wendell Holmes Lecture* at the Harvard Law School as part of a three-lecture program entitled "The Common Law in an Age of Statutes." In the second lecture, subtitled "Toward a Theory of the Second Look," according to the *Harvard Law Record*,

Calabresi proposed a judicial solution to the problem of outdated statutes. He defined his doctrine of the second look as: "Judicial power to change or nullify statutes in appropriate cases, without the arguable overkill of

133. *Peller v. Liberty Mut. Fire Ins. Co.*, 220 Cal. App. 2d 610, 611, 34 Cal. Rptr. 41, 42 (1963). Admittedly, the *Peller* court made reference to the idea that "special damages, unlike general damages, are certain, or can be made certain, for the purposes of subrogation." *Id.* See note 71 *supra* and accompanying text. But the uncertainty concerns the inchoate nature of the thing to be transferred, a factor with far less modern pertinence than fear of champerty. See notes 127-31 *supra* and accompanying text.

134. See, e.g., *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

135. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-94 (1966).

declaring the statute unconstitutional, and thus without precluding a second look by the legislature.

He went on to explain the considerations appropriate to the application of the doctrine. First, the court should act only within the areas of legislative inertia—the idea is to deal only with laws the legislature, as a practical matter, can't reach. A court wouldn't be justified in simply looking to its own views and prejudices in overcoming legislative inertia. It must ask certain questions, such as: is the statute, because of changes in the world around it, clearly inadequate today, is the statute philosophically out of step with newer statutes; has there been an accretion of criticism from scholars, or a series of events undercutting the statute.¹³⁶

Statutory prohibitions against transfer of tort claims would seem opportune for a "second look."

Ultimately, however, if reliance on the judiciary to uphold the idea proposed in this article still looks too risky for an insurer to try without legislative authorization—and such authorization seems doubtful in view of the power of the trial bar¹³⁷—the safer course would be for an insurer to market first-party no-fault with assignment of third-party claims, but allowing the no-fault insured a choice to pursue either his no-fault or his tort remedy.¹³⁸

136. Zelanak, *Calabresi: "Second Look" May Prevent Choking on Statutes*, Harv. L. Rec., May 18, 1977, at 5, col. 2 (Calabresi's lectures are scheduled to be published in book form by the Harvard University Press, G. CALABRESI, *THE COMMON LAW FUNCTION IN THE AGE OF STATUTES*); see Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979). See also Bischoff, *The Dynamics of Tort Law: Court or Legislature?*, 4 VT. L. REV. 35 (1979); Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1042-43 (1975), reprinted in edited form in G. GILMORE, *THE AGES OF AMERICAN LAW* 94-98 (1977); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

137. O'Connell, *supra* note 1, at 695-97, adapted from J. O'CONNELL, *supra* note 1, at 158-59.

138. See notes 12-14 *supra* and accompanying text.

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