Automobile Insurance Reform in New Jersey: Could a Pure No-Fault System Provide a Final Solution?

The New Jersey legislature has enacted numerous reforms in its effort to effectively and efficiently regulate the state's automobile insurance industry.[1] These reforms, however, have not resolved the fundamental problem plaguing the state's automobile insurance system: New Jersey's consistent rank among the states with the most expensive insurance rates in the nation.[2] Despite these high rates, the unprofitability of providing automobile insurance in New Jersey has prompted many insurers to leave the state

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[1] *See infra* notes 19-36 and accompanying text (discussing the Motor Vehicle Security-Responsibility Act, New Jersey's first comprehensive effort to regulate automobile insurance through financial responsibility laws); notes 38-51 and accompanying text (explaining the provisions of the State's first no-fault automobile insurance law, the New Jersey Automobile Reparation Reform Act); notes 52-57 (analyzing the legislative response to problems stemming from no-fault insurance through the enactment of the Automobile Insurance Freedom of Choice and Cost Containment Act); notes 58-62 (describing the current status of the law, the Fair Automobile Insurance Reform Act).

An effective automobile insurance system guarantees that injured parties receive all financial relief due according to law. ROBERT I. MEHR & EMERSON CAMMACK, PRINCIPLES OF INSURANCE 317 (7th ed. 1980). An efficient system affords remedies at the lowest cost compatible with social justice. *Id.* In this context, cost refers to expenses associated with insurance, litigation, and claims settlement. *Id.* States strive to meet these goals by: 1) enacting financial responsibility laws and no-fault laws; 2) providing uninsured motorist insurance; 3) requiring all drivers to carry insurance; and, 4) creating unsatisfied judgment funds. *Id.*

[2] *See* CONG. QUARTERLY'S EDITORIAL RES. REP., Apr. 27, 1990, at 240 (indicating that in 1988, New Jersey's automobile insurance rates ranked as the second highest in the nation). The poll, conducted by the A.M. Best Company, found the average premium in New Jersey to be $733.66. *Id.*

From 1989 to 1993 New Jersey drivers paid the highest average automobile insurance premiums in each year except 1992. Randy Diamond, *N.J. Car Insurance Rates Again Top Nation*, RECORD (Hackensack), Feb. 9, 1995, at A-3. In 1992, New Jersey ranked second only to Hawaii. *Id.* New Jersey Insurance Commissioner Drew Karpinski viewed the figures as illustrative of the need to work with the legislature to further reform state insurance law and decrease automobile insurance prices. *Id.*

In 1993, a survey by the National Association of Insurance Commissioners revealed that New Jersey drivers paid the highest average automobile insurance rates in the nation. Joe Donohue, *Jersey Auto Policies Highest in the U.S.*, STAR-LEDGER (Newark), Feb. 9, 1995, at 1. Nationwide, annual premiums averaged $637.72. *Id.* at 23. Examples of annual automobile insurance costs in various states follow:

during the last several years.[3] Only the enactment of laws imposing

Most Expensive	
New Jersey	$960.69
Hawaii	953.08
Connecticut	925.00
Massachusetts	908.97
Washington, D.C.	878.62
Rhode Island	871.14
New York	832.26
California	802.63
Louisiana	752.14
Delaware	738.47
Least Expensive	
North Dakota	349.04
South Dakota	364.48
Iowa	396.98
Wyoming	401.00
Nebraska	403.19
Kansas	421.83
Idaho	429.24
Montana	431.67
N. Carolina	440.38
Arkansas	445.42

Id.

In 1994, the National Association of Independent Insurers (NAII) reported data on average annual automobile insurance premiums and ranked New Jersey first with premiums of $1,119.90. Colleen Mulcahy, *NAII Analyzes Costliest States for Auto Coverage*, NAT'L UNDERWRITER, June 6, 1994, at 7. The nationwide average premium was $710. *Id.* at 61. New York and California ranked among the top 10 most expensive states with premiums of $949.86 and $885.69, respectively. *Id.* at 7. North Dakota ranked as the least expensive state with average annual premiums of $424.28. *Id.* at 61. The NAII attributed the high rates to states with non-competitive rating laws, high automobile theft rates, and severe uninsured motorist problems. *Id.* at 7. The NAII identified other factors that contributed to high automobile insurance premiums, such as the high cost of living, the high percentage of the state's population residing in urban areas, assigned risk pools, and the extent of attorney involvement in the claims process. *Id.*

[3] *See* Wayne King, *Risks in New Jersey*, N.Y. TIMES, Sept. 18, 1991, at B1 (citing the decision by The Allstate Insurance Company to withdraw from New Jersey because excessive state regulation had created an unprofitable market). Studies suggest that a variety of other factors also contribute to the unprofitability of the automobile insurance market. *Id.* Of these, New Jersey leads the nation in: 1) population density; 2) miles of roadway for its size; 3) automobiles per square mile; and, 4) car theft rate. *Id.* Additionally, New Jersey residents face a high accident rate per capita, high car repair costs, high medical expenses, and numerous lawsuits after accidents that result in large settlements. *Id.*

After reaching a compromise with the state, Allstate decided to remain in New Jersey for at least two more years. Wayne King, *Auto Insurer Reaches Pact in New Jersey*, N.Y. TIMES, Dec. 15, 1992, at B1. The compromise gave Allstate, which accounts for 14% of the automobile insurance market, a 6.5% rate increase for 1993 while the State would receive $75 million to help pay off the Joint Underwriting Association's (JUA) debt. *Id.* Allstate will also drop lawsuits against the state regarding profit margins, rate regulation, and the methods of assigning customers. *Id.* at B9.

harsh penalties on companies seeking to withdraw from the automobile insurance market has stemmed their flight.[4] Furthermore,

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The state has also responded to threats from ITT Hartford Insurance Group to cease writing automobile insurance in New Jersey. Wayne King, *New Jersey Warns of Ban on Insurer*, N.Y. TIMES, Aug. 15, 1990, at B1. State officials warned ITT Hartford that it would lose its license to sell other types of insurance if it left the state. *Id.* ITT Hartford insures approximately 1% of private passenger automobiles in the state. *Id.* Thirty-two other automobile insurers have also applied to stop providing automobile insurance to New Jersey drivers. *Id.* These applications follow the enactment of laws designed to reduce premiums and to eliminate a $3 billion debt incurred by the JUA. *Id.* New laws, passed pursuant to the Fair Automobile Insurance Reform Act (FAIR Act), required automobile insurers to help pay off this debt. *Id.* at B3; *see infra* notes 47-51, 60 (discussing the JUA, its debt, and the subsequent provisions enacted to rectify the problem).

Moreover, automobile insurance companies have considered New Jersey an unprofitable market. Joe Donohue, *Auto Insurer to Begin Phaseout from State*, STAR-LEDGER (Newark), Aug. 6, 1994, at 1. For example, in 1990, the State granted Atlantic Employers Insurance Co., owned by CIGNA, permission to begin leaving New Jersey's automobile insurance market in 1996. *Id.* Due to multi-million dollar losses in 1993, however, the State agreed to CIGNA's request to begin withdrawing in February 1995. *Id.* CIGNA, the state's 10th largest automobile insurer, follows other insurance companies such as GEICO and Nationwide, who have already left the state's market. *Id.* at 6.

Concern about the affordability of automobile insurance has prompted New Jersey Insurance Commissioner Drew Karpinski to examine possible corrective options. Joe Donohue, *Insurance Chief Still Uncertain of Reforms to Implement for Auto Policies*, STAR-LEDGER (Newark), Sept. 22, 1994, at 19. Before deciding on an appropriate plan, the Commissioner sought more public input. *Id.* To date, the Commissioner has identified three basic concerns expressed by the public: 1) the high cost of premiums; 2) insurance fraud; and 3) a desire for choice in coverage levels. *Id.* In addition, data compiled by a study of insurance claims fraud revealed that public distrust of the insurance industry caused many people to condone filing false or inflated claims as a counter-balancing measure. Robert W. Emerson, *Insurance Adjusters and Plaintiffs' Attorneys: From Claims Fraud Consensus to Settlement Reform*, 30 AM. BUS. L.J. 537, 540-41, 542 (1993) (footnotes omitted).

Concern over the possibility of insurance companies leaving the state might prompt favorable treatment to insurance companies. *See* Joe Donohue, *Insurance Chief Clears Rate Increases for 221,000 Drivers*, STAR-LEDGER (Newark), Sept. 20, 1994, at 1, 14 (noting that in an effort to "protect the financial stability of the insurers and the interest of their policyholders," the Insurance Commissioner approved a 12.9% rate increase for drivers insured through the state's "bad driver" pool, the Personal Automobile Insurance Plan (PAIP)). *Id.* The Parkway Insurance Co. and the Newark Insurance Co. each received approval for general rate increases of 4.2% and 5.0%, respectively. *Id.*

[4] *See* Samuel F. Fortunato & Joseph L. Yannotti, *Automobile Insurance Reform in New Jersey*, 23 BRIEF 25, 53 (1993) (reviewing the restrictions that the FAIR Act imposes upon automobile insurers seeking to withdraw from New Jersey's market). The state required orderly withdrawal plans in order to reduce the impact on the public and on policy holders. *Id.*; N.J. STAT. ANN. § 17:33B-30 (West 1994). The withdrawal restrictions created under the FAIR Act of 1990 are as follows:

> An insurance company of another state or foreign country authorized . . . to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or

the tort system has sustained a steady rise in the number of automobile-related cases.[5] Claims resulting from automobile accidents have often led to inequitable results.[6] Responding again to the

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> more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance on the public generally and on the company's policyholders in this State. The plan shall be approved by the commissioner before the withdrawal or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority . . . held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out . . . .

Id.

[5] Kenneth Jost, *Too Many Lawsuits?*, CQ RESEARCHER, May 22, 1992, at 435. In 1990, plaintiffs filed over 100 million new cases in state courts, with the largest percentage (68%) of cases concerning traffic violations. *Id.*

[6] *See* Caldwell v. Haynes, 136 N.J. 422, 439, 643 A.2d 564, 573 (1994) (correcting an excessive jury award for injuries sustained in an automobile accident). In *Caldwell*, the plaintiff, a passenger in a stalled car, received back injuries from a rear-end collision. *Id.* at 426, 643 A.2d at 566. The plaintiff earned $25.65 per hour as a construction worker. *Id.* at 428, 643 A.2d at 567. The accident initially caused the plaintiff to lose three months of work. *Id.* Three years later, the construction company fired the plaintiff due to his inability to perform the strenuous work required by the job. *Id.* at 429, 643 A.2d at 567. After remaining unemployed for approximately 18 months, the plaintiff secured a position driving a senior citizens van for $5.50 per hour. *Id.*, 643 A.2d at 568. This job only consisted of 20 hours of work per week, although the plaintiff stated that he could work full-time if given the opportunity. *Id.* A jury awarded $1,950,000 to the injured party. *Id.* The jury compensated the plaintiff for lost past wages ($200,000), future wages he would have earned ($1.5 million), and pain and suffering ($250,000). *Id.* The trial court found the jury award excessive and ordered a new trial to determine damages. *Id.* at 429, 430, 643 A.2d at 568. The appellate division reversed the trial court decision to retry the awards for lost future wages and pain and suffering. *Id.* at 431, 643 A.2d at 569. The New Jersey Supreme Court agreed, however, to set aside the jury awards as excessive and to remand for a new trial as to the issue of damages. *Id.* at 439-40, 443, 643 A.2d at 573, 574.

The supreme court utilized the net-income rule to reflect the plaintiff's actual damages as accurately as possible. *Id.* at 434, 643 A.2d at 570 (citation omitted). The *Caldwell* court calculated lost wages at $114,360, an amount less than half of the amount awarded by the jury. *Id.* at 438-39, 643 A.2d at 572 (citation omitted). Furthermore, the court found that the plaintiff would have to work full-time for over 40 years, until the age of 80, without a vacation, and without paying taxes, to reach the jury's calculation of future lost wages. *Id.* at 439, 643 A.2d at 573. Finally, the court ruled that it could not separate an award for pain and suffering from the claims of lost income. *Id.* at 442-43, 643 A.2d at 574 (citation omitted). Thus, the court remanded the case to retry the issue of damages. *Id.* at 443, 643 A.2d at 574.

Whereas *Caldwell* exemplifies how the judicial process provides safeguards to overturn excessive jury awards, the system does not always work consistently. *See, e.g.*, Hartlein v. Norbro Trucking Co., N.J. VERDICT REV. & ANALYSIS, July 1994, at 2, 2 (culminating in a jury award in excess of actual economic loss). In *Hartlein*, two trac-

need for automobile insurance reform, legislators have introduced a bill[7] that would mandate compulsory pure no-fault automobile insurance.[8]

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tor-trailers collided, causing the plaintiff's truck to jack-knife and slide along a guardrail prior to hitting a light pole. *Id.* The plaintiff contended that he suffered a herniation that required a minidiscectomy and a second operation due to the herniation recurring. *Id.* Free floating disk material also resulted in a neurological injury that caused Mr. Hartlein's left foot to drag. *Id.* Evidence produced at the trial indicated that future lost wages totalled approximately $25,000. *Id.* The plaintiff made no claims for property damage because his insurance covered this loss. *Id.* at 3. Finally, the plaintiff asserted that he could no longer continue driving a tractor-trailer and that he had difficulty caring for his two minor children. *Id.* The injury forced the plaintiff, who had sole custody of his children, to solicit his mother to help him care for his children. *Id.* A jury awarded the plaintiff $1,010,086, an amount well in excess of the claimed economic loss. *Id.*

Jury verdicts that result in no recovery reflect another potential hazard of the jury system. *See, e.g.*, Graner v. Carhart, N.J. JURY VERDICT REV. & ANALYSIS, Mar. 1994, at 17, 17 (denying compensation to the plaintiff who contended that she sustained myofascitis in the upper back and cervical radiculopathy as a result of rear-end collision). The greatest number of vehicular liability verdicts award less than $10,000 to plaintiffs. CURRENT AWARD TRENDS IN PERSONAL INJURY: NEW JERSEY 13 (LRP Publications Release No. 1.20.0, 1994). For instance, based on data from 1987-93, physical, mental, and emotional injuries from vehicular accidents account for 35% of personal injury awards in New Jersey. *Id.* at 9, 10. The following depicts the distribution of compensatory verdicts for vehicular injuries in New Jersey:

Verdict Range	*Percentage*
$0 - $ 9,999	25%
10,000 - 24,999	22%
25,000 - 49,999	14%
50,000 - 99,999	9%
100,000 - 249,999	15%
250,000 - 499,999	7%
500,000 - 749,999	2%
750,000 - 999,999	3%
1,000,000 +	3%

Id. at 13. The midpoint for New Jersey vehicular liability verdicts is $25,000. *Id.*

[7] S. 450, 206th N.J. Leg., 1st Reg. Sess. (1994) (introduced by Senator Cardinale on January 20, 1994); A. 631, 206th N.J. Leg., 1st Reg. Sess. (1994) (introduced by Assemblyman Garrett on January 11, 1994) (proposing the enactment of the New Jersey Peoples' Automobile Insurance Act) [hereinafter S-450]; *see infra* notes 63-78 and accompanying text (describing the provisions of the bill).

[8] S. 450, 206th N.J. Leg., 1st Reg. Sess. (1994). *See infra* notes 76-78 and accompanying text (explaining that S-450 creates a pure no-fault system by precluding tort claims for economic and non-economic losses unless the injured party sustained their injuries from another motorist driving under the influence of alcohol or drugs). No-fault automobile insurance provides compensation to an injured party from its own insurer, not the insurer of the wrongdoer. ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW 2D § 7:1, at 2 (1992). Thus, no-fault insurance acts as a first-party benefit. *Id.* A "pure no-fault" system provides compensation to an injured party, regardless of fault, for 95% of all claims. *Id.* at 1. Only 5% of claims allow an injured person to seek relief through the traditional tort system. *Id.* These specified exceptions typically include: uncompensated economic losses, wrongful death, and enforcement of public policies such as injuries received from a person driving while

Traditionally, insurance companies and attorneys have disagreed about the elements of automobile insurance reform.[9] The

intoxicated. *Id.* A pure no-fault automobile insurance system does not currently exist in the United States. *Id.* at 2. Israel, New Zealand, Sweden, and the Canadian Province of Quebec have such insurance schemes, but these jurisdictions also have national health care plans. *Id.* The national health system provides primary coverage for medical costs incurred from an automobile accident. *Id.* at 3. The insurance industry then acts as a secondary source of coverage. *Id.* Moreover, injured parties in these jurisdictions receive lost wage, disability, and rehabilitation benefits from various social insurance programs. *Id.* Finally, these laws compensate victims for non-economic losses without regard to fault. *Id.* This differs markedly from current American no-fault laws which never award non-economic benefits on a no-fault basis. *Id.*

By contrast, "add-on no-fault" plans operate by allowing first-party coverage in addition to the ability to seek recourse through the tort system. MEHR & CAMMACK, *supra* note 1, at 324. Add-on plans allow an injured party free access to the tort system and only require the addition of no-fault first party coverage to insurance policies on a compulsory or voluntary basis. *Id.* at 323, 324. Add-on laws prevent double recovery. *See id.* at 324 (explaining that compensation under a no-fault policy cannot also be recovered from a tort claim). Advocates of add-on schemes argue that they simplify rate setting for insurance companies and keep the burden of paying higher insurance prices on high risk drivers. *Id.*

"Modified no-fault" plans provide first-party coverage subject to limited exclusions while allowing recovery through the tort system when injuries exceed a monetary or verbal threshold. *Id.* Thresholds require an injured party to sustain injuries that surpass a specified minimum cost and that result in injuries of a minimum severity to sustain a cause of action. *Id. See infra* notes 55-57 (describing monetary and verbal threshold provisions).

See generally R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965) (developing the concept of no-fault automobile insurance based upon workmen's compensation principles). The purposes of all types of no-fault automobile insurance include: 1) compensating all victims regardless of fault; 2) establishing more equitable judgments; 3) expediting payment of claims; 4) reducing litigation and its expenses; and, 5) lowering premiums. 12A GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:661, at 245 (2d ed. 1981).

[9] *See* Emerson, *supra* note 3, at 547-52 (analyzing the opposing views between attorneys and insurance companies regarding insurance fraud reform) (footnotes omitted). Emerson summarized the groups' differences regarding: 1) the imposition of caps on non-compensatory damage awards; 2) the effect of bad faith laws in reducing automobile insurance fraud; 3) the awarding of a pro rata share of attorney fees based upon a ratio of the final judgment to the initial claim; 4) the effectiveness of using the "offer of judgment rule" which would allow recovery of attorney fees when a plaintiff initially rejects a settlement offer and a jury subsequently awards less than the amount offered; 5) reliance upon the last best offer principle; and, 6) the use of contingency fee agreements. *Id.*

Emerson concluded, however, that sufficient agreement exists between the groups to lay a foundation for reforms that would reduce premiums while adequately compensating injured parties. *Id.* at 585. This foundation relies upon consensus concerning: 1) the employment of negotiating with exaggerated values on behalf of claimants in uninsured motorist and bodily injury cases, but not in personal injury protection (PIP) cases; 2) the impropriety of factual misstatements; and, 3) the value of specific antifraud laws. *Id.* at 560-62 (footnotes omitted). Emerson suggested utilizing alternative dispute resolution as a substitute or prerequisite for trial as a

introduction of the insurance reform bill, S-450, as part of a larger tort reform package, has sparked vigorous lobbying.[10] Attorney groups such as the American Bar Association (ABA) and the American Trial Lawyers Association (ATLA), strongly oppose the enactment of a pure no-fault system.[11] These opponents to pure no-fault automobile insurance assert that it would decrease the amount of insurance protection and increase insurance costs, while defeating the basic tort principle that requires negligent

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means to achieve the mutual goal of reducing fraud. *Id.* at 563 (footnote omitted). Both groups viewed pro se litigants as typically accurate in the amount of claims. *Id.* at 572 (footnote omitted). Thus, Emerson recommended a strict liability standard for excess exposures to pro se claimants in third-party bad faith claims. *Id.* at 573-74 (footnote omitted). This rule would expedite claims settlement while maximizing compensation to injured parties. *Id.* at 577 (footnote omitted). To provide further protection for the consumer, Emerson advocated only binding the insurer to the arbitrator's decision. *Id.* at 578 (footnote omitted). Finally, according to Emerson, either party should have the ability to request a fraud investigation by the state insurance department. *Id.* at 580 (footnote omitted).

10 *See* Herb Jaffe, *Nation Watches Jersey on 'Tort Reform'*, STAR-LEDGER (Newark), May 1, 1994, at 1 (describing the provisions of the tort reform bills and observing that the package has instigated lobbying efforts from various special interest groups). The tort reform package includes several bills that are pending before the Senate and the Assembly. *Id.* at 30. Specifically, the bills' proposals include: 1) abolishing contingent fees; 2) requiring a losing plaintiff in a negligence case to pay the prevailing defendant's costs; 3) eliminating joint and several liability; 4) requiring medical malpractice plaintiffs to acquire an affidavit from a qualified neutral physician; 5) arbitrating medical malpractice claims; 6) allowing retailers to avoid product liability claims by identifying the manufacturer; and, 7) providing punitive damage award criteria. *Id.*

The Civil Justice Reform Group (CJRG) has targeted New Jersey to lobby on behalf of large industries, including insurance companies. *Id.* at 1. The CJRG hopes to successfully lobby for tort reform at the state level. *Id.* Another national lobbying group, the American Tort Reform Association (ATRA), cites New Jersey's public and political support for tort reform for creating conditions that favor the enactment of tort reform measures. *Id.* at 30. Marilyn Quayle has also appeared in New Jersey to support tort reform in a panel discussion sponsored by the Republican National Policy Forum. *Id.* These groups face opposition by the American Trial Lawyers Association (ATLA) and consumer advocate Ralph Nader. *Id.* at 1, 30. The national president of ATLA, Barry Nace, described tort reform as an attempt by corporate America "'to subvert the only means that the consumer has of getting any kind of justice.'" *Id.* at 1.

11 *See* MEHR & CAMMACK, *supra* note 1, at 321 (identifying the ABA and ATLA as opponents of a pure no-fault system). Members of the ABA receive one-sixth of their total income from automobile accident cases. *Id.* Opponents of no-fault contend that it violates the basic tort principle of having the wrongdoer provide compensation to the injured party. *Id.* at 320. Furthermore, they criticize no-fault for: 1) reducing driving care by eliminating the deterrent effect of potential lawsuits; 2) requiring drivers to purchase insurance to protect against the negligence of others; 3) decreasing the amount of pain and suffering compensation; 4) failing to ameliorate the high cost of insurance; and, 5) creating an inequitable rating structure. *Id.* at 320-21.

wrongdoers to compensate injured parties for losses.[12] In rebuttal, proponents of a pure no-fault system argue that the current tort system frequently operates in an inefficient and inequitable manner.[13] These arguments have also divided state Republican legislators.[14]

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12 *See* Donald A. Caminiti, *End Insurance Fraud: People for Fair Insurance Exposed*, N.J. TRIAL LAW., May 1994, at ix (outlining the opposing viewpoints of ATLA-NJ and People for Fair Insurance (PFI), an organization lobbying on behalf of S-450). Caminiti characterizes S-450 as "The Insurance Companies' Wish List." *Id.* ATLA-NJ argues that a pure no-fault system "slams the courthouse door in the face of a legitimate claimant" by eliminating claims against careless drivers. *Id.* Furthermore, ATLA-NJ asserts that the proposed reforms would decrease consumer's insurance protection while increasing costs. *Id.* Finally, ATLA-NJ contends that S-450 fails to include fraud reduction provisions. *Id.* Various groups and associations have formed a lobbying alliance to battle tort reform in New Jersey. Herb Jaffe, *Lawyers, Consumerists, Others Join in Bid to Kill 'Draconian' Tort Reform*, STAR-LEDGER (Newark), May 4, 1994, at 1. The Consumers for Civil Justice (CCJ) and the New Jersey Bar both vigorously oppose tort reform. *Id.* The recently formed CCJ serves as an umbrella group to coordinate efforts to thwart tort reform. *Id.* CCJ's membership includes the New Jersey branch of Ralph Nader's Public Interest Research Group, the Industrial Union Council of AFL-CIO, New Jersey Citizen Action, the New Jersey Chapter of the NAACP, and the New Jersey Environmental Federation. *Id.*

13 *See* MEHR & CAMMACK, *supra* note 1, at 319-20 (citing the following disadvantages of the current tort system: 1) lengthy delays in completing cases; 2) inequitable compensation for injured parties; 3) high administrative costs; 4) coerced settlements; and, 5) fraud). These advocates argue that no-fault plans save time and money by removing many claims from the courts. *Id.* at 320. Furthermore, proponents assert that no-fault allows for a more equitable distribution of payments because claims are paid without regard to fault. *Id.*

New Jersey Citizens Against Lawsuit Abuse (NJCALA), also lobbies in support of no-fault laws. Rachel Janine Mills, *Who Are Citizens Against Lawsuit Abuse, and What Are They Doing in New Jersey?*, N.J. TRIAL LAW., May 1994, at viii. NJCALA consists of 500 members, many representing businesses and health care providers that lobby for tort reform. *Id.* Operating in New Jersey since 1993, the group also lobbies in California, Louisiana and Texas. *Id.* Another lobbying group with similar viewpoints is People for Fair Insurance (PFI). Caminiti, *supra* note 12, at ix. In 1991, a political consultant from Utah founded PFI in New Jersey. *Id.* Previously, this consultant had headed efforts in Arizona to campaign against an insurance rate rollback proposal. *Id.* PFI receives strong financial support from insurance companies to support a pure no-fault system. *Id.* PFI maintains that consumers would receive more choice in their amounts of insurance protection while enjoying quicker recovery times for legitimate claims. *Id.* PFI also contends that a pure no-fault system would provide increased protection from irresponsible, uninsured drivers and fraudulent or frivolous lawsuits. *Id.*

Two other groups, the Civil Justice Reform Group (CJRG) and the American Tort Reform Association (ATRA), also seek to promote tort reform. Mark A. Hofmann, *Big Names Try To Keep Low Profile*, BUS. INS., Apr. 4, 1994, at 3. In particular, the CJRG has targeted California, Illinois, Texas, New Jersey, and New York with lobbying efforts designed: 1) to promote pro-business tort reforms in state legislatures; 2) to campaign to educate the public; and, 3) to aid court improvement projects. *Id.* Hofmann noted that the membership of the Civil Justice Reform Group consists primarily of lawyers for large corporations and insurance companies. *Id.*

14 *See* Herb Jaffe, *Pain Suit Issue Tops Package of Tort Reform Bills*, STAR-LEDGER (New-

To lay a foundation upon which to analyze the merits of pure no-fault reform, Part I of this Comment focuses on the evolution of automobile insurance regulation in New Jersey. Part II outlines the provisions of the current proposal for pure no-fault laws. Part III analyzes the merits of pure no-fault automobile insurance. Finally, Part IV acknowledges the need for insurance reform in New Jersey, but concludes that adopting a pure no-fault system would likely result in perpetuating the system's inequities and inefficiencies.

I. NEW JERSEY'S LONG HISTORY OF REFORM

Originally, the United States Supreme Court gave the individual state sole authority to regulate the insurance industry, reasoning that insurance contracts were local in nature.[15] In a reversal almost eighty years later, however, the Supreme Court held that insurance transactions do affect interstate commerce and thus authorize the federal government to regulate the insurance industry.[16] Realizing that the states had regulated the insurance industry

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ark), May 17, 1994, at 16 (indicating that insurance reform has led separate factions of the state Republican legislators to propose both expanding and eliminating the no-fault system).

15 Paul v. Virginia, 75 U.S. 168, 181, 183 (1868), *overruled by* United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944). In *Paul*, the State of Virginia fined the plaintiff for failure to comply with state law requiring an insurance company incorporated outside the state to obtain a license to act as an agent within the state. *Id.* at 169. The Court found that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Rather, the Court explained that insurance contracts involve a local transaction similar to other personal contracts because an insurance policy does not become effective until the insured takes delivery. *Id.* Thus, the Court concluded that Virginia law did not implicate the Commerce Clause of the United States Constitution. *Id.* at 185. *See infra* note 16 (discussing the Commerce Clause).

Paul originated the concept that federal laws could not regulate insurance because insurance did not travel in interstate commerce. Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 553 & n.37 (1957-58). This view prevailed between 1868 and 1944. *Id.* at 553. During this time, insurance cases primarily related to the validity of state regulations. *Id.* (footnote omitted). The expansion of federal powers through the Commerce Clause during the 1930s made federal regulation of insurance companies more probable. *Id.* (footnote omitted). Consequently, in 1944, the Supreme Court overturned *Paul* in *United States v. South-Eastern Underwriters Ass'n. See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944) (holding that interstate commerce included insurance); *see infra* note 16 (discussing the case).

16 *South-Eastern Underwriters*, 322 U.S. at 553. The Court in *South-Eastern Underwriters* explained that the insurance industry does not function in distinct territories defined by state lines. *Id.* at 541. Specifically, the Court noted that:

> Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. . . . The result is a continuous and indivisible stream of intercourse among the states composed of col-

for such an extensive time, Congress responded by passing the McCarran-Ferguson Act in 1945.[17] Through this Act, the federal government primarily entrusts the regulation of the insurance industry to the states.[18]

> lections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts.

Id. The Court continued that the insurance industry does not become a local business merely because the sales contracts themselves are local in nature. *Id.* at 547. In determining whether an activity comprises interstate commerce, the Court examined the transaction as a whole from negotiation to execution. *Id.* at 546-47. The Court concluded that the insurance industry implicates the Commerce Clause by conducting business across state lines, thus exposing the industry to federal regulation. *Id.* at 552-53; *see* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."); *see also* Kimball & Boyce *supra* note 15, at 553-54 (describing the fear held by insurance companies and state officials that the Supreme Court's decision in *South-Eastern Underwriters* would jeopardize the existence of state insurance regulations); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 883, 909 (1946) (explaining the historical reasons for exempting insurance from federal regulation despite its interstate nature).

[17] *See* 15 U.S.C. §§ 1011-15 (Supp. 1993). Congress intended to preserve state insurance regulation in the absence of express federal preemption. *Id.* § 1011. The McCarran-Ferguson Act states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Id. To safeguard state insurance regulations, the McCarran-Ferguson Act specifically provided:

> (a) State regulation
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) Federal regulation
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That . . . the Sherman Act, and . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id. § 1012. *See generally* R. K. Powers, Comment, *A Year of S. E. U. A.*, 23 CHI.-KENT L. REV. 317 (1944) (describing the activities between the announcement of the *South-Eastern Underwriter* decision and the passage of the McCarran-Ferguson Act).

[18] *See* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L. REV. 13, 20 (1993) (footnote omitted) (portraying the McCarran-Ferguson Act as unusual in its deference to state regulation). Through the McCarran-Ferguson Act, Congress has announced a policy of regulating the world's largest insurance industry at the state, not federal, level. *Id.* at 14 (footnote omitted). Despite this deference, the McCarran-

New Jersey began regulating the automobile insurance industry in 1929.[19] Specifically, the first law required financial responsibility for injuries and property damage resulting from the following: vehicular homicide, driving under the influence of alcohol or drugs, and reckless driving.[20] As the numbers of licensed drivers, automobiles, and accidents steadily increased, the legislature acknowledged a need for a more comprehensive automobile insurance scheme.[21] It was not until 1952, however, that the New Jersey Legislature enacted such a scheme known as the Motor Ve-

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Ferguson Act does not completely prevent federal regulation of the insurance industry. *Id.* at 26. Consequently, the federal government may regulate insurance when: 1) a state fails to sufficiently regulate a specific activity; 2) Congress expressly overrides state law; or, 3) state regulations violate the U.S. Constitution. *Id.* at 26-27.

19 *See* N.J. STAT. ANN. §§ 39:6-31 to 39:6-34 (West 1990), *repealed by* Act of Aug. 9, 1979, ch. 169, § 5, 1979 N.J. Laws 646, 649 (effective Aug. 9, 1979) (Historical and Statutory Notes, citing Act of April 16, 1929, ch. 116, § 1, 1929 N.J. Laws 195-96, *repealed by* N.J. STAT. ANN. § 39:6-56 (West 1990) (effective April 1, 1953). The 1929 law:

> required proof of financial responsibility to satisfy any claim for damages due to bodily injury or death from any person whose license was suspended or revoked for conviction of the violation of certain laws; required the director to suspend or revoke a driver's license on failure to furnish proof of financial responsibility; allowed a non-owner to operate a vehicle if the owner furnished acceptable proof of financial responsibility and required the restoration of the driving privilege three years after suspension or revocation.

Id.

20 Act of April 16, 1929, ch. 116, § 1, 1929 N.J. Laws 195-96 (*repealed by* N.J. STAT. ANN. § 39:6-56 (West 1990) (effective April 1, 1953). The statute provided:

> 1. The Commissioner of Motor Vehicles shall require from any person who shall have been convicted of [driving under the influence, vehicular homicide, or reckless driving] or who, while operating any motor vehicle, shall have been concerned in any motor vehicle accident resulting in the death of, or injury to, any person, or damage to property to the extent of at least one hundred dollars ($100), or from the person in whose name such motor vehicle is registered, or both, proof of financial responsibility to satisfy any claim for damages, by reason of personal injury to, or the death of, any one person of at least five thousand dollars ($5,000) or by reason of personal injury to, or the death of, more than one person on account of any such accident, of at least ten thousand dollars ($10,000), and for damage to property of at least one thousand dollars ($1,000). . . . If any person shall fail to furnish such proof, said commissioner shall, until such proof shall be furnished, suspend or revoke the license of such person to operate a motor vehicle. . . .

Id.

21 *See* JERRY S. ROSENBLOOM, AUTOMOBILE LIABILITY CLAIMS 2 (1968) (presenting the growing national trend toward motor vehicle use and accidents). Rosenbloom reported the following statistical data:

hicle Security-Responsibility Law (Seurity Responsibility Law).[22]

The Security-Responsibility Law required posting security for any accident resulting in damages exceeding the statutory amount.[23] According to the New Jersey Supreme Court, the legis-

	1920	1940
Drivers licensed (millions)	14	48
Motor vehicles registered (millions)	9	32
Highway travel (billions of miles)	45	302
Motor vehicle accidents: Highway deaths	12,600	34,500
. . .		
Cost of highway accidents (billions of dollars)	0.5	1.6

Id.

In 1992 the New Jersey Commissioner of Insurance issued a report regarding the feasibility of continuing the current system and describing the purposes of early financial responsibility laws. NEW JERSEY'S MANDATORY MOTOR VEHICLE LIABILITY INS. SYS. 20-21 (1992) [hereinafter 1992 REPORT]. Financial responsibility laws represent the initial legislative response to correct the problems of financially insolvent motorists. *Id.* at 20. These laws sought to induce drivers to purchase automobile insurance. *Id.* New Jersey's 1929 law comports with this philosophy. *See id.* at 35 (enforcing the public policy of providing compensation to injured parties). By not requiring proof of financial responsibility until after an accident, these laws allowed each motorist one free accident. *Id.* at 36. The victims of a financially irresponsible driver's first accident received no protection under these laws. *Id.* In 1950, only 62% of vehicles in New Jersey carried liability coverage. *Id.* at 37. Thus, in 1952, the legislature enacted new laws hoping to improve highway safety, to encourage more motorists to voluntarily purchase insurance, and to provide compensation for persons injured by insolvent motorists. *Id.*

[22] Motor Vehicle Security-Responsibility Law, Act of May 10, 1952, ch. 173, § 1, 1952 N.J. Laws 548 (current version at N.J. STAT. ANN. §§ 39:6-23 to 39:6-60 (West 1990)) (Security-Responsibility Law) (creating the Motor Vehicle Security-Responsibility Law); *see* 1992 REPORT, *supra* note 21, at 38 (portraying the Security-Responsibility Law as a financial responsibility law "with teeth in it"). The Security-Responsibility Law sought to add incentives for drivers to purchase liability insurance to provide a reliable source of compensation for persons injured in automobile accidents. *Id.* This law reflected public opinion that all drivers should voluntarily purchase liability insurance. *Id.* (citation omitted). Rather than only requiring financially irresponsible drivers to post security, the Security-Responsibility Law mandated that all uninsured drivers post security after an accident. *Id.* at 38-39. Unfortunately, this law still allowed one free accident. *Id.* at 40. From 1954 to 1973 automobile insurance remained voluntary and estimates of insured motorists ranged between 80 and 90%. *Id.* at 41.

[23] Act of May 10, 1952, ch. 173, § 3, 1952 N.J. Laws 548, 549-51 (current version at N.J. STAT. ANN. § 39:6-25 (West 1990)). The statute required these actions after the occurrence of a motor vehicle accident:

> 3.(a) If twenty days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars ($100.00), the director does not have on file evidence satisfactory to him that the person who would otherwise be required to file security . . . has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from

lature had intended the law to encourage drivers to purchase liability insurance and give injured parties a means to collect damages.[24] Therefore, the Security-Responsibility Law empowered the Director of the Division of Motor Vehicles to fix the amount to be posted unless the owner or operator of the vehicle carried valid liability insurance.[25]

> the accident, the director shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each operator or owner.
>
> (b) The director shall, within sixty days after the receipt of such report of a motor vehicle accident, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident . . . unless such operator or owner or both shall deposit security in the sum so determined by the director. . . .

Id.

[24] Selected Risks Ins. Co. v. Zullo, 48 N.J. 362, 368, 225 A.2d 570, 574 (1966). In *Zullo*, a minor drove a car owned by Blumberg. *Id.* at 365, 225 A.2d at 572. Blumberg gave the minor permission to drive his car to have it washed. *Id.* at 366, 225 A.2d at 573. Afterward, the minor drove the car with some friends to return it to Blumberg. *Id.* Rather than returning the car directly, however, the minor drove out of town to purchase a soda. *Id.* During the side trip, the minor was involved in an accident that caused injuries to two passengers and killed Zullo, also a passenger. *Id.* at 365, 225 A.2d at 572. The plaintiff insured Blumberg through two policies that each contained restrictive omnibus clauses. *Id.* The clauses excluded use outside the scope of the owner's permission. *Id.* The plaintiff contended that the restrictions presented a jury question as to whether the minor remained within the scope of permission and therefore entitled him to coverage from the plaintiff. *Id.* at 367, 225 A.2d at 573-74.

The New Jersey Supreme Court examined the purpose of the Motor Vehicle Security-Responsibility Law and ascertained that the law posed significant disadvantages to those who register an uninsured motor vehicle in the state. *See id.* at 368, 225 A.2d at 574 (listing registration requirements for uninsured vehicles) (citations omitted). The court reasoned that these obligations evidenced a legislative policy to ensure that injured parties have financially responsible sources from which to seek damages. *Id.* Reading the statute to further this legislative policy, the court found that the minor qualified as an insured party under the statute. *Id.* at 374, 225 A.2d at 577.

[25] Act of May 10, 1952, ch. 173, § 3(c), 1952 N.J. Laws 548, 550 (current version at N.J. STAT. ANN. § 39:6-25 (West 1990)) The statute established the following exceptions to the statutory posting requirement:

> (c) This section shall not apply under the conditions stated in section four of this act nor:
>
> (1) to such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;
>
> (2) to such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;
>
> (3) to such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the director, covered by any other form of liability insurance policy or bond; nor

In conjunction with this law, the legislature created the Unsatisfied Claim and Judgment Fund Law (UCJF).[26] The UCJF established a fund to compensate persons injured by an unknown or indigent motorist.[27] Injured plaintiffs who met the statutory re-

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(4) to any person qualifying as a self-insurer . . . or to any person operating a motor vehicle for such self-insurer.

Id.

[26] *See* Act of May 10, 1952, ch. 174, §§ 3, 31, 1952 N.J. Laws 570, 572-73, 591 (current version at N.J. STAT. ANN. §§ 39:6-61 to 39:6-91 (West 1990)) (creating the UCJF in 1952, but delaying its full implementation until 1955); *see* 1992 REPORT *supra* note 21, at 41 (observing that the legislature delayed the effective date of the UCJF in an attempt to increase the number of insured drivers and decrease the financial burden to the UCJF); *see infra* notes 27-33 and accompanying text (discussing the provisions of the UCJF).

[27] *See* Act of May 10, 1952, ch. 174, § 9, 1952 N.J. Laws 570, 576-77 (current version at N.J. STAT. ANN. § 39:6-69 (West 1990)). The statute allowed an application for payment from the fund as follows:

> 9. When any qualified person recovers a valid judgment for an amount in excess of two hundred dollars ($200.00), exclusive of interest and costs, in any court of competent jurisdiction in this State, against any other person, who was the operator or owner of a motor vehicle, for injury to, or death of, any person or persons or for damages to property, . . . arising out of the ownership, maintenance or use of the motor vehicle in this State on or after [April 1, 1955], and any amount in excess of two hundred dollars ($200.00) remains unpaid thereon, such judgment creditor may, upon the termination of all proceedings, . . . file a verified claim in the court in which the judgment was entered, and . . . may apply to the court for an order directing payment out of the fund of the amount unpaid upon such judgment, which exceeds the sum of two hundred dollars ($200.00) and does not exceed—
>
> (a) The maximum amount or limit of five thousand dollars ($5,000.00), exclusive of interest and costs, on account of injury to, or death of, one person, in any one accident, and
>
> (b) The maximum amount or limit, subject to such limit for any one person so injured or killed, of ten thousand dollars ($10,000.00), exclusive of interest and costs, on account of injury to, or death of, more than one person, in any one accident, and
>
> (c) The maximum amount or limit of one thousand dollars ($1,000.00), exclusive of interest and costs, for damage to property in any one accident.

Id.

The legislature has since increased the maximum amounts available. *See* N.J. STAT. ANN. § 39:6-69 (West 1990) (indicating that injured parties may apply for payment from the UCJF when a judgment of at least $500 remains unpaid with maximum amounts payable limited to $15,000 per person, $30,000 per accident, and $5,000 per accident for property damage); *see also* CRAIG & POMEROY, NEW JERSEY AUTO INSURANCE LAW 30:1, at 344 (1993) (relating that the current maximum amounts recoverable from the UCJF equal the minimum PIP coverage allowed by law). The legislature placed a cap on the amount recoverable from the UCJF to reflect a policy of providing a basic form of relief, rather than serving as a substitute for insurance. *Id.* at 343 (citations omitted).

New Jersey courts have also commented on the purpose of the UCJF. *See* Dixon v. Gassert, 26 N.J. 1, 5, 138 A.2d 14, 16 (1958) ("The purpose of [the UCJF] is to

quirements and otherwise lacked an alternative remedy could receive financial relief.[28] Initially, the State financed the UCJF

provide a measure of relief to persons who sustain losses inflicted by financially irresponsible or unknown owners and operators of motor vehicles, where such persons would otherwise be remediless."). In *Dixon*, the plaintiffs, both pedestrians, sustained injuries from a hit-and-run driver. *Id.* at 3, 138 A.2d at 15. At trial, a jury awarded plaintiffs $25,000 and $10,000, respectively. *Id.* at 4, 138 A.2d at 15. The trial court issued an order for plaintiffs to receive compensation through the UCJF. *Id.* at 5, 138 A.2d at 16. The trial court reduced Dixon's recovery, however, by the amount he received through an accident and health insurance policy, group health insurance policy, and a hospitalization contract. *Id.* at 4, 138 A.2d at 15-16. On appeal, the New Jersey Supreme Court reasoned that the UCJF contained limitations on amounts recoverable from the fund. *Id.* (citations omitted). Rejecting plaintiff's contention that the trial court should not have reduced the UCJF judgment, the supreme court held that the trial court correctly deducted payments from the compensation insurance policies as "indemnity or other benefits" pursuant to state law. *Id.* at 7, 8, 138 A.2d at 17.

See also Exum v. Marrow, 112 N.J. Super. 570, 574, 575, 272 A.2d 298, 300, 301 (Law Div. 1970) (declaring that the legislature intended to ease the burden on the UCJF by prohibiting claims of injured parties that possessed alternative means of compensation). In *Exum*, the plaintiff, a passenger in an automobile, sustained injuries from a collision with another vehicle driven by an uninsured motorist. *Id.* at 572, 272 A.2d at 299. Moving for the uninsured motorist, the UCJF contended that the plaintiff could not collect from the fund because she could recover damages from the driver's uninsured motorist insurance. *Id.* The court reasoned that the legislature created the UCJF to provide compensation to persons injured by financially insolvent or unidentified motorists who are unable to recover damages for their injuries. *Id.* at 575, 272 A.2d at 301. Therefore, the court held that the plaintiff's entitlement to compensation through the driver's uninsured motorist insurance precluded her from collecting through the UCJF. *Id.*, 272 A.2d at 300.

Similarly, in *New Jersey Manufacturers Insurance Co. v. Griffin*, a stolen car struck and injured a pedestrian. New Jersey Manuf. Ins. Co. v. Griffin, 253 N.J. Super. 173, 174, 601 A.2d 261, 262 (Law Div. 1991). The pedestrian, Griffin, sought recovery under PIP coverage through the UCJF. *Id.* at 174-75, 601 A.2d at 262. The court held that because Griffin could recover through the car owner's insurance company, he had another remedy available and could not collect from the UCJF. *Id.* at 177, 179, 601 A.2d at 263, 264. The court posited that the UCJF "funds are a last resort, not to be approached until all other legal remedies have been exhausted." *Id.* (citation omitted). The court explained that attempting to utilize alternative remedies would help ease the UCJF's financial burden. *Id.* (citations omitted).

[28] Act of May 10, 1952, ch. 174, § 10, 1952 N.J. Laws 570, 577-80 (current version at N.J. STAT. ANN. § 39:6-70 (West 1990)). The statute dictated that the applicant show entitlement to payment providing:

> 10. The court shall proceed upon such application, in a summary manner, and, upon the hearing thereof, the applicant shall be required to show
>
> (a) He is not a person covered with respect to such injury or death by any workmen's compensation law, or the personal representative of such a person,
>
> (b) He is not a spouse, parent or child of the judgment debtor . . .
>
> (c) He was not at the time of the accident, a guest occupant riding in a motor vehicle owned or operated by the judgment debtor . . .
>
> (d) He was not at the time of the accident, operating or riding in an uninsured motor vehicle owned by him or his spouse, parent or

through special assessments placed upon every person registering an automobile and on insurance companies selling liability insurance in New Jersey.[29] After receiving the initial funding, the State

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child, and was not operating a motor vehicle in violation of an order of suspension or revocation,

(e) He has complied with all of the requirements of [appropriately filing a notice of accident and intention to file a claim],

(f) The judgment debtor at the time of the accident was not insured under a policy of automobile liability insurance under the terms of which the insurer is liable to pay in whole or in part the amount of the judgment,

(g) He has obtained a judgment as set out in [§ 39:6-69] of this act, stating the amount thereof and the amount owing thereon at the date of the application,

(h) He has caused to be issued a writ of execution upon said judgment and the sheriff or officer executing the same has made a return showing that no personal or real property of the judgment debtor, liable to be levied upon in satisfaction of the judgment, could be found . . .

(i) He has caused the judgment debtor to make discovery under oath, pursuant to law, concerning his personal property and as to whether such judgment debtor was at the time of the accident insured under any policy or policies of insurance . . .

(j) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of personal or real property or other assets, liable to be sold or applied in satisfaction of the judgment,

(k) By such search he has discovered no personal or real property or other assets, liable to be sold . . .

(l) The application is not made by or on behalf of, any insurer by reason of the existence of a policy of insurance, whereby the insurer is liable to pay, in whole or in part, the amount of the judgment . . .

(m) Whether he has recovered a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of the accident . . . .

Id.

The modern statutory provisions remain essentially the same. *See* N.J. STAT. ANN. § 39:6-70 (West 1990) (adopting the additional requirement of meeting a verbal threshold to recover for any non-economic losses).

[29] Act of May 10, 1952, ch. 174, § 3(a)-(c), 1952 N.J. Laws 570, 572, *deleted by* N.J. STAT. ANN. § 39:6-63 (a)-(c) (West 1990); *id.* at § 3(d) (current version at N.J. STAT. ANN. § 39:6-63(d) (West 1990)). The statute imposed the following registration requirements on uninsured vehicles to fund the UCJF:

(a) Every person registering an uninsured motor vehicle in this State for the yearly period commencing April [1, 1954], shall pay at the time of registering the same, in addition to any other fee prescribed by any other law, a fee of three dollars ($3.00);

(b) Every other person registering a motor vehicle in this State for the yearly period commencing April [1, 1954], shall pay at the time of registering the same, in addition to any other fee prescribed by any other law, a fee of one dollar ($1.00);

(c) On or before March [31, 1955], each insurer shall pay to the treasurer a sum equal to one-half of one per centum (.5%) of its net

maintained the UCJF through annual fees collected from persons registering uninsured motor vehicles in New Jersey.[30] If the UCJF needed additional funding, the Director of the Division of Motor Vehicles would make an annual assessment against automobile insurers.[31] When the UCJF paid funds to an injured party, the State sought repayment from the wrongdoer.[32] Additionally, the State could refuse to renew a canceled or suspended driver's license or registration until the negligent driver reimbursed the UCJF or posted proof of financial ability to satisfy the debt.[33]

The UCJF placed a tremendous financial burden on New Jersey.[34] To relieve this burden and still provide remedies to per-

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> direct written premiums for the calendar year [1953] as shown in its annual statement filed with the commissioner;
>
> (d) On the first day of September in each year, beginning with [1955], the treasurer shall calculate the probable amount which will be needed to carry out the provisions of this act during the ensuing registration license year. If, in his judgment, the estimated balance of the fund at the beginning of the next registration license year will be insufficient to meet such needs, he shall
>
> (1) Assess the estimated deficiency against insurer's . . . apportioned among such insurers in the proportion that the net direct premiums of each bears to the aggregate . . . .
>
> (2) If such assessment against insurers be insufficient in the judgment of the treasurer . . . [he] shall certify the sum . . . [and] in no case exceed one dollar ($1.00), . . . *provided, however*, that each owner of an uninsured motor vehicle at the time of payment of such fee shall also pay the sum of two dollars ($2.00) in addition thereto.

Id.

30 *See id.* (imposing a $3.00 fee on all uninsured motor vehicle registrations).

31 *See* N.J. STAT. ANN. § 39:6-63(d) (West 1990) (authorizing the state insurance commissioner to estimate annually the funds necessary to support the act and to direct insurers to make a proportionate contribution thereto). The statute dictates that the contributions paid equal the proportion of net direct written premiums to the total of all net direct written premiums during the preceding year. *Id.* Currently, however, compulsory insurance laws prevent the registration of uninsured vehicles and thus eliminate these individuals as a funding source. *See infra* note 38 and accompanying text for a discussion of these laws; CRAIG & POMEROY, *supra* note 27, 30:3-3 at 348 (noting that the UCJF maintains funding only by levying these assessments on insurance companies doing business within the state).

32 Act of May 10, 1952, ch.174, § 25, 1952 N.J. Laws 570, 588-89 (current version at N.J. STAT. ANN. § 39:6-85 (West 1990)). The statute granted the right of subrogation to the UCJF over the cause of action of the injured party when the fund pays a judgment entered against it on behalf of the injured party. *Id.*; *see also* CRAIG & POMEROY, *supra* note 27, § 30:3-6, at 353 (explaining that the statutory structure reflects an obligation of the UCJF to seek reimbursement from the wrongdoer).

33 Act of May 10, 1952, ch. 174, § 27, 1952 N.J. Laws 570, 589-90 (current version at N.J. STAT. ANN. § 39:6-87 (West 1990)). The statute instructed the state to withhold suspended licenses and registrations until the UCJF receives repayment in full or until the debtor provides proof of financial ability to fulfill damages from future accidents. *Id.*

34 *See* 1992 REPORT, *supra* note 21, at 44 (blaming the financial difficulty exper-

sons injured by an unknown or uninsured motorist, the state legislature enacted laws which permitted insurers to provide uninsured motorist coverage for their customers.[35] Insureds chose whether to purchase the uninsured motorist coverage, thus allowing the insurance industry to sell private insurance to absorb part of the responsibility of the UCJF for uninsured claims.[36]

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ienced by the UCJF on inadequate funding mechanisms for constantly increasing claims payments); *see also* Reginald Stanton, *Protection Against Uninsured Motorists in New Jersey*, 3 SETON HALL L. REV. 19, 20 (1972) (citing the financial history of the UCJF to criticize its reliance upon assessments against uninsured motorists).

35 *See* N.J. STAT. ANN. § 17:28-1.1 (West 1970) (current version at N.J. STAT. ANN. § 17:28-1.1(b) (West 1994)) (requiring insurers to offer uninsured motorist coverage upon issuance or renewal of an automobile liability policy). Modern law only differs in the maximum coverage limits as follows:

> b. Uninsured and underinsured motorist coverage shall be provided as an option by an insurer to the named insured up to at least the following limits: $250,000.00 each person and $500,000.00 each accident for bodily injury; $100,000.00 each accident for property damage or $500,000.00 single limit, subject to an exclusion of the first $500.00 of such damage to property for each accident, except that the limits for uninsured and underinsured motorist coverage shall not exceed the insured's motor vehicle liability policy limits for bodily injury and property damage, respectively.
>
> Rates for uninsured and underinsured motorist coverage for the same limits shall, for each filer, be uniform on a Statewide basis without regard to classification or territory.

N.J. STAT. ANN. § 17:28-1.1(b) (West 1994).

The courts have commented on the legislative intent behind the adoption of N.J. STAT. ANN. § 17:28-1.1. *See* Hannan v. Employers Com. Union Ins. Co., 117 N.J. Super. 485, 489, 285 A.2d 83, 85 (Law Div. 1971) (indicating that the legislature sought to relieve the financial burden on the UCJF). In *Hannan*, the plaintiff sustained injuries from an automobile collision. *Id.* at 487, 285 A.2d at 84. At the time of the accident, the plaintiff carried automobile insurance while both the defendant operator and the defendant owner were uninsured. *Id.* The plaintiff's policy contained a limitation that excluded uninsured motorist coverage for accidents occurring outside of New Jersey. *Id.* This exclusion complied with the statutory law at that time. *Id.* at 487-88, 285 A.2d at 84. Subsequently, the legislature eliminated the statutory restriction that prevented insurance companies from providing uninsured motorist coverage for accidents occurring out-of-state. *Id.* at 488, 285 A.2d at 84 (citations omitted). The court explained that the legislature amended the law to ease the financial burden of the UCJF. *Id.* at 489, 285 A.2d at 85 (citation omitted).; *see also* 1992 REPORT, *supra* note 21, at 44 (citation omitted) (commenting that the financial stress of the UCJF prompted the legislature to enact laws allowing insurers to offer uninsured motorist coverage for in-state accidents as well as out-of-state accidents). This alteration represented a change in legislative policy towards spreading the burden of protection against losses caused by uninsured motorists over the group of insured motorists rather than uninsured motorists. *Id.* at 45. Allowing uninsured motorist coverage logically followed the implementation of the UCJF because contributions from uninsured drivers could not adequately offset the compensation of losses. *Id.* (footnote omitted).

36 *See* N.J. STAT. ANN. § 17:28-1.2 (West 1970), *repealed by* Act of Dec. 26, 1972, ch. 204, § 2, 1972 N.J. Laws 786, 787 (effective Jan. 1, 1973) (authorizing the discretion-

In response to findings by the Automobile Insurance Study Commission (AISC),[37] the legislature made a dramatic change in 1972 with the enactment of compulsory insurance laws as part of the New Jersey Automobile Reparation Reform Act (No-Fault Act).[38] The No-Fault Act required all drivers to carry personal injury protection (PIP) coverage which provided specified benefits

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ary election of uninsured motorist coverage). *But see infra* notes 37-46 and accompanying text (analyzing the implementation of compulsory no-fault automobile insurance laws which mandated all registered motorists to purchase uninsured motorist coverage).

37 *See* Alan J. Karcher, *No More No-Fault: Beyond the Rhetoric Toward True Reform of the New Jersey Automobile Insurance System*, 8 SETON HALL LEGIS. J. 173, 176-78 (1984) (reviewing the evolution of legislative reform of the automobile insurance system). A former Speaker of the New Jersey General Assembly, Karcher identified that the prior system had created mounting problems for the insurance industry, including compensation delays, increasing premiums, overburdened courts, and inequitable verdicts. *Id.* at 173, 176-77 (footnote omitted). These problems reached crisis proportions. *Id.* at 177. Consequently, the legislature created the Automobile Insurance Study Commission (AISC). *Id.* at 177 (footnote omitted). The AISC, after studying insurance reforms for one and one-half years, concluded that new legislation must meet four objectives: "(1) prompt reparation of benefits (*reparation* objective); (2) reduced or stabilized cost (*cost* objective); (3) increased availability of coverage (*availability* objective); and, (4) judicial economy (*judicial* objective)." *Id.* at 177-78 (footnote omitted). Subsequently, the legislature passed the New Jersey Automobile Reparations Reform Act (No-Fault Act) based upon the recommendations of the AISC. *Id.* at 178 (footnote omitted).

38 *See* New Jersey Automobile Reparation Reform Act, N.J. STAT. ANN. §§ 39:6A-1 to 39:6A-35 (West 1990) (No-Fault Act).

The New Jersey Supreme Court has examined the purposes behind the enactment of the No-Fault Act. *See* Gambino v. Royal Globe Ins. Cos., 86 N.J. 100, 107, 429 A.2d 1039, 1043 (1981) (interpreting the Act as "promot[ing] *prompt* payment to *all* injured persons for *all* of their losses"). In *Gambino*, two days before starting a new job, the plaintiff sustained injuries in an automobile accident. *Id.* at 103, 429 A.2d at 1040. Consequently, the plaintiff filed a claim with the defendant insurance company to receive income continuation benefits to cover the five month period during which he was unable to work. *Id.* When the defendant refused to honor the claim, the plaintiff challenged the statutory definition of "income producer" contained within N.J.S.A. § 39:6A-2(d). *Id.* at 104, 429 A.2d at 1040-41, 1041 (citing N.J. STAT. ANN. § 39:6A-2(d) (West 1990)). The New Jersey Supreme Court focused on the legislative intent supporting the enactment of the personal injury protection (PIP) statute. *Id.* at 105, 429 A.2d at 1041. Specifically, the court noted that the legislature had responded to the four major concerns raised by the AISC. *Id.* at 105-06, 429 A.2d at 1042; *see supra* note 37 (examining the AISC Recommendations). Upon reviewing the reparation and judicial objectives, the court interpreted the No-Fault Act to encourage prompt payment for all losses to all injured parties. *Id.* at 106, 107, 429 A.2d at 1042 (citations omitted). The court determined that the legislature intended the statute to include all those gainfully employed persons unable to work due to injuries sustained during an automobile accident. *Id.* at 109, 429 A.2d at 1043 (citation omitted). Therefore, the court held that the plaintiff's definite, imminent arrangements for employment placed him within the statutory definition of "income producer." *Id.* at 112, 429 A.2d at 1045.

directly to the insured regardless of fault.[39] Additionally, the No-Fault Act imposed liability insurance requirements[40] and insisted upon uninsured motorist insurance for all privately-owned motor vehicles.[41] Moreover, the legislature instituted strict sanctions for noncompliance.[42] The New Jersey Superior Court, Law Division, later upheld the No-Fault Act against constitutional challenges that the law worked an unjust taking and denied due process and equal protection.[43]

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[39] N.J. STAT. ANN. § 39:6A-4 (West 1990). The statute stipulates:

> Every automobile liability insurance policy . . . shall provide personal injury protection coverage . . . for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian . . . .

Id.

The statute continues by defining PIP coverage to include medical expense benefits, income continuation benefits, essential services benefits (expenses for replacement services normally performed by the insured), death benefits, and funeral expense benefits. *Id.* PIP insurance provides coverage on a first-party basis by paying benefits directly to the insured, regardless of fault. JOOST, *supra* note 8, at 4. By contrast, third-party insurance pays benefits to a third party injured by the insured. *Id.* at 3.

[40] N.J. STAT. ANN. § 39:6A-3 (West 1990). The Act demands:

> Every owner or registered owner of an automobile registered or principally garaged in this State shall maintain automobile liability insurance coverage . . . insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation or use of an automobile . . . .

Id.

[41] *See* N.J. STAT. ANN. § 39:6A-14 (West 1990) ("Every owner or registrant of an automobile registered or principally garaged in this State shall maintain uninsured motorist coverage . . . ."); *see supra* note 35 (providing the specifications for uninsured motorist coverage under N.J. STAT. ANN. § 17:28-1.1).

[42] *See* N.J. STAT. ANN. § 39:6B-2 (West 1990). The statute admonished:

> Any owner or registrant of a motor vehicle registered or principally garaged in this State who operates or causes to be operated a motor vehicle . . . without motor vehicle liability insurance coverage . . . who knows or should know . . . that the motor vehicle is without motor vehicle liability insurance coverage required by this act shall be subject, for the first offense, to a fine of $300.00 and a period of community service . . . and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of one year . . . . Upon subsequent conviction, he shall be subject to a fine of $500.00 and shall be subject to imprisonment for a term of 14 days and shall be ordered by the court to perform community service for a period of 30 days . . . and shall forfeit his right to operate a motor vehicle for a period of two years . . . .

Id.

[43] Frazier v. Liberty Mutual Ins. Co., 150 N.J. Super. 123, 147, 374 A.2d 1259, 1271 (Law Div. 1977). In *Frazier*, the plaintiff received disabling injuries from a rear-end collision. *Id.* at 129, 374 A.2d at 1262. Unable to work, the plaintiff sought income

The advent of compulsory insurance laws raised problems for the insurance industry by mandating that it provide coverage for all drivers.[44] Due to the excessive cost of insuring high-risk drivers,

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continuation benefits through PIP coverage from his insurance company. *Id.* (citation omitted). The defendant insurance company gave the plaintiff only $15 per week for income continuation benefits after deducting the $85 per week in temporary disability benefits that the plaintiff could have received. *Id.* The plaintiff chose not to apply for these benefits. *Id.* The plaintiff asserted that the statute worked an unconstitutional taking of his property because it reduced his PIP payments by the amount he could have obtained from his disability benefits. *Id.* at 130, 374 A.2d at 1263. The court concluded that deduction of monies received through collateral sources did not constitute a taking without due process. *Id.* at 135, 374 A.2d at 1265. Rejecting the plaintiff's argument that the United States Constitution granted a fundamental right to earn a living, the court reasoned that the statute did not trigger due process guarantees. *Id.*

The court then addressed the plaintiff's assertion that the No-Fault Act violated the Equal Protection Clause by discriminating against the poor and those without collateral sources of income. *Id.* at 136, 374 A.2d at 1266. The court found that the plaintiff lacked standing to bring this claim. *Id.* at 137-38, 374 A.2d at 1267. Assuming that the plaintiff met the requirements for standing, the court maintained that the statute would pass an equal protection claim. *Id.* at 138, 140, 374 A.2d at 1268. Finally, the court held that the statute does not violate the New Jersey Constitution by impermissibly appropriating public funds to benefit insurance companies. *Id.* at 143-44, 145, 374 A.2d at 1270, 1271.

Interestingly, the court examined the legislative intent that supported the enactment of the no-fault legislation and articulated the four purposes supporting the adoption of a no-fault system. *Id.* at 133, 374 A.2d at 1264 (citation omitted); *see supra* note 37 (identifying these purposes). The court questioned the success of the no-fault laws by observing that the number of large lawsuits had not declined and that the insurance companies had not realized the anticipated savings in legal costs. *Frazier*, 150 N.J. Super. at 133, 374 A.2d at 1264. While discussing the purposes served by collateral resources, the court explicitly stated that it perceived the No-Fault Act to have failed in achieving its cost objectives. *Id.* at 134, 374 A.2d at 1265. In conclusion, the court again expressed dissatisfaction with the No-Fault Act: "This court, however, acknowledges reservations about the success of no-fault Legislation in this State without substituting its judgment for that of the State Legislature." *Id.* at 147, 374 A.2d at 1271.

[44] *See* Suzanne Yelen, *Withdrawal Restrictions in the Automobile Insurance Market*, 102 YALE L.J. 1431, 1436 (1993) (attributing insurance company losses to the state's requirement that insurance companies insure high-risk drivers at regulated rates). Insurance companies usually charge insurance rates in proportion to the risk of loss associated with a given driver. *Id.* at 1434. Compulsory insurance laws force insurance companies to participate in the involuntary insurance market, which consists of high-risk drivers unable to obtain insurance at standard rates. *Id.* (footnote omitted); *see supra* note 38 and accompanying text (defining compulsory insurance laws). To keep insurance affordable, states have restricted the maximum premiums that insurance companies may charge but have created a larger involuntary market as a result. Yelen, *supra*, at 1434 (footnote omitted). After enactment of the No-Fault Act, New Jersey regulated maximum rates for high-risk drivers. *Id.* at 1436. These rates, however, failed to cover the costs of losses. *Id.* The JUA sought to provide affordable coverage to the involuntary market. *Id.* Surcharges attached to all policies and to certain motor-vehicle violations provided funds for the JUA. *Id.* (footnote omitted). By 1990, the JUA had a deficit of over $3 billion. *Id.* (footnote omitted). In response

many insurance companies began to leave New Jersey.[45] To prevent their departure, the legislature ultimately imposed strict withdrawal restrictions.[46] Furthermore, in an effort to lessen the burden on the insurance industry, the legislature created the New Jersey Automobile Insurance Full Underwriting Association (JUA) in 1983.[47] The JUA, replacing an assigned risk system,[48] provided that high-risk drivers would receive similar rates to those in the voluntary market.[49] The legislature created special funding mecha-

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to these problems, the legislature enacted the Fair Automobile Insurance Reform Act in 1990. *Id.* at 1437 (footnote omitted); *see infra* notes 58-61 and accompanying text (describing the FAIR Act).

45 *See supra* notes 2-3 and accompanying text (explaining how high insurance costs in New Jersey made the state's automobile insurance market undesirable).

46 *See supra* note 4 (referring to the withdrawal restrictions imposed by the state).

47 *See* New Jersey Automobile Full Insurance Availability Act, N.J. STAT. ANN. §§ 17:30E-1 to 17:30E-24 (West Supp. 1984) (current version at N.J. STAT. ANN. §§ 17:30E-1 to 17:30E-24 (West 1994)) (Availability Act) (instituting a statutory scheme designed to provide access to affordable automobile insurance for all drivers regardless of risk). The Availability Act created the New Jersey Automobile Full Insurance Underwriting Association (JUA). *See* N.J. STAT. ANN. § 17:30E-4 (West Supp. 1984) (current version at N.J. STAT. ANN. § 17:30E-4 (West 1994)). The Act authorized the JUA as follows:

> There is created in the State of New Jersey an unincorporated nonprofit association to be known as the New Jersey Automobile Full Insurance Underwriting Association consisting of all insurers licensed to transact automobile insurance in this State . . . . Every such insurer shall be a member of the association and shall be bound by the association's plan of operation . . . . Any insurer which has ceased to transact automobile insurance in this State shall nevertheless remain liable for income . . . with respect to business transacted prior to the effective date of its cessation of business in the State . . . .

Id.

48 *See* MEHR & CAMMACK, *supra* note 1, at 312 (describing that assigned-risk plans allow drivers in the residual market to receive affordable automobile insurance). Insurance companies often refuse to insure high-risk drivers, who comprise the residual insurance market. *Id.* Assigned-risk plans distribute these drivers from the residual market among insurance companies within a state. *Id.* The state makes assignments proportionate to each insurer's premium voluntary market share. *Id.*

49 N.J. STAT. ANN. § 17:30E-2 (West Supp. 1984) (current version at N.J. STAT. ANN. § 17:30E-2 (West 1994)). The statute stated that:

> The purpose of this act is to assure to the New Jersey insurance consumer full access to automobile insurance through normal market outlets at standard market rates, to encourage the use of available market facilities, to provide automobile insurance for qualified applicants who cannot otherwise obtain such insurance through a full automobile insurance underwriting association, and to require that companies be made whole for losses in excess of regulated rates on all risks not voluntarily written by providing procedures for the spreading and recoupment of losses based on actual experience.

Id.

nisms for the JUA.[50] Unfortunately, due to inadequate funding, this system soon went into debt.[51]

Meanwhile, the legislature also enacted the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984 (Cost Containment Act), giving consumers the ability to select the insurance plan most compatible with their needs and fi-

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50 *See* N.J. STAT. ANN. § 17:30E-8 (West Supp. 1984) (current version at N.J. STAT. ANN. § 17:30E-8 (West 1994)) (establishing funding sources for the JUA through premiums paid by the high-risk drivers insured by the JUA, from various other surcharges, and from a residual market equalization charge (RMEC)). The statute defines an RMEC as "the amount which when added to all other sources of association income, will cause the association to operate on a no profit, no loss basis." N.J. STAT. ANN. § 17:30E-3(o) (West Supp. 1984) (current version at N.J. STAT. ANN. § 17:30E-3(o) (West 1994)). Drivers, under the age of 65 and in the voluntary market, pay the RMEC through a charge added to their automobile insurance premiums. *See* N.J. STAT. ANN. § 17:30E-8(b) (West Supp. 1984) (current version at N.J. STAT. ANN. § 17:30E-8(b) (West 1994)). The statute computed the RMEC as follows:

> b. At least annually, the board shall file its experience with the commissioner, which experience shall include the projected income, expenses, losses and reserve requirements of the association for the ensuing year, any adjustment in previously established reserves for unpaid losses and loss adjustment expenses necessary to make such reserves adequate and actuarially sound . . . . The board shall include in its filing with the commissioner, for his approval, a computation of the [RMEC] per insured vehicle to be collected by each member from its voluntary insureds, exclusive of principal operators 65 years of age or older, and by each servicing carrier from association insureds, exclusive of principal operators 65 years of age or older, to offset the anticipated losses of the association.

Id.; see also Fortunato & Yannotti, *supra* note 4, at 25 (commenting that the JUA required various income sources in order to charge the high-risk drivers insured by the JUA similar rates to those charged to drivers in the voluntary market). Insurance companies, who had no legal obligation to insure high-risk drivers, left the JUA to insure many drivers. *Id.* By 1988, however, the JUA insured more than half of the state's drivers causing the JUA to lose money while attempting to cover claims. *Id.* At the same time, RMEC charges cost drivers approximately $222 per vehicle. *Id.*

51 *See* Richard A. Epstein, *A Clash of Two Cultures: Will the Tort System Survive Automobile Insurance Reform?*, 25 VAL. U. L. REV. 173, 191 (1991) (footnote omitted) (concluding that the failure of the State Commissioner of Insurance to timely levy the RMEC resulted in the inability of the JUA to offset mounting losses). Epstein noted that funding for the JUA came from premiums paid by high-risk drivers and from the RMEC. *Id.* at 190-91 (footnote omitted); *see supra* note 50 (describing these financing mechanisms). The Insurance Commissioner delayed imposing the RMEC on drivers in the voluntary market because of its political disfavor. *Epstein, supra*, at 191. In fact, the Commissioner successfully litigated his discretionary authority to impose the RMEC. *See* New Jersey Auto. Full Ins. Underwriting Ass'n v. Gluck, No. A-4870-84T1 (N.J. Super. Ct. App. Div.), *cert. denied*, 107 N.J. 41, 526 A.2d 133 (1986) (holding that the Commissioner of Insurance need not impose the RMEC so long as the pool could pay current debts). Although the Commissioner eventually levied a $225 per driver charge in 1988, the JUA still lacked adequate funding to overcome its losses and expenses. *Epstein, supra*, at 191. By 1990, therefore, the JUA had accrued approximately $3.5 billion in debt. *Id.*

nances.[52] The Cost Containment Act required all vehicles, not merely automobiles, to carry PIP insurance for uninsured motorists and for the protection of injured pedestrians.[53] Uninsured motorist coverage remained compulsory and the legislature continued to require insurance companies to offer such protection as an option for all automobile insurance policies.[54] The Act also amended the monetary threshold by allowing consumers to choose the threshold level in order to reduce premium costs.[55] In 1988, the inability of the monetary threshold to control court congestion prompted the legislature to replace the monetary threshold with a verbal threshold, which necessitated that an injury fall within one of nine statutorily defined categories to sustain a cause of action.[56] The courts

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[52] *See* New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, N.J. STAT. ANN. §§ 17:28-1 to 17:28-7 (West 1994) (Introductory Statement) (Cost Containment Act); *see also* GEORGE J. KENNY & FRANK A. LATTAL, NEW JERSEY INSURANCE LAW § 12.5, at 469-70 (1993) (citing the dual legislative purposes for requiring uninsured motorist coverage under the Cost Containment Act as providing financial relief for the UCJF while protecting those injured by negligent uninsured motorists).

[53] N.J. STAT. ANN. § 17:28-1.3 (West 1994) (mandating PIP coverage); *see supra* note 39 (defining PIP coverage). The statute defines an uninsured motor vehicle as:

> (a) a motor vehicle with respect to the ownership, operation, maintenance, or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident;
>
> (b) a motor vehicle with respect to the ownership, operation, maintenance, or use of which there is bodily injury liability insurance in existence but the liability insurer denies coverage or is unable to make payment with respect to the legal liability of its insured because the insurer has become insolvent or bankrupt, or the Commissioner of Insurance has undertaken control of the insurer for the purpose of liquidation; or
>
> (c) a hit and run motor vehicle . . . .
>
> "Uninsured motor vehicle" shall not include an underinsured motor vehicle; a motor vehicle owned by or furnished for the regular use of the named insured or any resident of the same household; a self-insurer . . ., a motor vehicle which is owned by the United States or Canada, or a state, political subdivision or agency of those governments or any of the foregoing; a land motor vehicle or trailer operated on rails or crawler treads; a motor vehicle used as a residence or stationary structure and not as a vehicle; or equipment or vehicles designed for use principally off public roads, except while actually upon public roads.

N.J. STAT. ANN. § 17:28-1.1(e)(2) (West 1994).

[54] *See supra* note 35 (presenting the maximum uninsured and underinsured motorist coverage prescribed by N.J. STAT. ANN. § 17:28-1.1(b)).

[55] *See* CRAIG & POMEROY, NEW JERSEY AUTO INSURANCE LAW § 15:2, at 170-71 (1994) (describing the requirements of New Jersey's monetary threshold). New Jersey's original monetary threshold precluded tort suits for damages unless soft tissue injuries exceeded $200, exclusive of hospital expenses. *Id.* at 170; *see* N.J. STAT. ANN. § 39:6A-8.

[56] *See* N.J. STAT. ANN. § 39:6A-8(a) (West 1990). The nine categories for cognizable actions for non-economic loss are:

have upheld the constitutionality of the verbal threshold option against equal protection challenges.[57]

Recognizing that the no-fault system had largely failed to fulfill its goal of achieving an efficient, equitable and economical system, in 1990, the state legislature enacted its most recent reform measure, the Fair Automobile Insurance Reform Act (FAIR Act).[58]

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

Id.

See also Lori A. Dvorak, Note, *No-Fault Automobile Insurance Law: Speaking Out on New Jersey's Verbal Threshold*, 16 SETON HALL LEGIS. J. 716, 756 (1992) (concluding that the verbal threshold provided an imperfect solution, yet comprised another step towards achieving the goals of no-fault legislation).

57 *See* Dyszel v. Marks, 6 F.3d 116, 119 (3d Cir. 1993) (upholding the constitutionality of automatically assigning out-of-state drivers to the verbal threshold option). Nonresidents of New Jersey challenged the constitutionality of this "deemer" aspect of the verbal threshold. *Id.* at 119. The *Dyszel* case involved two consolidated actions. *Id.* In the first matter, the Dyszels, residents of Pennsylvania, sustained injuries in an automobile accident in New Jersey resulting from the negligence of the defendant. *Id.* at 121. The Dyszel's insurer, State Farm Insurance Company, operated within the state of New Jersey. *Id.* at 122. The trial judge concluded that Michele Dyszel's injuries failed to meet the verbal threshold. *Id.*

In the second matter, Mr. Tumolo, also a resident of Pennsylvania, received injuries from an accident in New Jersey. *Id.* at 121. Mr. Tumolo's insurance company, CNA, also transacted business in New Jersey. *Id.* at 122. The district court found that Mr. Tumolo's injuries did not surpass the verbal threshold. *Id.* at 123.

The United States Court of Appeals, Third Circuit, recognized that N.J. STAT. ANN. § 17:28-1.4 deems non-resident drivers with out-of-state insurance companies to have selected the verbal threshold option rather than the tort option. *Id.* at 120. New Jersey residents, the court stated, may choose between both options. *Id.* at 119. The plaintiffs contended that treating out-of-state residents differently from New Jersey residents results in a denial of equal protection. *Id.* The court explained that the New Jersey Legislature enacted the deemer clause in an effort to reduce insurance costs and court congestion. *Id.* at 125-26 (footnote omitted) (citation omitted). Furthermore, the court noted that the New Jersey Legislature sought to provide compensation for economic losses while minimizing costs. *Id.* at 126. The court concluded that the deemer statute was rationally related to these goals and upheld its constitutionality against the plaintiffs' claimed denial of equal protection. *Id.* at 127, 128.

58 N.J. STAT. ANN. § 17:33B-2 (West 1994). The statute sets forth these legislative findings and declarations:

> a. For almost two decades the system of motor vehicle insurance in this State has been the subject of examination, reform, review and revision in all three branches of government.
>
> b. The common public purpose throughout this period has been to provide to the motorists of this State a comprehensive program of in-

demnification from the injuries and damages that may arise out of the ownership or operation of motor vehicles that is equitable, efficient and economical . . . .

d. It has become increasingly obvious to the Legislature and the public that, as a result, one of the principal goals of this common purpose has not been attained: economy . . . .

. . .

e. The current law developed through legislative initiative, executive administration and judicial interpretation for: (1) the underwriting and rating of motor vehicle insurance; (2) the apportionment of drivers between a voluntary and residual market based on their characterization as "good" or "bad" drivers; (3) the provision of health care services and motor vehicle repair; (4) the payment of claims and protection of the rights and remedies of those injured or damaged; and (5) the regulation and financing of this system, and its many aspects, is cumbersome, complex, and confusing and allows for and encourages inefficiency, waste, mismanagement and the potential for misuse of public and private moneys.

f. As a result of this experience, the Legislature finds that it is necessary to address the myriad aspects and issues of this complicated and interrelated system, not through piecemeal adjustment of various statutory or regulatory provisions, but through a logical, comprehensive and complete revision of the various laws and regulatory schemes that impact, in whatever fashion, on the system and its participants.

g. To provide a healthy and competitive automobile insurance system in this State, automobile insurers are entitled to earn an adequate rate of return through the ratemaking process.

h. To that end, the Legislature declares that it is in the public interest to:

(1) revise the basic options and coverages available under automobile insurance policies, including the option to make one's health insurance the primary source for payment of medical and hospital expenses;

(2) eliminate, over time, the current residual market mechanism, the [JUA], and certain of the market subsidies currently funding its losses;

(3) provide, through the appointment of an insolvency trustee, for the orderly evaluation, prioritization and satisfaction of obligations payable on behalf of the association;

(4) provide, through assessments on property-casualty insurers, a surtax on the premium taxes of automobile insurers, temporary assessments for the privilege of practicing certain professions and occupations, temporary and minimal increases in certain motor vehicle registration fees, as well as continuation of merit rating surcharges, for the funding of the debts and obligations of the association;

(5) create a new residual market mechanism in which insurers will share directly in the risk of insuring the "bad driver";

(6) guarantee that "good drivers" secure motor vehicle insurance coverage in the voluntary market and control the apportionment of drivers in the residual market;

(7) eliminate anti-competitive aspects of the current rating laws as they apply to automobile insurers and completely eliminate combinations among automobile insurers for rate-making purposes;

(8) promote the efficient handling of claims and the elimination of fraud and other deceptive practices; and

The FAIR Act guarantees qualified "good drivers" insurance coverage in the voluntary market,[59] phases out the JUA,[60] and creates the Market Transition Facility (MTF).[61] The MTF replaced the

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(9) promote the participation of the insurance consumer in reducing losses through the installation and use of anti-theft devices, the successful completion of defensive driving courses, and similar activities.

Id.

59 *See* N.J. STAT. ANN. § 17:33B-15(a) (West 1994) (directing every insurer to provide coverage for all eligible persons); *see also* N.J. STAT. ANN. § 17:33B-13 (West 1994) (defining an eligible person). The statute describes an eligible person as:

> a person who is an owner or registrant of an automobile registered in this State or who holds a valid New Jersey driver's license to operate an automobile, but does not include any person:
>
> a. Who, during the three-year period immediately preceding application for, or renewal of, an automobile insurance policy has been convicted [of refusing to submit to a test to determine intoxication levels pursuant to § 39:4-50.4(a)];
>
> b. Whose driver's license to operate an automobile is under suspension or revocation;
>
> c. Who has been convicted, within the five-year period immediately preceding application for or renewal of a policy of automobile insurance, of fraud or intent to defraud involving an insurance claim or an application for insurance . . . .
>
> d. Whose policy of automobile insurance has been canceled because of nonpayment of premium or financed premium within the immediately preceding two-year period . . . .
>
> e. Who fails to obtain or maintain membership or qualification for membership in a club, group, or organization, if membership is a uniform requirement of the insurer as a condition of providing insurance . . . .
>
> f. Whose driving record for the three-year period immediately preceding application for or renewal of a policy of automobile insurance has an accumulation of automobile insurance eligibility points as determined under [this Act]; or
>
> g. Who possesses such other risk factors as determined to be relevant by rule or regulation of the commissioner.

N.J. STAT. ANN. § 17:33B-13 (West 1994).

60 N.J. STAT. ANN. § 17:33B-3 (West 1994). The legislature found that:

> a. . . . [the JUA] is currently operating in a substantially impaired financial state with an operating deficit which the association has estimated to be in excess of $3 billion and that, based upon the results of a recent claim and underwriting review and financial audit, the Commissioner of Insurance stated that mismanagement by the insurance companies acting as servicing carriers cost the association $908 million between its inception in 1984 and 1988. The Legislature further finds that the association is not earning new premium income or collecting subsidies in an amount sufficient to pay its claims and expenses. The Legislature further finds that under the above enumerated circumstances the association, if it were a licensed insurer, would likely be declared financially impaired or insolvent . . . .

Id.

61 N.J. STAT. ANN. § 17:33B-11 (West 1994). The statute authorized the MTF as indicated below:

JUA as a temporary interim entity while insurance premiums continued spiraling, prompting the legislature to recently propose to make New Jersey the first state with a pure no-fault automobile insurance system.[62]

II. THE PURE NO-FAULT PROPOSAL

Currently, the New Jersey Peoples' Automobile Insurance Act (S-450) awaits action in the state senate.[63] The legislature acknowledges in S-450 that New Jersey must overcome some unique circumstances before effectively containing the high cost of automobile insurance.[64] The bill recognizes the problems inherent in the current tort system, noting the inequities of compensating economic losses on a no-fault basis and allowing tort suits for non-economic losses.[65] Moreover, S-450 declares that the current

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> a. There is created a Market Transition Facility to be operated by the Commissioner of Insurance pursuant to the provisions of this section. Every insurer authorized to transact automobile insurance in this State shall be a member of the facility and shall share in its profits and losses as provided by the commissioner . . . .

Id.

62 *See* Fortunato & Yannotti, *supra* note 4, at 25 (indicating that the MTF served only for a two year period, October 1, 1990 until September 30, 1992, as an interim entity designed to ease the transition from the JUA to an assigned-risk plan); *see also* JOOST, *supra* note 8 (explaining that a pure no-fault automobile insurance system would be a novelty in the United States).

63 *See* S. 450, 206th N.J. Leg., 1st Reg. Sess. (1994) (introduced by Senator Cardinale on January 20, 1994); A. 631, 206th N.J. Leg., 1st Reg. Sess. (1994) (introduced by Assemblyman Garrett on January 11, 1994) (proposing the enactment of the New Jersey Peoples' Automobile Insurance Act); *see infra* notes 64-78 and accompanying text (describing the provisions of the bill).

64 *See* S. 450, 206th N.J. Leg., 1st Reg. Sess. (1994), at § 2(a)-(d) (commenting on the relationship between the state's population density and the high cost of automobile insurance). According to the bill, the legislature has found that:

> a. Automobiles are needed for society to function and for most residents of New Jersey to function in society.
>
> b. Automobile accidents cause bodily injury and property damage in New Jersey, and the owners and operators of automobiles must contribute to paying the costs of these bodily injuries and property damage by means of automobile insurance.
>
> c. New Jersey is the most densely populated state in the United States and as such can be expected to have a high rate of automobile accidents.
>
> d. This high rate of automobile accidents means that, unless the system for paying the costs of automobile accidents is carefully designed, it will be expensive for all people and unaffordable for many people in New Jersey.

Id.

65 *Id.* § 2(e)-(h). The bill draws the following conclusions about the existing tort system:

> e. The use of the tort system to compensate automobile accident

no-fault laws have failed to correct the ills of the system.[66] Thus,

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bodily injuries is an inequitable system which results in many persons receiving no compensation for their economic losses, many persons receiving less than their economic losses, while many other persons receive full compensation for their economic and their real non-economic losses and more.

f. The problems of the tort system in compensating bodily injuries in automobile accidents are inherent in that system because the system varies compensation to the injured persons based on the principles of "fault," the specific non-economic losses of the person which are, by their nature, uncertain and cannot be measured, the liability limits of the tortfeasor's bodily injury liability insurance, if any, which by law can be as little as $15,000, and rarely exceeds $100,000, and the need for expensive attorney involvement because of the complexities of the legal tort system.

g. These problems mean that if the tort system is used, then the automobile insurance system will be expensive for all, unaffordable for many in New Jersey, and inequitable in compensating persons.

h. The problems of the tort system are further magnified by the existence of fraud on the part of some participants in the system who can profit by taking advantage of the different features that are inherent in the tort system.

Id.

[66] *Id.* § 2(i)-(m). S-450 catalogues numerous deficiencies of existing no-fault provisions, including:

i. A combined system of compensating economic losses of injured persons without regard to fault and allowing tort suits for non-economic losses with little or no restrictions, instituted in 1973, still contained inequities in compensating injured persons in that many injured persons were compensated in amounts greater than their economic losses and real non-economic losses while many others were not compensated for their non-economic losses at all, or were only partially compensated for their non-economic losses due to the uncertain nature of the tort system.

j. The combined system has resulted in, and would continue to result in, automobile insurance being expensive for all and unaffordable for many.

k. The problems of the combined system are further magnified by the existence of fraud on the part of some participants in the combined system who can profit by taking advantage of the features inherent in the system.

l. The "verbal threshold option" which was instituted in 1989, improved the combined system for those who selected the verbal threshold option by eliminating most cases in which persons were compensated in excess of their economic and real non-economic losses, thus making it more fair and equitable than the tort system, but it did not reduce costs enough so that auto insurance is still expensive for all and unaffordable for many in New Jersey.

m. A system which compensates all economic losses alone, though more equitable than the tort system or a combined system, with or without the verbal threshold, would be expensive for all and unaffordable for many in New Jersey.

Id.

the legislature seeks to create a novel system.[67]

Enforcing the compulsory insurance mandate, S-450 would require that consumers choose one of three policy options: the Basic Policy, the Basic Plus Policy, and the Comprehensive Plus Policy.[68] The first option, the Basic policy, provides the minimum legal coverages for no-fault PIP, property damage, and out-of-state liability insurance.[69] The second option, the Basic Plus policy, offers the coverage from the Basic policy as well as additional benefits such as the option to elect higher PIP coverage limits.[70] Finally, the Comprehensive Plus policy encompasses the coverages of a Basic Plus

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67 *See id.* at § 2(n) (concluding that the relationship between the high cost of automobile accidents in New Jersey and the state's ranking as the most densely populated state in the nation, requires restructuring the system in a unique manner).

68 *Id.* at Statement (characterizing S-450 as promoting consumer choice by necessitating that motorists elect one of three insurance programs).

69 *Id.* § 4. S-450 proposes to amend N.J. STAT. ANN. § 39:6A-3 with the Basic policy option as follows:

> a. . . . personal injury protection coverage for accidental bodily injury or death in an amount of $15,000 for the payment of benefits without regard to negligence, liability or fault of any kind; and
>
> b. . . . automobile property damage liability insurance with a limit of $5,000, exclusive of interest and costs, for damage to property in any one accident; and
>
> c. . . . if an insured becomes subject to a compulsory motor vehicle insurance, financial responsibility, or similar law of another state, out-of-state liability insurance coverage with coverages required by and with limits equal to the applicable limits in that state.

Id.

The bill enumerates the extent of PIP coverage. *See id.* § 5. The bill proposes to amend N.J. STAT. ANN. § 39:6A-4 by defining PIP coverage to include:

> a. Medical expense benefits. Payment of reasonable and necessary medical expenses . . . incurred as a result of bodily injury arising out of the ownership, operation, maintenance or use of an automobile, up to the limits of the automobile insurance policy. In the event of death, payments shall be made to the estate of the decedent.
>
> Managed care systems, which are subject to the review of the Commissioner of Insurance, may be utilized by insurers for medical expense benefits required to be offered pursuant to this section.
>
> b. Income continuation benefits . . . up to the limit of the coverage provided. . . .
>
> c. Essential services benefits . . . subject to the limits of the insurance policy . . . .
>
> d. Death benefits . . .
>
> e. Funeral expenses benefits . . . to a maximum benefit of . . . $2,000 . . . .

Id.

70 *Id.* § 14. First, PIP benefits can range from the minimum requirement of $15,000 to $250,000. *Id.* Second, the Basic Plus policy offers bodily injury liability and uninsured motorist coverage. *Id.* Third, this policy type offers a choice of property damage coverage between $5,000 and $50,000. *Id.*

policy as well as providing scheduled pain and suffering benefits.[71]

The bill also modifies existing law by allowing arbitration for overdue payments of PIP benefits.[72] Originally, the statute provided that the insurer must pay the costs of these proceedings if the insured prevailed.[73] While this requirement remains intact, S-

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[71] *Id.* The bill proposes to amend N.J. STAT. ANN. § 39:6A-10 by incorporating the Comprehensive Plus policy to include the benefits provided under the Basic Plus policy and as indicated below:

> Scheduled pain and suffering coverage shall provide protection for non-economic loss to an insured who sustains bodily injury as the result of an accident while the insured is occupying, entering into, alighting from or using an automobile or if the insured is a pedestrian injured by an automobile. Scheduled pain and suffering coverage shall be paid according to the benefit table below, provided that no more than one of the benefits, which shall be the largest, shall be paid for any person with respect to losses resulting from any one accident.
>
> (1) Loss of life: the principal sum;
>
> (2) Permanent and total disability: the principal sum;
>
> (3) Loss of two or more members: the principal sum;
>
> (4) Loss of one member: one-half of the principal sum;
>
> (5) Loss of thumb and index finger on the same hand: one-quarter of the principal sum;
>
> (6) Permanent and total loss of hearing: one-half of the principal sum;
>
> (7) Permanent and total loss of a sense: one-quarter of the principal sum;
>
> (8) Loss of a finger or toe: one-eighth of the principal sum;
>
> (9) Serious permanent disfigurement: one-eighth of the principal sum; and
>
> (10) Permanent and total loss of use of an internal organ: one-eighth of the principal sum.

Id.

Under the Comprehensive Plus policy, scheduled pain and suffering benefits may range from a principal sum of $15,000 to $250,000. *Id.* Another available option would provide tort pain and suffering coverage. *Id.* An insurer may elect to offer this coverage along with either Basic Plus or Comprehensive Plus policies. *Id.* This coverage pays what would have been payable under the tort system with no threshold. *Id.*

[72] *Id.* § 9. The bill proposes to amend N.J. STAT. ANN. § 39:6A-5 by arbitrating disputes concerning the payment of PIP benefits accordingly:

> 5. Payment of personal injury protection coverage benefits . . . .
>
> c. All overdue payments shall bear interest at the percentage of interest prescribed in the Rules Governing the Courts of the State of New Jersey for judgments, awards and orders for the payment of money. . . . An automobile . . . insurer shall provide any claimant with the option of submitting a dispute under this section to binding arbitration pursuant to its approved policy provisions. . . . If the claimant prevails in the arbitration proceedings, the insurer shall pay all the costs of the proceedings, including reasonable attorney's fees . . . . The arbitrators shall order the claimant to pay all the costs and reasonable attorney's fees of the insurer if the claimant submitted to arbitration a false or frivolous claim.

Id.

[73] N.J. STAT. ANN. § 39:6A-5 (West 1990). The statute proclaims, "If the claimant

450 adds a provision requiring the claimant to pay costs and reasonable attorney's fees for false or frivolous claims submitted to arbitration.[74] Furthermore, the bill prevents those responsible for, but failing to, carry automobile insurance from receiving a remedy through the tort system.[75]

Finally, all three options preclude consumers from pursuing tort claims for economic and non-economic losses resulting from automobile accidents unless the injured party falls into certain narrow categories.[76] An additional exception to this restriction occurs when a person receives injuries from a motorist driving under the influence of alcohol or drugs.[77] Thus, because ninety-five percent

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prevails in the arbitration proceedings, the insurer shall pay all the costs of the proceedings, including reasonable attorney's fees . . . ."

74 *See supra* note 72 (proposing to amend N.J. STAT. ANN. § 39:6A-5 by penalizing the insurer with the costs and fees of unnecessary arbitrations).

75 S. 450, 206 N.J. Leg., 1st Reg. Sess. (1994), at § 7. The bill proposes to amend N.J. STAT. ANN. § 39:6A-4.5 to bar remedies to uninsured motorists as follows:

> Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain . . . a Basic policy . . . or a Basic Plus policy or a Comprehensive Plus policy . . . shall:
>
> . . .
>
> c. be subject to the limitation on the right to sue in tort and the exemption from tort liability for non-economic loss and certain economic losses arising out of an automobile accident . . .
>
> d. retain the right to sue in tort for economic loss arising from bodily injury in an automobile accident . . . but only to the extent that such economic loss would not have been recoverable under the coverage in [N.J. STAT. ANN. § 39:6A-3, as amended] had the person been insured; and
>
> e. retain the right to sue in tort for economic loss arising from property damage . . . but only to the extent that such economic loss exceeds $5,000 . . . .

Id.

76 *See id.* at Statement (explaining that the bill does not subject certain commercial vehicles, motorcycles, and automobiles registered out-of-state to the bars on tort actions).

77 *Id.* § 12. The bill proposes to amend N.J. STAT. ANN. § 39:6A-8 as follows:

> 8. Tort exemption; limitation on the right to economic or noneconomic loss; operation of a motor vehicle under the influence of alcohol or drugs exception . . . .
>
> a. Every owner, registrant, operator or occupant of an automobile to which [N.J. STAT. ANN. § 39:6A-4] personal injury protection coverage, regardless of fault, applies, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for noneconomic loss, and for economic loss which is payable for personal injury protection coverage to a person who is subject to this subsection and who is either a person who is required to maintain the coverage mandated by this act, whose policy is subject to subsections a., b., c. or d. of [N.J. STAT. ANN. § 17:28-1.4], who has a right to receive benefits pursuant to subsection c. of [N.J. STAT. ANN. § 17:28-1.4], who is subject to [N.J. STAT. ANN. § 39:6A-4.5], or is a person who has a right

of all claims would likely be handled through insurance, the bill creates a pure no-fault system.[78]

III. PURE NO-FAULT: POSING MORE OF A PROBLEM THAN A SOLUTION?

Determining the viability of S-450 requires an examination of the constitutional issues contained within its provisions.[79] First, S-450 eliminates the right to sue in tort as a remedy for losses sustained in most automobile accidents.[80] The New Jersey Constitution, however, provides for the absolute right to a trial by jury.[81] Previously, the courts have upheld New Jersey's No-Fault Act against claims that the monetary threshold imposed an unconstitutional denial of court access.[82] In other states, the courts have held

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> to receive benefits under [N.J. STAT. ANN. § 39:6A-4], or this 1994 amendatory and supplementary act as a result of bodily injury, arising out of the ownership, operation, maintenance or use of . . . an automobile in this State . . . .
>
> . . .
>
> c. The exemption from tort liability for non-economic loss in subsection a. of this section shall not apply if that owner, registrant, operator or occupant is convicted of or pleads nolo contendere to a violation . . . for driving while under the influence of alcohol or drugs or his right to operate a motor vehicle is revoked . . . .

Id.; *see supra* note 56 and accompanying text (discussing N.J. STAT. ANN. § 39:6A-8).

78 *See supra* note 8 (defining types of no-fault plans and indicating that S-450 creates a pure no-fault system by forcing the handling of approximately 95% of all claims on a no-fault basis).

79 *See* JOOST, *supra* note 8, § 2:21, at 21 (summarizing constitutional issues raised by no-fault automobile insurance schemes).

80 *See supra* notes 76-78 and accompanying text (explaining the provisions of S-450 that abolish the right to sue in tort and the driving under the influence exception).

81 N.J. CONST. art. I, ¶ 9 (West Supp. 1994). The New Jersey Constitution establishes that:

> [t]he right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

Id.

82 Rybeck v. Rybeck, 141 N.J. Super. 481, 507, 358 A.2d 828, 842 (Law Div. 1976), *appeal dismissed* 150 N.J. Super. 151, 375 A.2d 269, *cert. denied*, 75 N.J. 30, 379 A.2d 261 (1977). In *Rybeck*, the New Jersey Superior Court, Law Division, consolidated two cases. *Id.* at 486, 358 A.2d at 831. The first suit arose when the plaintiff, Mrs. Rybeck, sustained injuries as a passenger in her family car. *Id.* at 485-86, 358 A.2d at 830-31. The defendant, Mr. Rybeck, was the driver of the car. *Id.* at 485, 358 A.2d at 831. The automobile insurance policy named both the plaintiff and the defendant as insureds. *Id.* at 486, 358 A.2d at 831. Accordingly, the plaintiff sought first-party and third-party recovery from the same policy. *Id.* The second suit arose when Mr. and Mrs. Rybeck sued Amica, their insurance company, seeking to have the No-Fault Act declared invalid. *Id.*

that the legislature has the right to eliminate remedies in a reasonable manner.[83] These cases involved various modified no-fault in-

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First, the court examined the purposes of the New Jersey Automobile Reparations Reform Act (No-Fault Act) and found that the No-Fault Act constitutes a "comprehensive scheme for reform of the system for compensating persons injured in auto accidents." *Id.* at 487, 358 A.2d at 831. The court commented that the No-Fault Act prohibited civil suits for injuries below the threshold. *Id.* Instead, the court noted that the No-Fault Act provided recovery through mandatory personal injury protection (PIP). *Id.*

In dismissing the plaintiffs' claim that the No-Fault Act violated their right to due process, the court reasoned that the No-Fault Act offered a rational remedy for the system's problems at the time of its enactment. *Id.* at 493, 358 A.2d at 834. Nevertheless, the court characterized the No-Fault Act as "ill-fated legislation" that had failed to decrease insurance costs and remedy court congestion. *Id.* at 492, 358 A.2d at 834. Addressing the plaintiff's companion equal protection challenge to the No-Fault Act, the court applied the rational basis test to determine that the Act did not make unreasonable classifications. *See id.* at 496, 497, 358 A.2d at 836, 837 (analyzing and affirming the basis for the $200 threshold provision of the No-Fault Act). Furthermore, the court recognized that the legislature may modernize the common law by prospectively striking rights and remedies without offering alternatives. *Id.* at 506, 358 A.2d at 841 (citations omitted). Determining her rights as of the time of the accident, the court held that the No-Fault Act did not improperly deny the plaintiff access to the courts because the law afforded her no cognizable cause of action. *Id.* at 507, 358 A.2d at 842; *see also* 8D JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5152, at 380 (1981) (footnote omitted) (characterizing the court's conclusion in *Rybeck* that the No-Fault Act did not unconstitutionally deny court access because the plaintiff did not have a valid cause of action as "walk[ing] a judicial tightrope").

[83] *See* Zaba v. Motor Vehicle Div., Dep't of Revenue, 516 P.2d 634, 637 (Colo. 1973) (allowing the legislature to suspend motor vehicle licenses for point accumulation without a hearing in the interest of public safety). In *Zaba*, the court consolidated two cases in which district courts had upheld the suspension of the plaintiffs' licenses. *Id.* at 636. A state statute authorized the suspension after a driver had received 12 points from traffic violations within a defined period. *Id.* (citation omitted). Responding to the appellants' contention that the statute allows unreasonable police powers, the Colorado Supreme Court held that the legislature may limit one's ability to use the highways based on the reasonable relationship to public safety. *Id.* at 637 (citations omitted). Thus, the court reasoned that the general assembly could establish standards for drivers to insure public safety and determine when just cause exists to revoke that right. *Id.* (citation omitted).

Other courts have upheld an absolute right for the legislature to abolish remedies. *See* Singer v. Sheppard, 346 A.2d 897, 906 (Pa. 1975), *on remand*, 381 A.2d 1007 (1978) (upholding the constitutionality of Pennsylvania's no-fault automobile insurance law by concluding that the two groups created by the laws—injured parties with and without tort remedies—rationally relate to a legitimate legislative purpose); *see also* Pinnick v. Cleary, 271 N.E.2d 592, 599-600 (Mass. 1971) (quoting New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917)). The *Pinnick* court recognized:

> The Legislature is admittedly restricted in the extent to which it can retroactively affect common law rights of redress which have already accrued. However, there is authority in abundance for the proposition that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." . . . The citizen may find that events occurring after passage of such a statute place him in a different position legally from that which he would have occupied had they occurred before the passage of the statute.

surance schemes in which many cases still remained eligible for trial.[84] In contrast, S-450 disqualifies most individuals injured in automobile accidents from filing tort claims.[85] Before enacting a pure no-fault automobile insurance system, the legislature should carefully consider the potential ramifications of denying access to the judicial system on such a widespread basis.[86]

Secondly, S-450 raises important equal protection concerns.[87] No-fault laws have been attacked on equal protection grounds asserting discriminatory effects towards the young, the elderly, the poor, the underprivileged, the unemployed, women, housewives, and people with careers.[88] To date, the courts have generally upheld the right of the legislature to make reasonable classifications.[89] The underlying objectives of pure no-fault systems differ, however, from other no-fault plans.[90] Therefore, the legislature

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Id.; see also Munn v. Illinois, 94 U.S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law.").

84 *See supra* note 8 (defining modified no-fault insurance).

85 *See supra* notes 76-78 and accompanying text for a discussion of S-450's disqualification provisions.

86 *See* APPLEMAN, *supra* note 82, § 5152, at 384 (illustrating the effects of allowing the legislature to prevent court access through a hypothetical in which the legislature eliminates the need for a condemnation proceeding after a taking due to the expense of the procedure). In this analogy, the legislature provides for an arbitrator to determine the amount of compensation after a taking. *Id.* A general fund, financed by a 10% surcharge on real estate tax, would provide money to compensate for the taking. *Id.* The hypothetical also imagines a situation where the state provides no compensation. *Id.* Appleman observed that the hypothetical involves a substitute remedy and the legislature's right to destroy a right of action without a judicial remedy. *Id.* Appleman concluded that the legislature might carry to extremes its authority to destroy a previously existing right, thus severely weakening constitutional guarantees. *Id.*

87 *See* JOOST, *supra* note 8, § 2:21, at 21 (providing an overview of equal protection claims asserted against no-fault laws).

88 *See* Appleman, *supra* note 8, § 5153.35, at 387-89 (citations omitted) (addressing the arguments of groups claiming that no-fault insurance violates their right to equal protection under the law).

89 *See* COUCH, *supra* note 8, § 45.663, at 258 (remarking that successful challenges to the constitutionality of no-fault laws necessitate a showing of arbitrariness or that the classifications do not rationally relate to a legitimate legislative purpose). Despite numerous constitutional challenges, the courts have upheld no-fault laws with only two exceptions. *Id.* at 257 (citing Grace v. Howlett, 283 N.E.2d 474, 481 (Ill. 1972); Shavers v. Kelley, 267 N.W.2d 72, 91 (Mich. 1978)) (footnote omitted).

90 *See* JOOST, *supra* note 8, § 2:21, at 21 (questioning the constitutionality of a pure no-fault system based upon past decisions upholding other types of no-fault laws). Pure no-fault schemes strive to prohibit tort claims. *Id.* Other no-fault plans, however, seek to eliminate tort recovery for relatively minor injuries. *Id.* Furthermore, the courts view no-fault benefits as an adequate alternative to tort damages. *Id.* Joost reasons that the courts would only uphold pure no-fault plans if premiums sufficiently decreased or if injured parties could receive ample compensation from their insurance benefits to meet the "adequate substitute" test. *Id.* Because premium deductions would likely fail this test, pure no-fault benefits must provide more no-fault

should not rely upon past decisions to predict the likelihood of S-450 meeting constitutional mandates.[91]

CONCLUSION

Analyzing S-450 requires an understanding of the relationship between tort law and insurance.[92] Tort law deters negligent behavior by holding the wrongdoer financially liable for causing injury and destroying property.[93] This reflects an underlying principle that one who injures another bears the responsibility for compensating the victim. In the context of automobile accidents, tort law seeks to encourage drivers to prevent accidents to avoid receiving a judgment for damages. Pure no-fault laws, such as S-450, virtually eliminate tort remedies and destroy these benefits of the tort system. S-450 strives to decrease court congestion and provide timely compensation, but sacrifices the deterrent benefits of the tort system. To be viable, a pure no-fault system must overcome the loss of the tort system's deterrent effects. S-450 keeps the tort deterrent for driving while under the influence intact, but fails to provide a deterrence for negligent driving. Negligent drivers cause the same injuries as intoxicated drivers. The legislature should make accident deterrence, regardless of the cause, a priority of any system.

Tort deterrence theory relies upon the assumption that a negligent driver has assets to lose in a successful lawsuit. Due to the relative insolvency of many drivers, the insurance industry must also function as a deterrent. Insurance operates to shield drivers from the financial consequences of their actions. Thus, automobile insurance may create a moral hazard by diminishing the motivation for drivers to exercise due care.[94] The insurance industry,

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benefits than the average accident victim could receive through the fault-based tort system. *Id.*

91 *See* JOOST, *supra* note 8, § 2:21, at 21 (casting doubt on the ability to predict future court determinations on pure no-fault laws based upon past decisions).

92 *See* Epstein, *supra* note 51, at 175 (acknowledging that insurance reform accompanies, or serves as an option to, tort reform).

93 *See id.* at 176 (footnote omitted) (commenting that tort liability encourages drivers to exercise care and avoid accidents). Potential liability, however, does not deter insolvent drivers with insufficient assets to satisfy a judgment. *Id.* at 177. Insurance also reduces the deterrent aspect of tort liability by shielding a wrongdoer from the financial consequences of one's actions. *Id.* at 179. Epstein suggested that other social controls such as safety measures, licensing requirements, and the need for self-protection serve to mitigate this insulating effect of insurance. *Id.* at 178.

94 *See* Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 313-14 (1990) (examining the interrelationship between liability insurance and the deterrence objectives of the tort system). Schwartz distinguished "completely flat" insurance from "perfectly responsive" insurance. *Id.* at 318,

however, achieves a deterrent effect through its efforts to maximize profits. In order to profit, insurance companies must monitor driving records and rely upon underwriting to evaluate potential risks and to set appropriate rates. Thus, the potential for increased premiums assessed against drivers considered as higher risks acts as a deterrent to individual drivers. This underscores the importance of compulsory insurance laws to prevent drivers from avoiding increased insurance rates—and their corresponding deterrent effects—merely by driving without insurance.

S-450 represents an unwisely sudden and drastic alteration to New Jersey's automobile insurance scheme. Past experience reflects the disadvantages of radical change.[95] S-450 correctly notes that the state's high population density, high road density, and high number of vehicles on the roads causes many of New Jersey's automobile insurance problems. S-450, however, fails to respond to its own findings. Eliminating tort remedies ignores the heart of the problem: New Jersey's high accident rate. The legislature should also look to reform outside of the tort and insurance arena. For instance, measures that would increase the use of public transportation and thereby reduce traffic congestion would decrease the costs associated with accidents. Clearly, pure no-fault laws will not provide a final solution, nor even a viable solution, for the problems facing New Jersey's automobile insurance system.

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320. Completely flat insurance does not consider an insured's potential risk level when determining premium costs and policy terms. *Id.* at 318. The cost of perfectly responsive insurance varies in accordance with an insured's risk level. *Id.* at 320. In an economic analysis of the deterrent effects of tort law, if a safety precaution would cost a defendant $700 but the precaution would eliminate a $1000 risk, the defendant has an incentive to avoid the risk. *Id.* at 337 (footnotes omitted). Perfectly responsive insurance would not interfere with the deterrent effect because an insured who failed to take the precaution would pay higher premiums. *Id.* (footnote omitted). Completely flat insurance, however, creates a moral hazard. *Id.* at 338 (footnote omitted). The moral hazard occurs because the insured no longer has an incentive to take the $700 precaution. *Id.* Thus, the existence of the insurance policy alters the behavior of the insured. *Id.* (footnote omitted); *see also* Breeden v. Frankfort Marine, 119 S.W. 576, 580 (Mo. 1909) (concluding that liability insurance does not violate public policy).

95 *See* SENATE SPECIAL COMMITTEE ON AUTOMOBILE INS. REFORM, FINAL REP. 2 (1986) (recommending that any changes to the system be made in a systematic manner over a period of time).