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Jeffrey O'Connell

Stephen Carroll

Michael Horowitz

Allan Abrahamse

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Articles

THE COSTS OF CONSUMER CHOICE FOR AUTO INSURANCE IN STATES WITHOUT NO-FAULT INSURANCE

JEFFREY O'CONNELL,* STEPHEN CARROLL,** MICHAEL HOROWITZ,***
ALLAN ABRAHAMSE,**** & DANIEL KAISER*****

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* The Samuel H. McCoy II and Class of 1941 Professor of Law, University of Virginia; B.A., Dartmouth College; J.D., Harvard University.

** Senior Economist, RAND; B.S., M.S., Illinois Institute of Technology; Ph.D., Johns Hopkins University.

*** Senior Fellow, Hudson Institute; B.A., City University of New York; J.D., Yale University.

**** Mathematician, RAND; B.S., Ph.D., University of Michigan.

***** B.B.A., M.S., University of Wisconsin.

I. THE PRESENT SITUATION AND THE PROPOSED CHOICE SYSTEM¹

Traditional tort liability for personal injury from auto accidents has long been criticized on the grounds that its costs are too high and that any compensation it provides is inefficient, unfair and dilatory.² But no-fault laws, the putative alternative to strict tort systems, are in turn criticized as infringing on the fundamental legal right to be paid for noneconomic damages,³ and as failing in their promise to contain auto insurance costs.⁴ This latter criticism may be countered with the argument that the economic shortcomings of no fault laws are not inherent, but rather result from the politically driven character of many state no-fault laws: such laws are crafted to preserve too many full-scale tort claims—above defined thresholds of either dollar losses or verbally described severe injuries—payable in addition to no-fault claims.⁵ Is there a reform of auto insurance that will meet these criticisms from both sides?

In this Article we examine a reform system that replaces current no-fault proposals.⁶ Current no-fault systems must bear the burden of not only automatic payment for economic loss but also, once threshold injury levels are reached, expensive tort claims for noneconomic loss. Moreover, automatic payment provisions often serve to subsidize tort claimants and thereby to facilitate the bringing of tort claims.⁷

1. This Article is an expansion of a previous article by the same authors, except for Daniel Kaiser, entitled *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993) [hereinafter O'Connell et al.]; both Articles focus on estimating the cost savings resulting from adoption of the "choice plan." Both this work and our previous article make use of earlier data and estimates prepared and published by the RAND Corporation. See STEPHEN J. CARROLL ET AL., NO FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS (1991); STEPHEN J. CARROLL & JAMES S. KAKALIK, NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE (1991).

2. See CARROLL & KAKALIK, *supra* note 1, at vii; JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE 114-15 (1987). For more recent data, see INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS (1994).

3. For purposes of this Article, noneconomic damages refer mainly to pain and suffering.

4. CARROLL & KAKALIK, *supra* note 1, at vii; O'CONNELL & KELLY, *supra* note 2, at 118.

5. O'CONNELL & KELLY, *supra* note 2, at 120.

6. See *infra* Appendix B for the terms of a draft bill implementing this proposal. For a journalistic discussion of the bill and the justification therefore, see Trevor Armbrister, *This Could Slash Your Car Insurance Bill*, READER'S DIGEST, Feb., 1995, at 181.

7. O'CONNELL & KELLY, *supra* note 2, at 120. For a further discussion of the arguable subsidy effect afforded tort claims by PIP benefits, see *id.*; STEPHEN CARROLL & ALLAN ABRAHAMSE, THE COSTS OF EXCESSIVE CLAIMING FOR AUTOMOBILE PERSONAL INJURIES (forthcoming 1995); Jeffrey O'Connell & Robert Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 70-72 (1986). For a discussion of the mutually inflationary effect of health and disability insurance and liability insurance, see Jeffrey O'Connell, *Reforming Both Liability and Health Insurance*, 3 KAN. J.L. & PUB. POL'Y 106 (1993).

This new type of reform would give motorists the *option* of foregoing claims for noneconomic loss, without forcing them to do so.⁸ Thus, motorists would be given the option of purchasing PIP coverages⁹ at the financial responsibility level required by state law for personal injury liability.¹⁰ Persons electing such PIP coverage could neither sue nor be sued for pain and suffering when involved in accidents with others whether the latter had elected PIP coverage or not. However, PIP motorists could claim in tort for economic loss in excess of their PIP coverage against such other motorists.¹¹ An exception for both PIP payment and exemptions from tort liability for noneconomic loss arises when motorists' drug or alcohol abuse causes the injury. In that event, no PIP payment would be due to substance abusing motorists, nor would any restriction on the right to sue them in tort apply.¹²

As to accidents between PIP insureds and those electing to stay under the tort system, tort insureds would make a claim against their own insurer for economic and noneconomic loss—under coverage termed “tort maintenance coverage”—just as they do today under uninsured motorists' coverage.¹³ Claims for economic loss in excess of one's own tort maintenance coverage would be allowed against PIP insureds. In accidents between tort liability insureds, the current common-law system would apply without change.

94); Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. ___ (forthcoming March 1995); Jeffrey O'Connell & Michael Horowitz, *The Lawyer Will See You Now: Health Reform's Tort Crisis*, WASH. POST, June 13, 1993, at C3.

8. The Bush administration, at the urging of Michael Horowitz and Jeffrey O'Connell, based on an article by O'Connell and Joost, *supra* note 7, proposed a federal statute promulgating this type of auto insurance. Peter Passell, *Bush's Bold Plan for Car Insurance*, N.Y. TIMES, Oct. 17, 1992, at 41.

9. Throughout this discussion, we adopt the following terminology: payments without reference to fault are referred to as “PIP,” a popular acronym standing for personal injury protection or personal protection insurance. See *infra* note 2 to Appendix B.

10. See O'Connell & Joost, *supra* note 7, at 63, 77-82. For example, Maryland requires \$20,000 for personal injury liability. For application of the reform to states already having no-fault laws, see *id.* at 77-82.

11. Passell, *supra* note 8, at 41. Note that just as one can opt to buy more liability insurance than financial responsibility limits mandate, so too could one opt to buy more PIP coverage than financial responsibility limits mandate. But see *infra* note 1 to Appendix A.

12. Passell, *supra* note 8, at 41. RAND's cost estimates in this study do not take account of either provision as to drug or alcohol abuse because of the lack of sufficiently precise figures in its data bank on drunken or drugged driving. See CARROLL ET AL., *supra* note 1, at 13, 49-59 (explaining sources of data). But note that the costs of such motorists remaining liable in tort will be offset, to a greater or lesser extent, by the savings from not paying PIP benefits to them.

13. O'Connell et al., *supra* note 1, at 1026 & n.48. For an explanation of uninsured motorist insurance coverage, see *id.* at 1028 n.55.

PIP coverage would be in excess of all collateral sources¹⁴ and payable periodically. When injured motorists pursue claims for economic loss in excess of either PIP or tort maintenance coverages, a reasonable attorney's fee, in addition to economic loss, would be recoverable.¹⁵ For purposes of the cost study in this Article, we assume no change would be made in the law applicable to property damage.¹⁶

II. ESTIMATING THE EFFECTS OF THE CHOICE PLAN

A. *General Approach*

Our objective here is to go much further than our earlier Article. Here we estimate the effect of the choice plan on the costs of personal, private passenger auto insurance¹⁷ in every state currently without a PIP plan limiting recovery for noneconomic losses. Not only do we here estimate more precisely the percentage reductions in premiums for motorists choosing the new coverage, but we also compute the anticipated dollar savings as well.¹⁸ As in our earlier study focusing on the effects of the choice plan in the costs of personal auto insurance to insured motorists,¹⁹ we focus here on the effects of the choice plan on the amount each insured motorist must be charged on average to defray the costs of compensating auto accident victims. As used here, compensation costs include all the costs auto insurers incur in compensating auto accident victims, including both compensation paid to accident victims from all forms of auto insurance plus all transaction costs incurred in making such payments.²⁰ We here first esti-

14. *But see infra* notes 39-40 and accompanying text.

15. The recovery of attorney's fees is necessary because attorney's fees today normally are paid out of damage awards for pain and suffering; thus, a regime not paying for pain and suffering calls for an alternate source for such payment. Pain and suffering damages are "a rough measure of the plaintiff's attorney fees." CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 528 n.21 (1986).

16. For an explanation of the rationale for excluding property damage from no-fault coverage, see ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 280-81 (1965). For a relatively minor change dealing with car damage in the "choice" bill proposed herein, but not taken into account in this cost study, see *infra* Appendix B, subsection 14f.

17. Although our analysis examines only personal auto insurance, this plan would likely have an even more favorable impact on insurance costs for commercial vehicles because the liability exposure of large commercial vehicles is even greater than that for private passenger vehicles. Jeffrey O'Connell & Robert H. Joost, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 *OHIO ST. L.J.* 947, 968 n.74 (1990).

18. See Table 1, *infra*, Col. 3 and Appendix A, Tree Charts.

19. O'Connell et al., *supra* note 1, at 1027-29.

20. Under traditional tort law, claimants must pay their legal fees and costs out of any compensation they receive.

mate what auto insurers would have to charge the average insured motorist to recover the costs the insurers incur in compensating accident victims under all coverages under the traditional tort system. We then develop corresponding estimates for motorists who elect to remain in the tort system and for motorists who elect PIP coverage under the choice plan. We next compare these estimates to determine how the adoption of the choice plan would affect the cost of auto insurance to motorists, depending on their insurance status under the choice plan.

Under the traditional tort system, motorists can purchase several different personal injury coverages—Bodily Injury (BI), Uninsured Motorist (UM) including Underinsured Motorist (UIM), and Medical Payments (MedPay). Accordingly, under the tort system, insured motorists must bear the sum of the compensation costs of each of those coverages. We estimate the compensation cost of the traditional tort system for the average insured motorist as the sum of what insurers pay out plus the associated transaction costs under all the above coverages, divided by the total number of insured motorists. Motorists who are uninsured, of course, bear none of the costs of auto insurance.

Under the choice plan, it will be recalled, motorists may remain in the tort system, elect PIP coverage, or illegally remain uninsured. Those who remain in the tort system must purchase tort maintenance coverage, in addition to BI, and possibly UM and MedPay. Following the pattern set forth in the foregoing paragraph, we estimate the average compensation costs for tort-insured motorists under the choice plan as the sum of what auto insurers pay injured people plus the associated transaction costs under all coverages on behalf of tort-insured motorists, divided by the total number of tort-insured motorists. Note that the average compensation costs for tort-insured motorists include the costs insurers incur on their behalf in providing compensation under tort liability coverages—BI, UM, and tort maintenance—and any MedPay coverage.

Motorists who elect PIP coverage under the choice plan are not limited to purchasing PIP. PIP-insured motorists also may purchase BI to cover liability claims brought against them for losses in excess of PIP or tort maintenance policy limits. Following the above pattern, we estimate the average compensation costs for PIP-insured motorists as the sum of the costs auto insurers incur on behalf of motorists who elect PIP for both their PIP and their BI coverages, divided by the number of PIP insureds. Note that this average equals the costs insurers incur on behalf of PIP insureds in providing compensation under both their PIP coverage and their BI coverage. As was the case under

the traditional tort system, people who go uninsured under the choice plan bear none of the costs of compensating auto accident victims.²¹

We neglect the many other factors, such as insurers' overhead, profit margins and investment income, that also affect insurance premiums.²² However, compensation costs are a major component of insurance premiums. In the long run, we expect that the effects of the choice plan on insurance premiums will be similar in both direction and order of magnitude to its effects on compensation costs.²³

B. *The Results*

The effects of the choice plan on premiums charged to particular drivers will vary with such factors as the coverages they buy, their policy limits, the insurer they choose, the mileage they drive, their location within the state, and, of greater significance under the reform than under a tort law, the type of car they drive. On this last point, the first-party character of the choice plan allows insurers to calibrate rates on the basis of the crash-worthy features of their insureds' vehicles, thereby creating a market mechanism to enhance auto safety. The proposal thus replaces today's third-party system under which the obligation of insurers to pay those who claim against their insureds makes it unfeasible to fix rates on the basis of the crash-worthy features of their own insureds' autos.²⁴ Keeping such variables in mind, our estimates are meant only to indicate the general nature of cost effects averaged over all drivers.

Granted these caveats, the savings we estimate for motorists who choose PIP turn out to be very substantial. At the same time, however, costs for motorists who elect to remain in tort under the choice plan will be only marginally affected. Table 1 presents the costs of private

21. For more on RAND's methodology, see O'Connell et al., *supra* note 1, at 1054-59.

22. See CARROLL & KAKALIK, *supra* note 1, at 16-17 (noting the several factors affecting insurance premiums); see also U.S. DEP'T OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS 67 (1985) (stating that the most important factor in determining insurance premiums is the frequency and severity of the claimed loss).

23. See CARROLL & KAKALIK, *supra* note 1, at 16 (stating that reducing injury compensation costs should lead to lower premiums because they are a large amount of overall insurance costs). We thus focus this Article not on total premiums, but rather only on some of the costs which contribute to total premiums: mainly, the costs of paying losses, which constitute approximately three quarters of automobile insurance premiums. In effect, costs for paying losses are the equivalent of the "pure premium" for personal injury—pure premium being that portion of premium needed to pay losses—thereby excluding expenses for marketing and other administrative costs. See Table 2, *infra*.

24. See O'Connell et al., *supra* note 1, at 1040-41. But see Warren Brown, *Air Bag Aftermath: The Device Saves Lives, But Socks Insurance Firms as Medical Costs Rise*, WASH. POST, Mar. 21, 1993, at H1 (indicating that while air bags save lives, they may cause insurers higher costs in payments for surviving victims' medical and rehabilitation expenses).

TABLE 1: TOTAL PREMIUM SAVINGS UNDER PIP

State	System	(1)	(2)	(3)
		Total premium savings for motorists with <i>only</i> mandatory coverage who switch to PIP* (%)	Total premium savings for <i>all</i> motorists who switch to PIP* (%)	Total dollar savings if all motorists switch (\$ millions)
AL	Tort	37.0%	18.8%	\$171
AK	Tort	24.2	15.0	24
AZ	Tort	52.6	36.9	504
AR	Add-on	43.5	25.3	162
CA	Tort	51.7	33.5	3,257
DE	Add-on	51.0	36.2	107
ID	Tort	38.9	23.5	57
IL	Tort	42.0	23.2	742
IN	Tort	43.2	26.0	431
IA	Tort	50.1	28.0	192
LA	Tort	59.6	40.8	500
ME	Tort	50.6	30.6	112
MD	Add-on	54.9	36.9	635
MS	Tort	46.1	26.2	143
MO	Tort	42.0	24.5	372
MT	Tort	51.6	29.9	62
NE	Tort	38.9	21.6	90
NV	Tort	53.5	36.0	176
NH	Tort	43.4	26.6	102
NM	Tort	49.3	31.1	147
NC	Tort	44.8	30.1	616
OH	Tort	47.8	28.9	848
OK	Tort	47.5	27.9	247
OR	Add-on	43.8	29.4	260
RI	Tort	41.5	27.3	94
SC	Add-on	53.0	36.0	376
SD	Add-on	51.5	28.4	45
TN	Tort	37.3	20.1	238
TX	Add-on	51.6	33.6	1,485
VT	Tort	42.2	22.8	36
VA	Add-on	48.6	32.4	590
WA	Add-on	51.8	35.3	561
WV	Tort	56.1	35.4	207
WI	Tort	51.4	30.5	414
WY	Tort	46.1	22.7	25
All States		48.8%	30.6%	\$14,028

* Assumes 50% switch

passenger auto insurance (excluding commercial vehicles), for every state currently operating under either the tort system alone or the tort system with "add-on" provisions.²⁵ No-fault states that restrict the

25. U.S. DEP'T OF TRANSPORTATION, *supra* note 22, at 41. "Add-on" plans are similar to no-fault plans in that an injured party can be compensated from his or her own insurer for economic losses without regard to anyone's fault or lack thereof, but without limiting the

right to sue in tort unless losses are incurred above defined thresholds are, as indicated above, not included.

As can be seen from Table 1, PIP buyers would realize significant savings on personal auto insurance premiums. For insureds who switch to PIP, savings of over 30% on total premiums would be achieved nationally.²⁶ Indeed, PIP buyers would save on the order of 20-40% in state after state.²⁷ Using Maryland as an example of an Eastern "add-on" state, and cumulating the totals for both those who do and do not purchase collision and comprehensive coverages,²⁸ we estimate savings of 36.9% in total premiums for those who choose PIP,²⁹ and savings of 54.9% for those motorists who buy only mandatory coverages.³⁰ The latter group includes generally lower income motorists without collision and comprehensive coverages. These savings assume that 50% of insureds switch to PIP. If 100% of insureds switch to PIP, the percentage savings remain pretty much the same with a total of \$635 million in premium savings achieved in Maryland.³¹ Similarly, using California as an example of a large West Coast tort state, we estimate total premium savings for PIP buyers of 33.5%,³² and savings of 51.7% for lower income drivers,³³ again based on 50% of all insureds switching to PIP. If 100% switch, a total of almost \$3.3 billion in annual premium savings would be achieved.³⁴ As a further example, this time from a medium-sized Midwest tort state, Wisconsin, we estimate total savings for those who choose PIP of 30.5%³⁵ and savings of 51.4% for those purchasing only mandatory coverages,³⁶ again on the basis of 50% switching to PIP. If 100%

right to claim in tort for noneconomic losses. As to commercial vehicles, *see supra* note 17. *See also supra* note 10.

26. Table 1, *supra*, Row All States, Col. 2 (the table assumes 50% of motorists will switch to PIP).

27. Table 1, *supra*, Col. 2.

28. Collision and comprehensive are complementary physical damage coverages payable by one's own insurer without regard to fault. KEETON & O'CONNELL, *supra* note 16, at 572. Collision covers damage to one's car resulting from collision with any other object or upset. Comprehensive is a catch-all provision affording coverage for damage to one's car caused by a variety of perils other than collision or upset; for example, theft, falling objects, fire, wind, hail, glass breakage, and vandalism. *Id.*

29. Table 2, *infra*, Row Md., Col. 2.

30. *Id.*, Col. 1. As to the percentage savings if 100% switch, see Table 3, *infra*, Cols. 5 and 6; *see also infra* note 1 to Appendix A.

31. Table 2, *infra*, Row Md., Col. 3.

32. *Id.*, Row Ca., Col. 2.

33. *Id.*, Col. 1.

34. *Id.*, Col. 3.

35. *Id.*, Row Wi., Col. 2.

36. *Id.*, Col. 1.

switch to PIP, Wisconsin motorists would yield \$414 million in annual premium savings.³⁷

Savings in the 20-40% range for total auto insurance premiums are, of course, remarkably high—especially because they stem from savings in the 55-70% range for personal injury premiums.³⁸ Yet such estimates are arguably conservative. For example, because of data limitations,³⁹ we did not consider the effect of making PIP coverage excess to private health insurance benefits, publicly mandated sources such as Medicare, Medicaid, workers' compensation, and private sick leave or disability coverages for wage loss.⁴⁰ Furthermore, premium reductions based on owning safer cars—brought about by the proposal's first party insurance character—should yield lower injury rates per accident. In addition, because motorists will have less incentive to incur medical bills and wage loss to inflate claims for pain and suffering,⁴¹ those who opt for PIP will have less incentive to pursue personal injury claims or to utilize medical treatment. However, RAND's estimates do not include this last factor in their primary findings, because its data lacks a means of precisely weighing reductions resulting from this drop in incentives.⁴²

C. *Effects on the Poor*

The especially disastrous effects of high auto insurance rates on the poor can hardly be overemphasized. For example, a recent editorial in an African-American Philadelphia newspaper illustrates the problem in terms which apply to most urban areas in the United States:

If you just listened to the candidates jocking [sic] for election in November, you would easily think that the only *issue* of importance is crime because all the candidates talk about is who will be the "toughest" on criminals.

37. *Id.*, Col. 3.

38. See Table 2, *infra*, Cols. 5 and 7. Note that we assume no change in premiums for losses to property. See *supra* note 16 and accompanying text.

39. See O'Connell et al., *supra* note 1, at 1054-62.

40. See *supra* text accompanying note 14.

41. O'Connell & Joost, *supra* note 7, at 70-72.

42. See CARROLL ET AL., *supra* note 1, at 16-17. However, RAND has detailed alternate hypotheses, each with a benefit level of \$15,000 and a strong verbal threshold, wherein they assume the elimination of payment for pain and suffering will reduce both the size and number of claims. *Id.* at 224-31. Under this assumption, insurers in tort states that change to a no-fault system would realize an additional 4% reduction in costs over and above the estimated 22% reduction, assuming the size and number of claims remains the same. *Id.*

There is one issue that impacts more Philadelphians than all of the crimes committed in any given month and that is the (criminal) auto insurance rates Philadelphians are *forced* to pay simply because they live within the city.

Because state law mandates that motor vehicle owners must have insurance to drive those vehicles and because many Philadelphians are required to pay auto insurance rates far in excess of the value of the vehicles they drive, many Philadelphians are committing a crime because they are driving without the legally required auto insurance.

Curiously, none of these tough on crime candidates is addressing the issue of usurious auto insurance rates which has turned thousands of otherwise law abiding Philadelphians into criminals. Many city residents see a better option in becoming petty criminals than impoverishing themselves by paying the highest auto insurance rates in the nation.

Candidates need to get real and use their clout to assist reforming auto insurance laws which force decent citizens to become criminals.⁴³

As Table 1 indicates, savings under the choice plan mirror progressive taxation in that its premium reductions will be proportionately higher for the poor. This results from freeing PIP insureds from any obligation to buy supplementary BI liability insurance—a freedom that those having few or no assets to protect will embrace. In this regard, RAND's estimates are again conservative. They are based on the premise that anyone choosing PIP coverage would also purchase supplementary BI coverage at the same BI limits at which they had bought under the traditional tort system. For former tort insureds who had bought liability coverage to protect their assets, that assumption would be correct. But many low income motorists with no or few assets previously bought BI coverage only to comply with their state's financial responsibility laws. It is unlikely that these motorists would purchase supplementary BI coverage under a choice system that gives them the option not to do so.⁴⁴

Thus, it is useful to note the significant positive impact of the choice plan on the fragile financial status of low income motorists. Because earners with no or low income can little afford discretionary spending, each dollar of savings on auto insurance can be spent directly on necessities like food and shelter that otherwise were sacrificed to pay for compulsory auto insurance. Currently, if less affluent

43. PHILADELPHIA TRIBUNE, Oct. 21, 1994, at 6A.

44. See O'Connell et al., *supra* note 1, at 1058 n.90.

motorists insure at all, they may spend over thirty percent⁴⁵ of their annual household income on auto insurance.⁴⁶ Indeed, many less affluent motorists are in fact forced to delay buying basic necessities in order to pay their premiums.⁴⁷ For example, a recent study of low income insured motorists of Maricopa County, Arizona, found that forty-four percent were forced at some point to postpone buying food in order to pay their auto insurance premium,⁴⁸ forcing them to choose between putting food on the table or complying with the law.

In addition to consuming an exorbitant amount of a less affluent motorist's income, the relatively prohibitive cost of auto insurance potentially has other dire effects. All states have some form of a mandatory coverage or financial responsibility law. Financially strapped individuals who rely on their vehicles for transportation to work may be forced to give up their driving privileges because of their inability to afford auto insurance.⁴⁹ The loss of driving privileges may, in turn, result in the loss of employment and propel poorer motorists into further impoverishment and dependency on publicly funded support. Even small savings in premiums may provide the margin the less affluent need to keep bills paid. Thus, the large premium savings estimated by RAND under the PIP plan would increase the percentage of household income available to the less affluent for basic needs.

Moreover, the less affluent not only pay a huge percentage of their household income for auto insurance, but also may pay significantly more for insurance in absolute terms. Many poorer motorists reside in urban areas where average personal auto insurance premiums are often more than twice as high as premiums of suburban drivers.⁵⁰ For example, the average annual premium charged in 1994 by one insurer for minimum liability coverage in Los Angeles, California was \$811, while the same coverage in Northridge, California was only

45. ROBERT L. MARIL, *THE IMPACT OF MANDATORY AUTO INSURANCE UPON LOW INCOME RESIDENTS OF MARICOPA COUNTY, ARIZONA* 8-9, 11 (1993). Robert Maril is an associate professor in the sociology department at Oklahoma State University.

46. See Gerald D. Stephens, *Please, No More Complaints*, BEST'S REVIEW: PROP./CAS. ED., Jan. 1991, at 61, 83 (predicting that the number of uninsured motorists will exceed 75% if premiums continue to rise, and noting the built-in unfairness of the tort system when negligent defendants have no insurance or assets to satisfy judgments against them). See also *infra* note 18 to Appendix B.

47. MARIL, *supra* note 45, at 11.

48. *Id.*

49. *But see* U.S. DEP'T OF TRANSPORTATION, *supra* note 22, at 120 (rejecting this argument on the basis that insurance premiums are a small expense compared to the expense of an automobile. But in rebuttal to that, compare the often nominal cost of very old, but still operative, automobiles with still very high liability insurance costs for such autos.).

50. *Id.* at 67.

\$578.⁵¹ Similarly, in Milwaukee, Wisconsin, average annual minimum liability premiums in 1994 were \$367, but only \$213 in Waukesha.⁵² Premium savings in the 50% range can have an especially substantial effect on the less affluent in both absolute dollars and percentage of household income saved. Those savings, in turn, can affect substantially the overall standard of living of the less affluent.

In addition, PIP coverage, which provides for more rapid benefit payments than does today's more adversarial tort system, is especially important to low income drivers. Less affluent drivers, who lack independent resources to cover the cost of their accidents, are often compelled under tort law to accept low settlements out of their need for immediate cash awards of even modest dimensions. An insurance system based on proof of injury, rather than the harder-to-prove negligence of the putative injurer, is thus highly progressive in character.

Finally, on the subject of the poor, this proposal also represents another corrective to the regressive nature of today's third-party auto insurance system. Under today's third-party auto insurance, your insurance company, in rating you, only takes account of the likelihood that you will be involved in an accident. It does not take account of your likely recovery once an accident occurs. This is so because your insurance company will pay not you but rather the unknown person you may injure in a future accident. As a result, the poor (along with the young) are charged very high rates, despite the fact that when they are in accidents, their losses are comparatively small. They suffer less wage loss compared to others, for example. Under present auto insurance, it is as though everyone was charged for fire insurance solely on the basis of how likely it was that a fire would start on one's property, with no consideration being given to the value of the house. Thus, under auto insurance, the poor, along with those with middle incomes, have to pay into the insurance pool the same as the rich for a given level of coverage, even though they stand to draw much less than the rich from the pool. But with first-party insurance, all of a sudden the less affluent would at least get credit for the advantageous aspect of their risks that their losses are likely to be smaller. Keep in mind, too, that it is the poor who seem least likely to pursue a tort remedy and who therefore generally derive the least benefit from the tort system. In the words of H. Laurence Ross, a sociologist who studied the tort liability system:

51. Data supplied by State Farm Insurance Companies (on file with author).

52. *Id.*

[T]ort law in action may . . . be termed inequitable. It is responsive to a wide variety of influences that are not defined as legitimate by common standards of equity. The interviews and observations I conducted convinced me that the negotiated settlement rewards the sophisticated claimant and penalizes the inexperienced, the naive, the simple, and the indifferent. Translating these terms into social statutes, I believe that the settlement produces relatively more for the affluent, the educated, the white, and the city-dweller. It penalizes the poor, the uneducated, the [African-American and the rural dweller]⁵³

III. DETERRENCE

Will substitution of PIP coverage for traditional tort liability lessen the deterrent effect that traditional tort liability has on unsafe conduct, thereby increasing costs? RAND's calculations assume no such effect. In support of that conclusion, substituting PIP for tort liability will create offsetting incentives.⁵⁴ For example, negligent motorists will absorb or "internalize" less of their loss than under traditional tort law because they recover even if they cause accidents and

53. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 241-42 (1970). Consider the following table from the most comprehensive study of payment to auto accident victims, done in the 1960s:

Table 3.25. Relationship of Family Income to Serious Injury and Fatality [Automobile] Cases, to Retention of Counsel, and to [Compensation] . . . Received.

(1) Family Income	(2) Percent Retaining Counsel	(3) Ratio of Net Reparations to Economic Loss
Under \$5,000	30.0	0.38
\$5,000 - 9,999	36.7	0.52
\$10,000 and over	41.9	0.61
Total	35.0	0.49

U.S. DEP'T OF TRANSP., *ECONOMIC CONSEQUENCES OF AUTOMOBILE INJURIES* 54 (1970) (Automobile Insurance and Compensation Study). The compensation received figures included both tort and nontort sources, with "[a]bout one-third' of recovery [for bodily injury and property damage] from tort." *Id.* at 2.

54. See Richard A. Epstein, *Automobile No-Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769, 785 (1980) (arguing that "[a]ny shift in the various rules of liability . . . will create *offsetting* incentives"). See also O'Connell et al., *supra* note 1, at 1040-41 (arguing in accord with the text at *supra* note 24 that under first party insurance, such as PIP, insurers can create incentives when they offer lower premiums for safer cars because the savings accrue to their insureds and not to third parties). See generally O'Connell & Joost, *supra* note 7, at 87 n.72 (discussing the effect of a choice system on unsafe driving). But see Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 393-97 (1994).

they will not be liable for pain and suffering. Conversely, those same motorists will internalize *more* costs because their insurers pay for losses even though they were not at fault and because they cannot recover for their own pain and suffering.

Quite apart from the effects of insurance in muting motorists' responsibility for tortious conduct under traditional tort liability, unsafe driving is not deterred by a single influence; rather it is affected by a combination of criminal, civil, and tort sanctions, and, arguably above all, by one's interest in preservation of one's own body and property.⁵⁵ Thus, under PIP, all elements of deterrence but one remain unchanged, and even the influence of civil sanctions are transformed but not eliminated. Finally, as indicated above, by reducing the relative cost of driving safer cars the plan should, at the margin, necessarily increase the use of such safer cars. Thus, the plan should generate affirmative market incentives that should, in turn, enhance the overall safety of driving automobiles.⁵⁶

IV. CONCLUSION

In sum, the merits of allowing motorists to opt out of payment for pain and suffering and other noneconomic loss, in return for lower costs and receipt of automatic payment for economic loss, are worthy of consideration in every state.⁵⁷

55. KEETON & O'CONNELL, *supra* note 16, at 373 & n.31.

56. See *supra* note 24 and accompanying text.

57. For a study echoing points made herein, emphasizing the necessity of combining PIP payments with the concomitant elimination of claims for pain and suffering as a means of controlling auto insurance costs, see J. David Cummins & Sharon Tennyson, *Controlling Automobile Insurance Costs*, 6 J. ECON. PERSP. 95 (1992); see also Kevin Eastman et al., *The New York Verbal Threshold for Third-Party Liability under No-fault Insurance*, 12 J. INS. REG. 369 (1994).

Note that the choice device could also be adapted in a state already having no-fault insurance by providing for choice of waiver of claims for noneconomic loss applicable when the tort threshold is exceeded. A forthcoming article by the authors will replicate the study contained herein with cost estimates for no-fault states making this change, coupled with draft bill language. See also O'Connell & Joost, *supra* note 7, at 80-81; Jeffrey O'Connell, *A Model Bill (and Commentary Thereon) Allowing Choice of Coverage Under Michigan No-Fault Auto Insurance Law*, 17 J. LEGIS. 155 (1991).

APPENDIX A: TABLES AND TREE CHARTS

What follows is further documentation of RAND data, supporting and expanding on the foregoing material, with scenarios for 50% and 100% of motorists choosing PIP.¹ The 100% assumption obviously applies to both a choice plan and a mandatory plan. The following data includes personal auto insurance premium data for all 35 states without no-fault laws, with the three states mentioned—Maryland, California, and Wisconsin—each highlighted in detail.

Included for Maryland, California and Wisconsin are tree charts that illustrate how we computed the data, accompanied by explanatory notes for each figure on the tree charts. Also included are additional tables providing more of both the input and output figures for and from the tree charts. By using either the Maryland, California or Wisconsin example, corresponding data, including tree charts and tables, can be readily formulated for each of the remaining 32 listed states.

1. It will be noted in Table 2, *infra* (Cols. (5) and (7)) and Table 3, *infra* (Cols. (1)(2)(5) and (6)) that the savings for PIP insureds are slightly higher with 50% of motorists PIP insureds than with 100%. The reason is bottomed on the fact that a PIP insured must pay the economic loss of the person he tortiously injures above that person's PIP or tort maintenance coverage. See *supra* main text accompanying notes 11-13. With that premise, RAND assumes that motorists who stay in the tort system will buy tort maintenance coverage at the same limits that they buy coverage under the present tort system, with many motorists today buying more than the state financial responsibility limits. On the other hand, RAND assumes that motorists will buy only the minimum PIP insurance limits—which is consistent with what PIP insureds do today in no-fault states. Thus the exposure of PIP insureds to tort payment for economic loss above their victims' first-party limits would be somewhat higher as more motorists are insured for PIP.

TABLE 2: TREE CHART INPUT DATA

(1)*	(2)*	(3)*	(4)	(5)	(6)	(7)	
State	Total Premium (\$ millions)	Collision and Comprehensive Premium Total (\$ millions)	Liability Premium Total (\$ millions)	Percent of column (3) that is Personal Injury (PI) Premium	PI premium savings for switchers if 50% switch	PI premium savings for stayers if 50% switch	PI premium savings if 100% switch**
AL	\$ 1,039	\$ 511	\$ 528	69.0%	53.6%	-2.4%	47.0%
AK	189	72	117	71.0	34.1	-4.7	28.8
AZ	1,410	420	990	82.0	64.1	0.2	62.1
AR	655	274	381	67.0	65.0	4.2	63.5
CA	9,822	3,463	6,359	81.0	63.9	2.0	63.2
DE	322	93	229	79.0	64.5	-4.9	59.4
ID	251	99	152	71.0	54.7	2.6	52.4
IL	3,348	1,495	1,853	71.0	59.1	3.2	56.4
IN	1,685	670	1,015	66.0	65.5	5.1	64.4
IA	740	326	414	71.0	70.6	-3.4	65.3
LA	1,251	395	856	82.0	72.7	6.7	71.3
ME	370	146	224	70.0	72.3	3.3	71.6
MD	1,922	630	1,292	78.0	70.4	-3.9	63.0
MS	597	257	340	73.0	63.2	-3.5	57.4
MO	1,532	641	891	65.0	64.7	5.1	64.2
MT	214	90	124	72.0	71.7	2.7	69.0
NE	440	196	244	70.0	55.6	3.3	53.0
NV	502	164	338	83.0	64.4	2.8	62.7
NH	435	169	266	72.0	60.3	-4.8	53.0
NM	478	176	302	78.0	63.2	4.5	62.3
NC	2,076	683	1,393	71.0	63.1	6.7	62.3
OH	3,134	1,238	1,896	72.0	66.4	-1.2	62.1
OK	932	385	547	71.0	67.0	0.3	63.7
OR	994	327	667	77.0	57.0	-3.7	50.6
RI	400	137	263	78.0	53.2	-3.9	45.8
SC	1,207	388	819	72.0	73.7	-5.3	63.7
SD	167	75	92	74.0	69.6	1.8	65.9
TN	1,317	607	710	68.0	54.9	-0.1	49.3
TX	5,031	1,756	3,275	75.0	68.8	-3.1	60.5
VT	177	81	96	71.0	59.4	-3.4	53.5
VA	2,060	688	1,372	75.0	64.8	-3.6	57.4
WA	1,640	524	1,116	79.0	65.6	1.4	63.7
WV	603	222	381	78.0	71.9	2.5	69.5
WI	1,384	562	822	74.0	69.4	3.3	68.0
WY	116	59	57	72.0	64.1	1.8	60.6
All States	48,440	18,018	30,422	n/a	64.9	0.6	61.3

* National Association of Insurance Commissioners, December 1993

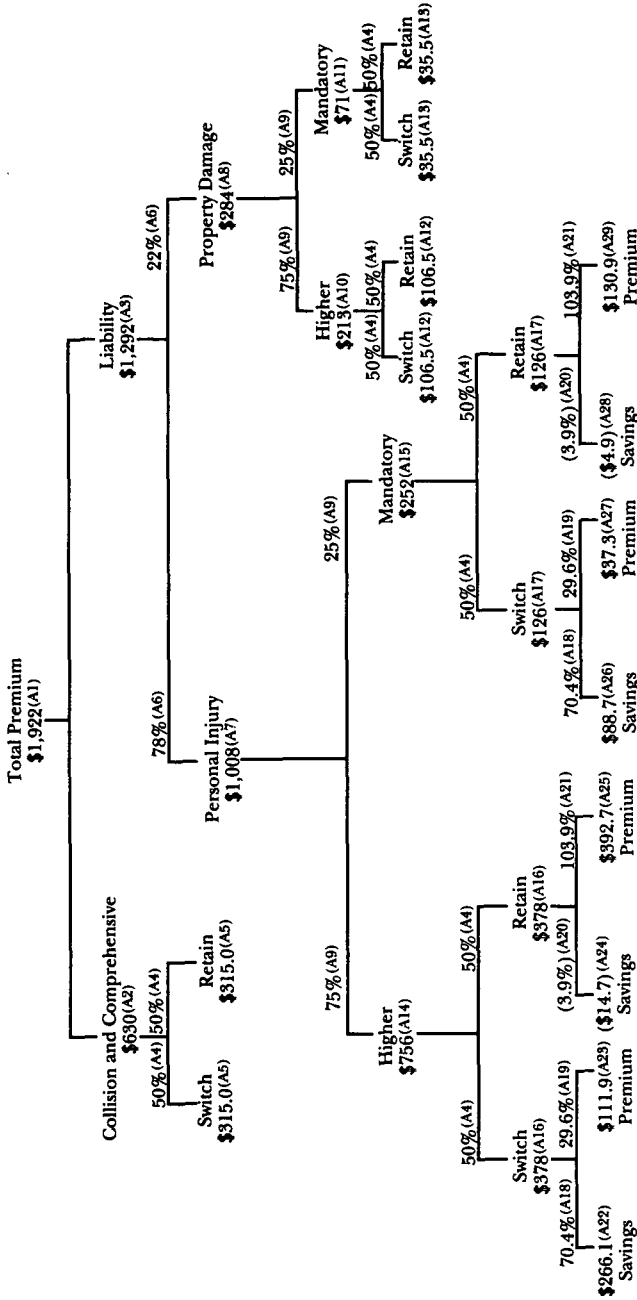
** See *supra* note 1 to Appendix A.

TABLE 3: TREE CHART OUTPUT DATA

State	(1)	(2)	(3)	(4)	(5)	(6)
	50% Switch to PIP				100% Switch to PIP*	
	% Total Premium Savings for Switchers		% Total Premium Savings for Stayers		% Total Premium Savings for Switchers	
	Mandatory Coverage	Higher Coverage	Mandatory Coverage	Higher Coverage	Mandatory Coverage	Higher Coverage
AL	37.0%	16.1%	-1.6%	-0.7%	32.4%	14.2%
AK	24.2	13.3	-3.3	-1.8	20.4	11.2
AZ	52.6	33.6	0.2	0.1	50.9	32.5
AR	43.5	22.2	2.8	1.4	42.6	21.7
CA	51.7	30.0	1.6	0.9	51.2	29.7
DE	51.0	33.0	-3.9	-2.5	46.9	30.4
ID	38.9	20.7	1.8	1.0	37.2	19.9
IL	42.0	20.2	2.3	1.1	40.1	19.3
IN	43.2	23.0	3.4	1.8	42.5	22.6
IA	50.1	24.4	-2.4	-1.2	46.3	22.6
LA	59.6	36.9	5.5	3.4	58.4	36.2
ME	50.6	27.0	2.3	1.2	50.1	26.8
MD	54.9	33.3	-3.1	-1.9	49.1	29.8
MS	46.1	22.9	-2.5	-1.3	41.9	20.8
MO	42.0	21.5	3.3	1.7	41.8	21.3
MT	51.6	26.2	1.9	1.0	49.7	25.2
NE	38.9	18.8	2.3	1.1	37.0	17.9
NV	53.5	32.5	2.3	1.4	52.0	31.6
NH	43.4	23.5	-3.5	-1.9	38.2	20.7
NM	49.3	27.7	3.5	2.0	48.6	27.4
NC	44.8	27.1	4.7	2.9	44.3	26.8
OH	47.8	25.6	-0.9	-0.5	44.7	23.9
OK	47.5	24.5	0.2	0.1	45.3	23.3
OR	43.8	26.5	-2.9	-1.7	39.0	23.6
RI	41.5	24.5	-3.0	-1.8	35.7	21.0
SC	53.0	32.5	-3.8	-2.4	45.9	28.1
SD	51.5	24.7	1.3	0.6	48.8	23.4
TN	37.3	17.5	-0.1	0.0	33.5	15.7
TX	51.6	30.1	-2.3	-1.4	45.3	26.4
VT	42.2	19.8	-2.4	-1.1	38.0	17.8
VA	48.6	29.1	-2.7	-1.6	43.0	25.8
WA	51.8	31.9	1.1	0.7	50.3	30.9
WV	56.1	31.6	2.0	1.1	54.2	30.5
WI	51.4	26.9	2.4	1.3	50.4	26.3
WY	46.1	19.4	1.3	0.6	43.6	18.4
All States	48.8	27.3	0.4	0.2	46.1	25.8

* See *supra* note 1 to Appendix A.

A. RELATIVE SAVINGS IN MARYLAND IF 50% SWITCH TO PIP AND 50% RETAIN TORT
(In Millions)



Savings for Drivers with Higher than Mandatory Coverage
 Switch to PIP ————— \$266.1(A22) + \$378(A16) + \$315(A5) = **\$959.6(A23)**
 Retain Tort ————— (\$14.7)(A24) + \$378(A16) + \$315(A5) = **\$678.8(A24)**

Savings for Drivers with Only Mandatory Coverage
 Switch to PIP ————— \$88.7(A26) + \$126(A17) + \$35.5(A13) = **\$250.2(A27)**
 Retain Tort ————— (\$4.9)(A28) + \$126(A17) + \$35.5(A13) = **\$156.6(A28)**

NOTES FOR TREE CHART A

Relative Savings in Maryland if 50% Switch

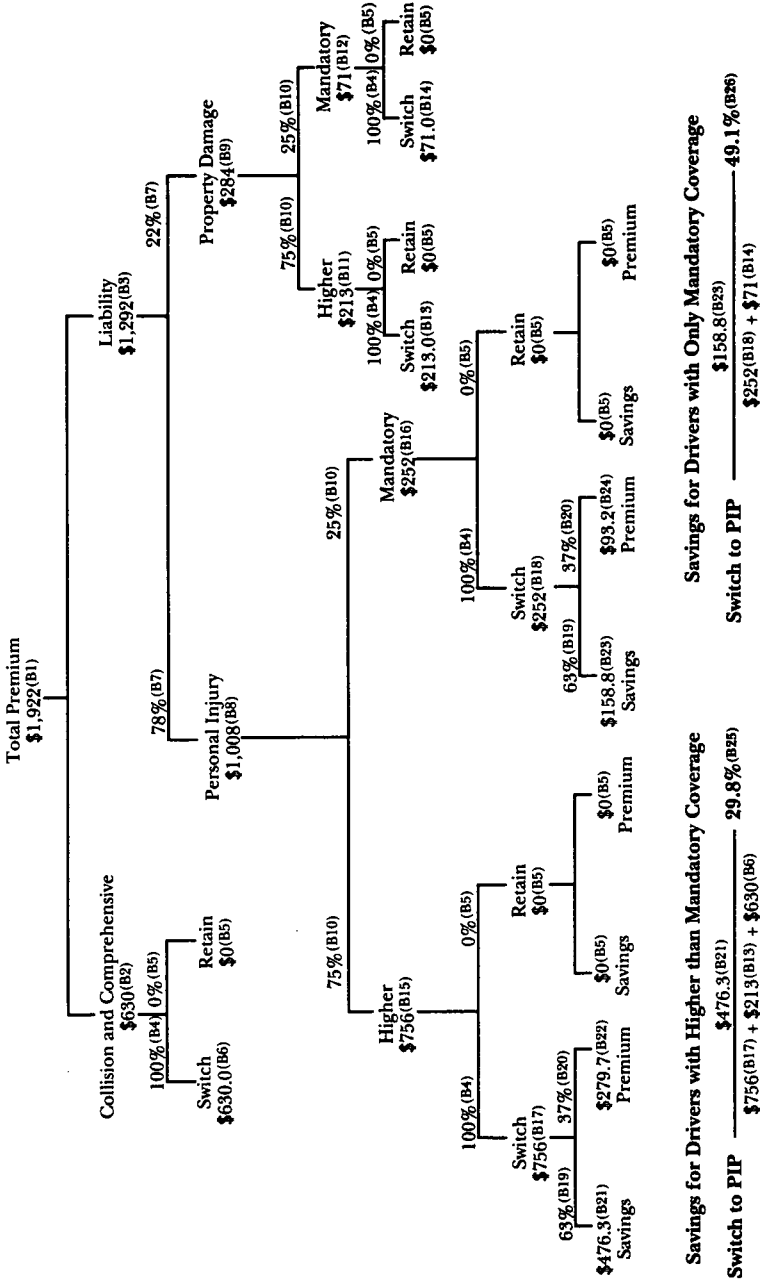
* All dollars figures are in millions

- A1. Total 1992 personal auto insurance premiums for Maryland: \$1,922. Table 2, Col. 1.
- A2. Total premiums for collision and comprehensive (CC) for Maryland: \$630. Table 2, Col. 2. Collision and comprehensive are complementary physical damage coverages. Collision covers automobile damage resulting from either collision with any other object or upset. Comprehensive is a catch-all provision covering for damage caused by a variety of perils other than collision or upset, such as theft, falling objects, fire, wind, hail, glass breakage, and vandalism.
- A3. Total liability premiums (personal injury (PI) plus property damage (PD) liability): \$1,292. Table 2, Col. 3.
- A4. The assumption here is that 50% of insured motorists will switch to PIP.
- A5. Total premiums for CC coverages for insured motorists who switch to PIP or retain tort: \$630, *supra* note A2, multiplied by 50%, *supra* note A4, equal \$315.
- A6. The ratio of PI liability premiums to property damage (PD) liability premiums is 78 to 22. *See* Table 2, Col. 4; 22 is the remaining percentage ($100\% - 78\% = 22\%$).
- A7. Total premiums for PI liability: \$1,292, *supra* note A3, multiplied by 78%, *supra* note A6, equals \$1008.
- A8. Total premiums for PD liability: \$1,292, *supra* note A3, multiplied by 22%, *supra* note A6, equals \$284.
- A9. RAND assumed that 75% of insured motorists carry higher than mandatory coverage and that 25% carry only mandatory coverage.
- A10. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$284, *supra* note A8, multiplied by 75%, *supra* note A9, equals \$213.
- A11. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$284, *supra* note A8, multiplied by 25%, *supra* note A9, equals \$71.
- A12. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage who either switch to PIP or retain tort: \$213, *supra* note A10, multiplied by 50%, *supra* note A4, equals \$106.5.

- A13. Total premiums for PD liability coverage for insured motorists with only mandatory coverage who either switch to PIP or retain tort: \$71, *supra* note A11, multiplied by 50%, *supra* note A4, equals \$35.5.
- A14. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$1008, *supra* note A7, multiplied by 75%, *supra* note A9, equals \$756.
- A15. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$1008, *supra* note A7, multiplied by 25%, *supra* note A9, equals \$252.
- A16. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP or retain tort: \$756, *supra* note A14, multiplied by 50%, *supra* note A4, equals \$378.
- A17. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who either switch to PIP or retain tort: \$252, *supra* note A15, multiplied by 50%, *supra* note A4, equals \$126.
- A18. Percentage of PI liability coverage premium savings for insured motorists who switch to PIP equals 70.4%. Table 2, Col. 5.
- A19. Total premium multiple for PI liability coverage for insured motorists who switch to PIP: 100% minus 70.4%, *supra* note A18, equals 29.6%.
- A20. Percentage of PI liability coverage premium savings for insured motorists who retain tort equals -3.9%. Table 2, Col. 6.
- A21. Total premium multiple for PI liability coverage for insured motorists who retain tort: 100% minus -3.9%, *supra* note A20, equals 103.9%.
- A22. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP: \$378, *supra* note A16, multiplied by 70.4%, *supra* note A18, equals \$266.1.
- A23. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP with higher than mandatory coverage: \$378, *supra* note A16, multiplied by 29.6%, *supra* note A19, equals \$111.9.
- A24. Total dollar savings available for PI liability coverage for motorists with higher than mandatory coverage who retain tort: \$378, *supra* note A16, multiplied by -3.9%, *supra* note A20, equals -\$14.7.
- A25. Total premiums for PI liability coverage for motorists with higher than mandatory coverage who retain tort with higher

- than mandatory coverage: \$378, *supra* note A16, multiplied by 103.9%, *supra* note A21, equals \$392.7.
- A26. Total dollar savings available for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$126, *supra* note A17, multiplied by 70.4%, *supra* note A18, equals \$88.7.
- A27. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$126, *supra* note A17, multiplied by 29.6%, *supra* note A19, equals \$37.3.
- A28. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage who retain tort with only mandatory coverage: \$126, *supra* note A17, multiplied by -3.9%, *supra* note A20, equals -\$4.9.
- A29. Total premiums for PI liability coverage for motorists with only mandatory coverage who retain tort: \$126, *supra* note A17, multiplied by 103.9%, *supra* note A21, equals \$130.9.
- A30. The total percentage of savings for insured motorists who switch to PIP with higher than mandatory coverage (including collision and comprehensive, PI liability, and PD liability coverages) equals 33.3%. Table 3, Col. 2.
- A31. The total percentage of savings for insured motorists who switch to PIP with only mandatory coverage equals 54.9%. Table 3, Col. 1.
- A32. The total percentage of savings for insured motorists who retain tort with higher than mandatory coverage equals -1.9%. Table 3, Col. 4.
- A33. The total percentage of savings for insured motorists who retain tort with only mandatory coverage equals -3.1%. Table 3, Col. 3.

B. RELATIVE SAVINGS IN MARYLAND IF 100% SWITCH TO PIP AND 0% RETAIN TORT
(In Millions)



NOTES FOR TREE CHART B

Relative Savings in Maryland if 100% Switch

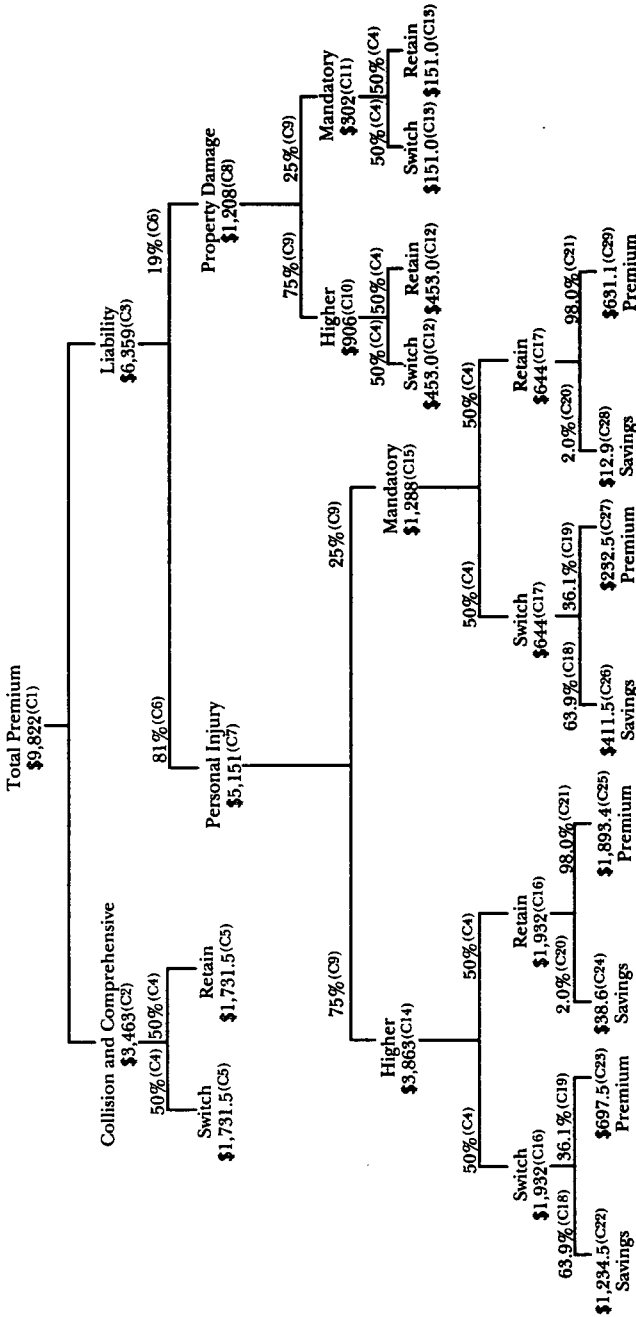
* All dollars figures are in millions

- B1. Total 1992 personal auto insurance premiums for Maryland: \$1,922. Table 2, Col. 1.
- B2. Total premiums for collision and comprehensive (CC) for Maryland: \$630. Table 2, Col. 2. *See supra* note A2.
- B3. Total liability premiums (personal injury (PI) plus property damage (PD) liability): \$1,292. Table 2, Col. 3.
- B4. The assumption here is that 100% of insured motorists will switch to PIP.
- B5. All figures on the tort branches will be zero because of the assumption that all insured motorists will switch to PIP—no insured motorists retain tort.
- B6. Total premiums for CC coverages for insured motorists: \$630, *supra* note B2, multiplied by 100%, *supra* note B4, equals \$630.
- B7. The ratio of PI liability premiums to PD liability premiums is 78 to 22. *See* Table 2, Col. 4; 22 is the remaining percentage (100% - 78% = 22%).
- B8. Total premiums for PI liability: \$1,292, *supra* note B3, multiplied by 78%, *supra* note B7, equals \$1,008.
- B9. Total premiums for PD liability: \$1,292, *supra* note B3, multiplied by 22%, *supra* note B7, equals \$284.
- B10. RAND assumed that 75% of insured motorists carry higher than mandatory coverage and that 25% carry only mandatory coverage for all states.
- B11. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$284, *supra* note B9, multiplied by 75%, *supra* note B10, equals \$213.
- B12. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$284, *supra* note B9, multiplied by 25%, *supra* note B10, equals \$71.
- B13. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage: \$213, *supra* note B11, multiplied by 100%, *supra* note B4, equals \$213.
- B14. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$71, *supra* note B12, multiplied by 100%, *supra* note B4, equals \$71.
- B15. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$1,008, *supra* note B8, multiplied by 75%, *supra* note B10, equals \$756.

- B16. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$1,008, *supra* note B8, multiplied by 25%, *supra* note B10, equals \$252.
- B17. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage where all insureds switch to PIP: \$756, *supra* note B15, multiplied by 100%, *supra* note B4, equals \$756.
- B18. Total premiums for PI liability coverage for insured motorists with only mandatory coverage where all insureds switch to PIP: \$252, *supra* note B16, multiplied by 100%, *supra* note B4, equals \$252.
- B19. Percentage of premium savings for PI liability coverage equals 63%. Table 2, Col. 7.
- B20. Total premium multiple for PI liability coverage for insured motorists: 100%, minus 63%, *supra* note B19, equals 37%.
- B21. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage: \$756, *supra* note B17, multiplied by 63%, *supra* note B19, equals \$476.3.
- B22. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$756, *supra* note B17, multiplied by 37%, *supra* note B20, equals \$279.7.
- B23. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage: \$252, *supra* note B18, multiplied by 63%, *supra* note B19, equals \$158.8.
- B24. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$252, *supra* note B18, multiplied by 37%, *supra* note B20, equals \$93.2.
- B25. The total percentage of savings for insured motorists with higher than mandatory coverage (including collision and comprehensive, PI liability, and PD liability coverages) equals 29.8%. Table 3, Col. 6.
- B26. The total percentage of savings for insured motorists with only mandatory coverage equals 49.1%. Table 3, Col. 5.

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C. RELATIVE SAVINGS IN CALIFORNIA IF 50% SWITCH TO PIP AND 50% RETAIN TORT
(In Millions)



Savings for Drivers with Higher than Mandatory Coverage

Switch to PIP \$1,234.5(C22) **30.0%(C30)**

Retain Tort \$38.6(C24) **0.9%(C32)**

\$1,932(C16) + \$453(C12) + \$1,731.5(C5)

\$1,932(C16) + \$453(C12) + \$1,731.5(C5)

Savings for Drivers with Only Mandatory Coverage

Switch to PIP \$411.5(C36) **51.7%(C31)**

Retain Tort \$12.9(C28) **1.6%(C33)**

\$644(C17) + \$151(C15)

\$644(C17) + \$151(C15)

NOTES FOR TREE CHART C

Relative Savings in California if 50% Switch

* All dollars figures are in millions

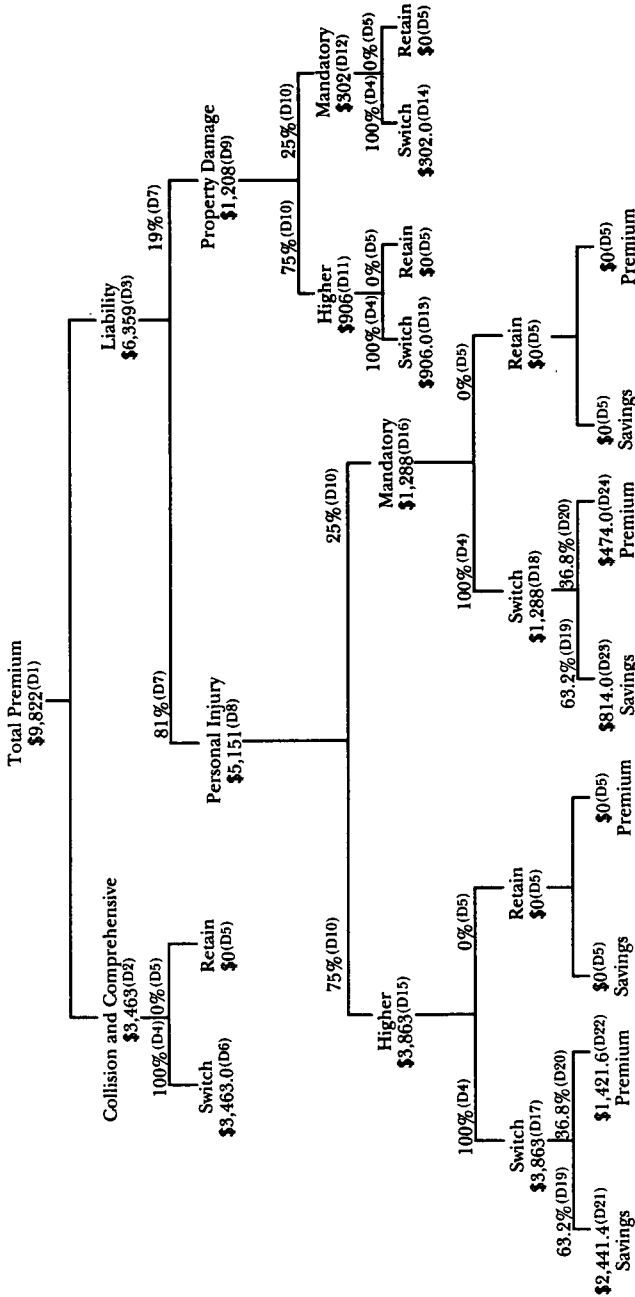
- C1. Total 1992 personal auto insurance premiums for California: \$9,822. Table 2, Col. 1.
- C2. Total premiums for CC for California: \$3,463. Table 2, Col. 2. *See supra* note A2.
- C3. Total liability premiums (personal injury [PI] plus property damage [PD] liability): \$6,359. Table 2, Col. 3.
- C4. The assumption here is that 50% of insured motorist will switch to PIP.
- C5. Total premiums for CC coverages for insured motorists who switch to PIP or retain tort: \$3,363, *supra* note C2, multiplied by 50%, *supra* note C4, equals \$1,731.5.
- C6. The ratio of PI liability premiums to PD liability premiums is 81 to 19. *See* Table 2, Col. 4; 19 is the remaining percentage (100% - 81% = 19%).
- C7. Total premiums for PI liability: \$6,359, *supra* note C3, multiplied by 81%, *supra*, note C6, equals \$5,151.
- C8. Total premiums for PD liability: \$6,359, *supra* note C3, multiplied by 19%, *supra* note C6, equals \$1,208.
- C9. RAND assumed that 75% of insured motorists carry higher than mandatory coverage and that 25% carry only mandatory coverage for all states.
- C10. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$1,208, *supra* note C8, multiplied by 75%, *supra* note C9, equals \$906.
- C11. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$1,208, *supra* note C8, multiplied by 25%, *supra* note C9, equals \$302.
- C12. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage who either switch to PIP or retain tort: \$906, *supra* note C10, multiplied by 50%, *supra* note C4, equals \$453.
- C13. Total premiums for PD liability coverage for insured motorists with only mandatory coverage who either switch to PIP or retain tort: \$302, *supra* note C11, multiplied by 50%, *supra* note C4, equals \$151.
- C14. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$5,151, *supra* note C7, multiplied by 75%, *supra* note C9, equals \$3,863.

- C15. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$5,151, *supra* note C7, multiplied by 25%, *supra* note C9, equals \$1,288.
- C16. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage who either switch to PIP or retain tort: \$3,863, *supra* note C14, multiplied by 50%, *supra* note C4, equals \$1,932.
- C17. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who either switch to PIP or retain tort: \$1,288, *supra* note C15, multiplied by 50%, *supra* note C4, equals \$644.
- C18. Percentage of PI liability coverage premium savings for liability coverage for insured motorists who switch to PIP equals 63.9%. Table 2, Col. 5.
- C19. Total premium multiple for PI liability coverage for insured motorists who switch to PIP: 100% minus 63.9%, *supra* note C18, equals 36.1%.
- C20. Percentage of PI liability coverage premium savings for insured motorists who retain tort equals 2%. Table 2, Col. 6.
- C21. Total premium multiple for PI liability coverage for insured motorists who retain tort: 100% minus 2%, *supra* note C20, equals 98%.
- C22. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP: \$1,932, *supra* note C16, multiplied by 63.9%, *supra* note C18, equals \$1,234.5.
- C23. Total premiums for personal injury (PI) liability coverage for insured motorists with higher than mandatory coverage who switch to PIP: \$1,932, *supra* note C16, multiplied by 36.1%, *supra* note C19, equals \$697.5.
- C24. Total dollar savings available for PI liability coverage for motorists with higher than mandatory coverage who retain tort: \$1,932, *supra* note C16, multiplied by 2%, *supra* note C20, equals \$38.6.
- C25. Total premiums for personal injury (PI) liability coverage for motorists with higher than mandatory coverage who retain coverage: \$1,932, *supra* note C16, multiplied by 98%, *supra* note C21, equals \$1,893.4.
- C26. Total dollar savings available for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$644, *supra* note C17, multiplied by 63.9%, *supra* note C18, equals \$411.5.

- C27. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$644, *supra* note C17, multiplied by 36.1%, *supra* note C19, equals \$232.5.
- C28. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage who retain tort: \$644, *supra* note C17, multiplied by 2%, *supra* note C20, equals \$12.9.
- C29. Total premiums for PI liability coverage for motorists with only mandatory coverage who retain tort: \$644, *supra* note C17, multiplied by 98%, *supra* note C21, equals \$631.1.
- C30. The total percentage of savings for insured motorists who switch to PIP with higher than mandatory coverage (including collision and comprehensive, PI liability, and PD liability coverages) equals 30%. Table 3, Col. 2.
- C31. The total percentage of savings for insured motorists who switch to PIP with only mandatory coverage equals 51.7%. Table 3, Col. 1.
- C32. The total percentage of savings for insured motorists who retain tort with higher than mandatory coverage equals 0.9%. Table 3, Col. 4.
- C33. The total percentage of savings for insured motorists who retain tort with only mandatory coverage equals 1.6%. Table 3, Col. 3.

D. RELATIVE SAVINGS IN CALIFORNIA IF 100% SWITCH TO PIP AND 0% RETAIN TORT

(In Millions)



Savings for Drivers with Higher than Mandatory Coverage

Savings for Drivers with Only Mandatory Coverage

Switch to PIP \$2,441.4(D21) 29.7% (D25)
 Retain Tort N/A(D5)

Switch to PIP \$814.0(D23) 51.2% (D26)
 Retain Tort N/A(D5)

NOTES FOR TREE CHART D

Relative Savings in California if 100% Switch

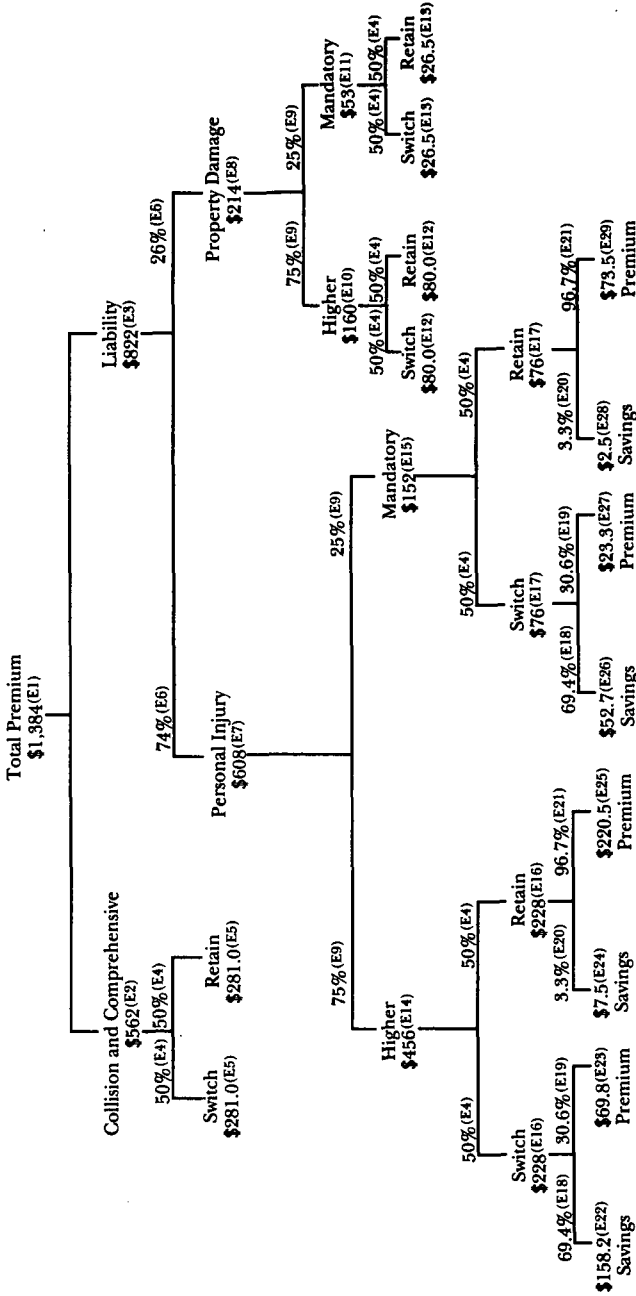
* All dollars figures are in millions

- D1. Total 1992 personal auto insurance premiums for California: \$9,822. Table 2, Col. 1.
- D2. Total premiums for collision and comprehensive (CC) for California: \$3,463. Table 2, Col. 2. *See supra* note A2.
- D3. Total liability premiums (personal injury (PI) plus property damage (PD) liability) for California: \$6,359. Table 2, Col. 3.
- D4. The assumption here is that 100% of insured motorists will switch to PIP.
- D5. All figures on the tort branches will be zero because of the assumption that all insured motorists will switch to PIP—no insured motorists retain tort.
- D6. Total premiums for CC coverages for insured motorists: \$3,463, *supra* note D2, multiplied by 100%, *supra* note D4, equals \$3,463.
- D7. The ratio of PI liability premiums to PD liability premiums is 81 to 19. *See* Table 2, Col. 4; 19 is the remaining percentage ($100\% - 81\% = 19\%$).
- D8. Total premiums for PI liability: \$6,359, *supra* note D3, multiplied by 81%, *supra* note D7, equals \$5,151.
- D9. Total premiums for PD liability: \$6,359, *supra* note D3, multiplied by 19%, *supra* note D7, equals \$1,208.
- D10. RAND assumed that 75% of insured motorist carry higher than mandatory coverage and 25% carry only mandatory coverage for all states.
- D11. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$1,208, *supra* note D9, multiplied by 75%, *supra* note D10, equals \$906.
- D12. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$1,208, *supra* note D9, multiplied by 25%, *supra* note D10, equals \$302.
- D13. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage: \$906, *supra* note D11, multiplied by 100%, *supra* note D4, equals \$906.
- D14. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$302, *supra* note D12, multiplied by 100%, *supra* note D4, equals \$302.

- D15. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$5,151, *supra* note D8, multiplied by 75%, *supra* note D10, equals \$3,863.
- D16. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$5,151, *supra* note D8, multiplied by 25%, *supra* note D10, equals \$1,288.
- D17. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage where all insureds switch to PIP: \$3,863, *supra* note D15, multiplied by 100%, *supra* note D4, equals \$3,863.
- D18. Total premiums for PI liability coverage for insured motorists with only mandatory coverage where all insureds switch to PIP: \$1,288, *supra* note D16, multiplied by 100%, *supra* note D4, equals \$1,288.
- D19. Percentage of premium savings for PI liability coverage for insured motorists equals 63.2%. Table 2, Col. 7.
- D20. Total premium multiple for PI liability coverage for insured motorists: 100% minus 63.2%, *supra* note D19, equals 36.8%.
- D21. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage: \$3,863, *supra* note D17, multiplied by 63.2%, *supra* note D19, equals \$2,441.4.
- D22. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$3,863, *supra* note D17, multiplied by 36.8%, *supra* note D20, equals \$1,421.6.
- D23. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage: \$1,288, *supra* note D18, multiplied by 63.2%, *supra* note D19, equals \$814.
- D24. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$1,288, *supra* note D18, multiplied by 36.8%, *supra* note D20, equals \$474.
- D25. The total percentage of savings for insured motorists with higher than mandatory coverage (including collision and comprehensive, PI liability, and PD liability coverages) equals 29.7%. Table 3, Col. 6.
- D26. The total percentage of savings for insured motorists with only mandatory coverage equals 51.2%. Table 3, Col. 5.

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E. RELATIVE SAVINGS IN WISCONSIN IF 50% SWITCH TO PIP AND 50% RETAIN TORT
(In Millions)



Savings for Drivers with Higher than Mandatory Coverage

Switch to PIP	\$228(E16) + \$80(E12) + \$281(E5)	29.6% (E30)
Retain Tort	\$7.5(E24)	1.3% (E33)
	\$228(E16) + \$80(E12) + \$281(E5)	
	\$158.2(E22)	
	\$228(E16) + \$80(E12) + \$26.5(E13)	
	\$52.7(E28)	
	\$76(E17) + \$26.5(E13)	
	\$51.4% (E31)	
	\$2.5(E28)	
	\$76(E17) + \$26.5(E13)	
	2.4% (E33)	

Savings for Drivers with Only Mandatory Coverage

Switch to PIP	\$76(E17) + \$26.5(E13)	51.4% (E31)
Retain Tort	\$2.5(E28)	2.4% (E33)
	\$76(E17) + \$26.5(E13)	

NOTES FOR TREE CHART E

Relative Savings in Wisconsin if 50% Switch

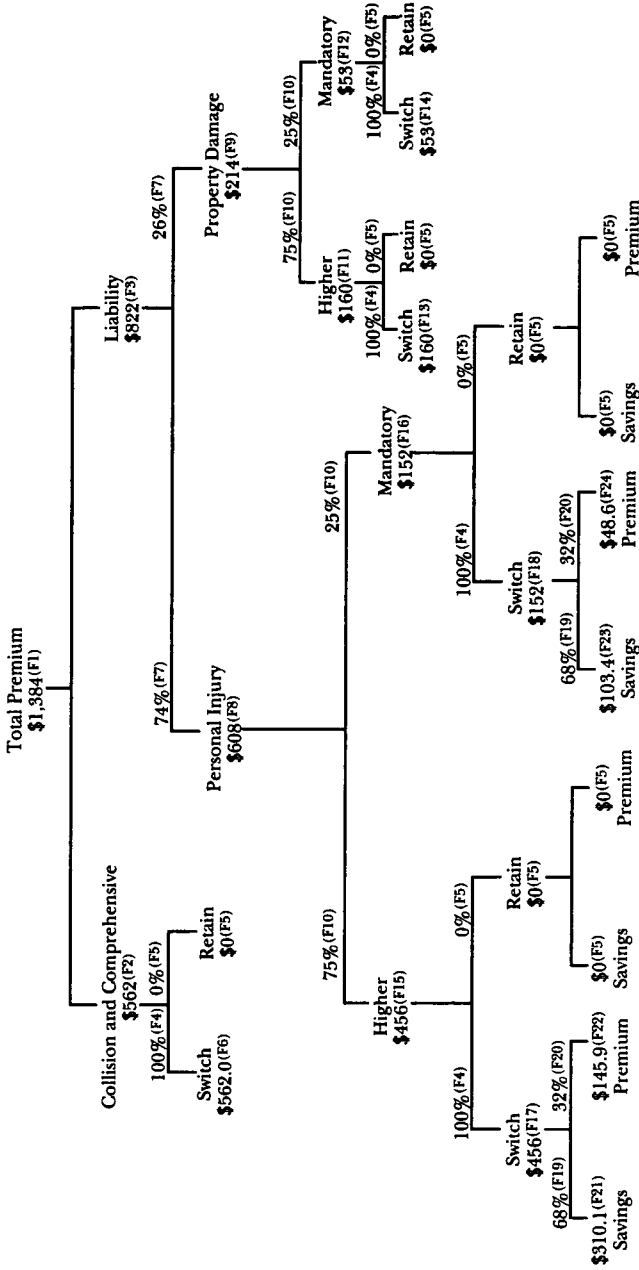
* All dollars figures are in millions

- E1. Total 1992 personal auto insurance premiums for Wisconsin: \$1,384. Table 2, Col. 1.
- E2. Total premiums for collision and comprehensive (CC) for Wisconsin: \$562. Table 2, Col. 2. *See supra* note A2.
- E3. Total liability premiums (personal injury (PI) plus property damage (PD) liability): \$822. Table 2, Col. 3.
- E4. The assumption here is that 50% of insured motorists will switch to PIP.
- E5. Total premiums for CC coverages for insured motorists who switch to PIP or retain tort: \$562, *supra* note E2, multiplied by 50%, *supra* note E4, equals \$281.
- E6. The ratio of PI liability premiums to PD liability premiums is 74 to 26. *See* Table 2, Col. 4; 26 is the remaining percentage (100% - 74% = 26%).
- E7. Total premiums for PI liability: \$822, *supra* note E3, multiplied by 74%, *supra* note E6, equals \$608.
- E8. Total premiums for PD liability: \$822, *supra* note E3, multiplied by 26%, *supra* note E6, equals \$214.
- E9. RAND assumed that 75% of insured motorists carry higher than mandatory coverage and that 25% carry only mandatory coverage.
- E10. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$214, *supra* note E8, multiplied by 75%, *supra* note E9, equals \$160.
- E11. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$214, *supra* note E8, multiplied by 25%, *supra* note E9, equals \$53.
- E12. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage who either switch to PIP or retain tort: \$160, *supra* note E10, multiplied by 50%, *supra* note E4, equals \$80.
- E13. Total premiums for PD liability coverage for insured motorists with only mandatory coverage who either switch to PIP or retain tort: \$53, *supra* note E11, multiplied by 50%, *supra* note E4, equals \$26.5.
- E14. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$608, *supra* note E7, multiplied by 75%, *supra* note E9, equals \$456.

- E15. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$608, *supra* note E7, multiplied by 25%, *supra* note E9, equals \$152.
- E16. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage who either switch to PIP or retain tort: \$456, *supra* note E14, multiplied by 50%, *supra* note E4, equals \$228.
- E17. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP or retain tort: \$152, *supra* note E15, multiplied by 50%, *supra* note E4, equals \$76.
- E18. Percentage of PI liability coverage premium savings for insured motorists who switch to PIP equals 69.4%. Table 2, Col. 5.
- E19. Total premium multiple for PI liability coverage for insured motorists who switch to PIP: 100% minus 69.4%, *supra* note E18, equals 30.6%.
- E20. Percentage of PI liability coverage premium savings for liability coverage for insured motorists who retain tort equals 3.3%. Table 2, Col. 6.
- E21. Total premium multiple for PI liability coverage for insured motorists who retain tort: 100% minus 3.3%, *supra* note E20, equals 96.7%.
- E22. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP: \$228, *supra* note E16, multiplied by 69.4%, *supra* note E18, equals \$158.2.
- E23. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage who switch to PIP: \$228, *supra* note E16, multiplied by 30.6%, *supra* note E19, equals \$69.8.
- E24. Total dollar savings available for PI liability coverage for motorists with higher than mandatory coverage who retain tort: \$228, *supra* note E16, multiplied by 3.3%, *supra* note E20, equals \$7.5.
- E25. Total premiums for PI liability coverage for motorists with higher than mandatory coverage who retain tort: \$228, *supra* note E16, multiplied by 96.7%, *supra* note E21, equals \$220.5.
- E26. Total dollar savings available for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$76, *supra* note E17, multiplied by 69.4%, *supra* note E18, equals \$52.7.

- E27. Total premiums for PI liability coverage for insured motorists with only mandatory coverage who switch to PIP: \$76, *supra* note E17, multiplied by 30.6%, *supra* note E19, equals \$23.3.
- E28. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage who retain tort: \$76, *supra* note E17, multiplied by 3.3%, *supra* note E20, equals \$2.5.
- E29. Total premiums for PI liability coverage for motorists with only mandatory coverage who retain tort: \$76, *supra* note E17, multiplied by 96.7%, *supra* note E21, equals \$73.5.
- E30. The total percentage of savings for insured motorists with higher than mandatory coverage who switch to PIP: (including collision and comprehensive, PI liability, and PD liability coverages) equals 26.9%. Table 3, Col. 2.
- E31. The total percentage of savings for insured motorists with only mandatory coverage who switch to PIP equals 51.4%. Table 3, Col. 1.
- E32. The total percentage of savings for insured motorists with higher than mandatory coverage who retain tort equals 1.3%. Table 3, Col. 4.
- E33. The total percentage of savings for insured motorists who retain tort with only mandatory coverage equals 2.4%.

F. RELATIVE SAVINGS IN WISCONSIN IF 100% SWITCH TO PIP AND 0% RETAIN TORT
(In Millions)



Savings for Drivers with Higher than Mandatory Coverage
 Switch to PIP \$310.1(F21)
 Retain Tort \$456(F17) + \$562(F6)

Savings for Drivers with Only Mandatory Coverage
 Switch to PIP \$103.4(F23)
 Retain Tort \$152(F18) + \$53(F14)

Switch to PIP 26.3% (F25) Retain Tort N/A(F5)

Switch to PIP 50.4% (F26) Retain Tort N/A(F5)

NOTES FOR TREE CHART F

Relative Savings in Wisconsin if 100% Switch

* All dollars figures are in millions

- F1. Total 1992 personal auto insurance premiums for Wisconsin: \$1,384. Table 2, Col. 1.
- F2. Total premiums for collision and comprehensive (CC) for Wisconsin: \$562. Table 2, Col. 2. *See supra* note A2.
- F3. Total liability premiums (personal injury (PI) plus property damage (PD) liability): \$822. Table 2, Col. 3.
- F4. The assumption here is that 100% of insured motorists will switch to PIP.
- F5. All figures on the tort branches will be zero because of the assumption that all insured motorists will switch to PIP—no insured motorists retain tort.
- F6. Total premiums for CC coverages for insured motorists: \$562, *supra* note F2, multiplied by 100%, *supra* note F4, equals \$562.
- F7. The ratio of PI liability premiums to PD liability premiums is 74 to 26. *See* Table 2, Col. 4; 26 is the remaining percentage (100% - 74% = 26%).
- F8. Total premiums for PI liability: \$822, *supra* note F3, multiplied by 74%, *supra* note F7, equals \$608.
- F9. Total premiums for PD liability: \$822, *supra* note F3, multiplied by 26%, *supra* note F7, equals \$214.
- F10. RAND assumed that 75% of insured motorists carry higher than mandatory coverage and 25% carry only mandatory coverage for all states.
- F11. Total premiums for PD liability for insured motorists with higher than mandatory coverage: \$214, *supra* note F9, multiplied by 75%, *supra* note F10, equals \$160.
- F12. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$214, *supra* note F9, multiplied by 25%, *supra* note F10, equals \$53.
- F13. Total premiums for PD liability coverage for insured motorists with higher than mandatory coverage: \$160, *supra* note F11, multiplied by 100%, *supra* note F4, equals \$160.
- F14. Total premiums for PD liability coverage for insured motorists with only mandatory coverage: \$53, *supra* note F12, multiplied by 100%, *supra* note F4, equals \$53.
- F15. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$608, *supra* note F8, multiplied by 75%, *supra* note F10, equals \$456.

- F16. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$608, *supra* note F8, multiplied by 25%, *supra* note F10, equals \$152.
- F17. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage where all insureds switch to PIP: \$456, *supra* note F15, multiplied by 100%, *supra* note F4, equals \$456.
- F18. Total premiums for PI liability coverage for insured motorists with only mandatory coverage where all insureds switch to PIP: \$152, *supra* note F16, multiplied by 100%, *supra* note F4, equals \$152.
- F19. Percent of premium savings for PI liability coverage equals 68%. Table 2, Col. 7.
- F20. Total premium multiple for PI liability coverage for insured motorists: 100% minus 68%, *supra* note F19, equals 32%.
- F21. Total dollar savings available for PI liability coverage for insured motorists with higher than mandatory coverage: \$456, *supra* note F17, multiplied by 68%, *supra* note F19, equals \$310.1.
- F22. Total premiums for PI liability coverage for insured motorists with higher than mandatory coverage: \$456, *supra* note F17, multiplied by 32%, *supra* note F20, equals \$145.9.
- F23. Total dollar savings available for PI liability coverage for motorists with only mandatory coverage: \$152, *supra* note F18, multiplied by 68%, *supra* note F19, equals \$103.4.
- F24. Total premiums for PI liability coverage for insured motorists with only mandatory coverage: \$152, *supra* note F18, multiplied by 32%, *supra* note F20, equals \$48.6.
- F25. The total percentage of savings for insured motorists with higher than mandatory coverage (including collision and comprehensive, PI liability, and PD liability coverages) equals 26.3%. Table 3, Col. 6.
- F26. The total percentage of savings for insured motorists with only mandatory coverage equals 50.4%. Table 3, Col. 5.

APPENDIX B: MODEL LEGISLATION FOR CREATION OF A CONSUMER
CHOICE IN MOTOR VEHICLE INSURANCE ACT*

AN ACT relating to insurance; creating a system of motor vehicle insurance that offers a choice of methods of protection against losses from personal injury arising out of the maintenance or use of motor vehicles; abolishing tort liability in certain cases; and providing other matters properly relating thereto:

CONSUMER CHOICE IN MOTOR VEHICLE INSURANCE ACT

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* This Model Legislation is authored by Jeffrey O'Connell alone. It does not necessarily reflect the views of the co-authors of the Article's main text and Appendix A.

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THE PEOPLE OF THE STATE OF [NAME], REPRESENTED IN THEIR
LEGISLATURE, DO ENACT AS FOLLOWS:

SECTION 1. TITLE. This Act may be cited as the Consumer Choice in Motor Vehicle Insurance Act.¹

SECTION 2. STATEMENT OF PURPOSE.

a. Controlling Provisions. To the extent the provisions of section 2 differ from the provisions of section 3 and thereafter, the provisions of the subsequent sections control.

b. Existing Law. Under existing law, the ability of a person to recover losses incurred as a result of a motor vehicle accident is limited by factors over which the accident victim has no control. The recovery is dependent on, among other things, the conduct of the other driver, the amount of liability insurance (if any) carried by the other driver, and the financial resources (if any) of the other driver. Under the current system, two individuals who have received identical injuries may recover markedly different amounts. Therefore, many

1. These footnotes are adapted from Jeffrey O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 OHIO ST. L.J. 947 (1990). That article set forth a bill based on the first variation of a choice plan discussed *infra* note 2 to Appendix B. As a result of the change to the second approach in O'Connell *supra*, the terminology of the footnotes has been changed where appropriate. Furthermore, in order to limit the length of this Appendix, some identifying footnotes either cross refer to O'Connell *supra*, or have not been reproduced here. Any reader desiring to have the benefit of those eliminated footnotes can, with relative ease, track them by the section letters in the Table of Contents in O'Connell *supra*, bearing identical, or at least similar, section titles in the draft bill presented herein.

individuals, particularly the large number of motorists involved in one-car accidents, receive no compensation for their losses at all.

c. **The Right to Choose.** This bill gives motorists (1) the right to choose the kinds of personal injury protection which will be available to themselves and their family members in case of an automobile accident, and (2) the right to choose the amount of financial protection they deem appropriate and affordable for themselves and their families. Instead of being forced to buy traditional tort liability insurance to protect strangers, motorists will have the opportunity to buy a new Personal Injury Protection coverage to protect themselves and their family members in the event of a motor vehicle accident. As an alternative, they will have the right to elect traditional Tort Liability Insurance which will include an inverse liability coverage (entitled "Tort Maintenance Coverage") to provide protection in the event of injury caused by someone who has elected the Personal Injury Protection Option.²

2. A pivotal requirement of any law allowing motorists to choose between coverages payable with and without regard to fault is the proper allocation of benefits from the surrender of tort rights.

To illustrate the problem, consider the impact of the possible combinations of insurance coverages in a two-car collision. (1) both vehicles could be covered by insurance payable without regard to fault; (2) both vehicles could be covered by insurance payable with regard to fault; or (3) one vehicle could be covered by insurance payable without regard to fault and the other by insurance payable with regard to fault.

Resolving claims and transferring accident losses is easy for the first two coverage combinations. If two motorists with insurance payable without regard to fault collide, they would recover under their respective Personal Injury Protection policies without bringing a common law claim based on fault against each other. The term "Personal Injury Protection" is used in preference to "no-fault" throughout this bill because the latter term has come to connote, based on statutes passed under that rubric, laws that include both benefits paid without reference to fault and the preservation of full tort rights at least above a defined threshold. For a discussion of the (sometimes confusing) terminology applicable to various forms of automobile insurance reform whereby benefits are payable without reference to fault, see U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 15-18, 21-22 (1985) [hereinafter DOT REPORT]; see also Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 63-64 (1986). If two motorists insured under traditional insurance payable with regard to fault collide, they could claim against each other based on fault as they do under common law rules. But resolving claims and transferring losses is problematic for the third combination, a collision between motorists insured with and without regard to fault. The motorist insured without regard to fault would recover under his or her Personal Injury Protection policy, but the traditional insured who was not at fault in causing the accident could not recover unless he or she was permitted to sue the other motorist based on fault. But requiring the motorist insured without regard to fault to insure based on fault for a claim by a fault-insured while surrendering his or her own right to claim based on fault would obviously be unfairly prejudicial—and expensive—for the motorist insured without regard to fault.

One solution would never take away tort rights in an accident involving those insuring both with and without regard to fault. Under this system, those who choose Personal In-

d. Tort Liability Insurance versus Personal Injury Protection coverage.

(1) Motorists who choose the Tort Liability Insurance and who are involved in an accident with another motorist will retain the tort liability system, except that, based on fault, (a) they can be sued by those who choose personal injury protection but only for damages in excess of the limits of the Personal Injury Protection policy and (b) they cannot claim against those who choose Personal Injury Protection coverage except for uncompensated economic loss in excess of the limits of their own first party Tort Maintenance Coverage.

jury Protection insurance must buy tort liability coverage for claims against them by those insured based on fault. However, because insurance without regard to fault can be expected to cost substantially less than tort liability coverage, exposure to tort liability for personal injury protection insureds will not be all that great.

The disadvantage of this approach is that insurers cannot be sure in advance of the percentages of drivers who will insure for traditional tort liability and those who will insure without regard to fault. As a result, reductions in premiums could conceivably be significantly less than would occur under a device in which insurers could confidently know that no motorist insured regardless of fault will be exposed to normal liability in tort to those electing traditional tort liability insurance.

The latter assurance can be gained by the device proposed herein for a regime allowing choice between insurance regarding and regardless of fault. Under a scheme of "inverse liability" (termed "Tort Maintenance Coverage"), in a collision between a motorist covered by traditional tort liability and another insured regardless of fault, no normal tort claims between the motorists would be allowed, but the driver with traditional tort liability insurance coverage would be allowed to sue his or her own company for full tort damages as if his or her company covered the driver insured regardless of fault. Such a regime mirrors "uninsured motorist" coverage, extant today, which allows victims to claim damages against their own companies if the motorist with whom they collide is uninsured. Under the proposed regime the costs of "uninsured motorist" coverage would increase, but that increase would be offset by fewer claims against the traditional insured's tort liability coverage because all those insured regardless of fault would be impeded in liability claims.

A third method of dealing with the reallocation problem has been employed in N.J. STAT. ANN. §§ 39:6A-21 to -22 (West 1990). It entails a "risk exchange" to reallocate the money saved by the motorist insured under traditional tort liability back to the motorist insured regardless of fault. Thus, under a risk exchange, as under "inverse liability," those insuring regardless of fault need not carry liability insurance to cover full common law liability for those insured under traditional tort liability. But the administrability of such a risk exchange device is subject to dispute among insurers. O'Connell, *supra* note 1 to Appendix B, at 949-50 & n.8.

The fourth and worst possible solution to the reallocation problem was adopted in Pennsylvania's bastardized choice bill, which simply ignored the need for reallocation. Act of Feb. 7, 1990, §§ 8, 17, 1990 Pa. Laws 11 (adding 75 PA. CONS. STAT. ANN. § 1705(a)(1) and amending § 1791.1(b) (Supp. 1994-95)). "As a result, the cost savings of surrendering tort rights do not accrue to the motorist surrendering the same. Instead, they accrue to the person who was at fault in injuring him or her. That is, surrender of tort rights simply reduces the chances of recovering in tort against the person at fault, which saves money for the latter's insurer but not for the insurer of the motorist surrendering his or her tort rights." O'Connell, *supra* note 1 to Appendix B, at 951.

(2) Motorists who choose Personal Injury Protection coverage established by this Act and who are involved in an accident with a motorist who has chosen traditional Tort Liability Insurance will be promptly compensated for their own losses, without regard to fault, and can also claim against the other motorist based on fault for uncompensated economic loss in excess of the limits of the Personal Injury Protection policy.

(3) Two motorists who each choose Personal Injury Protection coverage and who are involved in an accident with each other will be promptly compensated under their own policies for their own losses without regard to fault. In this situation, the two motorists who have chosen the Personal Injury Protection coverage lose the right to claim and sue for "pain and suffering" and other noneconomic loss, but if either suffers economic loss in excess of his/her policy's benefit levels, that person retains the right to claim and sue for unreimbursed economic loss based on fault.

(4) When two motorists who each choose Tort Liability Insurance are involved in an accident with each other, their rights against each other are unaffected by this Act.

(5) If a motorist who has chosen Tort Liability Insurance is involved in an accident with an uninsured motorist, the policyholder will be compensated for losses under the uninsured motorist provisions of his/her own policy based on fault and has the right to sue for damages. The uninsured motorist forfeits the right to claim for noneconomic loss against the motorist who has chosen Tort Liability Insurance unless the tort liability insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct.

(6) If a motorist who has chosen the Personal Injury Protection policy is involved in an accident with an uninsured motorist, the policyholder will be promptly compensated for losses without regard to fault under his/her Personal Injury Protection policy, and has the right to claim and sue the uninsured motorist for damages based on fault. The uninsured motorist forfeits the right to claim for noneconomic loss against the motorist who has chosen the Personal Injury Protection policy except when the Personal Injury Protection Insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct.

e. Property Damage. A motorist who purchased a Personal Injury Protection policy will thereby procure [\$10,000] of property damage liability insurance as part of his/her mandatory coverage. In order to keep the cost of property damage liability insurance as low as

possible, persons who have chosen Personal Injury Protection policies have no cause of action for damage to a motor vehicle to the extent such vehicle is insured against collision damage in accidents involving other Personal Injury Protection Insureds.³

SECTION 3. DEFINITIONS. As used in this Act, unless the context requires otherwise, the following terms have the meaning ascribed to them in this section:

a. "Accidental bodily injury" means bodily injury, sickness or disease, including death resulting therefrom, arising out of the operation or use of a motor vehicle, or while occupying such vehicle, which is accidental as to the person injured.⁴

b. "Added Personal Injury Protection" means coverage for additional Personal Injury Protection. Added Personal Injury Protection coverage includes benefits with an aggregate limit of [\$100,000] per person (including [\$30,000] of Basic Personal Injury Protection benefits), to consist of medical expenses, up to [\$1,000] per week of loss of income from work, up to [\$300] per week of replacement services loss, and if death is proximately and directly caused by a motor vehicle and occurs within one year of the date of the accident, a death benefit

3. Note that under this bill, motorists electing Personal Injury Protection insurance are not required to carry tort liability insurance for personal injury. Thus, a poorer person with no or few assets to protect can buy only Personal Injury Protection insurance protecting himself and his family for their medical bills and wage loss. This does not overly disadvantage those injured by the poor since the poor are so likely to be either un- or under-insured anyway. *See supra* main text accompanying note 43.

Note also that because insured motorists remain liable for uncompensated economic losses in excess of their own first party insurance or other coverages applicable to injury, poorer persons buying only the minimum amounts of insurance will more often be able to claim for higher losses against insureds who have purchased higher amounts of coverage than vice versa. This can arguably be justified by considerations of income redistribution. *Cf.* Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 356-58. But even without reference to the bill being discussed here, under traditional tort liability insurance, the poor—carrying either no or low liability insurance—can similarly draw more from the pool of liability insurance than they pay into it. (Though in fact, they may not do so. The poor are often reluctant to invoke the tort process; in addition, the poor suffer no or less wage loss and lower medical bills compared to those more affluent. *See supra* main text accompanying note 53.) The proposed plan preserves at least this theoretical advantage for the poor. But it also advantages the more affluent (1) by guaranteeing that those who buy Personal Injury Protection insurance will be covered up to whatever high limits they buy irrespective of fault, and (2) by limiting their tort exposure (including to uninsureds) to uncompensated economic loss payable periodically. This means that the temptation of those claiming against Personal Injury Protection insureds to pad claims will not be nearly so great as under tort liability. *See supra* note 7 to main text.

4. The last phrase in subsection 3a incorporates a common concept in insurance such that a victim of an intentional act (which is not accidental as to the intentional actor) is nonetheless accidental as to the victim of the actor's intentional act.

of [\$25,000] payable to the dependents, if any, or, if none, to the heirs or estate of the decedent. Nothing contained in this section prevents a Personal Injury Protection Insurer from also making available other additional compensation benefits in coverages and amounts other than those prescribed in this section. No applicant or insured may be required to purchase a lesser amount than those prescribed in this subsection.

c. "Basic Personal Injury Protection" means coverage, for Personal Injury Protection which provides benefits for loss resulting from accidental bodily injury. Basic Personal Injury Protection benefits consist of the following elements with an aggregate limit of [\$15,000] per person:

(1) Medical expenses, subject to a deductible of [\$250] applicable only to the named insured and to resident relatives of the named insured;

(2) Loss of income from work, not to exceed [\$200] per week;

(3) Replacement services loss, not to exceed [\$100] per week;
and

(4) A death benefit of [\$10,000], payable to the dependents, if any or, if none, to the heirs or estate of the decedent, if the death of an injured person is directly and proximately caused by an accidental bodily injury and occurs within one year of the date of such injury.

d. "Cause of action for injury" means a claim for accidental bodily injury for economic or noneconomic loss, or both, caused by the negligent conduct or intentional misconduct of another person (whether directly or vicariously), and includes a claim by any person other than a person suffering accidental bodily injury based on such injury, including, but not limited to, loss of consortium, companionship, or any other derivative claim.

e. "Collateral sources" means all benefits one receives or is entitled to receive as reimbursement of loss because of an injury from sources other than Personal Injury Protection benefits. In such calculation, no subtraction is made for amounts one receives or is entitled to receive:

(1) in discharge of familial obligations or support;

(2) by reason of another's death, except that there is subtracted from loss in calculating net loss those amounts received from social security or workers' compensation; or

(3) as gratuities. In no event is any payment made by an employer to his employee or an employee's survivors to be regarded as a gratuity.⁵

f. "Commissioner" means the Commissioner of Insurance.⁶

g. "Coverage" means a policy or plan for insurance benefits.

h. "Dependent" means all persons related to another person by blood, marriage, adoption or otherwise who reside in the same household as such person at the time of the accidental bodily injury, and receive financial or services support from him or her.

i. "Driving under the influence of alcohol or illegal drugs" refers to such conduct when it causes or substantially contributes to the harm claimed for. A driver is deemed to be driving under the influence of alcohol for the purposes of this Act only if a test of blood, breath or urine as called for under the laws of this State shows an illegal blood or breath alcohol content as defined by State law,⁷ or if a driver refuses to undergo such tests as called for under the laws of this State.⁸

j. "Economic loss" means medical expenses, loss of income from work, and replacement services loss incurred by or on behalf of an injured person as the result of an accidental bodily injury to such injured person.⁹

k. "Fault" is encompassed by the definition of "Tort liability."

l. "Injured person" means a person who sustains accidental bodily injury when eligible for benefits under a policy providing Personal Injury Protection or under the assigned claims plan under section 23. The term also includes where appropriate the personal representative of an estate.

m. "Intentional misconduct" means conduct whereby harm is intentionally caused or attempted to be caused by one who acts or fails to act for the purpose of causing harm or with knowledge that harm is

5. Under subsection 3e, as to payment of both Personal Injury Protection benefits and uncompensated economic loss, they are payable as excess (not primary) to other coverages such as the victim's own health and disability insurance. To define these terms, primary insurance covers from the first dollar (often after a deductible) as distinguished from excess coverage which pays only after primary coverage has been exhausted.

Subsection 3e is adapted from ROBERT KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM § 1.10, at 306 (1965).

6. O'Connell, *supra* note 1 to Appendix B, at 959 & n.39.

7. *Id.* at 959 & n.40.

8. *Id.* at nn. 41, 42.

9. The term "economic loss" (definition j) means pecuniary loss and monetary expenses incurred by or on behalf of an injured person. The categories of economic loss are medical expenses (definition o), replacement services loss (definition z), and loss of income from work (definition n).

substantially certain to follow when such conduct caused or substantially contributed to the harm claimed for. A person does not intentionally cause or attempt to cause harm (i) merely because his act or failure to act is intentional or done with the realization that it creates a grave risk of causing harm or (ii) if the act or omission causing bodily harm is for the purpose of averting bodily harm to oneself or another person.¹⁰

n. "Loss of income from work" means [80%] of loss of income an injured person would have earned through work during the period of disability, reduced by any income from substitute work actually performed by the injured person, or by any income the injured person would have earned in available appropriate substitute work which such person was capable of performing but unreasonably failed to undertake.¹¹ Loss of income from work does not include any loss after the death of an injured person and payment for the period of disability is not to exceed two years from the date of the accident.

o. "Medical expenses" means reasonable expenses incurred by an injured person for necessary medical, surgical, X-ray, dental, ambulance, hospital, medical rehabilitation, and professional nursing services and includes expenses for eyeglasses, hearing aids, and prosthetic devices. The words "incurred by" include medical expenses incurred on behalf of an injured person by a parent or guardian if the injured person is a minor or incompetent, or by a surviving spouse if the injured person be deceased. Personal Injury Protection Insurers are authorized to review medical expenses prior to, during, and after the course of treatment of an injured person, to assure that they are both reasonable and necessary. Under Basic Personal Injury Protection and under Added Personal Injury Protection, medical expenses are payable for services provided to the injured person within two years of the date of accidental bodily injury. "Medical expenses" does not include:

10. O'Connell, *supra* note 1 to Appendix B, at 960 & n.46.

11. In subsection 3n,

the definition contains an explicit reference to the doctrine of avoidable consequences—work loss is computed by subtracting not only income from work which the injured person undertook in lieu of that which his injury prevented him from performing but also income which he might have earned in available appropriate substitute work. As under the common law doctrine of avoidable consequences, the issue is whether claimed work loss is justly attributable to the injury. Subtraction of potential income from alternate work which the injured person declines is proper only where, under all the circumstances, the alternate work is "appropriate" and the injured person's refusal to undertake the work is "unreasonable."

UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 1(a)(5)(ii) cmt., 14 U.L.A. 46 (1972) [hereinafter UMVARA].

(1) that portion of the charge for a room in any hospital, clinic, convalescent or nursing home, extended care facility or any similar facility in excess of the reasonable and customary charge for semi-private accommodations unless medically required; or

(2) treatment, services, products or procedures that are experimental in nature, for research or not primarily designed to serve a medical purpose, or not commonly and customarily recognized throughout the medical profession and within the United States as appropriate for treatment of accidental bodily injury.

p. "Medical rehabilitation" means rehabilitation services reasonably necessary and designed to reduce the disability and dependence of an injured person and to restore such person, to the extent reasonably possible, to his or her pre-accident level of physical functioning.

q. "Motor vehicle" means:

(1) a vehicle of a kind required to be registered under the laws of this State relating to motor vehicles, or

(2) a vehicle with four or more load bearing wheels, including a trailer,¹² designed for operation upon a public roadway by other than muscular power, except a vehicle used exclusively upon stationary rails or tracks. "Public roadway" means a way open to the use of the public for purposes of automobile travel.¹³

r. "Noneconomic loss" means any loss other than economic loss and includes, but is not necessarily limited to, pain, suffering, inconvenience, mental anguish, and all other noneconomic damage whether otherwise recoverable under the law of this State or not. Noneconomic loss does not include economic loss caused by pain and suffering or by physical impairment.¹⁴

s. "Occupying" means to be in or upon a motor vehicle or engaged in the immediate act of entering into or alighting from the motor vehicle.

12. Under subsection 3q(2), those on a motorcycle are not insured under Personal Injury Protection. The tremendous exposure of a motorcyclist to personal injury would mean that switching to first-party coverage whereby the motorcyclist insured himself for his injuries, whether based on fault or not, would cause an exponential rise in motorcyclists' personal injury premiums. The solution adopted under this bill is simply to exempt motorcyclists from the choice system, such that motorcyclists can sue and be sued in tort after collision with those insured for Personal Injury Protection benefits as well as with those insured under Tort Liability Insurance.

13. Under subsection 3q(2), the definition of a "public roadway" excludes trails open to the public but designed solely for off-road vehicles. *UMVARA*, *supra* note 11 to Appendix B, § 1(7)(ii), commentary at 273-74.

14. O'Connell, *supra* note 1 to Appendix B, at 962 & n.52.

t. "Operation or use" means operation or use of a motor vehicle as a motor vehicle. Operation or use does not include manufacturing, sale or maintenance of a motor vehicle, including repairing, servicing, washing, loading or unloading, unless the conduct occurs while occupying it.¹⁵

u. "Owner" means the person or persons in whose name the motor vehicle has been registered. If no registration is in effect at the time of an accident involving the motor vehicle, "owner" means the person or persons holding legal title thereto, or in the event the motor vehicle is the subject of a security agreement or lease with option to purchase with the debtor or lessee having the right of possession, "owner" means the debtor or lessee. Owner does not include the United States of America or any agency thereof except with respect to motor vehicles for which it has elected to provide insurance.

v. "Person" includes an organization, public or private.

w. "Personal Injury Protection" means coverage providing Basic (and, if purchased, Added) benefits, regardless of fault, for loss resulting from accidental bodily injury.

x. "Personal Injury Protection Insured" means, the first person identified by name as an insured under a policy providing Personal Injury Protection benefits, the spouse of such person if a resident of household, and any other resident relative of the same household, and, with respect to accidents within this State, any person who sustains accidental bodily injury while occupying or through being struck

15. As to subsection 3t,

While "use" has a broader meaning than operating or driving a vehicle, the requirement that use of the motor vehicle be "as a motor vehicle" qualifies the term so that both the tort exemption and the availability of . . . benefits [without reference to fault] are more nearly limited to activities whose costs should be allocated to motoring as part of an automobile insurance package. For example, it has no application to an injury which occurs when a person slips and falls inside a travel trailer which has been parked at a camp site.

UMVARA, *supra* note 11 to Appendix B, § 1(a)(6) cmt., 14 U.L.A. 47.

Also in subsection 3t,

The indefiniteness of the defined term ["as a vehicle"] has produced litigation in cases arising under automobile liability policies. In some cases, in part because of a tendency to construe an ambiguous term against the interests of the companies drafting the policy, and, in part to assure a solvent source of payment to a person injured by an admitted wrongdoer, it is arguable that courts have included accidents too far removed from the general activity of motoring and that a narrower construction of the term would be more consistent with the policy of this Act. Other than specifying that injury arise out of maintenance or use "as a vehicle," it has not been possible to define the general concept more specifically, so borderline cases are left to the courts, as they have been under current automobile insurance policies.

Id. § 1(a)(6) cmt., 14 U.L.A. 47.

by a motor vehicle insured for Personal Injury Protection, unless such person is insured pursuant to the Tort Liability Insurance option provided under section 4 or is an uninsured motorist.¹⁶

y. "Personal Injury Protection Insurer" means an insurer or qualified self-insurer providing Personal Injury Protection benefits.

z. "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services from others, not members of the injured person's household, in lieu of the services the injured person would have performed for the benefit of the household. Replacement services loss are not due if the injured person is entitled to receive Personal Injury Protection benefits for loss of income from work for the same time period. Replacement services loss does not include any loss after the death of an injured person, and payment for the period of disability under Basic Personal Injury Protection is not to exceed two years from the date of accidental bodily injury.

aa. "Resident relative" means a person related to the owner of a motor vehicle by blood, marriage, adoption, or otherwise, and residing in the same household. A person resides in the same household if he or she usually makes his or her home in the same family unit, even though temporarily living elsewhere.

bb. "Tort liability" means the legal obligation for payment of damages caused by one adjudged to have committed a tort.

cc. "Tort Maintenance Coverage" means coverage under which a person who has chosen Tort Liability Insurance coverage when involved in an accident with a Personal Injury Protection insured, claims for tort liability against his/her own insurer to the extent of such coverage.

dd. "Uncompensated economic loss" means that portion of economic loss arising out of an accidental bodily injury of an injured person which exceeds the benefits provided by (i) Personal Injury Protection coverage (except for loss on account of the application of a deductible under such a policy), or (ii) Tort Maintenance Coverage, and (iii) collateral sources. Such loss is recoverable under the same terms and limitations as under Added Personal Injury Protection, but

16. The term "Personal Injury Protection Insured" (definition x) describes the people who are "insureds" under a Personal Injury Protection policy, which allows them benefits payable without regard to fault in case of a motor vehicle accident. The term means a person identified by name as an insured in a Personal Injury Protection policy and his or her spouse who lives in the same household. The term also includes any other relative of a named insured who usually lives in the same household.

shall not be subject to the aggregate limit of liability of such coverage.¹⁷

ee. "Uninsured motorist" means the owner, or a dependent thereof, of a motor vehicle uninsured for either Basic Personal Injury Protection or Tort Liability Insurance at the limits prescribed by this State's financial responsibility law, or higher while such person is operating, using or occupying the owned but uninsured motor vehicle.

SECTION 4. INSURANCE REQUIREMENTS.¹⁸ Every motor vehicle required to be registered in this State can be insured:

17. As to subsection 3dd, for the circumstances under which a claim for uncompensated economic loss is recovered, see *supra* main text accompanying note 11. Added Personal Injury Protection can be purchased to provide payment for economic loss in excess of Basic Personal Injury Protection. Basic Personal Injury Protection limits are designed to equal the amounts required under the enacting state's financial responsibility law for personal injury liability. These levels are generally in the range of \$10-20,000. For a listing of each state's financial responsibility requirement, see DOT REPORT, *supra* note 2 to Appendix B, at 51-64. Although compensation for uncompensated economic loss is payable without any limit, as a practical matter rarely will amounts be collectible beyond liability insurance carried by the motorist against whom a claim is made.

18. This section, which is called "Insurance Requirements," is the core of the bill. The first sentence is key. The section also provides that the purchase of Basic Personal Injury Protection "meets the requirement's of this state's mandatory motor vehicle insurance law." The section requires each insurance company to make available Added Personal Injury Protection coverage and additional coverages if it sells Basic Personal Injury Protection insurance in the state.

A bill closely modeled on Appendix B was introduced in Hawaii in January 1995, as H.B. 2286. A further wrinkle in the Hawaii version added by the author of Appendix B would allow motorists a third option of going uninsured for either PIP or tort liability coverage. H.B. 2286 read in part as follows:

§ 431-2. Insurance Requirements. (a) Every motor vehicle required to be registered in this State [may] be insured:

- (1) For basic personal injury protection and the property damage liability mandated under motor vehicle financial responsibility laws; or
- (2) For bodily injury and property damage liability as described in the motor vehicle financial responsibility laws; or
- (3) For none of the above.

The point of including this provision was to recognize that even with the drastic reduction in the cost of auto insurance achieved by this proposed "choice" reform, many among the poor will still be unable to afford it. Rather than continuing to force large numbers of people into an illegal status, it seems feasible to allow them to go legally uninsured, 'paying' for that status by voluntarily waiving (by virtue of going uninsured) that portion of their tort claims for pain and suffering. (This feature could also be enacted in states without no-fault insurance or no-fault without a choice feature.) For more on this uninsured motorist feature, see O'Connell's forthcoming article *Granting Uninsured Motorists a Legal Status by Waiver of Their Tort Claims for Economic Loss* (Mar. 10, 1995) (unpublished manuscript, on file with author). Admittedly such a provision will be controversial. Indeed, it will in all likelihood be dropped from H.B. 2286 in Hawaii. William Kresnak, *Insurance Bill Due a Rewrite in House: Rep. Menor [Chairman of the House Consumer Protection Committee] Doesn't Like the No-Coverage Option*, HONOLULU ADVERTISER, Feb. 19, 1995, at A3.

- a. for Basic Personal Injury Protection and the property damage liability mandated under this State's financial responsibility law, or
- b. for bodily injury and property damage liability as described in this State's financial responsibility law.
- c. An insurance policy written by a Personal Injury Protection Insurer pursuant to this Act to provide Basic Personal Injury Protection is deemed to include all Basic Personal Injury Protection coverage required by this Act. Coverage under Basic Personal Injury Protection meets the requirements of this State's financial responsibility law even though such policy does not provide protection against bodily injury liability claims arising out of accidents within this State.¹⁹
- d. A Personal Injury Protection Insurer shall make available, at the option of a named insured, Added Personal Injury Protection on a policy providing Basic Personal Injury Protection. The exercise of the option not to purchase Added Personal Injury Protection by a named insured or an applicant shall be binding on all Personal Injury Protection insureds covered under the policy.
- e. A Personal Injury Protection insurer is authorized to write Personal Injury Protection without any deductible or subject to reasonable deductibles pursuant to section 28 of this Act.
- f. A Personal Injury Protection Insurer shall also make available a pain and suffering coverage, pursuant to regulations issued under section 28 of this Act, with a limit of [\$50,000], payable if the injured person sustains an accidental bodily injury resulting in death or dismemberment or significant and permanent loss of important bodily function or significant and permanent scarring or disfigurement. Nothing contained herein shall preclude any insurer from offering higher limits of pain and suffering coverage or providing broader coverage.
- g. In addition to Added Personal Injury Protection coverages, a Personal Injury Protection insurer shall make available other insurance coverages with the approval of the Commissioner. Such coverages shall include, but are not limited to, bodily injury liability insurance, collision coverage, and comprehensive physical damage coverage.
- h. An insurance policy written by a motor vehicle liability insurer pursuant to this Act to provide coverage under the Tort Liability In-

19. As to subsection 4c, a Personal Injury Protection Insured is not required to carry bodily injury liability insurance. People owning their own homes or other substantial assets will want to buy residual liability insurance, but as the main text indicates it will be quite inexpensive.

insurance option shall include Tort Maintenance Coverage for accidental bodily injury of an insured under the Tort Liability Insurance option, caused by the negligence, in whole or in part, of a Personal Injury Protection insured. Such insurance will pay such damages as might have been recovered against a Personal Injury Protection insured but for the exemption from tort liability provided by section 14 up to the liability limits of the Tort Maintenance Coverage.

SECTION 5. REQUIRED LIMITS OF LIABILITY COVERAGE. Every owner who chooses the Tort Liability Insurance Option must carry liability insurance in an amount equal to the minimum liability limits for accidental bodily injury and property damage as specified by this State's financial responsibility law. Insurers providing coverage for such persons shall include Tort Maintenance Coverage required in section 4 in all policies providing primary coverage for legal liability for motor vehicles at limits equal to the bodily injury liability coverage carried by the Tort Maintenance Coverage insured.

SECTION 6. ELECTION OF PERSONAL INJURY PROTECTION OPTION OR TORT MAINTENANCE COVERAGE OPTION.²⁰ Upon the earliest and first renewal of any applicable motor vehicle liability insurance policy on or after the effective date of this Act, or before the issuance of a policy required by this Act, a choice must be made of either the Tort Maintenance Coverage option or the Personal Injury Protection option. In order to minimize conflict between the two options, all motor vehicle insurers are authorized to maintain underwriting rules which encourage uniformity within a household. A choice made pursuant to this Act is binding with respect to any continuation, renewal, or reinstatement of an applicable motor vehicle insurance policy, and continues with respect to any policy which extends, supersedes, or replaces the policy unless the named insured subsequently makes a different choice in writing.

SECTION 7. APPLICATION OF COVERAGE.

a. If there is only one vehicle owned by the named insured or any member of the household of the named insured, the choice made by the named insured is applicable to his or her spouse and to any resi-

20. This section requires motorists to elect between the Personal Injury Protection system and the tort system. It establishes procedures for such elections and for establishing their effective date. It also provides that a motor vehicle insurer may encourage that all the motor vehicle insurance policies within the same household be of the same type. Without this provision an insurer might find it administratively burdensome to have different options made by individual family members.

dent relatives of the household. That choice also applies to all persons insured under the policy while occupying other motor vehicles or if struck by another motor vehicle.

b. If there is more than one motor vehicle in the household, and the named insured chooses different options for different vehicles, the choice applicable to the vehicle in use governs not only the named insured, but also all other persons insured under the policy whose injury arises out of the use of that motor vehicle unless the named insured has specifically identified family members who shall be Personal Injury Protection insureds. If the named insured is injured while occupying or through being struck by another motor vehicle, the Tort Maintenance Coverage option shall be deemed applicable and Personal Injury Protection benefits shall not be provided. If any other person insured under two or more policies covering different options is injured while occupying or through being struck by another motor vehicle, and that insured has not been specifically identified by the named insured as being a Personal Injury Protection insured at all times, the Tort Maintenance Coverage option shall be deemed applicable and personal benefits shall not be provided.

c. If there are two or more vehicles in the household, each owned by different persons, each such person shall have the right to choose either the Personal Injury Protection option or the Tort Maintenance Option coverage for himself or herself. That person's choice shall determine that person's rights no matter which vehicle he or she is occupying or which vehicle he or she might be struck by. The rights of all members of the household who are not motor vehicle owners shall be governed by the choice applicable to the motor vehicle which they were occupying at the time of the injury, if that vehicle was owned by a member of the household.

d. In the event of a bodily injury occurring prior to the effective date of a required choice, if there are conflicting choices within the household creating questions as to the applicability of the Personal Injury Protection option or the Tort Maintenance Coverage option, or if there is a failure to make a choice as required by this Act, Tort Maintenance insurance will be applicable, and Personal Injury Protection benefits will not be payable.

SECTION 8. GEOGRAPHIC APPLICATION OF PERSONAL INJURY PROTECTION POLICIES.²¹ A Personal Injury Protection Insurer shall pay

21. This section provides that Personal Injury Protection benefits shall be paid to a Personal Injury Protection Insured injured anywhere in the United States and Canada. A Personal Injury Protection policy must contain provisions that satisfy the financial responsi-

Personal Injury Protection benefits for accidental bodily injury of a Personal Injury Protection Insured sustained within the United States of America, its territories or possessions, or Canada. Any Personal Injury Protection insurance policy issued to satisfy the financial responsibility law of this State shall be conformed to satisfy the financial responsibility law of any jurisdiction mentioned above in which the insured motor vehicle is being operated with respect to an accident occurring in that jurisdiction.

SECTION 9. PERSONS NOT ENTITLED TO PERSONAL INJURY PROTECTION BENEFITS.²² A Personal Injury Protection Insurer has no obligation to provide Personal Injury Protection benefits to or on behalf of any injured person who:

a. was involved in a motor vehicle accident while committing a felony or while voluntarily occupying a motor vehicle known by him or her to be stolen;

b. was driving under the influence of alcohol or illegal drugs;

c. is injured while occupying a motor vehicle owned by, or furnished or available for the regular use of the injured person, or the injured person's resident spouse or relative, if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy;

d. was operating or occupying a motor vehicle with three or fewer load bearing wheels;

e. was guilty of intentional misconduct.²³ (If a person dies as a result of intentional misconduct aimed at himself or herself, his or her survivors are not entitled to Personal Injury Protection for loss arising from the decedent's injury or death.);

bility law of any state or Canadian province in which the insured motor vehicle can be expected to be operated.

Financial responsibility laws, referred to in section 8, require motorists (or place penalties on them for failing) to carry minimum limits of automobile insurance.

22. This section provides that no Personal Injury Protection benefits will be paid to individuals who fall into one or more of the following categories:

- * persons driving under the influence of alcohol or illegal drugs;
- * persons occupying an uninsured motor vehicle which they themselves do not own;
- * persons operating or occupying a motorcycle;
- * persons occupying a motor vehicle known to be stolen or in the course of committing a felony; and
- * persons guilty of intentional misconduct (i.e. a person who intended to commit homicide, assault, or suicide by automobile).

23. See *supra* text accompanying note 10 to Appendix B.

f. is insured pursuant to the Tort Maintenance Coverage option described in section 4h, or

g. is an uninsured motorist, or a dependent of an uninsured motorist who is not otherwise insured for Personal Injury Protection.

Nothing contained herein prevents a Personal Injury Protection Insurer from including in Personal Injury Protection coverage persons mentioned in this section, but only if such is done by language clearly manifesting an intent to provide such coverage.

SECTION 10. PAYMENT OF PERSONAL INJURY PROTECTION BENEFITS. Personal Injury Protection benefits when due are payable at the option of the Personal Injury Protection Insurer to any of the following:

- a. the injured person;
- b. the parent or guardian of the injured person, if the injured person is a minor or incompetent;
- c. a dependent survivor, executor or administrator of the of the injured person; or
- d. any other person or organization rendering the services for which payment is due.

SECTION 11. MULTIPLE COVERAGES.²⁴ Regardless of the number of motor vehicles involved, persons covered, claims made, motor vehicles or premiums shown on the policy or premiums paid, in no event shall the coverage limits under a motor vehicle insurance policy for any one coverage be added to, combined with, or otherwise stacked upon any other coverage limit to determine the maximum limit of coverage available to an injured person for any one accident. Unless the contract clearly provides otherwise, policies or plans may also provide that if two or more policies, plans, or coverages apply equally to the same accident, the highest limit of liability applicable shall be the maximum amount available to an insured person under any one of such policies. Each such policy, plan, or coverage shall bear its proportionate share of the loss.

SECTION 12. PRIORITY OF BENEFITS.²⁵

a. Persons entitled to Basic Personal Injury Protection benefits required or provided pursuant to this Act are entitled to at least the

24. O'Connell, *supra* note 1 to Appendix B, at 966 & n.69.

25. This section determines which Personal Injury Protection coverage will provide compensation to a person qualified to receive such benefits. The underlying principle set forth in subsection 12a is that a person suffering loss should make his claim for benefits

Personal Injury Protection coverage under the policy insuring them and shall claim such benefits from insurers in the following order of priority up to the limits of Personal Injury Protection in the listed category:

First: The Personal Injury Protection covering a motor vehicle involved in the accident, if the person injured was an occupant of or was struck by such motor vehicle at the time of the accident.

Second: The Personal Injury Protection under which the injured person is or was an insured.

Third: If no Personal Injury Protection is available under the above priorities, a person injured as a result of a motor vehicle accident may claim benefits under the Assigned Claims Plan pursuant to section 23 of this Act, unless unqualified for benefits under section 6.

b. If two or more insurers are obligated to pay Personal Injury Protection benefits in accordance with the priorities set out in this section, the insurer against whom the claim is first made shall pay the claim as if wholly responsible, and may thereafter recover contribution pro rata from any other insurer at the same priority level for the cost of the payments and the processing of the claim. For purposes of this section, an unoccupied parked motor vehicle is not a motor vehicle involved in an accident unless it was parked in such a way as to cause unreasonable risk of injury.

SECTION 13. COORDINATION OF BENEFITS.²⁶ A Basic Personal Injury Protection Insurer has the primary obligation to indemnify an

against the insurer of the car which he was occupying or was struck by. In effect then, the insurance follows the car, not the driver and his family. Concerning this distinction, see DOT REPORT, *supra* note 2 to Appendix B, at 137-38; see also KEETON & O'CONNELL, *supra* note 5 to Appendix B, at 370-79.

Under subsection 12b, if two or more insurers of the same priority level are obligated to pay Personal Injury Protection benefits, the insurer against whom the claim is first made shall pay benefits, and may thereafter recover a pro rata contribution from every other insurer at the same priority level. The section also provides that an unoccupied parked motor vehicle is not a motor vehicle involved in an accident, such that it would not become the source of payment, even if damaged in the accident, "unless parked in such a way as to cause unreasonable risk of injury."

26. See *supra* text accompanying note 5 to Appendix B. Section 13 concerns the effect of collateral sources of benefits (such as health and disability coverages) on the right to receive Personal Injury Protection benefits.

Section 13 provides in effect that benefits from collateral sources received by a person injured in a motor vehicle accident shall be subtracted from Personal Injury Protection benefits payable to that person.

As a corollary to Personal Injury Protection as excess insurance over all other collectible coverage, the Personal Injury Protection Insurer has no right of subrogation except as provided in section 15.

injured person except to the extent of collateral sources paid or payable to such person.

SECTION 14. TORT RIGHTS AND LEGAL LIABILITY UNDER THIS ACT.²⁷

a. No Personal Injury Protection Insured has a cause of action for injury against, nor is liable to, any other person on account of an accident occurring within this State, except as provided in subsections b, c, d, and e and except for injury caused other than by the ownership, operation, or use of a motor vehicle.

b. An injured person has a cause of action for accidental bodily injury against any party driving under the influence of alcohol or illegal drugs or guilty of intentional misconduct. Any party providing Personal Injury Protection or Tort Maintenance Coverage benefits to such injured person has a right of subrogation under this subsection b.

27. This section defines the extent to which an insured who is injured in a motor vehicle accident is prohibited from bringing a lawsuit in tort.

Subsection 14a provides that no insured has a cause of action for injury against any other person except as provided in the next four subsections of this section.

Under the last clause of subsection 14a, a railroad covering the motor vehicles it owns under Personal Injury Protection remains liable for accidents in which its train negligently collides with a motor vehicle.

As to subsection 14e, because payment is made only for a claimant's economic losses, unless a claimant's attorney's fee were paid in addition to his damages, he would have to pay attorney's fees, if any, be out-of-pocket. See *supra* note 15 to main text.

As to subsection 14c, for a definition of collision insurance, see *supra* note 28 to main text. This provision too (along with those described in the main text at notes 45-52) enables special cost savings for the poor—a group especially hard hit by the high costs of compulsory auto insurance. Although states require only low limits of tort liability for personal injury—say, \$15,000 or \$20,000—around 15-20% of motorists either will not or cannot pay the premium, and thereby remain uninsured. The percentage of uninsured motorists can vastly exceed 50% in the inner cities of many major metropolitan areas. See Vlae Kershner, *Some See No End to Battle over No-Fault*, S.F. CHRON., Oct. 4, 1989, at A9; Kenneth Reich, *Relief From High Auto Insurance Not in Sight: Although State Drivers are Fuming, Powerful Lobbies Stymie Attempts at Legislative Reform*, L.A. TIMES, Nov. 23, 1986, at 1.

Because the poor ordinarily drive older cars not covered by collision insurance (many motorists are probably well advised not to insure a car for collision coverage if it is more than, say, five years old), poorer motorists buying Personal Injury Protection insurance will save substantially on property damage liability costs by virtue of their exemption from property damage claims to the extent other Personal Injury Protection insureds they collide with carry collision insurance. Such a provision can also be justified in that once loss is covered by efficient first party insurance payable without reference to fault—such as collision insurance—it no longer makes much economic sense to redistribute the loss under a second insurance scheme, especially a cumbersome one necessitating establishing fault with all its transaction costs. John G. Fleming, *The Collateral Source Rule and loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1536-37 (1966); see generally Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952).

c. A Personal Injury Protection Insured has a cause of action for accidental bodily injury for uncompensated economic loss against, and is liable for same, to, any person insured under Personal Injury Protection or Tort Maintenance Coverage.

d. Benefits under subsection c include reasonable expenses incurred by the party in collecting such benefits, including a reasonable attorney's fee for advising and representing a claimant for such benefits. No part of the fee for representing such party in connection with such benefits is a charge against benefits otherwise due the claimant, and no additional fee may be charged by an attorney to any party in collecting such benefits. All or part of the fee may be deducted from the benefits otherwise due the claimant if any significant part of the claim for such benefits was fraudulent or so excessive as to have no reasonable foundation. In any action brought against an injured person by a Personal Injury Protection Insurer, the court may award the injured person's attorney a reasonable attorney's fee for defending the action if the injured person was the prevailing party.²⁸

e. A Personal Injury Protection Insured whose motor vehicle is damaged by the fault of another Personal Injury Protection Insured has a cause of action for damage to such motor vehicle only to the extent such motor vehicle is not covered by collision insurance.²⁹

f. A person covered by Tort Maintenance Coverage has a cause of action for injury against another person so covered.

g. An uninsured motorist has no cause of action against a Personal Injury Protection Insured for (1) injury other than for uncompensated economic loss and (2) damage to property except damage in excess of the property damage liability limits mandated under this State's financial responsibility law unless the Personal Injury Protection Insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct. An uninsured motorist remains liable in tort to a person insured for Personal Injury Protection benefits for noneconomic loss, economic loss, and property damage.³⁰

SECTION 15. INSURER'S RIGHT OF SUBROGATION.³¹ There is no right of subrogation or contribution by a Personal Injury Protection

28. O'Connell, *supra* note 1 to Appendix B, at 970 & n.87.

29. *Id.* at 957 n.32.

30. *Id.* at 970 & n.89.

31. Under subsection 15a, to the extent that the Personal Injury Protection Insurer is obligated to pay any Personal Injury Protection benefits, it has a right to be reimbursed for those payments against an uninsured motorist. "This right to claim against the uninsured

Insurer except under sections 14, 16, 23, and except that a Personal Injury Protection Insurer is subrogated, to the extent of its obligations, to all of the rights of its Personal Injury Protection Insured with respect to an accident caused in whole or in part by

- a. the negligence of an uninsured motorist;
- b. the negligence of the owner or operator of a motor vehicle having a gross weight of 7000 pounds or more;³²
- c. driving under the influence of alcohol or illegal drugs;³³
- d. intentional misconduct; or
- e. any person who is not affected by the limitations on tort rights and liabilities pursuant to section 14.

SECTION 16. PERSONAL INJURY PROTECTION BENEFITS AND CAUSES OF ACTION FOR INJURY.³⁴ No subtraction is made against Personal Injury Protection benefits due because of the value of a cause of action for injury preserved under this Act, except that after recovery is realized under such cause of action, a subtraction is made to the extent of the net recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If Personal Injury Protection benefits have already been received, the recipient thereof shall repay to the insurer paying Personal Injury Protection benefits out of such recovery a sum equal to the Personal Injury Protection benefits received but not more than the realized net recovery, and the insurer shall have a lien on the recovery to this extent. Any remainder of the net recovery from such a cause of action applies

motorist, extant at common law, is unchanged by the bill. Such a right is very often only a theoretical one, given the lack of assets held by most uninsured motorists." *Id.* at 956 n.28.

As to subsection 15b, given their greater weight, large trucks in truck-car collisions disproportionately effect damage on private passenger vehicles and their occupants rather than vice versa. Lacking the above provision there would be a windfall to owners of such trucks and other large commercial vehicles following truck-car collisions because the insurer of each vehicle would simply pay the occupants of its own vehicle. Thus as a simple solution to this problem, the bill allows subrogation, based on fault, by private passenger car Personal Injury Protection payers against trucks and other vehicles having a weight of 7000 pounds or more.

Under subsection 15c, every motorist remains liable for driving under the influence of alcohol or illegal drugs (as well as for intentional misconduct under d).

Under subsection 15e, persons who retain tort rights and liabilities include an out-of-state motorist.

32. *Id.* at 968 n.74.

33. *Id.* at 968 n.75.

34. This section coordinates common law claims based on fault and claims for personal injury protection benefits. For its origins, see KEETON & O'CONNELL, *supra* note 5 to Appendix B, § 1.10(c)(2), at 307, 402-04.

periodically against loss as it accrues, until an amount equal to the net recovery under such a cause of action has been subtracted.

SECTION 17. PERSONAL INJURY PROTECTION BENEFITS PAYABLE PERIODICALLY.³⁵

a. Personal Injury Protection benefits are payable monthly as loss accrues. Such benefits are overdue if not paid within 30 days after the Personal Injury Protection insurer receives reasonable proof of the fact and the amount of loss sustained, except that a Personal Injury Protection Insurer may accumulate claims for periods not exceeding one month, and benefits are not overdue if paid within 20 days after the period of accumulation. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after such proof is received by the insurer, subject to the right of review specified in section 30. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after such proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment is treated as made on the date a draft or other valid instrument is placed in the United States mail in a properly addressed postpaid envelope, or, if not so posted, on the date of delivery. Personal Injury Protection benefits may be paid by the Personal Injury Protection insurer directly to persons supplying necessary products, services, or accommodations to the injured person. If overdue benefits are recovered against a Personal Injury Protection Insurer or are paid by a Personal Injury Protection Insurer, the provisions of subsection 14e pertaining to expenses and an attorney's fee apply. In addition, the insurer is obligated to pay interest on the overdue payment at [150]% of the prime rate in effect at the time the payment became overdue.

35. This section provides that Personal Injury Protection benefits are payable monthly, as the losses accrue. If they are not paid to the victim or the provider of service within 30 days after the insurer receives reasonable proof of the fact and amount of loss sustained, the benefits are overdue. (Alternatively, benefits are overdue if they are accumulated for up to one month if they are not paid within 20 days after the period of accumulation.)

The section further provides that "all overdue payments bear interest at the rate of 150% of the prime rate in effect at the time the payments became overdue." If overdue benefits are recovered from an insurer or paid by an insurer, the insurer shall also pay reasonable attorney's fees.

SECTION 18. ASSIGNMENT OR GARNISHMENT OF PERSONAL INJURY PROTECTION BENEFITS.³⁶

a. Personal Injury Protection benefits, other than those for medical expenses, are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law exempting wages or earnings from process or claims.

b. An agreement for assignment of any right to Personal Injury Protection benefits payable in the future other than medical expenses is unenforceable except to the extent that such benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee or that benefits for loss of income from work or replacement services are assigned to secure payment of alimony, maintenance, or child support. Pain and suffering coverage benefits may also be assigned.

SECTION 19. NO PENALTY FOR CLAIMS FOR PERSONAL INJURY PROTECTION BENEFITS.³⁷ An Insurer shall not cancel, fail to renew, or increase the premium of its Insured solely on account of the Insured or any other injured person making a claim for Personal Injury Protection benefits or for collision damage to the insured vehicle. Violation of this section is punishable by a fine of [\$1000] per offense, such punishment to be exclusive of all other remedies permitted by law.

SECTION 20. LIMITATION OF ACTIONS.³⁸ Subject to the arbitration provisions which follow, if no Personal Injury Protection benefits have been paid, an action therefore may be commenced against the Personal Injury Protection Insurer not later than two years after the injured person suffers accidental bodily injury. If Personal Injury Protection benefits have been paid, an action for recovery of further benefits by either the injured person or another claimant may be commenced not later than two years after the last payment of benefits.

36. O'Connell, *supra* note 1 to Appendix B, at 973-74 & n.101.

37. This section provides that an insurer may not cancel or fail to renew a policy nor may it increase the premium of an insured, solely because he or she filed a claim for Personal Injury Protection benefits or for collision damage to the insured vehicle.

38. This section provides a two year statute of limitations for claims for Personal Injury Protection benefits. Such an action must be brought against a Personal Injury Protection Insurer within two years after the accident or not later than two years after the last payment of benefits.

SECTION 21. MENTAL AND PHYSICAL EXAMINATIONS.³⁹

a. Whenever the mental or physical condition of an injured person is material to any claim that has been made or may be made for past or future Personal Injury Protection benefits, the insured person shall submit to reasonable mental or physical examinations by a physician or physicians designated by the insurer at a reasonably convenient time and location, subject to regulations, if any, promulgated by the Commissioner. Personal Injury Protection Insurers are authorized to include provisions of this nature in policies providing Personal Injury Protection benefits.

b. Where an insurer has requested of a person receiving Personal Injury Protection benefits that such person undergo medical or rehabilitation services, and such person unreasonably refuses to comply with such request, the insurer may, upon written notice, suspend all future such benefits until such person complies with that request.

SECTION 22. VERIFICATION OF ENTITLEMENT TO BENEFITS.⁴⁰

a. Every employer shall furnish pertinent information on a form approved by the Commissioner regarding an employee who has filed a claim for Personal Injury Protection benefits if a request is made by an insurer providing such benefits under this section.

b. Every physician, hospital, clinic, or other medical institution providing, before or after an injury resulting from a motor vehicle accident upon which a claim for Personal Injury Protection benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury shall, if requested to do so by the Personal Injury Protection Insurer against whom the claim has been made, furnish a written report of the history, condition, and treatment, and the dates and costs of such treatment, of the injured person. Such information shall be provided together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the injury sustained and identifying which portion of the expenses for such treatment or services were incurred as a result of such injury. Every such physician, hospital, clinic, or other medical institution shall also promptly produce and permit the inspection and copying of its records regarding such history, condition, and treatment, and the dates and costs of treatment. The sworn statement required under this section reads as follows:

39. O'Connell, *supra* note 1 to Appendix B, at 974-75 & n.104.

40. *Id.* at 975 & n.105.

“Under penalty of perjury I declare that I have read the foregoing and the facts alleged are true, to the best of my knowledge and belief.”

No cause of action for violation of a physician-patient privilege or invasion of the right of privacy is allowed against any physician, hospital, clinic, or other medical institution complying with the provisions of this section. The person requesting records and a sworn statement under this subsection shall pay all reasonable costs connected therewith.

c. In the event of any dispute regarding the Personal Injury Protection Insurer’s right to discovery of facts about an injured person, if the dispute is not referred to arbitration under section 31, a court of record may enter an order for such discovery as justice requires.

SECTION 23. ASSIGNED CLAIMS PLAN.⁴¹ Insurers and qualified self-insurers authorized to provide Personal Injury Protection insurance under this Act shall organize, participate in, and maintain an assigned claims plan to provide Basic Personal Injury Protection benefits to any person who is injured as a result of a motor vehicle accident if:

a. Basic Personal Injury Protection benefits are payable but not applicable to the injury for some reason other than those specified in section 9 of this Act; provided such person shall have the right to reject Personal Injury Protection benefits and to seek damages in tort. The election must be made within ninety days after the accident or ninety days after receiving written notice of the right of election.

b. Basic Personal Injury Protection benefits are unavailable, in whole or in part, because of financial inability of an insurer to fulfill its obligations. Payments made by the Assigned Claims Plan pursuant to this subsection b constitute covered claims of the Insurance Guaranty Association under the laws of this State.

c. The Assigned Claims Plan shall provide such rules and agreements for the operation of the Plan and for the equitable distribution of costs as approved by the Commissioner. Any claim brought through the Assigned Claims Plan is assigned to an insurer in accordance with such rules and agreements, and that insurer, after such assignment, has the rights and obligations it would have had if, prior to such assignment, it had issued a policy providing Personal Injury Protection applicable to the loss. Any person accepting Personal Injury Protection benefits under the Assigned Claims Plan has such rights

41. *Id.* at 975-76 & n.106.

and obligations as he or she would have had under a policy issued to him or her providing Personal Injury Protection benefits.

d. If a claim qualifies for assignment under this section, the Assigned Claims Plan and any insurer to whom the claim is assigned is subrogated to all of the rights of the claimant against any person liable for such loss and against any insurer, its successor in interest, or any other person or organization legally obligated to provide Personal Injury Protection benefits to the insured person for benefits provided by the assignment.

SECTION 24. FRAUDULENT CLAIMS.⁴² Any person, including an insurer, who, with intent to defraud, or deceive any other person in connection with a claim for payment or other benefit pursuant to an insurance policy providing benefits under this Act, does or attempts to do either of the following, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim

a. presents or causes to be presented, or conspires to present or cause to be presented, any written or oral statements in connection with a claim for payment or other benefit; or

b. prepares or makes any written or oral statement that is intended to be presented to any person in connection with or in support of any claim for payment or other benefit, shall be guilty of a felony punishable by a fine of not more than [\$10,000].

SECTION 25. NON-DISCRIMINATION IN FEES FOR MEDICAL SERVICES.⁴³ A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person, and a person or institution providing medical rehabilitation services following an injury to an injured person, may charge only a reasonable amount for the products, services, and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services, and accommodations in cases not involving insurance.

SECTION 26. MANAGED CARE.⁴⁴ A Personal Injury Protection Insurer, with the approval of the Commissioner, may utilize, for the payment of medical expenses provided under Personal Injury Protection, managed care systems, including but not limited to, health mainte-

42. *Id.* at 976 & n.107.

43. *Id.* at 977 & n.108.

44. *Id.* at 977 & n.109.

nance⁴⁵ and preferred provider organizations,⁴⁶ and may require an injured person to obtain health care through a managed care system designated by the Personal Injury Protection Insurer if such injured person has opted to be subject to such a managed care system at the time of purchase of Personal Injury Protection coverage at an appropriately reduced premium.

SECTION 27. SAFETY EQUIPMENT.⁴⁷ Each Personal Injury Protection Insurer shall adopt an actuarially sound program which provides incentives, in the form of increased benefits, reduced premiums, or other means, for Personal Injury Protection Insureds to install, maintain, and make use of injury reducing devices such as, but not necessarily limited to, seat and harness belts, air bags, and child restraint systems.⁴⁸

SECTION 28. REGULATIONS.⁴⁹

a. The Commissioner may adopt additional regulations to provide effective administration of this Act that are consistent with its purposes and are fair and equitable, including regulations which authorize Personal Injury Protection Insurers to write Personal Injury Protection insurance with reasonable deductibles higher or lower in amount than that provided in section 3c, and regulations to permit the offering of pain and suffering coverage.

b. The Commissioner shall develop an informational brochure which must be provided by each insurer or agent to each policyholder or applicant for motor vehicle insurance explaining the Personal Injury Protection option and the Tort Liability Insurance option as well as the consequence of selection of one option over the other.

The Commissioner shall establish, within the Department of Insurance, a compliance unit which shall monitor all complaints against insurers, health care providers, and attorneys arising out of the provision of Personal Injury Protection benefits. The Commissioner shall report to the legislature, at least annually, on the nature of the complaints, the penalties levied against insurers, and the final disposition of complaints. The report, which will identify parties by name, will be a public record available on request by any member of the public.

45. *Id.* at 977 & n.110.

46. *Id.* at 977 & n.111.

47. *Id.* at 977 & n.113.

48. *Id.* at 977 & n.114; *see also supra* main text accompanying note 56.

49. O'Connell, *supra* note 1 to Appendix B, at 978 & n.115.

SECTION 29. LIMITATION OF LIABILITY FOR ADVISING ON OPTIONS.⁵⁰ No insurer or any agent or employee of such insurer, no insurance producer representing a motor vehicle insurer or any automobile residual market plan, and no attorney licensed to practice law within this State shall be liable in an action for damages on account of an election of the Tort Liability Insurance option, an election of the Personal Injury Protection option, or a failure to make a required election, unless such person has wilfully misrepresented the available choices or has fraudulently induced the election of one system over the other.

SECTION 30. COST OF LIVING ADJUSTMENT.⁵¹ Every two years, on the anniversary of the effective date of this Act, the Commissioner shall report in writing to the legislature on the effect of changes in the relevant components of the cost of living on levels of benefits, limits of liability, and deductibles mentioned in this Act.

SECTION 31. ARBITRATION.⁵² Any dispute with respect to Personal Injury Protection coverage between a Personal Injury Protection Insurer and an injured person, or the dependents of such person, shall be submitted to arbitration. Such dispute either shall be submitted to the American Arbitration Association, or be submitted for determination in the following manner: Upon the request for arbitration being made by either party, each party to the dispute shall select an arbitrator and the two arbitrators so named shall select a third arbitrator. The written decision of any two arbitrators is binding on each party. If arbitrators are not selected within 45 days from such request, either party may require that such arbitration be submitted to the American Arbitration Association.

SECTION 32. OUT-OF-STATE VEHICLES.⁵³ Each insurer authorized to transact or transacting business in this State shall file with the Commissioner, as a condition of its continued transaction of business within this State, a form approved by the Commissioner declaring that any contract of motor vehicle liability insurance, wherever issued, covering the maintenance or use of a motor vehicle while the motor vehicle is in this State, is deemed to provide the insurance required by section 5 of this Act unless the named insured, prior to a motor vehicle accident within this State, has elected the Personal Injury Protec-

50. *See id.* at 972 & n.96.

51. *Id.* at 978 & n.116.

52. *Id.* at 978 & n.117.

53. *Id.* at 978-79 & n.118.

tion option pursuant to section 4. Any nonadmitted insurer may also file such form. In the event a person is entitled to Personal Injury Protection benefits or their equivalent under the requirements of more than one state, such person shall elect to recover under the laws of any one such state and such election shall represent the exclusive source of recovery of all Personal Injury Protection benefits, or their equivalent, paid or payable under the financial responsibility requirements of that or any other state.

SECTION 33. TERMS, CONDITIONS, AND EXCLUSIONS.⁵⁴ All insurance coverages provided pursuant to this Act are subject to such terms, conditions, and exclusions as have been approved by the Commissioner.

SECTION 34. APPLICABLE PROVISIONS TO TORT MAINTENANCE COVERAGE. As to matters covered in, sections 12, 15, 16, 18, 21, 22, 23, 26, 27, 29, 32, and other related matters, where appropriate laws and regulations of this State applicable to uninsured motorist coverage are applicable to Tort Maintenance Coverage, except that the Commissioner may by regulation apply pertinent provisions applicable to Personal Injury Protection to Tort Maintenance Coverage.⁵⁵

SECTION 35. SEVERABILITY AND CONSTITUTIONALITY.⁵⁶ If any provision of this Act or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid, the remainder of this Act and the application of such provision to other persons or circumstances are not affected thereby, and it is to be conclusively presumed that the legislature would have enacted the remainder of this Act without such invalid or unconstitutional provision, except that if section 14 is found to be unconstitutional or invalid, it is to be conclusively presumed that the legislature would not have enacted the remainder of this Act without such limitations, and the entire Act is invalid. If section 14 is found to be unconstitutional or invalid, Personal Injury Protection Insurers have no obligation to pay Personal Injury Protection benefits with respect to accidents occurring on or after the date of the finding of such unconstitutionality or invalidity and, in addition, are subrogated to all of the rights of Personal Injury Protection Insureds for all previous such benefits paid.

54. *Id.* at 979 & n.119.

55. This could be done, for example, in having Tort Maintenance Coverage track Personal Injury Protection coverage for recovery of uncompensated economic loss. *See supra* section 14.

56. O'Connell, *supra* note 1 to Appendix B, at 980 & n.123.

SECTION 36. DECLARATORY JUDGMENT.⁵⁷ In addition to the provisions of section 35, because the legislature finds and declares that questions of law may exist with respect to the constitutionality of some of the sections of this Act, the public welfare requires that such questions with respect to this Act be resolved with expedition prior to such time as its mandatory provisions take effect in order to avoid disruption of the orderly implementation of its provisions. Therefore, the legislature finds that the remedy of declaratory judgment to determine the constitutionality of the provisions of this Act should immediately be made available to determine those important questions, in order to avoid utter confusion by the public in the event this Act is declared unconstitutional after [its effective date]. Therefore, any resident of the State is authorized to forthwith bring an action for a declaratory judgment in the _____ court, for _____ County against the Commissioner to determine the constitutionality of this Act's provisions. Such court shall reserve the questions of law for the advice of the Supreme Court as provided by law. In the interest of expediting a decision, the Supreme Court may suspend its rules as provided therein.

SECTION 37. EFFECTIVE DATE. This Act takes effect on _____ and applies to the use or operation of motor vehicles within this State on and after such date. Sections 23, 26, 27, 28, 29, 32 and 36 of this Act shall take effect immediately in order that all actions necessary to prepare for the implementation and administration of this Act may be completed at least 90 days prior to the effective date.

57. *Id.* at 980-81 & n.124.