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# The Louisiana Legislature's Attempt to Reduce Auto Insurance Rates with No Pay, No Play: The Answer, A Step in the Right Direction, or Completely Useless?

Rachel Jenny

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# **The Louisiana Legislature's Attempt to Reduce Auto Insurance Rates with No Pay, No Play: The Answer, A Step in the Right Direction, or Completely Useless?**

## **I. INTRODUCTION**

Louisiana is one of forty-seven states in the nation plus the District of Columbia (D.C.) to require some form of auto insurance coverage.<sup>1</sup> This requirement is driven by each state's need to promote stability and protect its citizens when they suffer losses in an auto accident.<sup>2</sup> Louisiana, like most states, requires each driver to maintain minimum third party liability coverage.<sup>3</sup> The Motor Vehicle Safety Responsibility Laws require a minimum Bodily Injury (BI) coverage of \$10,000 per person and \$20,000 per accident and Property Damage (PD) coverage of \$10,000 per accident.<sup>4</sup> Unfortunately, this coverage costs money and affects an overwhelming percentage of Louisiana citizens. As such, it is one of the only laws by which the state imposes an expense on its citizens. Some think this imposition is unfair. Others believe it is a necessary evil and completely justified. Regardless, it is the law that must be observed and a cost for all to bear.

Louisiana has a history of battling high auto insurance rates. Compulsory auto liability insurance legislation intensifies the effect of this problem; both the rich and poor are required to purchase car insurance. As part of this battle, the State has kept a close watch on insurance rates. Until recently, any rate change required prior approval by vote of the Louisiana Insurance Rating Commission (LIRC) and, even now, the filings are reviewed for actuarial soundness and changes in excess of ten percent reach the LIRC's agenda.<sup>5</sup> The public is also very aware of auto insurance rates; the renewal notice informing a policyholder that their premium has

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1. Insurance Information Institute, *The I.I.I. Insurance Fact Book 2005* at p. 50-53 (2005).

2. *See Williams v. US Agencies Cas. Ins. Co., Inc.*, 2000-1693 (La. 2/21/01), 779 So. 2d 729.

3. La. R.S. 32:861 (2002).

4. La. R.S. 32:900B(2) (2002 & Supp. 2005).

5. La. R.S. 22:1406 (2004).

increased rarely goes unnoticed. Furthermore, the major newspapers consistently report rate changes, usually in the upward direction, of the state's top insurance writers.

To do its part to address rising insurance rates, the legislature passed the Omnibus Premium Reduction Act of 1997, mandating a ten percent rate decrease for auto liability coverage.<sup>6</sup> This decrease was to be offset by a recovery limitation for uninsured motorists, known as No Pay, No Play. Since its highly publicized passage, the No Pay, No Play legislation has received little attention.

Section II of this paper sets forth the backdrop the legislature was working against by surveying the plight of Louisiana auto insurance consumers. Next, section III analyzes the statute from beginning to end. It reviews the development of No Pay, No Play, its enactment, and the courts' and legislature's subsequent actions. Section IV attempts to quantify the statute's effects in comparison to its purpose for an overall evaluation of the legislation. Finally, section V of this paper presents several proposals for future legislative action to keep the auto insurance reform ball rolling.

## II. DIAGNOSIS OF SKYROCKETING RATES AND TREATMENT WITH NO PAY, NO PLAY

### A. *Breaking the Bank: The Louisiana Insurance Epidemic*

Louisiana auto insurance rates have consistently been among the highest in the United States. In 1997,<sup>7</sup> Louisiana ranked eighth in the nation for estimated average expenditure per vehicle for private passenger auto insurance.<sup>8</sup> The only states higher were New Jersey, D.C., New York, Hawaii, Connecticut, Rhode Island, and Nevada.<sup>9</sup> Louisiana's average expenditure of \$841.07 per year was nineteen percent higher than the national average and exceeded neighboring

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6. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476 sec. 5) (2002 & Supp. 2005).

7. This was the year in which the legislature was acting to pass reform.

8. Insurance Information Institute, *The I.I.I. Insurance Fact Book 2000* at 2.5 (1999).

9. *Id.*

states Texas, Arkansas, and Mississippi by thirteen percent, forty-eight percent, and twenty-nine percent respectively.<sup>10</sup>

More troubling than its rank by auto insurance rates, Louisiana tops the chart for yet another negative statistic. Louisiana's "Pain Index" is the highest in the country.<sup>11</sup> The "Pain Index" refers to the ratio of average auto insurance expenditure to median household income for a family of four in a given state.<sup>12</sup> Louisiana families spend an average of 1.64% of their income on auto insurance.<sup>13</sup> This percentage is just slightly higher than second ranked D.C., which has the highest auto rates in the country.<sup>14</sup> Louisiana drivers are definitely feeling the pain.

### *B. The Louisiana Legislature's Prescription: No Pay, No Play*

With most of their constituents facing the auto insurance rate problem, Louisiana legislators naturally sought influence on the rates through legal measures. Without taking the radical approach of actually setting the rates companies could charge, the multitude of factors that affect insurance rates could be targeted with rate decrease prompting legislation.

Perhaps inadvertently, the multitude of tort reform passed in 1996<sup>15</sup> had an impact on auto insurance rates. An independent study commissioned by the LIRC determined that the changes in comparative fault recovery and the partial elimination of the strict liability doctrine would reduce losses for private passenger auto policies, namely BI coverage.<sup>16</sup> Beginning in September of 1996, the LIRC required companies to factor the calculated 6.2% savings on

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10. *Id.* at 2.4–2.5.

11. *PPA Affordability "Pain Index"*, Auto Insurance Report, August 18, 2003 at 1 (on file with author).

12. *See PPA Affordability*, *supra* note 11.

13. *Id.*

14. *Id.*

15. The revisions evaluated were: the introduction of comparative fault; the elimination of exemplary damages for hazardous materials; the narrowing of the scope of strict liability; and the cap on damages against the state.

16. Wayne D. Holdredge, Tillinghast-Towers Perrin, *Estimated Loss Reduction Due to 1996 Tort Reforms*, 12–16 (La. Insurance Rating Comm'n Aug 19, 1996), available at [http://www.lidi.state.la.us/consumers/LIRC/LIRC\\_bulletins/bulletin96-05.pdf](http://www.lidi.state.la.us/consumers/LIRC/LIRC_bulletins/bulletin96-05.pdf) (last visited 12/09/2005).

losses for BI coverage into their rate filings.<sup>17</sup> Losses are just one of many components of an insurer's rates, so even though consumers likely realized a premium savings on this one coverage, the amount was probably slight. This tort reform, though marginally helpful, did not provide much relief from Louisiana's extreme auto insurance burden.

### 1. *Legislative History and Development of No Pay, No Play*

In 1996, Governor Foster, having always been a proponent of auto insurance reform, was eager to implement measures specifically designed to reduce rates. He appointed the Louisiana Task Force for Reduction of Automobile Insurance Rates (Task Force) with the express purpose of generating a feasible and promising proposal for reducing auto insurance rates in Louisiana. The Task Force, through its subcommittees, considered many options ranging from the reasonable to the ridiculous. A few of the rejected proposals were to: ban radar detectors; raise the minimum driving age to sixteen; prohibit happy hour sales; repeal the direct action statute; and move to a no-fault system of auto insurance.<sup>18</sup>

The Task Force next sought help from an Actuarial Subcommittee composed of a Department of Insurance (DOI) actuary and other insurance industry experts. They directed this subcommittee to evaluate the impact of as many proposals within their time and resource constraints and identify the five proposals that would result in the highest insurance savings. The subcommittee closely evaluated ten proposals and sorted the rest into groups based on their expected savings potential. The top five proposals and their estimated savings on a basic package policy<sup>19</sup> were as follows:<sup>20</sup>

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17. Louisiana Insurance Rating Commission Bull. and Directive LIRC 96-05 (1996), available at [http://www.ldi.state.la.us/consumers/LIRC/LIRC\\_bulletins/bulletin96-05.pdf](http://www.ldi.state.la.us/consumers/LIRC/LIRC_bulletins/bulletin96-05.pdf) (last visited 12/09/2005).

18. La. Task Force for Reduction of Auto. Ins. Rates, Report of the Actuarial Subcommittee (Mar. 5, 1997) (on file with author). See discussion on no-fault auto insurance *infra* Part IV.B.1.

19. A basic package policy was defined as an annual policy with 10/20/10 BI/PD limits and 10/20 uninsured motorist coverage.

20. Report of the Actuarial Subcommittee, *supra* note 18.

<b>Proposal:</b>	<b>Percentage Savings</b>	<b>Dollar Savings</b>
No-Fault <sup>21</sup>	37% to 44%	\$138 to \$164
GAP Coverage <sup>22</sup>	9.0% to 14.0%	\$34 to \$52
UM Coverage for Economic Loss <sup>23</sup>	8.0% to 9.0%	\$30 to \$34
No Pay, No Play <sup>24</sup>	4.3% to 10.0%	\$16 to \$37
Modified Comparative Fault <sup>25</sup>	5.0% to 5.8%	\$19 to \$22

The legislature implemented two of these proposals, UM Coverage for Economic Loss and No Pay, No Play, as part of the Omnibus Premium Reduction Act of 1997.<sup>26</sup>

The first and foremost purpose of the No Pay, No Play statute was to lessen the burden of compulsory auto insurance;<sup>27</sup> upon the statute's passage, the legislation required insurance companies to implement rate reductions based on the projected savings. An immediate rate reduction of ten percent on both the BI and PD coverages was forced upon the insurance industry.<sup>28</sup> Notably, this

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21. See discussion on no-fault auto insurance *infra* Part IV.B.1.

22. Under this option uninsured motorist coverage would be gap coverage instead of excess coverage, such that the UM limit of an insured would be the maximum recovery under all policies, instead of an additional recovery.

23. UM-Economic Only coverage is uninsured motorist coverage that would provide for only economic losses, and not non-economic losses such as pain and suffering.

24. No Pay, No Play provisions are laws whereby an uninsured driver would be prevented from collecting some portion of his losses.

25. This proposal would institute a threshold for fault of the other party before the injured party recovers damages.

26. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 5) (2002 & Supp. 2005).

27. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 5(A)) (2002 & Supp. 2005).

28. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 1) (2002 & Supp. 2005).

rate reduction was the maximum of the range of estimated premium savings calculated by the Actuarial Subcommittee.

A secondary purpose of No Pay, No Play was to encourage compliance with the Motor Vehicle Safety Responsibility Laws, thus reducing the uninsured motorist population.<sup>29</sup> The statute was intended to influence society's behavior by introducing yet another penalty for being uninsured. Failure to maintain the requisite security could already result in a vehicle's registration being revoked, vehicle impoundment, fines, license suspension, and even imprisonment in rare situations.<sup>30</sup> Similarly, No Play, No Play represented the most recent attempt at reducing the uninsured population.

The No Pay, No Play concept was nothing new in the realm of auto insurance reform. At the time, a few other states had enacted similar legislation. Since the enactment of Louisiana's statute, however, others have followed. California, New Jersey, Michigan, and Alaska all have employed the No Pay, No Play approach to reducing insurance rates as well as lowering the uninsured population. The laws in California, Michigan, and Alaska preclude uninsured motorists involved in an accident from collecting any non-economic losses such as pain and suffering, mental anguish, and disfigurement.<sup>31</sup> New Jersey's version of No Pay, No Play states that motorists who do not carry the requisite coverage have no cause of action for *any* damages.<sup>32</sup> Louisiana's version appears more moderate, barring recovery for the first \$10,000 in damages for both the BI and PD coverages by uninsured drivers.<sup>33</sup> However, since most losses are within the \$10,000 threshold, Louisiana's law is nearly as harsh as New Jersey's No Pay, No Play.

## 2. *No Pay, No Play Clears the Constitutional Hurdle*

Act 1476 of the Louisiana Legislature, known as the Omnibus Premium Reduction Act of 1997, was a complex piece of legislation affecting many areas relating to auto insurance rates. It

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29. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 1) (2002 & Supp. 2005). Estimates of Louisiana's uninsured population ranged from thirteen percent to twenty-nine percent. Report of the Actuarial Subcommittee, *supra* note 18, at 6.

30. La. R.S. 32:863-865 (2002 & Supp. 2005).

31. Cal. Civ. Code § 3333.4 (1997); Mich. Comp. Laws § 500.3135 (2002 & Supp. 2005); Alaska Stat. § 09.65.300 (2004).

32. N.J. Stat. Ann. § 39:6A-4.5 (2002 & Supp. 2005).

33. La. R.S. 32:866(A)(1) (2002 & Supp. 2005).

amended several existing provisions while also implementing new ones. The Act: 1) Revised judicial interest rates;<sup>34</sup> 2) Established requirements for an insurer's notice of cancellation of an insurance policy to the State;<sup>35</sup> 3) Required insurers to offer UM coverage for economic losses only for a rate at a minimum of twenty percent less than the traditional coverage;<sup>36</sup> 4) Restricted recovery for uninsured motorists involved in auto accidents (the No Pay, No Play aspect);<sup>37</sup> and 5) Mandated a ten percent rate reduction on BI and PD rates for all insurers doing business in Louisiana.<sup>38</sup> The No Pay, No Play element eliminated recovery by uninsured motorists of the first \$10,000 of their bodily injury or property damage losses when involved in an auto accident.<sup>39</sup> The few exceptions to the recovery limitation were when the driver of the other vehicle: 1) was driving while intoxicated,<sup>40</sup> 2) intentionally caused the accident,<sup>41</sup> 3) fled the accident scene,<sup>42</sup> or 4) was in furtherance of committing a felony at the time of the accident.<sup>43</sup> Passengers of an uninsured motor vehicle who were not themselves the owner of that vehicle were also allowed to recover the full amount of their damages.<sup>44</sup> The statute also provided for the assessment of costs on uninsured drivers if they filed suit and were awarded less than the \$10,000 threshold for each coverage.<sup>45</sup>

Of course, few pieces of controversial legislation are enacted without withstanding constitutional review. With this foresight the legislature provided for an immediate declaratory judgment on the constitutionality of the statute,<sup>46</sup> especially in light of the intense opposition to the legislation. The Louisiana Supreme Court

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34. La. R.S. 9:3500 (Supp. 2005).

35. La. R.S. 32:863.2 (2002).

36. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 5(B)) (2002 & Supp. 2005).

37. La. R.S. 32:866 (2002 & Supp. 2005).

38. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 5(A)) (2002 & Supp. 2005).

39. La. R.S. 32:866(A)(1) (2002 & Supp. 2005).

40. La. R.S. 32:866(A)(3)(a)(i) (2002 & Supp. 2005).

41. La. R.S. 32:866(A)(3)(a)(ii) (2002 & Supp. 2005).

42. La. R.S. 32:866(A)(3)(a)(iii) (2002 & Supp. 2005).

43. La. R.S. 32:866(A)(3)(a)(iv) (2002 & Supp. 2005).

44. La. R.S. 32:866(E) (2002 & Supp. 2005).

45. La. R.S. 32:866(C) (2002 & Supp. 2005).

46. La. R.S. 32:866 note (Legislative Intent, 1997 La. Acts No. 1476, § 6) (2002 & Supp. 2005).



conducted a constitutional review of the statute in *Progressive Security Insurance Company v. Foster*.<sup>47</sup>

The court rejected several constitutional challenges to the No Pay, No Play statute asserted by an insurer and an insurance trade organization. The plaintiffs argued that the limitation of recovery for uninsured drivers constituted excessive, cruel, and unusual punishment under the Louisiana Constitution. The court disagreed, finding that the recovery limitation was not a punishment at all. It reasoned that driving is a privilege with many conditions already attached to it such as acquiring a license and taking driver's education. The court characterized the recovery limitation as another of such conditions of driving. The plaintiffs also argued that the mandated rate reduction violated the Louisiana Constitution because the legislature was exercising the rate-setting power granted to the LIRC. The court dismissed this contention, noting that the statute clearly provided for final approval by the LIRC of the rate filings containing the required reductions. In response to the plaintiffs' assertion of vagueness, the court settled that the language "occasioned by" in the statute meant "suffered by" as dictated by the context and purpose of the legislation. The legislation's reasonable relation of the uninsured classification to a legitimate state interest, reducing the uninsured population and insurance rates, was sufficient to defeat the plaintiffs' equal protection argument.<sup>48</sup> The court easily dispensed with the plaintiffs' due process claim by declaring that there was no fundamental due process right to sue in tort and by saying that the legislature was simply redefining the scope of the available causes of action. Finally, the court ruled that the recovery limitation did not deny uninsured motorists access to the courts. It merely placed a limit on their legal remedies, which is authorized by the constitution.

Having survived constitutional scrutiny, all provisions of the Omnibus Premium Reduction Act took effect on May 8, 1998, the date of the final and definitive judgment. The LIRC subsequently declared May 8, 1998 to be "rate reduction day" with the statute declaring that the No Pay, No Play provisions were to take effect 120 days later, on September 6, 1998.<sup>49</sup>

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47. 97-2985 (La. 4/23/98), 711 So. 2d 675.

48. The plaintiffs asserted that uninsured motorists comprised an "unpopular group," likening them to other suspect classifications defined as race, alienage, and religion. *Id.* at 687 n.16.

49. La. Insurance Rating Comm'n Bulletin, 98-02 (1998), available at [http://www.lti.state.la.us/consumers/LIRC/LIRC\\_bulletins/bulletin98-02.pdf](http://www.lti.state.la.us/consumers/LIRC/LIRC_bulletins/bulletin98-02.pdf) (last visited 12/09/2005).

3. *Predicting the Unpredictable: The Application of No Pay, No Play in Louisiana Courts*

Insurance companies hoped the courts would apply the No Pay, No Play provisions liberally, while uninsured motorists and their advocates desired more restrictive interpretations of the statute. The case law applying the statute has fallen on both sides of the line, to the delight and dismay of everyone.

a. *Decisions Restricting No Pay, No Play*

In several questionable situations the courts have held the No Pay, No Play statute inapplicable, thus limiting its effect on losses. In such cases, drivers were still permitted to recover the full amount of their damages even though they were uninsured.

Courts have easily reached the conclusion that No Pay, No Play does not apply to vehicles registered in another state. In *Atkinson v. Boyne*,<sup>50</sup> *Martin v. Special Risk Insurance, Inc.*,<sup>51</sup> and *Gann v. Cucullu*,<sup>52</sup> the courts held that uninsured Mississippi drivers were not subject to the recovery restrictions since the clear language of the statute provided for application to vehicles registered in Louisiana. However, the issue is not completely resolved. As the *Gann* court noted, the accidents in these cases all occurred before Mississippi required compulsory auto insurance. Additionally, the Louisiana Legislature amended Louisiana's financial responsibility law to require residents of states which have compulsory auto liability insurance laws to maintain such coverage while driving in Louisiana, expressly subjecting those in violation to No Pay, No Play sanctions.<sup>53</sup>

Insurers have faced particular difficulty with respect to drivers who are uninsured because their coverage was cancelled due to non-payment of premium. The strict notification standards insurers must follow have let a few technically uninsured motorists circumvent the rule. *Henderson v. Geico General Insurance Co.*<sup>54</sup> involved a separated couple, where the husband who remained in the matrimonial domicile claimed that he did not receive any notice of cancellation. The wife was subsequently involved in an accident and the insurance company tried to invoke the affirmative defense of her being uninsured. The court held that there was

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50. 178 F.Supp. 2d 670 (E.D. La. 2001).

51. 01-2931 (La. App. 1st Cir. 6/7/02), 825 So. 2d 1235.

52. No. Civ.A.02-0607, 2002 WL 31496372 (E.D. La. 2002).

53. La. R.S. 32:861(E) (2002).

54. 36,696 (La. App. 2d Cir. 1/29/03), 837 So. 2d 736.

insufficient evidence that the insurance company actually mailed a notice of cancellation. The court had previously required all of the following in order to establish a prima facie case of mailing: computer generated records of mailing with witness verification and authentication, certificates of mailing, and testimony that the insurer had no records indicating that the notice was returned. This requirement asks a lot of the insurer and makes it very difficult to prove a valid notice of cancellation. The first circuit reached a similar result in *Williams v. Storms*<sup>55</sup> by following the case law which has held that an insured's denial of receipt of notice of cancellation is sufficient to defeat an insurer's motion for summary judgment.<sup>56</sup> As a result of these decisions, those who have had their policies cancelled for non-payment of premium are much more likely to collect the full amount of their damages.

Uninsured parked cars have also given the courts difficulty. In *Gibbs v. State Farm Mutual Automobile Ins. Co.*,<sup>57</sup> the court decided not to apply No Pay, No Play to a parked vehicle, stating that the statute was intended to discourage *operation* of uninsured vehicles. The legislature approved of this view, and amended the statute to explicitly exclude uninsured legally parked vehicles from its scope.<sup>58</sup> The court in *Rogers v. Commercial Union Insurance Company*<sup>59</sup> held this amendment to be interpretive and applied it retroactively. The court in *Dallas v. Hales*<sup>60</sup> held the exact opposite, refusing to apply the amendment retroactively and limiting recovery. The *Dallas* court observed that even if it applied the amendment retroactively, it still might not apply in the case before it, since the driver had parked the uninsured vehicle on the side of the highway due to mechanical problems. It raised doubt as to whether the circumstances could result in the vehicle being legally parked, as it had been in operation immediately prior. The legislature solved this problem with another amendment, which states that the recovery limitation does not apply if the vehicle is not being operated at the time.<sup>61</sup> In summary, owners of uninsured vehicles not in operation can collect the full amount of their damages.

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55. 01-2820 (La. App. 1st Cir. 11/8/02), 835 So. 2d 755.

56. The case law holds contrary to a statute which states that proof of mailing shall be sufficient proof of notice. See La. R.S. 22:636.1(F) (2004 & Supp. 2005).

57. 99-1242 (La. App. 4th Cir. 10/13/99), 746 So. 2d 685.

58. La. R.S. 32:866(H) (2002 & Supp. 2005).

59. 01-0443 (La. App. 3d Cir. 10/03/01), 796 So. 2d 862, 866.

60. 35,883 (La. App. 2d Cir. 05/08/02), 819 So. 2d 367, 373.

61. La. R.S. 32:866 (A) (3) (b) (2002 & Supp. 2005).

*b. The Expansion of No Pay, No Play*

There have been several questionable situations where the courts have applied the No Pay, No Play limitation, including a decision by the Louisiana Supreme Court. These decisions have in effect expanded the scope of the statute, thus reducing losses tied to uninsured motorists. In these cases, the insurers have seen some of the projected savings that the statute was designed to produce.

Courts have held that operators of uninsured vehicles, even if not their own, are barred from collecting the first \$10,000 of their BI and PD recovery under No Pay, No Play. In *Blue v. Donnie Baines Cartemps USA*,<sup>62</sup> the court ruled that an unlicensed driver who knew that he was excluded from the policy insuring the car he was driving was uninsured for purposes of the statute. Surprisingly, the third circuit held in *Jasper v. Progressive Ins. Co.*<sup>63</sup> that even an operator of a borrowed vehicle who did not know it was uninsured still was subject to the reduced recovery. The court focused on the language of the statute which refers to an operator of a motor vehicle, which clearly included borrowers.<sup>64</sup> It reasoned that by using "operator" in addition to "owner," the statute was meant to encourage borrowers to ascertain that the vehicle they are driving is insured.<sup>65</sup> Even though this is the only case on the subject, under the court's reasoning, the possibility exists that anyone driving an uninsured vehicle may not be entitled to full recovery because of the No Pay, No Play statute.

Another questionable scenario is the case of the injured passenger who was in an uninsured vehicle registered to her spouse. The court in *Lewis v. Miller*<sup>66</sup> held that the term "owner" as used in the No Pay, No Play statute encompassed a spouse of the registered owner. Reasoning that since the passenger-wife had legal custody of the vehicle by virtue of community property law, it determined that she also had the obligation to maintain liability insurance.<sup>67</sup> This decision indicates that no matter which spouse's name is on the bill of sale, both are responsible for maintaining insurance on the vehicle and both are limited on their recovery under No Pay, No Play if uninsured.

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62. 38,279 (La. App. 2d Cir. 03/03/04), 868 So. 2d 246, 248.

63. 99-1479 (La. App. 3d Cir. 02/09/00), 758 So. 2d 848, 851.

64. *Id.* at 850.

65. *Id.* at 851.

66. 02-0667 (La. App. 4th Cir. 08/21/02), 826 So. 2d 628, 632.

67. *Id.*

Until *Bryant v. United Serv.'s Auto. Ass'n*<sup>68</sup> came down from the Louisiana Supreme Court, the circuits were split on whether owners could recover the full amount of their property damage when a driver excluded by their insurance policy was operating the vehicle. In the court's view, the policies underlying the No Pay, No Play statute conflicted with those underlying the legislature's allowance of the so called "named driver exclusions." In situations where the named insured gave permission for the excluded driver to operate the vehicle, the court resolved in favor of No Pay, No Play. The court believed that recovery should be barred since the named insured "thwarted the law" by excluding a driver to reduce their premium, but then allowing that driver to operate their vehicle. The court saw the application of No Pay, No Play as a way to discourage owners from allowing an excluded driver to operate their cars. Conversely, in cases when the owner did not give permission to the excluded driver, the court held that recovery should not be reduced. The court equated this scenario to a thief getting into an accident with the stolen vehicle and ruled that it would be absurd to apply No Pay, No Play in such a situation.

After the courts and the legislature have whittled away at the scope of the recovery limitation, the statute does not seem to apply to very many situations. It applies to an owner of an uninsured vehicle or their spouse when they are in their own vehicle, but only while it is in operation. Drivers of uninsured vehicles are subject to the reduced recovery provisions in all instances. Owners who permit their vehicles to be operated by drivers excluded by their insurance policies may not collect for their property damage. The narrow scope of No Pay, No Play's application ensures not only that the ten percent rate reduction will not be justified in the long run, but also that the statute will not foster future rate relief.

### III. SEVEN YEARS LATER: A LOOK AT THE EFFECTS OF NO PAY, NO PLAY

The legislators can say they were successful. "Premium Reduction Day" marked an achievement of the Task Force's goal as auto insurance rates were reduced ten percent for BI and PD coverages. However, implementing the No Pay, No Play recovery limitation with its corresponding rate decrease only resulted in a one time rate change. This one time rate decrease was taken up front to reflect the expected future savings of the No Pay, No Play statute. Provided the estimates by the Actuarial Subcommittee

prove accurate, the new legislation alone will not result in any more rate decreases. Further, the ten percent mandated rate reduction was ambitious and probably unreasonably optimistic. By taking the high end of the range submitted by the Actuarial Subcommittee, the legislature left insurers vulnerable to the success or failure of the recovery limitation scheme. Since poor experience lends itself to upward rate adjustments, the future was already dim.

While insurers may or may not have been experiencing the effects of the No Pay, No Play statute,<sup>69</sup> numerous other factors continued to affect the insurance industry. Losses paid to uninsured motorists were just one of the forces responsible for the previous upward trend in auto rates. Skyrocketing medical costs, rising defense costs, and bad loss experience in general all continue to plague insurers. Particularly damaging is the effect that lawsuit awareness has had on the frequency and severity of claims.

*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.*<sup>70</sup>

Litigiousness is an increasing concern not unique to the insurance industry. Auto accidents are increasingly being viewed less as catastrophes and more as windfalls, and people are becoming less likely to let a minor “fender bender” slide. This is especially true in an age where we have so-called “personal injury clinics” taking referrals from attorneys who are consulted before a claim is even filed, where chiropractors have billboards advertising that they extend credit, and where anyone and everyone is referred to a neurologist. The “hit me, I need the money” mentality runs rampant in our society.<sup>71</sup> With Orleans Parish having been identified as a “judicial hellhole”<sup>72</sup> by the American Tort Reform Association, Louisiana clearly faces the same problems of

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69. The precise impact of No Pay, No Play on insurers is difficult to ascertain statistically and is subject to speculation. The statute might have been successful at encouraging more people to buy insurance. Insurers may not even see claims by uninsureds who know they cannot recover.

70. Abraham Lincoln, Notes for Law Lecture (July 1, 1850), in 2 Complete Works of Abraham Lincoln 140, 142 (J. Nicolay & J. Hay eds. 1894).

71. Marjorie M. Berte, *Hit Me—I Need the Money! The Politics of Auto Insurance Reform* (ICS Press 1991).

72. Am. Tort Reform Ass’n, *Bringing Justice to Judicial Hellholes* 26 (2004), available at <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>. This characterization was based on sympathy to plaintiffs. *Id.* at 8–9.

litigiousness that infect the nation.<sup>73</sup> Additionally, one third of Americans think that there is nothing wrong with inflating insurance claims.<sup>74</sup> Unfortunately, these people do not realize that they are hurting more than the insurance company who is paying their claim. They are ultimately hurting themselves and all other auto insurance consumers by driving up their premiums.

Yielding to these additional factors would no doubt undermine the achievement of the No Pay, No Play statute. Recognizing this dilemma, the LIRC attempted to keep rates at their newly lowered level for several months. The LIRC took a stand and consistently denied rate increases for private passenger auto coverage. The purpose of holding rates constant might have been to let the effects of the recovery limitation play out before reacting to any perceived rate deficiencies. The LIRC also might have desired to give at least the appearance of rate relief to Louisiana consumers. Eventually the factors not addressed by the Omnibus Premium Reduction Act prevailed and insurance rates resumed their upward trend. By 2003, Louisiana's average premium had increased to \$1,013.93, a twenty percent increase since 1997, moving the state up to a sixth rank in the nation for auto insurance rates.<sup>75</sup>

#### IV. PROPOSALS FOR THE FUTURE

Though No Pay, No Play was somewhat successful in reducing the auto insurance burden in the short term, it was not a law that could have a continuing beneficial effect on rates into the future. In essence, the statute, along with its mandated rate reduction, treated the symptoms instead of the disease.<sup>76</sup> For any auto insurance reform to have the desired long term benefits, it must target the heart of the problem. The two major components to the rates charged by an insurance company are losses and expenses. The loss component is a function of frequency and severity.<sup>77</sup> Any

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73. Tort filings in civil cases rose twenty percent in 2001. Insurance Information Institute.

74. AICPU/IIA [American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America], Insurance Research Council, *One in Three Americans Say It's Acceptable to Inflate Insurance Claims, But Public Acceptance of Insurance Fraud is Declining* (2003), <http://www.ircweb.org/news/200307242.htm>.

75. Ins. Info. Inst., *Auto Insurance Facts and Statistics* (2005), <http://www.iii.org/media/facts/statsbyissue/autof/>.

76. Berte, *supra* note 71, at 68–70.

77. Claim *severity* represents the average amount of paid claims, as determined by taking the total dollar amount the insurer paid out for losses and

reform measure expected to have a lasting effect must address one of these elements.

### A. *Controlling Insurance Expenses*

Perhaps the most difficult component to address through legislation is insurer expenses. True, lower operating costs mean that a profit can still be realized with less premium and lower rates, but these operating costs are in the hands of the insurance companies. Expense ratios<sup>78</sup> vary significantly from company to company and depend on such factors as size and age of the entity. Mandating a maximum expense ratio that insurers could factor into their rates would be next to impossible. This requirement would discriminate against smaller and younger companies and would discourage such insurers from doing business in Louisiana. Excluding a portion of the market in such a manner would hurt Louisiana consumers, since fewer choices mean less competition and less incentive for insurers to keep rates down. The cost of losing the companies squeezed from the market likely outweighs any savings from imposing a maximum expense ratio. Insurer self-help, whereby insurers take it upon themselves to cut costs, is the only realistic means of controlling the expense component of insurance rates.

### B. *Insurance Claims Costs*

#### 1. *Proposals Addressing Severity*

Auto insurance reform legislation commonly addresses claim severity. Within this area, laws can be directed at medical costs, the type of damages recoverable by accident victims, and the amount of such damages. No-fault insurance is a common proposal that focuses on the means of recovery as well as what types of damages are recoverable from which sources. Limitations on the cost of medical services provided to accident victims aim to reduce the dollar amount of losses paid by insurers.

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dividing by the number of claims paid (*frequency*). Reduction of either figure results in lower losses by the insurer and, consequently, lower rates.

78. An insurer's *expense ratio* is its expenses expressed as a percentage of premium.



No-fault insurance was the proposal that the Actuarial Subcommittee estimated would have the greatest impact on rates.<sup>79</sup> A no-fault system would completely change the way insurance is bought, how claims are made, and what damages can be recovered.<sup>80</sup> One of the most significant changes is that drivers would buy first party insurance coverage instead of third party liability coverage. Personal injury protection (PIP) would cover the purchaser of the policy for his medical expenses, lost wages, and related services resulting from an auto accident regardless of fault. A property damage package would provide compensation for the purchaser's vehicle(s). The second biggest change is the way in which tort claims are brought against a negligent party. Parties could only bring tort claims for uncompensated economic losses<sup>81</sup> or non-economic losses for certain severe injuries.<sup>82</sup>

Medical costs also factor into claim severity and directly affect insurance rates in two ways. The first and most obvious way is on the amount insurers pay for the treatment of accident victims' injuries. Second, and more indirectly, medical costs affect the total claim amount by driving up compensation for non-economic losses. It is no secret that non-economic losses such as pain and suffering are often calculated as a function of medical costs. As a result, rising medical costs lead to increased non-economic damage awards.

It may seem difficult to control the effect of medical costs on insurance rates, since doctors' charges and other health care related costs are not regulated. Progressive legislation enacted in Pennsylvania, however, demonstrates that the insurance industry does not have to be at the mercy of medical professionals.<sup>83</sup> Pennsylvania's statute provides for medical costs to be capped at

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79. The estimated savings was thirty-seven percent to forty-four percent on a basic package policy. Report of the Actuarial Subcommittee, *supra* note 18, at 3.

80. Various forms of no-fault insurance exist, but the one outlined is the form evaluated by the Actuarial Subcommittee.

81. Uncompensated economic losses are those not paid by a party's PIP coverage.

82. Non-economic damages could be recovered in tort for death, permanent brain injury, quadriplegia and paraplegia, dismemberment, total loss of vision in one or both eyes, total loss of hearing in one or both ears, loss of or serious permanent injury to an internal organ, significant and permanent disfigurement of scarification, or fracture of one or more of the following weight bearing bones: the pelvis, fibula, tibia, or femur. Report of the Actuarial Subcommittee, *supra* note 18, app. at 18.

83. 75 Pa. Cons. Stat. Ann. § 1797 (1996).

110% of the Medicare fee schedule and requires all injured persons'<sup>84</sup> medical bills to be reviewed by a disinterested peer review organization.<sup>85</sup> The Louisiana Task Force actually considered this measure, recognizing its success at reducing medical payments. Pennsylvania Insurance Department reports indicated that auto insurance companies representing fifty percent of the market share in the state saved an average of thirty-nine percent in payments to medical providers.<sup>86</sup> Such a large reduction in medical costs coupled with probable reduced non-economic damage awards should translate into lower insurance rates.

## 2. *Proposals Addressing Frequency*

Claim frequency, the second component of the loss equation, has become a problem in recent years. While accident rates have decreased in the last two decades, auto injury claim frequency has been on the rise.<sup>87</sup> A portion of the claims made in Louisiana are attributable to guest passengers making negligence claims against the driver of the vehicle in which they are riding. Not satisfied with the medical payments coverage they are entitled to as passengers, many take advantage of the more lucrative BI coverage that provides for pain and suffering awards. In extreme cases, a passenger might sue to collect under the driver of the other vehicles' BI coverage, the host driver's BI coverage, the host driver's UM coverage, the guest passenger's UM coverage, and any medical payments coverage on the vehicle. This outrageous collection scheme is just another tool used by plaintiff attorneys to get the most money for their client. This abuse of the system needs to be corrected by restricting the situations in which a guest passenger may bring suit against the host driver.

Attacking the problem from a different angle, legislation that reduces the number of auto accidents merits consideration. Accidents are the source of losses, and are a main driving force of insurance rate increases. If the number of accidents is reduced, the number of claims and the dollar amount of losses paid by insurers should be reduced. Continuing education for Louisiana's drivers

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84. Medical Costs are capped for all injured persons, regardless of fault. *Id.* § 1797 (a).

85. § 1797 (b).

86. Report of the Actuarial Subcommittee, *supra* note 18, app. at 13.

87. AICPU/IIA [American Institute for Chartered Property Casualty Underwriters and the Insurance Institute of America], Insurance Research Council, *IRC Report Shows Falling Auto Accident Rates, Higher Injury Claim Rates* (2002), <http://www.ircweb.org/news/20021111.htm>.

addresses the root of the problem, since smarter drivers are safer drivers.<sup>88</sup>

Any serious suggestion must certainly meet a few criteria. First, it must not be discriminatory, particularly against older drivers. A plan that re-tests licensees starting five years after initial licensing, and then continues only every ten years for the duration of the licensee's driving life, satisfies this non-discrimination requirement. Second, it must not be excessively burdensome, i.e., costs too much. Granted, requiring drivers to take a class every ten years would be very costly to the public in dollars as well as time spent studying for and taking these exams. Administering tests in DMV offices would also be costly to the State as well as to drivers. To keep expenditures to a minimum, this proposal consists of a "take home" exam that would be mailed out to drivers before their license renews at or near the relevant times. The driver would complete the exam, and either mail it back with their renewal or present it at the DMV, at which time it can be graded electronically. Alternatively, tests, and even classes, could be administered electronically over the internet, similar to states such as California. Finally, any proposal must be effective and justify its cost. Admittedly there are concerns over the effectiveness of such a "take home" exam, but the idea is that the motor vehicle safety laws will be in front of the driver since they have to at least look up the answers, making them aware periodically of the proper rules of driving. Knowledge about minimum stopping distances, proper lane usage, and rights of way should foster safer and more courteous driving.

Motor vehicle accidents in Louisiana caused 865 deaths in 2002 and 896 deaths in 2003.<sup>89</sup> It is inconceivable that drivers are allowed to operate machines that kill people on a regular basis without being required to take *any* drivers education. Most who do receive drivers education do so at age fifteen and then are only required to pass an eye exam periodically in order to renew their license. Many professions where errors can have negative consequences require continuing education of its practitioners.<sup>90</sup> Drivers of such dangerous machines should be held to a similar standard.

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88. Though evidence is inconclusive as to the effectiveness of any drivers education program, insurance companies recognize this possibility, with most offering sizable discounts for formal education.

89. Insurance Fact Book 2005, *supra* note 1, at 106 (citing Nat'l Safety Council, Motor Vehicle Traffic Deaths by State, 2002-2003).

90. Architects, lawyers, physicians, and even real estate agents must meet continuing education requirements in Louisiana.

Other measures aimed at combating the increasingly litigious nature of society may also play a key role in reducing both the frequency and the severity of auto insurance claims. Proposals such as mandatory arbitration and caps on contingency fees have the potential to both encourage more reasonable settlements once suit is filed and decrease the incentive to file suit by reducing its lucrative nature. Other desirable side effects of these proposals include alleviating some of the judicial backlog and reducing the amount of time it takes for victims to be compensated.

## V. CONCLUSION

The Omnibus Premium Reduction Act of 1997 and its flagship provision, No Pay, No Play, was a step in the right direction for auto insurance rate relief. Consumers briefly felt the effects of the mandated rate reduction, there appears to have been a slight drop in the uninsured population, and insurers did deny recovery to some uninsured motorists. Though it provided some temporary rate relief, No Pay, No Play failed to do more than scratch the surface of the auto insurance reform problem. Louisiana needs a morphine-type solution instead of aspirin if auto insurance consumers are ever going to get any lasting "pain" relief. Given the state's current predicament, lawmakers have nothing to lose and should be aggressive in pursuing insurance rate reform. Reforms need to address the problems underlying insurance rates, not just the rates themselves. Proposals that will have direct and long-term effects on the state's frequency and severity of claims offer the most promise for delivering the desired result, affordable auto insurance coverage for Louisiana citizens.

*Rachel Jenny\**

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