

1977

Operation of No-Fault Auto Laws: A Survey of the Surveys

Jeffrey O'Connell

University of Illinois College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Jeffrey O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 Neb. L. Rev. 23 (1977)

Available at: <https://digitalcommons.unl.edu/nlr/vol56/iss1/3>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

By Jeffrey O'Connell*

Operation of No-Fault Auto Laws: A Survey of the Surveys†

I. INTRODUCTION

Daniel Patrick Moynihan has called no-fault auto insurance the "one incontestably successful reform [proposed in] . . . the 1960s."¹

But in the late summer of 1976, John Massi, a motorist in East Meadow, Long Island, wrote to his State Senator, John Dunne, stating that the Senator, in acting as a primary backer of no-fault insurance in New York State, had thereby sold the public a "bill of goods."²

No-fault auto insurance, born in intense controversy, the subject of bitter, massive opposition by trial lawyers all over the country, continues to live that way.

As a result of the controversy, passage of no-fault laws, enacted in various forms in 24 states between 1970 and 1975, has been stalled. No new no-fault law was passed in any state in the last year, and an attempt to pass a federal bill failed in the Senate in the spring of 1976 after a tense roll-call vote of 49 to 45.³

* Professor of Law, University of Illinois; B.A. 1951, Dartmouth College; J.D. 1954, Harvard University.

† This manuscript is adapted from the author's remarks before the Department of Consumer Economics and Public Policy, Cornell University, Ithaca, N.Y., October 22, 1976.

1. Moynihan, *Foreword* to J. O'CONNELL, *ENDING INSULT TO INJURY* at xi (1975).

2. N.Y. Times, July 25, 1976, § 1, at 1, col. 1.

3. Wall St. J., Apr. 1, 1976, at 2, col. 2.

According to one account, at the end of the voting the motion [to recommit] was ahead by only one vote, with a tie being the same as a defeat [for no-fault]. Senator Frank Moss (D-Utah), floor leader for the bill, changed his vote so as to be able to move to reconsider the motion after Senator Claiborne Pell (D-R.I.) could get to the floor. But Senator Wendell Ford (D-Ky.) misunderstood the switch and altered his vote as well. . . . The later motion by Senator Moss to reconsider the motion to recommit lost 45 to 47.

Recently, several academic studies in law reviews and elsewhere have rather exhaustively examined the operation of several of the earliest no-fault laws. Who has been right, Moynihan or Massi? Before answering, some background information will be helpful.

II. NO-FAULT SYSTEMS

In essence, no-fault insurance is premised on the following conditions. Under the old common-law "tort," or fault-based system, after an accident between Smith and Jones, Smith can be paid only by claiming against Jones and proving him at fault and himself free from fault, or at least comparatively so. Because Smith is an "innocent" party claiming against a "wrongdoer," Smith is paid in one final lump sum not only for his out-of-pocket loss, but for the monetary value of his pain and suffering. But obviously, it is often very difficult to establish not only who was at fault in an accident but the pecuniary value of pain.⁴ Under the no-fault solution, after an accident between Smith and Jones, each would be paid regardless of anyone's fault, by his own insurance company, periodically month-by-month as his losses accrued, and only for out-of-pocket losses. As a corollary, each would be required to surrender his claim based on fault against the other.⁵

No-fault, then, was designed to make the following improvements in auto accident compensation. First, it was designed to assure that everyone injured in auto accidents is eligible for auto insurance payment, regardless of whether he was able to prove fault-based claims. According to a massive study by the United States Department of Transportation (DOT), about 55 per cent of those seriously injured get absolutely nothing from automobile liability insurance.⁶

Four senators who previously supported S. 354 were absent on the day of the voting.

Henderson, Report on the Status and Effect of No-Fault Insurance Schemes for Automobile Accidents in the United States, submitted to the Special Committee on the Uniform Motor Vehicle Accident Reparations Act of the National Conference of Commissioners on Uniform State Laws, June 26, 1976, at 12 n.25.

4. For a description of the tort system in operation in the context of auto accidents see J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 1-93 (1971), and J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND: TEACHING MATERIALS ON COMPENSATION FOR ACCIDENTS AND AILMENTS IN MODERN SOCIETY* 99-221 (1975).
5. See generally J. O'CONNELL, *supra* note 4, at 94-154; J. O'CONNELL & R. HENDERSON, *supra* note 4, at 223-46.
6. 1 U.S. DEP'T OF TRANSPORTATION, *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 37-38 (1970); A. CONARD, J. MORGAN, R. PRATT, C. VOTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATION* 186 (1964) (45

Second, it was designed to spend less on smaller, relatively trivial claims, and more on serious injury. According to Professor Alfred Conard of the University of Michigan, who conducted an extensive Michigan study, "If there is one thing which [all] the surveys have shown conclusively, it is that the [fault-based] system overpays the small claimants who need it least and underpays the large claimants who need it most."⁷

Third, it was designed to pay claims promptly. According to the DOT study, on the average, a period of 16 months elapses between an accident and time of payment. The larger the loss, the larger the delay. For losses over \$2,500, the average delay rose to 19 months.⁸

Fourth, it was designed to pay more efficiently by using less of the premium dollar on insurance overhead and legal fees. No-fault insurance has been called "no-lawyer insurance" by one consumer advocate.⁹ Prior to no-fault in Massachusetts, approximately 80 per cent of successful claimants under liability insurance there were represented by attorneys.¹⁰ According to several studies, 56 cents of the automobile liability insurance dollar is used up by insurance expenses and legal fees on both sides, with only 44 cents going to victims themselves.¹¹ This is in contrast, as Colston Warne, president of Consumers Union, has pointed out, to "an administrative cost of 3¢ in Social Security, 7¢ for Blue Cross [and] 17¢ for health and accident plans . . ."¹² As a corollary, no-fault was designed to reduce the amount of litigation stemming from auto accidents. Prior to no-fault laws, typically 50 to 80 per cent of civil jury dockets were taken up with auto cases.¹³

per cent of the seriously injured get no damage recovery through the tort law system).

7. Conard, *Testimony Before the New York Joint Legislative Committee on Insurance Rates and Regulation*, U. MICH. L. QUADRANGLE NOTES 14 (Fall, 1970).
8. 1 U.S. DEP'T OF TRANSPORTATION, *supra* note 6, at 52.
9. 1 LAWYER REFORM NEWS 4 (April/May, 1971).
10. 1 U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS 78 (1970). The Department of Transportation study lists the figures for 19 states. In 1970, the national average was about 47 per cent.
11. E.g., P. KEETON & R. KEETON, TORTS: CASES AND MATERIALS 514 (1971). The Keetons' figures were later cited and independently confirmed in N.Y. INSURANCE DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? A REPORT TO GOVERNOR NELSON A. ROCKEFELLER 34-37 (1970).
12. Warne, *Let's Hear From the Insurance Consumer*, 36 INS. COUNSEL J. 493, 496 (1969); see J. O'CONNELL, *supra* note 4, at 29. See also A. CONARD, J. MORGAN, R. PRATT, C. VOTZ & R. BOMBAUGH, *supra* note 6, at 59.
13. J. O'CONNELL, *supra* note 4, at 137. In unpublished remarks, then-Chief Justice Joseph Weintraub of New Jersey, in an address to a joint dinner in Newark of the State Supreme Court Justices and members of the New Jersey Press Association, offered the opinion that 51 per

Fifth, no-fault insurance was designed to reduce, or at least to stabilize, the costs of auto insurance. Prior to no-fault, the number one complaint about auto insurance was its high cost.¹⁴ It was one of the fastest rising items on the consumer price index.¹⁵

In response to all these problems, beginning in the mid-1960's, vigorous attempts were begun to initiate no-fault insurance reform. In fact, academic studies had been urging such reform since the early 1930's, but largely had been confined to the law reviews, and were consequently ignored. In 1970, Massachusetts enacted the first no-fault law, followed since by 23 other states. The laws are a bewildering variety—a fact that adds to the pressure for a uniform federal law—but basically fall into three categories, with some overlap.

In the first category are *modified no-fault laws*, which provide only modest no-fault benefits and eliminate only relatively few fault-based claims.¹⁶ States with modified plans are Colorado,¹⁷ Connecticut,¹⁸ Florida,¹⁹ Georgia,²⁰ Hawaii,²¹ Kansas,²² Kentucky,²³ Massachusetts,²⁴ Minnesota,²⁵ Nevada,²⁶ New Jersey,²⁷ North Da-

cent of civil cases arise from automobile-accident suits, but that those cases occupy about 80 per cent of the total civil trial time, and about 20 per cent of all trial time. In a letter to the author, Chief Justice Weintraub wrote that "the actual impact of this litigation on total court time is more than the stated percentages." Letter from Chief Justice Joseph Weintraub to Jeffrey O'Connell, Dec. 23, 1973. See also EXECUTIVE SECRETARY TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, ANNUAL REPORTS, indicating that consistently about two thirds of the jury cases pending in the trial courts of general jurisdiction in Massachusetts, and listed as "undisposed of" on June 30, were motor vehicle tort cases. See, e.g., *id.*, 11TH ANNUAL REPORT, Tip-in sheet between 60-61 (1967); *id.*, 12TH ANNUAL REPORT, Tip-in sheet between 72-73 (1968); *id.*, 13TH ANNUAL REPORT, Tip-in sheet between 68-69 (1969).

14. J. O'CONNELL, *supra* note 4, at 70-72; J. O'CONNELL & W. WILSON, CAR INSURANCE AND CONSUMER DESIRES 15 (1969).
15. N.Y. Times, July 6, 1970, at 47, col. 4.
16. For a description of modified no-fault plans see J. O'CONNELL & R. HENDERSON, *supra* note 4, at 281-82.
17. COLO. REV. STAT. ANN. §§ 10-4-701 to -723 (1973).
18. CONN. GEN. STAT. ANN. §§ 38-319 to -351a (Supp. 1975).
19. FLA. STAT. ANN. §§ 627.730-.741 (1972).
20. GA. CODE ANN. §§ 56-3401b to -3413b, -9915.2 (Supp. 1976).
21. HAWAII REV. STAT. §§ 294-1 to -41 (Supp. 1975).
22. KAN. STAT. ANN. §§ 40-3101 to -3121 (Supp. 1975).
23. KY. REV. STAT. ANN. §§ 304.39-010 to -340, -.99-050 (Supp. 1975).
24. MASS. GEN. LAWS ANN. ch. 90, §§ 34A, D, H, K, M-O, ch. 231, § 6D (Supp. 1976).
25. MINN. STAT. ANN. §§ 65B.14, -.41-.71 (Supp. 1976).
26. NEV. REV. STAT. §§ 698.010-.510 (1973).
27. N.J. STAT. ANN. §§ 39:6A-1 to -20 (1973).

kota,²⁸ Pennsylvania,²⁹ and Utah.³⁰

The second includes *add-on plans*, which, arguably, are not no-fault plans at all, in that although they call for usually modest benefits to be paid to traffic victims without regard to anyone's fault, they do not eliminate any victim's right to press a fault-based claim for his pain and suffering against other drivers.³¹ Hence, the name *add-on*. The laws add on benefits but do not take anything away. States with add-on plans are Arkansas,³² Delaware,³³ Maryland,³⁴ Oregon,³⁵ South Carolina,³⁶ South Dakota,³⁷ Texas,³⁸ and Virginia.³⁹

In the third category are *plans approaching pure no-fault*. A pure no-fault plan would eliminate all, or almost all, claims based on fault, and substitute relatively unlimited benefits for all medical expenses and wages lost, no matter how extensive.⁴⁰ No law goes that far, but Michigan's comes closest. It covers unlimited medical expenses and a maximum of about \$46,000 of wage loss, while eliminating fault-based claims unless the victim suffers death, serious disfigurement, or serious impairment of bodily function.⁴¹ New York's law, in providing \$50,000 of no-fault benefits, might be thought to approach pure no-fault, but like Massachusetts', it eliminates fault-based claims only where medical bills are less than \$500.⁴² On the other hand, the federal no-fault bill⁴³ clearly approaches pure no-fault in both benefits and elimination of fault-based claims.⁴⁴

28. N.D. CENT. CODE §§ 26-41-01 to -19 (Supp. 1975).

29. PA. STAT. tit. 40, §§ 1009.101-.603 (Supp. 1976).

30. UTAH CODE ANN. §§ 31-41-1 to -13.4 (1974).

31. See generally J. O'CONNELL & R. HENDERSON, *supra* note 4, at 279-81.

32. ARK. STAT. ANN. §§ 66-4014 to -4021 (Supp. 1975).

33. DEL. CODE ANN. tit. 21, § 2118 (1974).

34. MD. ANN. CODE art. 48A, §§ 538-546 (Supp. 1975).

35. ORE. REV. STAT. §§ 743.800-.835 (1973).

36. S.C. CODE ANN. §§ 46-750.101 to -.154 (Supp. 1976).

37. S.D. COMP. LAWS ANN. §§ 58-23-6 to -8 (Supp. 1976).

38. TEX. INS. CODE art. 5.06-3 (Supp. 1975).

39. VA. CODE ANN. §§ 38.1-380.1 to -380.2 (Supp. 1975).

40. For a discussion of plans approaching pure no-fault see J. O'CONNELL & R. HENDERSON, *supra* note 4, at 283-84.

41. MICH. COMP. LAWS ANN. §§ 500.3101-.3179 (Supp. 1976). Under the Michigan law, wage-loss is tied to inflation. Originally pegged at \$1000 per month, the maximum payment for lost wages was, in September 1976, \$1,285. See MICH. COMP. LAWS ANN. § 500.3107(b) (Supp. 1976).

42. N.Y. INS. LAW §§ 670-677 (McKinney Supp. 1975).

43. S. 354, 94th Cong., 2d Sess. (1976).

44. In a congressional hearing, Professor Robert Keeton characterized the various no-fault laws as follows:

As noted, the drive for no-fault reform has been stalled in the various states, largely over the question of whether laws should be of the add-on variety or otherwise. The trial bar vigorously has asserted, at both the state and federal levels, that no-fault benefits can be paid without eliminating anyone's fault-based claims for pain and suffering. No-fault backers, on the other hand, oppose add-on laws as a mockery of reform, often labeling them "yes-fault." Trial lawyers in reply argue that under add-on plans auto insurance rates are not only not increased; but reduced. How, though, *can* no-fault claims be added on, without eliminating fault-based claims, and still reduce costs? After all, no one eligible to be paid under fault-based claims loses anything, and new claimants are added to the rolls. Trial lawyers answer that many fault-based claims are *voluntarily* abandoned, as when people receive their out-of-pocket losses promptly from their own insurance companies and don't bother to press the claim against the other driver. Former Association of Trial Lawyers of America President Leonard Ring notes that the Delaware add-on experience "has indeed proven that, where the victim has received his medical and wage loss, the incen-

Among the real no-fault laws (as well as the "add-on" laws that do not provide a partial tort exemption), no two statutes thus far enacted are identical. The variations are substantial enough to cause confusion and concern among motorists who are quite properly worried about the possible consequences of accidents during travel outside their home state.

In one respect, the real no-fault laws are all alike. Each contains some kind of partial tort exemption. That is, in addition to providing benefits without regard to fault to cover losses from bodily injuries caused by car accidents, the statute eliminates tort claims . . . for some injuries. The claims for injuries of a less serious nature are eliminated. Persons who suffer more serious injuries still have their tort claims, in addition to the new no-fault benefits. A good statute also dovetails these two kinds of benefits to avoid double recovery for a single item of loss—and to avoid double cost for the system.

Two of the partial-tort-exemption statutes—those in New Jersey and Connecticut—eliminate tort recoveries for *minor* injuries only.

Thirteen eliminate tort recoveries for what I call *minor* and *substantial* injuries but preserve tort recoveries for what I call moderate, serious and severe injuries. These are the statutes in Colorado, Florida, Georgia, Kansas, Kentucky, Massachusetts, Minnesota, Nevada, New York, North Dakota, Pennsylvania, and Utah.

Two statutes eliminate tort recoveries for *minor*, *substantial*, and *moderate* injuries but preserve tort recoveries for serious and severe injuries. These are the statutes in Hawaii and Michigan.

By way of comparison UMVARA—the Uniform Motor Vehicle Accident Reparations Act proposed by the National Conference of Commissioners on Uniform State Laws—would eliminate tort recoveries for *all except severe* injuries.

tive to make further claim is extinguished in all but the most serious cases."⁴⁵

Proponents of the purer forms of no-fault that formally ban some fault-based claims argue that statistics for Delaware demonstrate that fault-based claims are not reduced by add-on plans.⁴⁶ Second, even if fewer people than expected bring fault-based claims when provided with no-fault benefits, despite their right to do so, that situation cannot be expected to remain, given the aggressive personal-injury bar and the money that can be made by pressing fault-based claims. Why, such proponents ask, pass a reform that leaves intact the claims which led to the need for reform in the first place, counting on human nature to forego taking advantage of the right to press those claims?⁴⁷

*Hearings on H.R. 285, H.R. 1272, H.R. 1900, H.R. 7985, and H.R. 8441 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., ser. 94-42, at 676 (1975) (testimony of Robert Keeton) [hereinafter cited as *Hearings*].*

45. Ring, *The Fault with 'No-Fault,'* 49 NOTRE DAME LAWYER 796, 826 (1974).

46. See notes 71 & 94 *infra* and accompanying text.

47. See J. O'CONNELL & R. HENDERSON, *supra* note 4, at 306-07.

The following exchange between Craig Spangenberg, a plaintiffs' lawyer from Cleveland, Ohio, and among trial lawyers perhaps one of the leading advocates of add-on plans, and Professor Robert E. Keeton, a leading proponent of purer no-fault plans, before a congressional hearing, is instructive:

MR. SPANGENBERG.

... What happened in Oregon [with its add-on law] is called by the insurance folks, and it is a good word they adopted, the happiness factor.

Most people with smaller claims just want their losses paid. They can't get them paid [in a state like Florida with its tort exemption]. The adjustor gives them a hard time.

Now, under Oregon no-fault the adjustor has to be sweet. He has to pay them; he goes in and pays them right away. He says: "Here are all of your losses. You don't want to have a tort suit, do you? Any losses you have we will pay—your wage and your medical."

It works. The claimants go to a lawyer, particularly when they say you get a couple of hundred more, but you have to then pay the lawyer and pay these people [the no-fault insurers] back, so what is the point? So, they don't bring a lawsuit. That factor works.

[One difficulty with Spangenberg's analysis up to this point is that the no-fault insurer is normally not the insurer defending the tort liability claim. In such cases, there may be no motivation for the no-fault insurer to turn off the tort liability claim.]

Now, suppose you say to the victim:

You aren't going to have a tort suit. Although you were on the right side of the road and he was on the wrong side and he creamed you and he was drunk and you are

Quite clearly, the several extensive statistical studies appraising the operation of no-fault laws help us answer how the various forms of no-fault have fared in practice.

III. STATISTICAL STUDIES

The principal controversy over no-fault has been whether insurance premiums go up or down upon its enactment. Early actuarial

mad at him and your wife is bleeding and battered and your kids are hurt and you are hurt and you know you are going to hurt and you want a tort suit. What happens?

You can't have it until you pass our thresholds.

What is that?

You have to spend \$1,000 of medical.

Where am I going to get \$1,000?

We will give it to you.

Do you think he is not going to spend \$1,000 for medical if he finds a doctor who is willing to treat him and why shouldn't the doctor be willing to treat him? He hurts and his doctor says: "Come on and we will give you physical therapy, massage and stretch your neck."

This is probably good for him, but it is not going to cure him any faster. I think you can get as much good out of standing under a hot shower.

Well, you get a crick in your neck; wrap a towel around your neck and put that on your neck and get a real hot soaking. That is deep heat. You can get it done by a pretty girl, and a massage, too, if you want to spend \$15 a session for physical therapy. If I could get that benefit and move myself toward a threshold I guess I would.

You know, the average fellow says: "Try to cheat me and I will fight back and if you treat me fair I will be fair with you." That is human psychology. All you see in these results is what happens to people.

When Congress gets over the idea that everyone is a plastic chip that you can move around and handfeed through a computer and say, "Your hurt does not count, show us your wage stub."

He says, "Forget that, I hurt. I enjoyed life and I have only one to live and you are taking away 3 or 4 months of it. When I don't enjoy it, I want to be paid for it."

...
MR. KEETON. Mr. Chairman, I will be very brief. I first want to express my admiration for Mr. Spangenberg's great advocacy . . .

I refer . . . [to] just one example . . . Do you realize that what he has told us is that if, instead of having any kind of tort exemption at all, you just add on more coverage, that it will cost less?

...
That is the proposition. You add on coverage that was not there before, and you provide for no duplication between the two. But nevertheless he says by adding the extra it will come out that it costs you less.

On the other hand, if you produce a tort exemption which says the insurance company pays out less, it will cost you

studies seemed to indicate clearly that insurance premiums would be cut. Based on these studies, many states, including Massachusetts, Florida, and New York, mandated a 15 per cent cut in auto insurance rates supposedly affected by no-fault. This was a crude

more. That is the proposition. That is what it adds up to. I submit that that is a little difficult to believe.

Now what is his theory? He finally got around to trying to tell us why it would be true . . . because on its face it is an absurd proposition. Why did he tell us it would happen? He says that because of what he refers to as the happiness factor—people will be so happy they get something more than they had before—they won't sue for what they could have sued for under the previous system.

Now there is, of course, another proposition that has been asserted by the [insurance] industry. Every time anybody proposes such [an add-on] . . . system to them and proposes that they rate it as something lower than what they would have charged, the industry talks about financing claims.

. . . . [I]t is a well-known phenomenon in the [insurance] industry. First party benefits run the risk of doing what the claims men call "financing more claims." They take away the bargaining weapon that the insurance company has because of the injured person's need for cash.

Now, I personally think that taking away this bargaining weapon will result in somewhat higher payments to the most severely injured persons, and I think that is right. That is the way it should be, because they have sometimes been settling their claims for less than they were truly worth because of the necessity of getting some cash promptly.

So, working on the opposite side from this so-called happiness factor is this proposition that you give an improved bargaining position to the claimant and do what claims men refer to, in [a] somewhat . . . pejorative sense, as financing claims.

Then I submit that not only is this proposition [of Mr. Spangenberg] absurd on its face—this proposition that by increasing the coverage and changing nothing else you can reduce the costs—but also when you start talking about "What would be the incentive factors to people operating under the system?" you will have a lot more people using these no-fault benefits to finance tort claims than you will saying "I am so happy that the insurance company is giving this that I won't pursue the rights I have."

Hearings, supra note 44, at 692-93, 696-97.

There is a further irony in the argument of the plaintiffs' lawyers from the Association of Trial Lawyers of America (ATL) that no-fault benefits can be added on to fault-based claims and yet reduce costs. When no-fault was first proposed, leaders of the ATL argued, in opposing it, that paying no-fault benefits would be so cumbersome and difficult that even if tort claims were eliminated, costs of insurance and litigation, in determining whether and what no-fault benefits were due, would increase under a no-fault system. See, e.g., Sargent & Corboy, *The Basic Protection Plan—Panacea or Inequity*, 44 NOTRE DAME LAWYER 51, 57-59 (1968); Cone, *The Keeton-O'Connell Monstrosity*, in UNIVERSITY OF MICHIGAN INSTITUTE OF CONTINUING LEGAL EDUCATION, PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN

gauge when one considers that the same size cuts were required in various states despite widely differing benefit levels and other provisions in the statutes. Perhaps nothing is more confusing to the average layman than "actuarial science," and actuarial opinions on whether no-fault does in fact increase or decrease costs have wildly fluctuated.

Recently, the New York State Insurance Department announced that the cost of auto insurance had more than doubled during 1975 for many state residents, with some department officials and insurance executives citing abuses in the state's no-fault system as a major factor.⁴⁸

Vernon G. Phelps, a spokesman for Government Employees Insurance Company (Geico), a major auto insurer, formerly a darling of the stock market but now threatened with insolvency, put a major share of the blame for the company's acute financial troubles on no-fault. The company's 1975 losses, estimated at about \$75,000,000, were "aggravated by the unexpectedly adverse effect of no-fault laws,"⁴⁹ said Phelps.

The ratios of the percentage of losses to premiums—called "loss ratios"—have increased under no-fault, according to Nationwide Insurance Company, from 56 per cent to 71 per cent in New York; from 70 per cent to 81 per cent in Florida; from 54 per cent to 63 per cent in Connecticut; and from 76 per cent to 112 per cent in New Jersey, where it has been especially difficult to get approval for rate increases from the Insurance Commissioner.⁵⁰

In reply to these figures, proponents of no-fault insurance argue that the "abuses" of the no-fault insurance system are due not to any defect in the no-fault principle, but to inadequate provisions inserted in no-fault laws largely at the urging of trial lawyers and those insurance companies opposed to true no-fault insurance. In New York, for example, although \$50,000 in no-fault benefits are mandated for auto accident victims, fault-based claims can be pressed if medical bills exceed only \$500. Compared to Massachusetts, then, New York provided \$50,000 in benefits, instead of \$2,000, and kept the same threshold for fault-based claims while mandating the same 15 per cent rate decrease! As a result, relatively few

AND ITS CRITICS 161, 169-74 (1967). Now we are told by the same trial lawyers that no-fault claims are so expeditious and simple that they can be added on to the tort system and reduce total costs. Quite a switch!

48. N.Y. Times, July 25, 1976, § 1, at 1, col. 1.

49. J. COMMERCE, Feb. 5, 1976; Wall St. J., Jan. 21, 1976, at 1, col. 6.

50. Wall St. J., Jan. 21, 1976, at 1, col. 6.

claims based on fault are eliminated, with the further result that insurance companies in far too many instances must be ready to respond to both no-fault and fault-based claims. Moreover, doctors and lawyers working together in many instances have arranged to use the no-fault benefits for medical bills to make sure that such bills exceed the \$500 threshold figure. According to a Geico spokesman, "People are learning that all they have to do is have another X-ray or spend another night in the hospital" in order to surpass the threshold and file a fault-based claim. Thomas C. Morrill, a vice-president of State Farm Mutual Automobile Insurance Co., the nation's largest, has charged that in Florida, where medical bills over \$1,000 permit a fault-based claim, many claims illegitimately have been "built to a level that exceeds the threshold established by the law. Once that level is passed, [claimants] are free to go for that alluring pot of litigious gold, which our customers keep filling for them."⁵¹ In New York too, according to James March, a recent director of research for the state's Select [Legislative] Committee on Insurance, the low threshold acts as "an incentive for doctors to work in cahoots with patients to get their medical fees over that \$500 level."⁵² In addition, United States Senator Frank E. Moss, Democrat of Utah, a sponsor of the federal no-fault bill, charges that New York State trial lawyers have attempted to circumvent the no-fault law by circulating a letter that encourages accident victims to seek larger medical expenses. In addition, Senator Moss charged, the lawyers' letter offers an incentive to doctors to go along with such higher charges by offering to collect them from insurance companies without charge to the doctors.⁵³

Investigations by the Florida Insurance Department and the Florida Legislature, as well as criminal prosecutions have caused Florida to scrap its \$1,000 medical bill threshold and phrase the barrier to fault-based claims in less manipulable terms, calling in effect for 90 days of disability before a fault-based claim can be brought. Similarly, Thomas Harnett, the insurance commissioner in New York, favors lifting the New York threshold to \$2,000 of medical bills or, even better he says, "a verbal definition of serious injury," perhaps along the lines of Florida's.⁵⁴ Admittedly, however, as one New York legislative aide puts it, "It would be a real political battle if we attempted to limit court cases this way." In the words of New York Times Albany correspondent Ronald Smothers, "[S]uch a pro-

51. *Id.* at 25, col. 3.

52. *N.Y. Times*, July 25, 1976, § 1, at 1, col. 1.

53. *N.Y. Times*, Apr. 18, 1976, § 1, at 24, col. 4.

54. *N.Y. Times*, July 25, 1976, § 1, at 1, col. 1.

posal . . . would have rough going in a Legislature that was made up of many lawyers and was vulnerable to pressure from groups representing trial lawyers."⁵⁵

Some idea of the widespread political power of trial lawyers is gained from the experience of a Democratic candidate for governor in a major northern industrial state in 1972. Convinced of the merits of no-fault, he finally was dissuaded from backing it as a campaign issue through fear of the effect on many of his key campaign workers. "In community after community," said a key aide, "we checked and found that plaintiffs' lawyers were campaign or finance chairmen, etc. They would not have tolerated a pro-no-fault stand. Our organization might well have fallen apart." The problem is especially acute for ambitious Democrats. With many individual exceptions, able and prominent Democratic lawyers who can be helpful to a politician at campaign time, especially in smaller cities, tend to represent either plaintiffs in personal-injury cases or unions in labor law matters. Often the two interests overlap in that many labor lawyers in effect provide free or cut-rate legal services to unions in return for the right to represent injured union members on a contingent fee.

As to Geico's problems, after discussing the effect of no-fault, an article in *Fortune* concluded, "But, these difficulties could have been surmounted—if only Geico had been doing things right. Basically, its downfall can be explained, as corporate catastrophes usually can, by bad management."⁵⁶ For example, according to the *Wall Street Journal*, Geico traditionally

charged 10% to 20% less than its competitors. It was able to do so because its traditional policyholder's base—government employees and other white-collar workers—had lower accident and claim rates than the population at large. But in the early 1970s, Geico tried to enlarge its market share by writing discounted business to practically anyone—one cause, analysts feel, of the company's downfall.⁵⁷

In addition to some adverse claims experience under inadequate no-fault laws, the *Wall Street Journal* stated that "no-fault has impaired the financial strength of some insurance firms [including Geico] in another way." It quoted a New York State Insurance Department spokesman as stating that under the old fault-based system, "a company had a claim reserved for it, went to court, argued and maybe one day had to pay. But in the meantime, that money

55. N.Y. Times, Apr. 18, 1976, § 1, at 24, col. 5.

56. Loomis, *An Accident Report on Geico*, FORTUNE, June, 1976, at 126, 128.

57. Wall St. J., Sept. 16, 1976, at 40, col. 2.

was earning income. Now, under no-fault, a company has to pay from day one, meaning its investment income is considerably reduced."⁵⁸ Surely, however, this is a curious complaint against no-fault. Traffic victims, if not investors, will welcome prompt payment of claims. After all, are insurance companies primarily in the business of paying for accident losses or investing money? If readers of the *Wall Street Journal* are confused on this point, the rest of us should not be.

Also, as business writer Philip Zinkewicz has stated concerning higher loss ratios, they were "not unexpected. The American Insurance Association predicted in the beginning that loss ratios would increase under no-fault. It was the high company expense ratio which is supposed [to] decrease under no-fault . . ."⁵⁹ Even those expense ratios may not decrease all that much to the extent that many fault-based claims are preserved along with no-fault claims. No-fault's effect on loss ratios in Michigan, however, which has a realistic ban on fault-based claims, seems to be favorable.⁶⁰

In addition, there is considerable indication that any price rise in auto insurance has been due not to difficulties under inadequate no-fault laws, but to rapidly rising prices, a factor applicable to all auto insurance, in fault-based states and no-fault states alike. Price rises for medical services and auto parts have been especially rapid.⁶¹ In the case of auto parts prices, the Council on Wage and Price Stability is investigating price increases over the past two years. According to the Council, a price index maintained by State Farm Insurance Company showed that auto crash-part prices increased by 31.7 per cent in 1974 and 24.8 per cent in 1975, compared to increases in the wholesale price index for new cars of 12.9 and 6.0 per cent respectively during the same period. Crash parts include such items as fenders, hoods, trunk lids, doors, and bumpers.⁶² Such disparity in price increases probably reflects the near monopoly of the seller of replacement parts. Initially when you buy a car, you can buy a Chevy, a Ford, or a Plymouth; but once you've bought, say, a Chevy, you can probably purchase crash parts, the ones most likely to be damaged in a collision, only from GM.⁶³

58. Wall St. J., Jan. 21, 1976, at 1, col. 6.

59. J. COMMERCE, Feb. 5, 1976.

60. Address by Robert H. Rowe, Deputy Insurance Commissioner, State of Michigan, Insurance/Finance Conference of the Cooperative League, Montreal, June 29, 1976.

61. N.Y. Times, July 25, 1976, § 1, at 34, col. 1.

62. INSURANCE INSTITUTE FOR HIGHWAY SAFETY, STATUS REPORT, vol. 11, no. 4, Mar. 3, 1976, at 9.

63. J. O'CONNELL, *supra* note 4, at 109-10.

There seems to be considerable evidence that, all things considered, no-fault has not only not increased auto insurance costs, but has in fact decreased them, just as was originally promised, despite the inadequacy of the laws passed. Granting all the difficulties of actuarial computations and comparisons, according to State Farm, admittedly a supporter of no-fault insurance, from 1971 to 1975 rates rose 23.4 per cent in add-on states and 12.6 per cent in non-no-fault states, while rising only 3.2 per cent in true no-fault states.⁶⁴

When one turns to "before" and "after" comparisons in a particular state, the measurement problems are prodigious. One is then trying to compare no-fault rates with rates for fault-based coverages which *would* have been imposed if no-fault had not been enacted. But inflation and differing accident rates for varying years can undermine such comparisons. Even so, comparisons have been made. A Michigan Insurance Department study⁶⁵ has compared the auto insurance premium rates charged on March 1, 1976, by four companies that wrote a total of 44 per cent of Michigan's auto premiums, with the rates charged by the same companies on September 30, 1973, the day before no-fault became effective. For all four companies, two risks were studied—that of a married couple, aged 35 with no children old enough to be driving, and that of a retired couple aged 67. Two different territories, one in Detroit and one in suburban Dearborn, were used. In all eight cases the rates for bodily injury coverage *decreased*, not just at the start of no-fault, but after a full 29 months of experience during the height of the worst inflation seen in modern time! The decreases ranged from 2 per cent to 27 per cent, with the sharpest cuts going to the retirees.⁶⁶

Professor Robert E. Keeton of the Harvard Law School, one of the originators of no-fault as it has been implemented, has characterized the effect of no-fault on Massachusetts auto insurance costs as one of dramatic reduction in compulsory rates for injured persons.⁶⁷ These reductions were in the face of raging inflation and

64. Henderson, *supra* note 3, at 63.

65. T. JONES, *THE MICHIGAN NO-FAULT AUTOMOBILE EXPERIENCE: A PRELIMINARY STUDY* (1976). Some of the data contained in Commissioner Jones's report are also included in Henderson, *supra* note 3, at 53-55. See also Address by Robert H. Rowe, *supra* note 60.

66. T. JONES, *supra* note 65, at 9, 12. See also note 60, *supra*.

67. Private Passenger Car Average Compulsory Rates for Injuries to Persons

Year	All Cars in the State	Boston Cars	
		Under 25	Lowest Adult Category
1970	\$66.75	\$374	\$117

a general history of precipitous price rises before the introduction of no-fault.

Upon the passage of the first no-fault auto laws, the Council on Law-Related Studies (CLRS), a small private foundation supportive of no-fault, commissioned several unbiased legal scholars to do statistical studies of the actual operation of no-fault.⁶⁸ One of these studies, by Professor Joseph Little of the University of Florida Law School, estimated that under Florida's no fault law, the costs of insurance covering personal injuries per registered vehicle in Miami and Jacksonville apparently decreased 15 per cent from 1971 to 1973, after the enactment of no-fault.⁶⁹ Little goes on to state that this

1971	53.57	318	99
1972	40.24	237	74
1973	39.54	196	61
1974	39.54	196	61
1975	36.10	146	45

Hearings, supra note 44, at 680.

Admittedly, the savings in Massachusetts are probably greater than elsewhere in light of the state's low limits on no-fault benefits (\$2,000), and the greater propensity of plaintiffs in Massachusetts to assert smaller tort claims that were eliminated by the tort exemption in Massachusetts, despite the threshold for the exemption being very low (\$500 in medical bills). According to the *Wall Street Journal*:

Prof. Keeton says that even no-fault's most fervent early supporters were surprised by these results, and he now believes they had missed the importance of certain special factors in the state. He notes that back in 1927, Massachusetts was the first state to require all motorists to carry bodily-injury liability insurance, but it didn't require coverage for property damage.

"I think we (no-fault's supporters) all under-estimated the extent to which unjustified bodily-injury claims were used to get cars repaired," Prof. Keeton surmises.

Wall St. J., Jan. 21, 1976, at 25, col. 1. For more on Keeton's cost estimates see *Hearings, supra* note 44, at 678-83, and Keeton, *Compensation Systems and Utah's No-Fault Statute*, 1973 UTAH L. REV. 383, 394-96. According to Professor Roger Henderson, "The same conclusions arrived at by Keeton are demonstrated again with greater detail and documentation in a forthcoming piece by Randall R. Bovbjerg, Associate Study Director for the Massachusetts No-Fault Auto Insurance Study sponsored by the Council on Law-Related Studies." Henderson, *supra* note 3, at 112 n.2.

68. All of the studies will be available in a book to be published by Oceana Publications, Inc., in 1976. Also included will be a Michigan Insurance Department study of that state's no-fault experience. See generally notes 78-81 *infra* and accompanying text. See also Little, *A Critique of No-fault Reparation for Traffic Crash Victims*, 51 IND. L.J. 635 (1976).
69. See Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of its Effects*, 9 MICH. J.L. REFORM 1, 45 (1975); Henderson, *supra* note 3, at 31.

apparent reduction occurred during a period when the trends in number of claims per registered passenger vehicle and in the cost of medical services apparently were increasing.⁷⁰ Another CLRS study of the Delaware add-on plan was unable to determine the effect of no-fault on insurance premiums in that state, but doubted that it had caused any reduction.⁷¹

On the other hand, a study by an insurance trade organization, the National Association of Independent Insurers (NAII), made up of companies generally opposed to no-fault, including Allstate, concluded that in Florida, Connecticut, New Jersey and Nevada, "the cost of no-fault coverages was higher than under [fault-based coverages]."⁷²

Summing up some of the cost appraisals, Professor Roger Henderson of the University of Nebraska College of Law reported to the Commissioners on Uniform State Laws, a quasi-official body, with members appointed by governors of the various states, which earlier had drafted a model no-fault law for the states. Henderson noted:

An examination of the . . . data with regard to insurance rate changes leads one to conclude that private passenger automobile insurance rates for bodily injury have gone up in most states since 1970 and that 1975 saw some substantial increases. The data from State Farm would lead one to conclude that the increases have been greater in those states which have not enacted no-fault plans with a . . . threshold [barring fault-based claims], that is some type of modified plan. The data from . . . [American Insurance Association] companies [a trade association favorable to no-fault] generally supports this position. On the other hand the NAII figures indicate that just the opposite has occurred.⁷³

All in all, Henderson, a no-fault backer, concluded that the figures from various sources

will not provide clear-cut answers to the question of the impact of no-fault on costs, but perhaps by a dogged and tedious effort

70. Little, *supra* note 69 (footnotes omitted).

71. While the Delaware study recounted the statements by the Delaware Commissioner of Insurance that no-fault had reduced premiums, the investigators were dubious of any cause and effect relationship since the rates were ordered to be reduced and there did not appear to be enough experience under the no-fault law at the time to support the statements. Two explanations were suggested though: (1) that the rates were probably too high at the time no-fault went into effect and (2) with more insureds the costs to each insured was lowered. To repeat though, this was mere speculation.

Henderson, *supra* note 3, at 32 (citing Clark & Waterson, "No-Fault" in Delaware, 6 RUTGERS-CAMDEN L.J. 225, 255-56 (1974)).

72. Henderson, *supra* note 3, at 79.

73. *Id.* at 109.

one can sense, if not actually demonstrate, that the better designed no-fault automobile insurance plans do in fact lower bodily injury insurance rates. At the very least though, the data clearly does [sic] not support the claims of those who charge that no-fault has caused higher rates.⁷⁴

But as several of the recent studies have strained to point out, simple premium aggregates are only one rather crude way of measuring costs. As Professor Little states in his Florida study, "[A]nother [way of defining cost] might be the amount of money paid out to recipients of insurance settlements; and a third might be the ratio of the first two, representing a measure of the administrative cost efficiency of the transfer of money from premium payers to injured beneficiaries."⁷⁵ Professor Little goes on to find even more dramatic cost improvements under no-fault in Florida when these last two criteria are also considered. Benefits paid per registered vehicle had increased by 31 per cent by 1973 and, even more important, the "benefits-to-premium ratio increased markedly [by 56 per cent] during the same period."⁷⁶ In other words, premiums went down while benefits went up, and the combination of the two meant more than a 50 per cent increase in value for the public. Concluded Professor Little, "To these [findings] may be added the earlier finding that the number of claims per registered vehicle also increased, thereby spreading the benefits paid over a larger population. . . . [T]hese findings . . . suggest that the hypothesis of more cost-effectiveness with no-fault should be accepted."⁷⁷

Perhaps the improved value per insurance dollar under no-fault is most graphically illustrated by the Michigan experience. Coverage under Michigan's no-fault law pays unlimited medical expenses plus over \$46,000 in wage losses, in addition to coverage of \$20,000 for those fault-based claims against a motorist which are preserved under the law. All this insurance is provided at a cost no greater, and apparently less, than the costs of only \$20,000 of traditional liability insurance based on fault, under which few seriously injured victims were paid much, if at all.

One must translate these figures into palpable, human dimensions. Keep in mind the importance to the tragically injured traf-

74. *Id.* at 62.

75. Little, *supra* note 69, at 43.

76. *Id.* at 49.

	1971	1972	1973
Premium Paid Per Registered Vehicle	1	0.88	0.85
Benefits Paid Per Registered Vehicle	1	1.22	1.31
B/P Ratio	1	1.39	1.56

Id.

77. *Id.* (footnote omitted).

fic victim and his family of relatively unlimited medical and other benefits, including comprehensive rehabilitation. According to a February 1976 letter to the editor of the Grand Rapids Press,

No-fault has been a godsend to our family over the past 28 months. . . . Our 18-year-old son was very seriously injured in a collision. . . . The no-fault insurance our boy carried on his car at the time has helped us keep our heads above water. I wouldn't attempt to list all the expenses it has paid, but I will name a few. [In addition to covering normal medical expenses not covered by health insurance] it paid for his wheelchair, crutches, leg braces, shoes and even for the labor attaching to the braces to his shoes. It paid for the driver's training to enable our son to get his driver's license with the use of hand controls, as his legs were paralyzed in the mishap. Also it paid for the hand controls on his car and pick-up truck. Our agent even gave me to understand I could submit a bill for caring for my son after he returned home from an eight-month stay in the hospital.⁷⁸

After detailing some of the other benefits, the writer concluded that no-fault cannot save and restore lives, but that it helped his son over what could have been a pretty rough rehabilitation.

A study of "catastrophic" medical claims in Michigan (defined as injuries resulting in medical expenses over \$25,000) by NAIL, the insurance trade organization of companies generally opposed to no-fault poignantly illustrates the large amounts available under no-fault to pay for tragic losses most often unpaid for under the old fault-based system. Bear in mind that a U.S. Department of Transportation study showed that those who suffer more than \$25,000 of economic losses from auto accidents suffer total losses of \$76,341 but receive from fault-based claims an average of \$3,742, or 5 per cent of their losses!⁷⁹ By way of contrast, between October 1, 1973 (when no-fault went into effect in Michigan), and December 31, 1975, of 260 representative claims for catastrophic medical expenses, 82 (or 32 per cent) were for single-car accidents. These, then, were cases where, in all likelihood, no fault-based payment would have been made, because, by definition, there was no "other" car or driver to sue. And yet for 82 claimants, almost nine million dollars had been "reserved" under no-fault insurance (that is, specifically ear-marked for payment) for these claims, amounting to an average of about \$108,000 per claim. According to the same study, 40 catastrophically injured victims (or 15 per cent) were motorcyclists, for whom about 2.5 million dollars was reserved. Given the

78. Grand Rapids Press, Feb. 27, 1976.

79. See 1 U.S. DEP'T OF TRANSPORTATION, *supra* note 6, at 277-78, Table 31 FS.

typical age and antics of motorcyclists, probably few would have been eligible for fault-based payment. In this connection, the NAI data were further broken down by type of injury and average age of accident victims.⁸⁰ The Michigan Insurance Department study concludes: "The seriousness of the injuries and the relative young age of the accident victims (32) vividly illustrates the need which is being met by no-fault."⁸¹

Professor Keeton of Harvard, in testimony before Congress, has compared the costs under the federal no-fault bill, which provides unlimited medical benefits and wage-loss protection up to a minimum of \$15,000, while eliminating fault-based claims unless total disability exceeds 90 days, with the cost for present fault-based coverage. Keeton noted that the actuarial estimates submitted to Congress from the three major segments of the insurance industry, which disagree sharply about the desirability of no-fault, ranged from only modest savings to modest increases in moving to such no-fault plans from the present system.⁸² "[G]ood no-fault laws, including [the one] before this committee now," Keeton testified,

would not increase the total amount of premiums that the public are putting into automobile insurance. Indeed, it is my own estimate that [they] would decrease it somewhat. But I accept, for the [sake of discussion] the data we are getting from the [insurance] industry studies that show that the total cost would remain at about the same level. But what would we get for our money? What would be the comparison?

80.

Unlimited Medical Claims in Michigan
October 1, 1973-December 31, 1975, NAI Companies
Distribution by Type of Accident \$25,000 and Over

Type of Injury	Number	Amount of Reserve	Average Age (Years)
Brain Damage	61	\$ 8,115,484	25
Quadriplegic	12	1,906,449	30
Paraplegic	20	2,881,974	24
Other	256	12,182,458	34
TOTAL	349	\$25,086,365	32

T. Jones, *supra* note 65 at 4, Table 3.

81. *Id.* at 5. "Some insurers have expressed concern that the cost of unlimited medical benefits may be prohibitive. It is interesting to note that on the basis of its study the NAI estimates the cost of medical claims exceeding \$25,000 in Michigan is \$8.00 per car." *Id.*

For favorable journalistic reports on the operation of no-fault, especially in serious cases, see the Chicago Tribune, Oct. 6, 1976, at 1, col. 3, and MONEY, Nov., 1976, at 75.

82. *Hearings, supra* note 44, at 678.

Instead of . . . coverage that pays several times the loss in minor injury claims and does not give us guaranteed protection above \$10,000 or some such figure as that, with [a] good no-fault law we would get life-time protection for medical expense [stemming from an automobile accident], at least \$15,000 of wage protection, something of that order for protection in death benefits, all of that plus liability protection [for the fault-based claims that are preserved under the federal no-fault law]. We would get all that for about the same price that we are now paying for this other [fault-based] package.⁸³

Keeton's comments raise another goal of no-fault insurance—namely, spending less on small, rather trivial claims, and, conversely, more on serious injuries. Professor Little found in his Florida study that a "shift to greater payments for more serious injuries is clearly seen" under no-fault compared to fault-based payment.⁸⁴ The percentage of total personal injury payments to more seriously injured victims almost doubled after two years' experience under no-fault.

As to the aim of prompt payment under no-fault, Professor Little found that the first payment to victims is made much more promptly but that, if anything, total time taken to finally settle claims increases under no-fault. He hypothesized that this may well be due to a more relaxed attitude on the part of victims about the need to finally settle since they are receiving no-fault benefits periodically as losses accrue, whereas they must wait for one final lump-sum settlement, as bills and wage-losses pile up, under fault-based claims. Professor Little concluded: "Owing to the change in the pattern of claim modes, it is difficult to conclude from these analyses that claimants are better or worse off under no-fault than before with regard to speed of claims and processing. Nevertheless, on balance the speeding up of the receipt of first payment appears to be a favorable result for claimants."⁸⁵

As to no-fault's aim of more efficiency by using less of the premium dollar on legal fees and insurance overhead, another CLRS

83. *Id.* at 669.

84. See Little, *supra* note 69, at 36.

PERCENTAGE DISTRIBUTIONS OF TOTAL PERSONAL
INJURY PAYMENTS . . .

	1971	1972	1973
\$0 to \$500	41.9	38.4	28.8
\$500 to \$999	16.3	16.9	17.1
\$1,000 to \$2,000	21.1	16.9	16.2
\$2,000 & above	20.7	27.7	37.9
n =	(473)	(354)	(309)

Id. This sample is limited to claims files in which at least one claim for payments of \$200 or more was made. *Id.* at 31-32.

85. *Id.* at 35.

study of the Massachusetts no-fault system by Professor Alan Widiss of the University of Iowa Law School suggests a radical reduction in the need for lawyers under no-fault claims. In contrast to the use of attorneys in about 80 per cent of the cases prior to the institution of no-fault, attorneys were used for no-fault claims in substantially less than 15 per cent of the cases.⁸⁶ According to Widiss, "No-fault insurance claims are usually paid without disputes over either the existence of coverage or the amount due the claimant."⁸⁷ He states: "A majority of the claimants and defense attorneys surveyed felt that the average [no-fault] . . . claimant did not require legal assistance because the forms were not complicated. Typical of this group was the response of one attorney who observed: 'It's just like Blue Cross or any health or accident claim.'"⁸⁸ In Florida, too, overall lawyer involvement per claim diminished.⁸⁹ On the other hand, according to Widiss,

A significant number of claimants' attorneys counseled, as one lawyer put it, that "you always need an attorney when an insurance company is involved." However, this attorney, as well as several others, also pointed out that, even if the attorney is able to do a better job of presenting the client's claim, the amount involved in a [no-fault] . . . claim is usually not sufficient to justify hiring a lawyer. Many lawyers felt this was true even though they also felt that some insurance companies were unjustifiably disputing medical bills, especially those for hospitalization and X rays. One attorney, who suggested that some claims departments were paying only a percentage of the amounts claimed, summarized the situation by observing that because "claimants don't stand to gain enough from suing the insurer to make it worthwhile, they are at the mercy of the insurer, and the insurer takes advantage."⁹⁰

Of course, the dilemma of the consumer whose complaint concerns an amount too small to sue for is not confined to insurance companies. One can argue that such a dilemma under no-fault is vastly better than the dilemma under fault-based claims, where insurers often pay little or nothing when the claimant's losses are heavy. Far better to have a situation where the claimant is paid so much of his loss—and conversely not paid so little—that the remainder is not really worth bothering about.

As to reduced litigation under no-fault, another Massachusetts study sponsored by CLRS found that the filing of personal injury cases in Massachusetts courts was "precipitously lowered in the

86. See note 10 *supra* and accompanying text.

87. Widiss, *Massachusetts No-Fault Automobile Insurance: Its Impact on the Legal Profession*, 56 B.U.L. Rev. 323, 338 (1976).

88. *Id.* at 336.

89. Little, *supra* note 69, at 25.

90. Widiss, *supra* note 87, at 337.

wake of no-fault,"⁹¹ including a remarkable reduction of over 50 per cent in courts of unlimited jurisdiction, and an astonishing decline⁹² of about 90 per cent in courts limited to claims under \$2,000. The reduction of litigation in Florida, while much less dramatic, was also significant.⁹³

On the other hand, under Delaware's add-on plan, according to the CLRS study there, "[T]ort litigation is continuing substantially unabated by the no-fault legislation." Concludes Professor Roger Clark of Rutgers-Camden Law School who conducted the Delaware study, "It is now clear that, whatever beneficial effects it has had, the Delaware legislation has not discouraged any significant number of potential tort plaintiffs from suing."⁹⁴

In this connection, Professor Widiss reports:

Although the reduction in the retention of attorneys had no overwhelming effects on a majority of the lawyers in Massachusetts, no-fault insurance has had a marked economic impact on the trial bar and on at least a portion of the lawyers in general practice. Many of the attorneys whose practices were substantially affected appear to have offset the economic effects by increasingly engaging in other fields of practice [including real estate, probate, commercial, corporate, tax, and other civil or criminal litigation].⁹⁵

On the other hand, the common canard that it is lawyers deprived of auto suits who have caused the recent rise in the number of malpractice claims is probably not true. In the first place, it seems that the relatively marginal practitioner is most affected by no-fault.⁹⁶ While many such lawyers are able to handle a simple auto intersection accident,⁹⁷ they would be quite unable to handle technical, arcane suits such as those involving medical malpractice. Second, the rise in malpractice suits seems as great, if not greater, in

91. Bovbjerg, *The Impact of No-Fault Auto Insurance on Massachusetts Courts*, 11 NEW ENGLAND L. REV. 325, 336 (1976); Henderson, *supra* note 3, at 17.

92. Bovbjerg, *supra* note 91, at 339.

93. Little, *supra* note 69, at 18; Henderson, *supra* note 3, at 18.

94. Clark, *Delaware No-Fault—1974 and 1975 Court Filings Arising from Personal Injury Incurred in Motor Vehicle Accidents*, an update of Clark & Waterson, *supra* note 71. Compare table 1 in the update with those in Clark & Waterson, *supra* note 71, at 232, 260.

95. Widiss, *supra* note 87, at 347, 355.

96. *Id.* at 346; N.Y. Times, Jan. 25, 1976, § 1, at 1, col. 7.

97. Actually, many lawyers deriving the bulk of their income from personal-injury claims could not try the simplest case, and never even think of appearing in court. They are only capable of "settling" the simplest cases, referring any complex cases to trial lawyers, with whom they—often illegitimately—share the contingent fee. J. O'CONNELL, *supra* note 4, at 60-62 (citing J. CARLIN, *LAWYERS ON THEIR OWN* 74-78 (1962)).

states such as California, Illinois, and Texas, which do not have auto no-fault, as in no-fault states.

Overall, Professor Widiss found tremendous satisfaction in Massachusetts with the operation of no-fault as applied to personal injury. Among those who had claimed and received no-fault benefits,

[s]eventy-five to 85 per cent . . . indicated that they were either "fairly satisfied" or "very satisfied" with the manner in which their claims had been handled and with the amount they had received. . . .

. . . .

[I]t seems unlikely that many comparable systems exist in which the percentage of "fairly satisfied" and "very satisfied" consumers exceeds 80 percent.⁹⁸

Seventeen to 19 months after the accidents, insurers had denied liability on only 1.5 per cent of the claims, and claims pending or otherwise not paid amounted to some 18 per cent of the cases.⁹⁹

In only three states has no-fault insurance been extended to property damage. In Florida the state supreme court ruled such an extension unconstitutional;¹⁰⁰ in Michigan, a trial court's ruling to the same effect is on appeal;¹⁰¹ and in Massachusetts the no-fault property damage law has just been repealed.¹⁰²

Admittedly, as Professor Keeton testified before Congress, the "possibilities for improvement of the [auto insurance] system [applied to car damage] . . . are very modest in comparison with the dramatic improvements effected by a real no-fault system for injuries to people."¹⁰³ This is largely because the savings from eliminating payment for pain and suffering and lawyers' fees are not applicable, because cars don't suffer pain, and car-damage cases are often arbitrated inexpensively and expeditiously between insurance companies, without the intervention of lawyers. But savings are still possible under no-fault car-damage coverage, compared to fault-based systems. Note that in the typical two-car accident, four

98. Widiss, *Accident Victims Under No-Fault Automobile Insurance; A Massachusetts Survey*, 61 IOWA L. REV. 1, 64-65 (1975).

99. *Id.* at 50-51. For a report on the percentage of claimants under predominantly fault-based claims who are satisfied or dissatisfied with their treatment at the hands of insurance companies see J. O'CONNELL & R. SIMON, *PAYMENT FOR PAIN & SUFFERING: WHO WANTS WHAT, WHEN & WHY?* 27 N.72 (1972), in 1972 U. ILL. L.F. 1, 27 n.72.

100. See *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

101. For the trial court's opinion see *Shavers v. Kelley*, 1973-1975 AUTO. INS. CAS. (CCH) ¶ 8308. For the intermediate appellate court's decision see *Shavers v. Kelley*, 65 Mich. App. 355, 237 N.W.2d 325 (1975).

102. See NATIONAL UNDERWRITER (Prop. & Cas. ed.), Aug. 6, 1976, at 1, col. 1.

103. *Hearings*, *supra* note 44, at 676.

insurance coverages are applicable to the potential damage to the two cars: each driver has insurance covering his liability to the other based on fault, and each driver normally carries collision insurance, a supplementary no-fault coverage applicable to the driver's own car widely sold even prior to no-fault. Any car bought on time must have collision insurance by order of the lender. Insurance companies, understandably, like a system that calls for four coverages on two losses. But the public shouldn't. By the application of no-fault, each car can be covered at the owner's option by collision-like no-fault coverage, with all fault-based claims abolished. This results in a sensible maximum of two coverages applicable to the two losses.

In point of fact, however, most of the public satisfaction with no-fault insurance has stemmed from its application to property damage. Why? Well, when someone plows into your car causing \$250 worth of damage, and you either haven't bothered to insure your own car or have insured it with a \$100 deductible, you are inclined to become outraged at your own uncompensated losses. People may not be so outraged at suffering the same kind of deductible loss in an accident causing injury to their person. This may be because they are thankful to have escaped with their lives or because they are thankful to be assured payment of all the rest of their medical expenses or lost wages, or both. In addition, in states that have applied no-fault to property damage as well as in those that have not, the precipitous rise in auto repair costs, which the Cost of Living Council is investigating, has served to cancel out any savings produced by no-fault insurance applicable to injuries to persons.

Even so, Professor Little's Florida no-fault insurance study demonstrates that the application of no-fault to property damage, prior to its being held unconstitutional there, resulted in net advantages to the consumer, albeit less dramatic than those stemming from no-fault for injuries to persons. Using the same formula he applied to personal-injury no-fault, Little found that under the benefits-to-premium ratio consumers were getting more for their dollar under property no-fault by a factor of about 10 per cent.¹⁰⁴

104. See Little, *supra* note 69, at 61.

	<u>1971</u>	<u>1972</u>	<u>1973</u>
Property Damage Premiums			
Paid Per Vehicle	1	1.14	1.14
Property Damage Benefits			
Paid Per Vehicle	1	1.22	1.24
B/P Ratio	1	1.07	1.09

Granting all that, the application of no-fault to car damage is still of much less moment than its application to personal injuries, especially because of the likelihood in personal injury cases of much more tragic personal and social losses.

IV. SLOWING OF LEGISLATIVE MOMENTUM

In many ways, the slowing momentum of the change to no-fault is very frustrating. The need and its solution have long seemed obvious to almost everyone except trial lawyers and a few recalcitrant insurance companies. Yet, six years after the enactment of the first no-fault law, only one state in the Union, Michigan, has a no-fault law good enough to comply with proposed standards under the federal bill, and many states have no no-fault law at all. On the other hand, perhaps this slow pace of reform is not surprising. As Daniel Patrick Moynihan stated as long ago as 1967 in a speech before a group of insurance executives and lawyers,

Many of the essential issues concerning [no-fault insurance] . . . were raised in 1932 in the *Report by the Committee To Study Compensation for Automobile Accidents*, published by the Columbia University Council for Research in the Social Sciences. This was a civilized country in 1932, and there were a lot of automobiles around. The Committee came out very explicitly on behalf of scrapping the concept of [fault-based] . . . liability in automobile accidents in favor of a non-fault . . . solution for such accidents. That was 35 years ago. And yet the proposal which the researchers at Columbia University so confidently recommended to a rational nation made no impression whatsoever. . . . Things do not change that simply.

The undeniable fact seems to be that built into the American system is a predisposition to keep things as they are in this and other respects. Anybody would be ill-advised to suppose that the American society changes very rapidly when it shows itself able to resist for so long such proposals for reform.¹⁰⁵

Experience under workers' compensation also helps put the whole matter in context. Workers' compensation, in essence a no-

The conclusion to be drawn from this information is that while both premiums and the size of property damage benefit payments increased under the Florida no-fault system, the benefits-to-premium [B/P] ratio also increased. This suggests that the no-fault system was somewhat more cost-efficient in transferring premiums paid to beneficiaries than was the superseded system.

Id.

105. Moynihan, *Changes for Automobile Claims?*, 1967 U. ILL. L.F. 361, 361-62, reprinted in *CRISIS IN CAR INSURANCE* 1-2 (R. Keeton, J. O'Connell & J. McCord eds. 1968).

fault system applied to industrial accidents, was first enacted in the United States in New York State in 1910, with the last state, Mississippi, enacting such a statute in 1948, almost 40 years later.¹⁰⁶ But no one really doubted, at least after the first few years, that workers' compensation would become the norm for compensating industrial accidents to replace the fault-based system. It is significant that after more than 50 years of experience with no-fault workers' compensation, none of the 50 states that have adopted it has ever seriously considered voluntarily abandoning it.¹⁰⁷

Thus it is not surprising that the principal dispute over no-fault auto insurance concerns whether and how it is to be extended beyond the states where it has been enacted. No state in which it has been enacted for injuries to persons is seriously considering abandoning it, but every state that does not have it is debating whether to adopt it.

Once again, it is Moynihan who has viewed the problem in a broad perspective.¹⁰⁸ Writing in 1975, Moynihan stated:

106. H. SOMERS & A. SOMERS, *WORKMEN'S COMPENSATION* 34 (1954). On the other hand, by 1920 all but six states had workmen's compensation legislation, with the holdouts concentrated in the then economically backward South. *Id.*

107. According to the National Commission on State Workmen's Compensation Laws:

We have discussed the implications of abolishing workmen's compensation and reverting to the negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to workmen's compensation. . . . [Tort] liability suits [are] a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases.

NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 25, 45 (1972).

108. Moynihan's early interest in no-fault insurance should not be surprising. As Timothy Crouse has grudgingly admitted in an otherwise hostile profile of Moynihan,

[H]e is in many ways a natural-born politician, and one of his gifts is so rare and valuable that it nearly offsets his drawbacks. It is the gift of short-term prophecy. When he has had a few drinks, he sometimes brags to his Harvard colleagues that he has a terrific ability to identify a going issue. This may be one of his few understatements. He has spotted many a hot issue—from auto safety to welfare reform—while it was still on the horizon of public consciousness. He has an uncanny sense of precisely what is going to worry people next. Just over a year ago he caught on to a monster of an issue, one so big . . . that it eventually took over his life and pushed him into politics—the Red/Third World Menace.

Crouse, *Ruling Class Hero: How Pat Moynihan Became a Credit to His Race*, *ROLLING STONE*, Aug. 12, 1976, at 42-43.

[N]o-fault automobile insurance laws not only succeeded in the first states to enact them, but also succeeded visibly, palpably, and almost immediately. . . . Overnight it became evident that [this reform] had substantially solved a major social problem—that *this* was the way to allocate the costs of personal injuries . . . that arise through the automobile transportation system. . . .

[A] settlement for a broken back need not take four years to reach and end up with the injured person getting, say, forty percent of the money spent in the process, the remainder going to lawyers and other expenses.

It is here that [the issue involved in no-fault] assumes an almost unique importance, for while modest seeming, it addresses the largest of questions. To wit: there is a rise in the perception of threat in modern society, a decline in confidence, a decline in trust. This surely must be the judgment of any person of sensibility.

[No-fault reformers do] not want us litigating ourselves into a stalemated and paranoid society. We could do so . . . and that would be such a waste, such a loss. . . . When everyone sues, no one gets satisfied. Our experience with the automobile [has] brought us after the fact to that realization.¹⁰⁹

In an early article on no-fault, Moynihan pointed out the essential virtue of a new system whereby people would look to their own insurance companies for automatic payment for their dollar losses after an accident. The proponents of no-fault insurance, he said, are "right in the all-important perception as to what it is Americans are good at. We are good at maintaining business relationships once a basis for mutual self-interest is established. [No-fault insurance] . . . would establish one."¹¹⁰

V. CONCLUSION

Moynihan's observation as to what it is we Americans are good at is profoundly true. Nowhere else in the world are there so many people in the affluent middle class—people who deal prosperously with one another. We are not so good, of course, at taking care of those unlucky or unskilled at keeping up—many of the aged, ill, injured, poor, or black. But at least we ought to play to our strengths where possible—especially where we find a way to deal effectively with each other on the happening of accidents. It is not without significance that on the issue of no-fault auto insurance, unlike all other areas of social insurance, America stands first and as a model. Plans indeed are afoot to try to copy our experience

109. Moynihan, *supra* note 1, at xi-xx (1975).

110. Moynihan, *Next: A New Auto Insurance Policy*, N.Y. Times, Aug. 27, 1967, § 6 (Magazine), at 26, 82.

all over the motorized world—in England, France, Sweden, Israel, Ireland, to name only the most prominent examples.

It turns out—as it so often has before—that Moynihan is right. The answer is “Yes” for No-Fault.

We really ought to get on with it.