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NO-FAULT INSURANCE: A STATUS REPORT

*Robert E. Keeton**

Massachusetts led reform of the automobile accident reparations system with its Personal Injury Protection Act enacted in August, 1970, effective January 1, 1971.¹ This was the first state statute of the type to which the term "no-fault" came to be applied during the latter part of the 1960's. By the close of the 1971 legislative sessions one more state (Florida) had enacted a statute of this general type.² In addition, five other states had enacted laws of a different type that were nevertheless being called "no fault" laws by some observers. These other states were Illinois,³ Delaware,⁴ Oregon,⁵ Minnesota,⁶ and South Dakota.⁷

During its 1971 session the Massachusetts legislature enacted another innovative bill, expanding the scope of its no-fault law. The original act applied only to bodily injuries. The 1971 enactment, effective on January 1, 1972, extended the no-fault principle to damage to vehicles as well, and it abolished negligence actions for damage to all vehicles within the system.⁸ This extension was prompted in part by the fact that actual experience during the first year under the bodily injury no-fault law produced greater savings in claim costs than even the boldest proponents of no-fault had predicted.

The chart appearing with this article presents a brief comparison of key features of the state laws that had been enacted by the close of the 1971 legislative sessions. There are many more differences among the laws than the chart shows, but perhaps it will serve to highlight the most significant differences and to provide a framework for further explanation of the key issues at stake.

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¹ Mass. Laws ch. 670 (1970), as amended by Mass. Laws ch. 744 (1970); MASS. GEN. LAWS ch. 90, § 34A, 34D, 34M, 34N; ch. 175, § 22E-22H, 113B, 113C; ch. 231 § 6D (Supp. 1971).

² Fla. Laws 71-252 (1971).

³ Ill. P.A. 77-1430 (Smith-Hurd 1971).

⁴ Del. Laws, H.B. 270 (Enacted May 27, 1971).

⁵ Ore. Laws, ch. 523 (1971).

⁶ Minn. Laws ch. 581 (1971).

⁷ S.D. CODE §§ 58-23-7, -8 (Supp. 1971).

⁸ Mass. Laws chs. 978, 1079 (1971).

DEGREES OF COERCION TO OBTAIN INSURANCE

Every state in the United States has adopted legislation imposing on motorists some degree of coercion to obtain motor vehicle liability insurance. In most states the legislation is in the form of a financial responsibility law requiring that insurance be obtained by a motorist who has run afoul of the law—for example, by being convicted of a serious driving offense or by having failed to offer security for payment of any sums he may be found liable to pay to a person injured as a result of his operation of his motor vehicle. The intent of this kind of law is to encourage the purchase of liability insurance by most drivers, but by the rather moderate coercion incident to the threat of sanctions against those who, while uninsured, happen to be involved in accidents or offenses.

A few states have adopted more stringently coercive measures. Before 1971 there were three states with *compulsory* motor vehicle liability insurance laws—Massachusetts (since 1927),⁹ New York (since 1956)¹⁰ and North Carolina (since 1957).¹¹ In 1971 Florida¹² and Delaware¹³ joined this group, as well as providing for *compulsory no-fault* coverage. Thus, there are now five states with compulsory liability insurance and three (Massachusetts, Florida, and Delaware) with an additional compulsory coverage paying benefits without regard to fault.

A *compulsory* coverage, as that term is commonly used, is one a motorist must have in order to operate his car legally. A *mandatory* coverage is one the insurer must include in every automobile liability policy it writes in the state. Thus, in a non-compulsory state a motorist may legally operate his car without having any automobile insurance at all, but if he buys automobile liability insurance, his policy must include any coverage that is *mandatory*. Uninsured motorist coverage is mandatory in many states. And, as the chart shows, coverage paying certain benefits without regard to fault is now *mandatory* in Illinois and Oregon. Under the so-called no-fault laws of Minnesota and South Dakota, there is no compulsory and no mandatory coverage. Those laws merely require that insurers *offer* to automobile liability policyholders an additional coverage that pays specified benefits without regard to fault.

⁹ Mass. GEN. LAWS ch. 90, § 34A (1971).

¹⁰ N.C. GEN. STAT. §§ 220-279.1 to -279.39, 20-309 to -319 (Supp. 1963).

¹¹ N.Y. VEH. & TRAF. LAW § 310-21 (McKinney Supp. 1970).

¹² Fla. LAWS 71-252 (1971).

¹³ Del. LAWS, H.B. 270 (Enacted May 27, 1971).

TORT EXEMPTION

The term "no-fault" insurance was first applied to systems and proposals with a tort exemption as well as provisions for no-fault benefits. Such a system abolishes at least some of the tort actions otherwise available to recover awards for pain and suffering. As the chart indicates, the laws in Massachusetts and Florida are the only ones having this feature of a tort exemption. Both these laws have *partial* tort exemptions. That is, the exemption eliminates *some* tort actions but preserves a substantial number of tort actions. In contrast, the American Insurance Association, the New York Insurance Department and Senator Jack Davies of Minnesota propose virtually a *total* tort exemption; they propose to eliminate virtually all tort actions for traffic injuries. In relation to this issue, the Basic Protection Plan that Professor O'Connell and I have advanced falls between the Massachusetts-Florida pattern on the one hand and the AIA-New York-Davies pattern on the other hand. We propose a partial tort exemption that would eliminate awards for pain and suffering except in cases of severe injury. The Massachusetts and Florida laws allow awards for pain and suffering in more cases since those acts permit awards in many cases of rather moderate injury as well as cases of severe injury.

The most active supporters of no-fault insurance urge that the tort exemption apply also to damage to vehicles. That is, they urge that tort claims for damage to vehicles be eliminated except when the claim involves a motorist "outside" the system (for example, a motorist from a state not having similar no-fault law). Massachusetts omitted this principle from its first act but adopted it in 1971, for application in 1972 and thereafter.¹⁴ Florida's act includes this principle.¹⁵

LIMITS ON PAIN AND SUFFERING
RELATED TO MEDICAL EXPENSE

The Illinois act,¹⁶ *rather than eliminating* some tort actions, adopts a rule that in some cases *limits* awards for pain and suffering to 50% of the first \$500 of medical expense and 100% of additional medical expense. This kind of law will reduce payouts for pain and suffering in some cases, but it seems unlikely to reduce administrative expenses since it does not eliminate any claims—even very small ones. Some proponents of this kind of plan argue that

¹⁴ Mass. Laws chs. 978, 1079 (1971).

¹⁵ Fla. Laws 71-252 (1971).

¹⁶ Ill. P.A. 77-1430 (Smith-Hurd 1971).

the number of claims will be reduced in fact because in many instances the victim who has received no-fault benefits reimbursing his actual losses will not bother to press his tort claim. Critics (with whom I agree) respond that claims and costs are more likely to go up than down because the no-fault benefits will place a "floor" under the tort claim and make it more attractive both to the claimant and to his lawyer. This risk is increased by the fact that the Illinois act, as well as most other proposals of this type, allows one to escape the limitation completely if he proves certain kinds of injuries—for example, "permanent partial disability."

One of the three major industry groups—the National Association of Independent Insurers—has thrown its support behind proposals similar to the Illinois act. The American Mutual Insurance Alliance supported this kind of legislation in the past, but currently it is proposing a threshold bill, that is, a bill that in this respect is like those of Massachusetts and Florida, requiring that plaintiff prove that he has sustained a special kind of injury or more than a specified amount of medical expense before he can recover general damages (for "pain and suffering").

PLANS WITH NO LIMITS ON TORT ACTIONS

The Insurance Company of North America has developed and is urging adoption of a plan that has neither a tort exemption nor a limitation of pain-and-suffering awards to a percentage of medical expense. The Delaware act¹⁷ is patterned after this INA proposal.

The Oregon,¹⁸ Minnesota¹⁹ and South Dakota²⁰ laws are similar to the Delaware law and the INA proposal in having no limitation on tort awards for pain and suffering. But, as already noted, they differ in another significant respect since the Delaware law, patterned on the INA proposal, makes automobile insurance compulsory and these other three states have only financial responsibility laws. Also, no-fault insurance is not even a "mandatory" coverage in Minnesota and South Dakota.

DEVELOPMENTS OUTSIDE STATE LEGISLATURES

Two developments outside the state legislative arena deserve special attention. One is the drafting of a proposed Uniform Motor Vehicle Accident Reparations Act by a special Committee of the

¹⁷ Del. Laws, H.B. 270 (Enacted May 27, 1971).

¹⁸ Ore. Laws, ch. 523 (1971).

¹⁹ Minn. Laws ch. 581 (1971).

²⁰ S.D. CODE §§ 58-23-7, -8 (1967).

National Conference of Commissioners on Uniform State Laws. The United States Department of Transportation had a significant role in the initiation of this project. At the moment, the work of the special committee is unfinished, but it appears likely that it will recommend to the National Conference a bill with a tort exemption much stronger than those of the Massachusetts and Florida laws.

The other matter of special interest is the development of increasing support for federal legislation. Indeed, at this moment it seems likely that the field of choice among automobile accident reparation systems will be occupied by Congress—and perhaps even to the exclusion of the states—unless the states act decisively in 1972 with laws in a pattern that approaches uniformity among the states and meets the criteria of sound no-fault legislation.

THE RATE IMPACT OF THE MASSACHUSETTS NO-FAULT INSURANCE ACT

Some opponents of no-fault insurance are currently spreading the charge—usually by innuendo but sometimes directly—that the Massachusetts no-fault law has *caused* automobile insurance rates in Massachusetts to go up rather than down. What has happened in fact is that the new law has *caused* greater savings to policyholders than even its proponents dared predict, while costs for those forms of automobile insurance not changed by the no-fault law have continued to rise dramatically.

The following table compares this assumed policyholder's actual rates in 1971 and 1972 with what his rates were in 1970 under the old system and with what his rates in 1971 and 1972 would have been if the law had not been changed.

	1970 Rates	What 1971 Rates Would Have Been	1971 Rates	What 1972 Rates Would Have Been	1972 Rates
\$5,000 Bodily Injury Liability Ins. Only	\$100	\$125		\$132.50	
\$5,000 Bodily Injury Liability Ins. Plus \$2,000 No-Fault Coverage			\$85		\$61.54
\$5,000 Bodily Injury Liability Ins. & Full Deductible for No-Fault Coverage			\$59.50		\$43.08

To illustrate what has happened, consider the case of a policyholder who in 1970 (the last year the old system was in effect) paid \$100 for *compulsory* coverage only. (You can get some idea of where this assumed policyholder stands among Massachusetts motorists from the following facts: In 1970 the statewide average rate for compulsory coverage was about \$70; the lowest rate in the state was about \$23; the highest (for an under-25 driver in Boston) was \$374.)

The following comments explain the figures in the table and add some further information.

At the time of the legislative hearings in the summer of 1970, bodily injury rates had been frozen for four years by law. Decisions of the Supreme Judicial Court of Massachusetts handed down later in 1970 made it clear that the freeze could not be continued.²¹ Anticipating such a ruling, actuarial witnesses (including the state's actuary) who appeared at the legislative hearings agreed that the 1971 rates would have to be at least 20% and probably 30% higher than in 1970 if the legislature failed to pass the no-fault law. Thus, the policyholder paying \$100 for compulsory coverage in 1970 would have paid \$120 to \$130 in 1971 if the law had not been changed. The table above uses the figure \$125, halfway between \$120 and \$130.

Over the span of the last two decades, rates for compulsory coverage in Massachusetts have risen at an average annual rate of approximately 6%. Note that the estimated 25% increase in 1971 at the end of a four-year freeze is consistent with this trend. The chart uses this 6% trend to show what 1972 rates would have been if the law had not been changed.

One who elected a full deductible for himself and members of his family (an option one should not take unless he has excellent collateral sources of coverage for wage and medical losses), received another 30% off the rate for his compulsory coverage. In our example of the policyholder who paid \$100 for compulsory coverage in 1970, the rate for compulsory coverage in 1971 with no deductible is 15% less, or \$85, and 30% of this is a saving of another \$25.50. Thus, in 1971 he paid not \$85 but \$59.50 for his compulsory bodily

²¹ *Aetna Cas. & Surety Co. v. Commissioner of Ins.*, 263 N.E.2d 698 (Mass. 1970); *Boston Herald Traveler*, Nov. 19, 1970, at 1, 10, reporting the decision of a single justice of the Supreme Judicial Court, from which no appeal to the full bench was taken, declaring unconstitutional a statutory mandate reducing rates for collision, comprehensive, fire, and theft coverages. See also *Insurance Rating Board v. Commissioner of Ins.*, 268 N.E.2d 144 (Mass. 1971).

injury coverage, compared with the \$120 or \$130 he would have been paying that year. In short, his costs for compulsory bodily injury coverage in 1971 were slightly less than half of what they would have been.

The Commissioner of Insurance has ordered another 27.6% rate reduction for 1972. Thus, in 1972 the assumed policyholder, if not electing a deductible, will pay \$61.54. This is a little less than half of what he would have paid in 1972. If he elects the full deductible he will pay \$43.08 in 1972. This is a little less than one-third of what he would have paid. That is, he saves over two-thirds on his compulsory coverage.

Moreover, the actual experience under the no-fault law has been better than even the most daring predictions. The Commissioner has ordered companies to rebate another 27.6% for 1971 by allowing an additional credit to that extent against 1972 rates. That order is under attack in court, and the outcome is not yet known. The additional savings that may result from rebates are not included in the table. That is, the savings shown in the table are the *minimum* savings policyholders will realize.

The Massachusetts no-fault act that went into effect January 1st of 1971 *made no change* in any of the property damage coverages, and the rates companies were allowed to charge for these coverages in 1971 were based on projections from past experience under these coverages. The increases were substantial (25% to 38% approximately), just as they would have been for bodily injury coverages if the no-fault law had not passed. In most instances, the total automobile insurance bill a Massachusetts policyholder paid in 1971 was larger than the bill he paid in 1970. That is, his savings on bodily injury coverages were exceeded by the increases in costs of his other coverages (collision, property damage liability and comprehensive). However, policyholders would have had increases in the costs of *all* their coverages, and would have paid even more in 1971 than they did pay, if the no-fault law had not been passed.

In November, 1971 Massachusetts enacted a new law extending the no-fault concept to property damage coverage, to be effective on January 1, 1972, unless postponed because of the impact of the national wage-price controls on insurance rates.²² It is expected that this new law will effect savings on property damage coverages for some policyholders, though probably not such dramatic savings as in the bodily injury area.

²² Mass. Laws chs. 978, 1079 (1971).

CRITERIA OF EFFECTIVE REFORM

I turn now to expressing some personal judgments. In my view, the key to effective reform is twofold. First, the law must establish automobile insurance on a basis such that you buy self-protection on a no-fault basis instead of just buying "liability" insurance to pay somebody else you injure. Second, the law must abolish "liability" claims altogether unless injuries are serious.

Under a system with this key, two-fold feature, you would be paid for your medical expenses and wage losses under the no-fault self-protection insurance. And you could buy as much self protection as you wish, instead of being at the mercy of the other fellow's low policy limit, as you are under "liability" insurance.

The so-called no-fault laws that have only one and not both of the two key provisions are bad models to follow. Laws like those in Illinois, Delaware, Oregon, Minnesota and South Dakota will probably make matters worse rather than better.

The laws in those five states are being called no-fault laws by people who are basically opposed to a real no-fault system and hope to head it off by compromise. Those laws are corruptions of the no-fault principle. They will just add more insurance costs to the burden the public is already bearing. And they will not correct the injustice of overcompensating for minor injuries while undercompensating for serious injuries.

A real no-fault system gives better protection at lower cost. Your medical expenses and wage losses are paid promptly under your own self-protection coverage. And your insurance costs you less because a real no-fault system reduces the overhead and cuts out wasteful overpayment of trivial and trumped-up claims against you.

Under the present system your insurance company usually settles small claims made against you just to get rid of them. And as a result you pay higher "liability" insurance premiums. Your company does this because under the "liability" system a claim of pain and suffering has a substantial amount of nuisance value, on top of any value it may have on the merits. The reason is that it would cost the insurance company more than a thousand dollars to fight the case through a jury trial and often more than two thousand to fight it through an appeal. In practice, the insurance companies find it less expensive to pay than to fight. And when the claimant's out-of-pocket loss is less than \$100 and he has an attorney, on the average the companies pay more than seven times the out-of-pocket

losses to settle. In contrast, the insurance companies find it worthwhile to fight in cases of serious injuries, and a claimant who has out-of-pocket losses of \$2500 or more has to be lucky just to get his out-of-pocket loss paid.

Consider one of the most horrible of the horrible hypotheticals opponents of no-fault insurance so often use, and see just how things work out both under the present system and under a good no-fault law.

Point One. If you have the misfortune to be severely injured by an irresponsible driver—a drunk, a drug addict, or a fleeing thief, for example—you will *always* receive at least as much under a good no-fault law as you get under the “liability” system. And in many cases you will get more. The reason is that your “liability” claim for *severe* injury is preserved. In addition, you receive benefits from your no-fault insurance, and this means you receive *more* than under the present “liability” system in those cases in which the irresponsible drunk had no insurance. In other words, the present liability system leaves you at the mercy of the drunk’s choice—not yours—to drive with low limits or even with no insurance at all.

Point Two. If you have the misfortune to be hit by that irresponsible drunk, you get nothing at all from *your own* “liability” insurance coverage *unless the drunk adds insult to injury by suing you for his injuries*. And even in that case all you get is protection as to *his claim against you*. So if the drunk is really irresponsible and has no insurance, you bear all your own losses yourself, *unless you have voluntarily, at additional cost, bought some separate coverage for your own self-protection*.

Point Three. A real no-fault law—one with the key two-fold feature—makes substantial self-protection insurance part of the basic package rather than an extra. Also, it still gives you all the “liability” protection you had under the old system for claims made against you by others. And by eliminating the wasteful and unfair overpayment of small “liability” claims against you, through the tort exemption, it gives you these greater benefits at lower cost than you pay for “liability” insurance alone under the present system.

If you want better protection against the risk of being severely injured, and if you want that better protection at lower cost, what you want is a real no-fault law.

NO-FAULT ACTS ENACTED BEFORE 1972

A Plan	B Effective Date	C Degree of Compulsion			D Tort Exemption for Bodily Injury		E Tort Exemption for Damage to Vehicles		F Tort Awards for Pain & Suffering Limited to % of Medical		G Approximate BI Nonfault Benefits Limits		
		Compulsory	Mandatory	Neither	Yes	No	Yes	No	Yes	No	Medical	Wage	Total
Massachusetts Bodily Injury Act	1/1/71	X			Partial					X			\$2,000
Property Damage Act	1/1/72	X				Full							
Florida	1/1/72	X			Partial		Partial			X			\$5,000
Illinois	1/1/72		X					X	X			\$2,000	\$7,800
Delaware	1/1/72	X						X		X			\$10,000
Oregon	1/1/72		X					X		X		\$3,000	\$6,000
Minnesota	1/1/70			X				X		X		\$2,000	\$3,120
S. Dakota	1/1/72			X				X		X		\$2,000	\$3,120

*In case of death—\$10,000