

## ARTICLES

# A MODEL BILL (AND COMMENTARY THEREON) ALLOWING CHOICE OF COVERAGE UNDER MICHIGAN'S NO-FAULT AUTO INSURANCE LAW

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When no-fault insurance laws were passed in late-1960s and early-1970s, their purpose was to ensure limited but prompt payment to accident victims by eliminating the two variables that were most troublesome: proving fault and collecting damages for pain and suffering. Under these new laws, motorists were allowed to recover only for their economic losses, up to a certain amount, from their own insurance companies without having to prove fault.<sup>1</sup> On the other hand, if the victim's injuries were particularly severe, she/he was allowed to sue. The results were more than satisfactory. A 1985 Department of Transportation study indicated that almost twice as many victims were compensated and that almost all no-fault payments were made within a year.<sup>2</sup>

These laws, however, turned out to have one side-effect, especially severe in states which offered substantial no-fault benefits: under the old tort system, without no-fault benefits, traffic victims were often without funds to cover accruing medical expenses and lost wage losses while their cases were battled over. Thus, they often settled for relatively little rather than undergo the delay and uncertainty of final resolution of a tort claim. But, with a tort system buttressed by relatively generous no-fault benefits (along with growing coverage for health care costs by private insurance, as well as Medicare and Medicaid), traffic victims have been guaranteed resources enabling them to much more energetically pursue tort claims, while also hiring a lawyer at a contingent fee and therefore no initial cost.<sup>3</sup> The result is that, in addition to the high cost of high levels of no-fault insurance, the cost of already expensive liability insurance became even higher, and thus auto insurance became unaffordable to many

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1. See generally, Jeffrey O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 OHIO ST. L.J. 948 (1990) (the advantages of allowing the insureds to choose between the two types of insurance); Jeffrey O'Connell, *No-Fault Auto Insurance: Back By Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993 (1989), (arguing for offering consumers a choice between insurance payable with and without regard to fault).

2. U.S. DEP'T OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES, 3, 4, 6 (1985).

3. This phenomenon is analogous to the way workers' compensation benefits subsidize a victim of an industrial accident who is permitted to bring a product liability claim against a third party (*i.e.*, other than his employer). But the subsidy is even stronger under no-fault auto insurance laws since the accident victim isn't dependent on finding a possible third party outside the system. O'Connell & Joost, *supra* note 5 at 71-72; O'Connell *Must Health and Disability Insurance Subsidize Wasteful Injury Suits?* 41 Rutgers L. Rev. 1055, 1061 (1989).

motorists. What actually happened, and is still going on, is best illustrated by Michigan's no-fault auto insurance law, the one which has long been reputed (with justification) to be the best in the country.<sup>4</sup> Michigan's no-fault law provides as *minimum* coverages: (1) unlimited medical benefits and very high wage loss protection (a maximum of \$32,000 per year for three years), far and away the highest no-fault benefit package in the country;<sup>5</sup> and (2) mandatory tort liability coverage above a high (but deteriorating) threshold. Thus, in effect, Michigan requires all motorists in Michigan to buy a "Cadillac" of auto insurance even if they can only afford a "Chevrolet." The result? Many motorists — especially in inner cities<sup>6</sup> — cannot afford to buy *any* auto insurance, and many others face very burdensome premiums (albeit at still relatively low cost compared to other states).<sup>7</sup>

On the subject of high no-fault benefits, the increase in cost is best illustrated by what has happened to the costs of the Michigan Catastrophic Claims Association. According to a Michigan State Senate Report:

The increase in health-care costs has been particularly dramatic for catastrophic claims. As more and more individuals survive severe . . . head injuries and make demands on an ever-more-expensive health-care system, the burden on the Michigan Catastrophic Claims Association (MCCA) has become extraordinary. The MCCA was established by the Michigan Legislature in 1978 to act as a reinsurer for all personal injury protection [*i.e.*, no-fault] claims exceeding \$250,000. The annual assessment per insured vehicle has increased from a mere \$12 in 1985 to \$22 in 1987, \$32 in 1988, nearly \$44 in 1989, and \$66.64 in 1990.<sup>8</sup> Total annual assessments have grown from \$57.5 million in 1985 to \$200 million in 1988. Even with high assessments, the deficit of the MCCA has been estimated at \$300-\$500 million as of the end of 1988.<sup>9</sup>

On the subject of the high cost of tort liability insurance above Michigan's threshold, once again the words of the Michigan State Senate Report are instructive:

[S]trict limitation of tort remedies was a major purpose in the adoption of a no-fault system in Michigan. As the name "no-fault" implies, the purpose of the law was to shift the auto insurance system away from the uncertainty of the courtroom to a system of swift and complete compensation for injuries and losses. A careful balance was struck, exchanging the potentially enormous but uncertain rewards of tort for the assured payment of economic losses under no-fault. The loophole for continued tort litigation was intended to be small permitting recovery for noneconomic loss only if an automobile accident victim suffered death, serious impairment of body function, or permanent serious disfigurement.

When the Michigan Supreme Court finally [interpreted] . . . the "verbal

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4. Report on No-Fault Auto Insurance Reform in Michigan, [Michigan State] Senate Commerce & Technology Committee, 5 (April 1990) [hereinafter cited as Senate Report].

5. U. S. Dep't of Transp., *Compensating Auto Accident Victims* 25-49 (1985); O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 Va. L. Rev. 64 n. 9 (1986).

6. Senate Report, *supra* note 1, at 27-29.

7. *Id.* at 5-6.

8. The figure rose to \$101 in 1991.

9. *Id.* at 19.

threshold" for recovery under . . . tort litigation . . . in *Cassidy v. McGovern*, 416 Mich 104 (1982), it made the important determination that whether a serious impairment of body function had occurred was a question of statutory construction for the judge, as long as there was no material, factual dispute about the extent of injury. The Court also held that an injury must be "objectively manifested" and "subject to medical measurement" and must interfere with a person's "general ability to lead a normal life." The establishment of this "verbal threshold" for bringing a successful lawsuit had the effect of stabilizing tort litigation under no-fault.

However, after a change in membership, the Michigan Supreme Court reversed itself with a decision in *DiFranco v. Pickard*, 427 Mich 32 (1986). In *DiFranco*, the Court held that the question of whether an injury constituted a serious impairment of body function was a question for the jury, entitling every claim to a full trial. The Court rejected the "objectively manifest" and "general ability to lead a normal life" criteria, opening the question of impairment to all relevant factors. As a result of this dramatic reversal, tort litigation has been opened up under Michigan's no-fault law.

Every claim of serious impairment of body function is now guaranteed a full jury trial, threatening insurers with tens of thousands of dollars in attorney fees in every case. No matter how weak the claim, the insurer must be prepared to endure a full trial in order to eliminate the claim. As a result, settlement values for auto accident cases have increased very dramatically.

The consequences of the *DiFranco* decision have already manifested themselves in higher insurance costs. Joseph Olson of the Michigan Insurance Federation testified that prior to *DiFranco*, Michigan body injury [claim] frequencies and the average paid body injury loss per insured vehicle was in decline, while the nation as a whole experienced increases. However, after *DiFranco*, Michigan body injury frequencies and average per-vehicle losses increased, at a rate even faster than the rest of the nation. While the per-car loss on body injury liability went up 26.8% nationwide between 1986-1988, the loss in Michigan increased a dramatic 30.2 percent.<sup>10</sup>

But even without the *DiFranco* decision — and regardless of its effects — data demonstrate that trying to provide very substantial no-fault benefits even with a rigidly enforced high tort threshold can be *very* expensive. In New York in 1987, for example, with a threshold similar to Michigan's and with \$50,000 in no-fault benefits, the costs of tort claims above the threshold contributed 64.7 percent to the total personal injury pure premium,<sup>11</sup> with the relatively high level of no-fault benefits contributing only 36 percent.<sup>12</sup> For comparable figures for Michigan, prior to *DiFranco* Michigan's even much higher no-fault benefits level contributed only 64.43 percent to the pure premium, with tort claims amounting to 35.7 percent.<sup>13</sup> What arguably happens in such states with substantial no-fault

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10. *Id.* at 12-13. For more on the need for "balanced" no-fault laws, see O'Connell & Joost, 72 Va. L. Rev. 61, 63-78, *supra* note 5.

11. Pure premium is that portion of premium used to pay losses, thereby excluding an insurer's expenses in marketing and administration costs as well as legal defense costs.

12. O'Connell, *No-Fault Insurance: Back by Popular (Market) Demand?*, 26 San. Diego L. Rev. 993, 997-999 (1989). The pure premium for bodily injury, uninsured motorist and no-fault combined was \$138.12 for no-fault alone it was \$49.78.

13. *Id.* at 998. The comparable figures (to those in New York in note 12 *supra*) were \$116.57 and \$74.93.

benefits and even a high threshold is the subsidy effect mentioned above.

These problems of high no-fault benefits, coupled with a high rate of expensive, large tort suits, prompt the following proposal for Michigan: Allow (but do not compel) motorists to opt for a limit on their no-fault benefits in amounts of either \$250,000, \$500,000, \$1,000,000, or \$2,000,000,<sup>14</sup> while also allowing (but not compelling) them to opt out from tort suits for pain and suffering even above Michigan's threshold.<sup>15</sup> By such reforms, auto insurance can be made much more affordable for many more motorists, while leaving the present system in effect for those who want — and can afford — current coverages.<sup>16</sup> Even those electing limits on no-fault benefits will still have coverage far more generous than that provided than under other states' no-fault laws.

How will the law work?

It will provide three options for motorists:

1. The present system.
2. The present level of no-fault benefits but elimination of rights to claim, and be claimed against for, tort damages payable for pain and suffering even if the severity of injury exceeds Michigan's tort threshold. This option is called "optional personal protection insurance" (OPIP).<sup>17</sup>
3. A limit on no-fault benefits of \$250,000, \$500,000, \$1,000,000 or \$2,000,000, at the option of the insured, with, as under option two, elimination of rights to claim, and be claimed against, for tort damages for pain and suffering even if the severity of injury exceeds Michigan's tort threshold. This option is called "limited optional personal protection insurance" (LOPIP).<sup>18</sup>

When two motorists who have retained the present system collide, present law will apply with payment of no-fault benefits at current levels and preservation of the right to claim in tort for pain and suffering above the threshold.

When two motorists collide who have elected either OPIP or LOPIP, they will receive no-fault benefits (up to the level selected in the case of a LOPIP insured), but will neither claim, nor be claimed against for, pain and suffering no matter how severe the injury. But the OPIP and LOPIP insured will have the right to claim against the other driver for pain and suffering in the event the latter intentionally caused harm or, in any event, for economic losses in excess of no-fault benefits as under present law.<sup>19</sup>

What happens in a collision between a motorist who elects the present system and one electing either OPIP or LOPIP? The OPIP and LOPIP insureds cannot claim against the motorist electing present coverage, nor can the latter claim against the former, for damages for pain and suffering. Rather the motorist

14. Note 26 *infra* and accompanying text.

15. *Id.*

16. For more on allowing motorists to choose between fault and no-fault insurance, see O'Connell & Joost, *supra* note 5, 72 Va. L. Rev., and O'Connell *supra* note 1, 26 San Diego L. Rev. See also Senate Report, *supra* note 4, at 29-31. For other draft bills applicable to other than Michigan, see O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 Oh. St. L. J. 947 (1990); *A Draft Bill to Allow Choice Between Fault and Fault-Based Auto Insurance*, 27 Harv. J. on Legislation 143 (1990).

17. Note 25 *infra* and accompanying text. Note the term used in Michigan for "personal protection (*i.e.*, no-fault) insurance is "PIP," inverting the second "p" and the "i."

18. Note 26 *infra* and accompanying text.

19. Note 28 *infra* and accompanying text.

electing present coverage would be allowed to claim against his or her own company under what is called "inverse liability coverage" for pain and suffering as if his or her company covered the driver insured under OPIP or LOPIP.<sup>20</sup> Such a regime mirrors "uninsured motorist coverage" existant today, which allows injured motorists to claim damages against their own companies if the motorist with whom they collide is uninsured. Note that under this new proposal the costs of "uninsured motorist coverage" (now including inverse liability) will increase, but that increase will be neatly offset by lower liability insurance costs in that there will be fewer claims against the motorist electing today's coverage because all those insured under OPIP or LOPIP will be precluded from asserting such liability claims.<sup>21</sup>

There follow the terms of a draft bill (with commentary) effectuating these changes.

Section 1. Section 3104 is amended and Section 3180 is added as follows:

Section 3104<sup>22</sup>

- (1) An unincorporated, nonprofit association to be known as the catastrophic claims association, hereinafter referred to as the association, is created. Each insurer engaged in writing insurance coverages which provide the security required by THIS CHAPTER within this state, as a condition of its authority to transact insurance in this state, shall be a member of the association and shall be bound by the plan of operation of the association. Each insurer engaged in writing insurance coverages which provide the security required by section 3103(1) within this state, as a condition of its authority to transact insurance in this state, shall be considered a member of the association, but only for purposes of assessments under subsection (7)(d). Except as expressly provided in this section, the association shall not be subject to any laws of this state with respect to insurers, but in all other respects the association shall be subject to the laws of this state to the extent that the association would be were it an insurer organized and subsisting under chapter 50.
- (2) The association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages, INCLUDING OPTIONAL AND LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE UNDER SECTION

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20. Note 33 *infra* and accompanying text. Under an alternative version of the proposal, OPIP and LOPIP insureds would claim against inverse liability coverage for their economic loss in excess of applicable OPIP or LOPIP benefits in an accident with other OPIP or LOPIP insureds as well as with insureds electing the present system. Under this alternative version, those electing the present system would claim against inverse liability coverage for both economic loss in excess of PIP benefits as well as noneconomic losses.

21. In the concluding words of the Michigan State Senate Report:

Both financially and philosophically, expanding the options for consumer choice can improve Michigan's no-fault auto insurance system. Drivers should have the opportunity to shape their insurance coverage to better suit their economic needs. No-fault must remain responsive to the needs of the consuming public. Availability, affordability and fairness can all be enhanced by making Michigan's no-fault system more open to consumer choice.

Senate Report, *supra* note 4, at 31.

22. 17a. These amendments to section 3104, which section establishes the Michigan Catastrophic Claims Association (MCCA, see note 9 *supra*), are necessary both (1) generally to take account of the proposed amendments to the statute, and (2) particularly to adjust the reallocation of burdens to fund the MCCA to take account of the limit of any exposure of the fund from those electing LOPIP. Note 18 *supra* and accompanying text.

3180, in excess of \$250,000.00 in each loss occurrence. As used in this section, "ultimate loss" means the actual loss amounts which a member is obligated to pay and which are paid or payable by the member, and shall not include claim expenses. An ultimate loss is incurred by the association on the date on which the loss occurs.

- (3) An insurer may withdraw from the association only upon ceasing to write insurance which provides the security required by THIS CHAPTER in this state.
- (4) -no change
- (5) -no change
- (6) When a member has been merged or consolidated into another insurer or another insurer has reinsured a member's entire business which provides the security required by THIS CHAPTER in this state, the member and successors in interests of the member shall remain liable for the member's obligations.
- (7)
  - (a) -no change
  - (b) -no change
  - (c) -Maintain relevant loss and expense data relative to all liabilities of the association and require each member to furnish statistics, in connection with liabilities of the association, WHICH STATISTICS SHALL BE SEGREGATED (i) BY LOSSES AND EXPENSES AND LIABILITIES ARISING FROM THE SECURITY REQUIRED BY SECTION 3101(1) OR BY SECTION 3103(1), OR BY OPTIONAL PERSONAL PROTECTION INSURANCE UNDER SECTION 3180, AND (ii) FURTHER SEGREGATED BY LIMIT OF LIABILITY FROM LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE UNDER SECTION 3180, at the times and in the form and detail as may be required by the plan of operation.
  - (d) In a manner provided for in the plan of operation, calculate and charge to members of the association a total premium sufficient to cover the expected losses and expenses of the association which the association will likely incur during the period for which the premium is applicable. The premium shall include an amount to cover incurred but not reported losses for the period and may be adjusted for any excess or deficient premiums from previous periods. Excesses or deficiencies from previous periods may be fully adjusted in a single period or may be adjusted over several periods in a manner provided for in the plan of operation. ANY DEFICIENCY EXISTING ON JANUARY 1, 1993, WILL BE ADJUSTED BY COLLECTING THE NECESSARY PREMIUM IN AN EQUAL AMOUNT FOR EACH EARNED CAR YEAR FOR EACH TYPE AND LIMIT OF INSURANCE PROVIDING THE SECURITY REQUIRED BY SECTION 3101(1), 3103(1) OR 3180.<sup>23</sup> Each member shall be charged an amount equal to that member's total earned car years of insurance providing the security required by section 3101(1), or BY SECTION 3103(1), or both AND BY THE MEMBER'S TOTAL EARNED CAR YEARS OF (i) OPTIONAL PERSONAL PROTECTION INSURANCE UNDER SECTION 3180, AND (ii) AND OF LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE

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23. This sentence makes clear that any existing deficit when OPIP and LOPIP (see notes 17 and 18 *supra* and accompanying text) take effect will be funded by all types of vehicles and coverages, including OPIP and LOPIP.

UNDER 3180, SEGREGATED BY LIMIT OF LIABILITY, written in this state during the period to which the premium applies multiplied by the average premium per car. The average premium per car FOR EACH TYPE AND LIMIT OF INSURANCE shall be the total premium CALCULATED FOR EACH TYPE AND LIMIT of insurance divided by the total earned car years of insurance providing the security required by section 3101(1), or 3103(1) OR 3180 written in this state of all members during the period to which the premium applies. ON OR BEFORE JULY 1, 1992, THE BOARD SHALL SUBMIT ANY REQUIRED AMENDMENTS TO THE PLAN OF OPERATION NECESSARY TO COMPLY WITH THE AMENDMENTS TO THIS SECTION TO THE COMMISSIONER PURSUANT TO SUBSECTION (19) BELOW.

#### SECTION 3180.

- (1) NOTWITHSTANDING THE PROVISIONS OF SECTION 3101(1), AN OWNER OR REGISTRANT OF A PRIVATE PASSENGER NONFLEET AUTOMOBILE AS DEFINED IN SECTION 2104(1)<sup>24</sup> ALSO MEETS THE REQUIREMENTS FOR MAINTAINING SECURITY ON SUCH A VEHICLE BY MAINTAINING COVERAGE IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.
- (2) IN ADDITION TO COVERAGE, AT THE LIMITS REQUIRED UNDER SECTION 3101(1), FOR PROPERTY PROTECTION INSURANCE AND MODIFIED RESIDUAL LIABILITY INSURANCE, WHICH COVERS (i) BODILY INJURY UNDER SUBSECTION (5), (ii) BODILY INJURY BUT WITHIN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS, OR CANADA, AND (iii) BODILY INJURY FOR WHICH LIABILITY IS PRESERVED UNDER SECTION 3101 (1), THE OWNER OR REGISTRANT OF SUCH A MOTOR VEHICLE MAY MAINTAIN SECURITY IN THE FORM OF EITHER:
  - (A) THAT SET FORTH UNDER SECTION 3101(3) OR (4) BUT WITH LIMITATIONS ON THE RIGHT TO CLAIM, AND BE CLAIMED AGAINST, FOR RESIDUAL LIABILITY AS SET FORTH BELOW IN SUBSECTION (5), SUCH SECURITY BEING TERMED "OPTIONAL PERSONAL PROTECTION INSURANCE,"<sup>25</sup>OR
  - (B) PERSONAL PROTECTION INSURANCE AS REQUIRED BY SECTION 3101(1) BUT WITH LIMITS THEREON, AT THE OPTION OF THE OWNER OR REGISTRANT, OF \$250,000, \$500,000, \$1,000,000 OR \$2,000,000 WITH LIMITATIONS ON THE RIGHT TO CLAIM, AND BE CLAIMED AGAINST, FOR RESIDUAL LIABILITY AS SET FORTH BELOW IN SUBSECTION (5), SUCH SECURITY BEING TERMED "LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE."<sup>26</sup> THE ABOVE LIMITS MAY BE EXCEEDED BY ALLOWABLE EXPENSES, WORK LOSS AND SURVIVOR'S LOSS AS DEFINED IN SECTIONS 3107 TO 3110 TO

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24. These amendments are not meant to affect other than "private passenger nonfleet automobile," such that commercial cars and trucks remain subject to the unamended law. For a discussion of various possible treatments of commercial trucks and vehicles under "choice" auto insurance laws, see O'Connell, *supra* note 16, 27 Harv. J. on Legislation 143, 154 n. 39; O'Connell, *supra* note 16, 51 Ohio St. L. J. at 967-98, including n. 74.

25. Note 17 *supra* and accompanying text.

26. Note 18 *supra* and accompanying text.

THE EXTENT SUCH LIMITS ARE CONSUMED BY ALLOWABLE EXPENSES UNDER SECTION 3107(a).

AN ELECTION OF EITHER OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE IS BINDING ON THE OWNER OR REGISTRANT SO ELECTING AS WELL AS ON HIS OR HER SPOUSE AND ANY RELATIVE OF EITHER DOMICILED IN THE SAME HOUSEHOLD.

- (3) EACH INSURER ISSUING MOTOR VEHICLE LIABILITY INSURANCE FOR PRIVATE PASSENGER NONFLEET AUTOMOBILES IN THIS STATE MUST, IN ADDITION TO THE SECURITY OTHERWISE PROVIDED BY SECTION 3101(1), OFFER TO ITS INSUREDS THE OPTION OF PURCHASING EITHER OPTIONAL PERSONAL PROTECTION INSURANCE OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE AT THE LIMITS AUTHORIZED ABOVE.
- (4) (A) THE PRIORITIES SET FORTH IN SECTIONS 3114 AND 3115 APPLY TO LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE, EXCEPT THAT NO PERSON WHO HAS ELECTED A LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE POLICY, NO SPOUSE OF SUCH A PERSON, AND NO RELATIVE OF EITHER DOMICILED IN THE SAME HOUSEHOLD SHALL RECOVER PERSONAL PROTECTION BENEFITS IN EXCESS OF THE LIMIT ELECTED BY SUCH PERSON, REGARDLESS OF THE EXISTENCE OF OTHER POLICIES WITH HIGHER LIMITS OR WITH NO LIMIT.<sup>27</sup>
- (B) THE LIMITS UNDER LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE DO NOT APPLY TO ANY PERSON NOT AN OCCUPANT OF SUCH A MOTOR VEHICLE, NOR SUBJECT TO AN ELECTION OF (i) OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION OR (ii) SECURITY OTHERWISE PROVIDED UNDER SECTION 3101(1), NOR IN VIOLATION OF SECTION 3101(1).<sup>27a</sup>
- (5) WITH REFERENCE TO PRIVATE PASSENGER NONFLEET AUTOMOBILES AS DEFINED IN SECTION 2104(1), A PERSON COVERED BY OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE (INCLUDING ANY OTHER PERSON WHO MIGHT ASSERT A DERIVATIVE CLAIM, INCLUDING BUT NOT LIMITED TO A CLAIM FOR WRONGFUL DEATH) MAY ASSERT A CLAIM FOR DAMAGES UNDER SECTION 3135(2)(C).<sup>28</sup> IN ADDITION A PERSON COVERED FOR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE MAY CLAIM DAMAGES UNDER SECTION 3135(2)(C) FOR ANY AMOUNTS WHICH ARE IN EXCESS OF THE LIMITS FOR SUCH INSURANCE AND WHICH WOULD HAVE BEEN RECOVERABLE UNDER PERSONAL PROTECTION INSURANCE BUT FOR THE SE-

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27. This subsection is meant to preclude a LOPIP insured, who is injured as a passenger in, or as a pedestrian by, a car insured under OPIP or the current system, being able to recover up to the limits of his or her LOPIP coverage and then recover any excess loss in personal protection insurance (PIP) benefits applicable to the car insured under OPIP or the current system. The provision similarly prevents such a LOPIP insured from recovering such excess over LOPIP limits from the Assigned Claims Facility.

27a. This provision applies to motorcyclists and pedestrians not improperly uninsured.

28. 3135(2)(c) preserves actions for economic loss in excess of no-fault limits.



LECTION OF LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE.<sup>29</sup> OTHERWISE SUCH A PERSON COVERED BY OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE NEITHER HAS NOR IS SUBJECT TO A CLAIM UNDER TORT LIABILITY EXCEPT:

- (A) AS PROVIDED IN SECTION 3135(2)(A),<sup>30</sup>
  - (B) FOR HARM CAUSED BY ONE NOT MAINTAINING SECURITY UNDER SUBSECTION (2) ABOVE OR UNDER SECTION 3101(3) OR (4),<sup>31</sup> NOR ENTITLED TO PERSONAL PROTECTION INSURANCE BENEFITS UNDER SECTION 3113.<sup>32</sup> SUCH A PERSON HAS AND IS SUBJECT TO A CLAIM UNDER SECTION 3135 ALSO WITH REFERENCE TO ANY PERSON NOT AN OCCUPANT OF SUCH A MOTOR VEHICLE, NOR SUBJECT TO AN ELECTION OF (i) OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE OR (ii) SECURITY OTHERWISE PROVIDED UNDER SECTION 3101(1), NOR IN VIOLATION OF SECTION 3101(1).<sup>32a</sup>
- (6) RESIDUAL LIABILITY FOR BODILY INJURY FOR PERSONS MAINTAINING SECURITY UNDER SECTION 3101(1) OR (4) INCLUDES INVERSE LIABILITY INSURANCE WHICH PAYS FOR DAMAGES SPECIFIED IN SECTION 3135(2)(B) WHEN DAMAGES ARE CAUSED IN WHOLE OR IN PART BY A PERSON INSURED UNDER EITHER OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE. ANY PAYMENT UNDER INVERSE LIABILITY IS DUE IN THE SAME MANNER AS PAYMENT WOULD HAVE BEEN DUE FROM SUCH PERSON HAD SUCH PERSON NOT BEEN IMMUNE FROM LIABILITY UNDER SUBSECTION (5).<sup>33</sup> CLAIMS UNDER INVERSE LIABILITY ARE TO BE PROCESSED IN THE SAME PRIORITY AS THAT SPECIFIED FOR CLAIMS FOR PERSONAL PROTECTION INSURANCE UNDER SECTIONS 3114 AND 3115.<sup>34</sup>
- (7) (A) ON OR BEFORE JULY 1, 1992, THE COMMISSIONER SHALL DEVELOP AND PUBLISH A STANDARD FORM FOR ELECTING OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION

29. Under this provision, both OPIP and LOPIP insureds can claim for economic loss, based on fault, in excess of PIP coverage, with the next-to-last sentence making clear that the LOPIP insured has a claim for uncompensated economic loss greater than that provided under section 3135(c), which section preserves the right to claim for economic loss above the wage loss protection lasting three years. Conceivably a LOPIP insured could exceed his LOPIP benefits before being paid for three years' wage loss. Thus the need for the next-to-last sentence.

30. This provision preserves a right of action for intentional injury.

31. This provision preserves tort actions against those not insuring despite requirements to do so. (But the right is more important in theory than in practice, given the likelihood that anybody not carrying insurance will be judgement proof.)

32. Thus an OPIP or LOPIP insured can still claim against a car thief (but, as in note 31, query as to the value of the right).

32a. See note 27a *supra*.

33. Note 20 *supra* and accompanying text.

34. Sections 3114 and 3115 provide that, in general, personal protection insurance follows the person, not the car, such that normally a person collects against his own insurer even though occupying someone else's car when injured. (If insurance follows the car, a person in that situation would claim against the insurer of the car he occupied.) Thus, the same priorities apply to inverse liability. Concerning this issue of whether insurance should follow the driver (and his family) or the car, see U.S. Dep't of Transp., *supra* note 2, at 137 (1985); R. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim* 370-79 (1965).

INSURANCE, ALONG WITH LIMITATIONS ON TORT RIGHTS AND LIABILITY. INSURERS MAY USE THIS FORM SEPARATELY OR AS PART OF AN APPLICATION FOR INSURANCE. INSURERS MAY ALSO DEVELOP AND USE THEIR OWN FORMS, WHICH SHALL BE FILED WITH THE COMMISSIONER AND DEEMED APPROVED UNLESS DISAPPROVED BY THE COMMISSIONER WITHIN 15 DAYS AFTER FILING. DISAPPROVAL SHALL BE BASED ONLY UPON THE FAILURE OF THE FORM TO CONTAIN ALL THE INFORMATION OF THE STANDARD FORM IN EASILY UNDERSTANDABLE LANGUAGE.<sup>35</sup> ANY SUCH ELECTION BY A PERSON WHO IS UNDER A LEGAL DISABILITY SHALL BE MADE ON BEHALF OF SUCH PERSON BY A PARENT, LEGAL GUARDIAN OR CONSERVATOR AND SHALL REMAIN IN EFFECT UNTIL REVOKED OR UNTIL THE PERSON IS NO LONGER UNDER LEGAL DISABILITY, WHICHEVER IS SOONER.

- (B) AN ELECTION OF EITHER OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE IS EFFECTIVE ON THE DATE AND TIME COVERAGE IS BOUND, AND THE ELECTION APPLIES TO ANY MOTOR VEHICLE ACCIDENT OCCURRING AFTER THAT TIME. THE ELECTION REMAINS EFFECTIVE AS LONG AS THE OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE REMAINS IN EFFECT AND APPLIES TO ALL RENEWALS, REPLACEMENTS OR REINSTATEMENTS OF OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE WITH THE SAME INSURER OR AN AFFILIATE OF THE INSURER, WITHOUT THE NECESSITY FOR THE EXECUTION OF A NEW ELECTION FORM.
- (C) THE COMMISSIONER OF INSURANCE SHALL ESTABLISH AND MAINTAIN A PROGRAM DESIGNED TO ASSURE THAT CONSUMERS ARE ADEQUATELY INFORMED ABOUT THE COMPARATIVE COSTS OF BOTH OPTIONAL AND LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE, COMPARED TO EACH OTHER AND TO THE COSTS FOR THOSE WHO DO NOT CHOOSE TO ELECT LIMITATIONS ON TORT RIGHTS AND LIABILITIES, AS WELL AS ABOUT THE BENEFITS, RIGHTS AND RESPONSIBILITIES OF INSURED UNDER EACH TYPE OF INSURANCE.<sup>36</sup>
- (D) A PERSON WHO ELECTS OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE ON A FORM DEVELOPED, APPROVED OR DEEMED APPROVED BY THE COMMISSIONER, OR WHO ELECTS SECURITY REQUIRED BY SECTION 3101(3) OR (4), IS BOUND BY THAT CHOICE AND IS PRECLUDED FROM CLAIMING LIABILITY OF ANY PARTY BASED UPON BEING INADEQUATELY INFORMED AS TO SUCH INSURANCE OR SECURITY. THIS PRECLUSION ALSO APPLIES

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35. The phrase "easily understandable language" follows the language in Section 3837(6) concerning options for collision insurance.

36. The Commissioner of Insurance is required by subsection (c) to maintain a program to assure that consumers are adequately informed about the comparative costs, benefits, rights, and responsibilities of insureds under the various types of insurance allowed under the Act.

TO THE SPOUSE OF THE PERSON NAMED IN THE POLICY AND ANY RELATIVE OF EITHER DOMICILED IN THE SAME HOUSEHOLD.<sup>37</sup> AN INSURER SHALL PROMPTLY PROVIDE A COPY OF AN EXECUTED ELECTION FORM TO A PERSON OR A PERSON'S REPRESENTATIVE WHO ASSERTS IN WRITING A TORT LIABILITY CLAIM AGAINST ANYONE WHO IS BOUND BY AN ELECTION OF OPTIONAL INSURANCE OR LIMITED OPTIONAL PERSONAL PROTECTION.

- (E) EACH INSURER ISSUING MOTOR VEHICLE LIABILITY INSURANCE IN THIS STATE MAY REQUIRE THAT ALL POLICIES WITHIN A HOUSEHOLD BE OF THE SAME TYPE, WHETHER (A) OPTIONAL PERSONAL PROTECTION INSURANCE POLICIES, (B) LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE POLICIES, OR (C) POLICIES OTHERWISE MEETING THE REQUIREMENTS OF SECTION 3101(1). IF MEMBERS OF THE HOUSEHOLD CANNOT AGREE ON THE TYPE OF COVERAGE, THE INSURER IS AUTHORIZED TO ISSUE A POLICY MEETING THE REQUIREMENTS OF SECTION 3101(1).<sup>38</sup>
- (8) UNLESS OTHERWISE SPECIFIED, ALL PROVISIONS APPLICABLE TO PERSONAL PROTECTION INSURANCE ARE APPLICABLE TO OPTIONAL AND LIMITED OPTIONAL PERSONAL PROTECTION INSURANCE.<sup>39</sup>
- (9) IN ANY CLAIM FOR RESIDUAL LIABILITY UNDER SUBSECTION (5) AND SECTION 3135 BY AN OPTIONAL OR LIMITED OPTIONAL PERSONAL PROTECTION INSURED, IF THE PARTY CLAIMED AGAINST PROVIDES THE CLAIMANT, WITHIN NINETY DAYS AFTER THE DATE ON WHICH SUCH PARTY RECEIVED WRITTEN NOTICE OF THE CLAIM, OR IN THE CASE OF AN INSURED PARTY, WITHIN 90 DAYS AFTER THE INSURER RECEIVES WRITTEN NOTICE OF THE CLAIM, WITH A WRITTEN NOTICE TO PAY DAMAGES UNDER SECTION 3135(2)(C) (AS QUALIFIED BY SUBSECTION (5) IN THE CASE OF A CLAIM BY A LIMITED OPTIONAL PERSONAL PROTECTION INSURED), THE CLAIMANT IS FORECLOSED FROM PURSUING THE CLAIM ANY FURTHER EXCEPT AS PROVIDED IN SUBSECTION 5(A) AND (B). IF SUCH OFFER IS NOT MADE, THE CLAIMANT RETAINS THE RIGHT TO CLAIM NOT ONLY FOR SUCH DAMAGES BUT ALSO FOR NONECONOMIC LOSS WITHOUT REGARD TO THE LIMITATIONS OF SECTION 3135(1).<sup>40</sup>

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37. Subsection (d) states that a person is bound by the choice of the system he selects and "is precluded from claiming liability of any party based on being adequately informed as to such insurance." Putting subsections (c) and (d) together, insurers, brokers, and agents are immune from claims for inadequately informing insureds as to the available choices, provided they furnished insureds in advance with the information generated by a program maintained or approved by the Commissioner of Insurance.

38. Subsection (e) provides that a motor vehicle insurer may insist that all motor vehicle insurance policies within the same household be the same type. Without this provision, an insurer might find it administratively burdensome to provide automobile insurance to some families. The default provisions calls for coverage unchanged by the "choice" options contained in the amendments hereby proposed.

39. Section (8) assures that the new coverages change as little of Michigan's no-fault law as possible. Thus, for example, Section 3145 providing for a one year statute of limitations for submission of personal protection insurance benefits applies to OPIP and LOPIP insureds as well.

40. Under this alternative provision (indicated by its being in brackets), OPIP or LOPIP insureds

SECTION 2. SECTION 3104 AS AMENDED AND SECTION 3180(8) SHALL TAKE EFFECT IMMEDIATELY AND SECTIONS 3180(1) THROUGH (7) AND (9) AND (10) SHALL TAKE EFFECT JANUARY 1, 1993.

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do not give up their rights to general damages unless they have been offered prompt payment of economic loss uncompensated by OPIP or LOPIP benefits. For the origins of this "early offers" approach, see O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims By Defendant's Prompt Tender of Claimants' Net Economic Losses*, 77 Nw. U. L. Rev. 589 (1982). Under this approach, defendants are encouraged, but not required, to provide expeditiously an offer to pay benefits covering only net economic loss above collateral sources, rather than spending precious resources litigating fault and the value of noneconomic loss, in addition to paying for amounts already paid as collateral sources.

An "early offers" approach is deemed better, for example, than just allowing an injury victim to claim in tort for only economic loss (and not for pain and suffering) above his PIP coverage. Under the latter approach, a defending insurer may be under a strong incentive to resist and delay payment of a tort claim for economic loss, knowing that its exposure is thus limited. This is a common complaint under tort claims for property damage against less responsible insurers when they similarly face no exposure to payment of noneconomic loss. Under the "early offers" approach, an insurer must *earn* the right to pay a tort claimant only economic loss, by promptly (within 90 days) offering to do so. On the other hand, a defendant with either no liability or very doubtful liability — or no or low tort liability insurance — would not be inclined to make an early offer in order to evade full scale tort liability.

Note that under subsection 9, an OPIP or LOPIP insured retains the right to claim for noneconomic loss in claims against those insured under OPIP, LOPIP or even the present system, if such insureds do not make an offer to pay uncompensated economic loss even if the injury is not severe enough to exceed Michigan's threshold. Unless this was the rule, the possibly inordinate incentives mentioned above on the part of defendants to resist payment of economic loss operates. (Actually, only earners of high incomes are likely to suffer economic losses in excess of OPIP or LOPIP benefits without also suffering injury in excess of the threshold.)

If subsection 9 were to be included in the amendment to Michigan's no-fault law, it could be coordinated with the prior subsections by including in subsection (2)(a) and (b), after the words "as set forth in subsection (5)," the words, "subject to subsection (9)," and beginning subsection 5, "Subject to subsection 9".