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Leonard M. Ring

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THE FAULT WITH "NO-FAULT"

*Leonard M. Ring**

I. Introduction

Having to date testified in the legislative councils of almost half the states in the union on "no-fault" automobile insurance, it is manifestly clear to this author at least, that most legislators pondering the matter are handicapped by a material lack of factual data concerning the subject upon which they are called to legislate. And while most people, including members of the news media, have taken a position on no-fault, few understand it.

A. No-Fault Auto Insurance

No-fault automobile insurance is in reality a new name for an old product. It is simply a very limited form of accident insurance, or more precisely, insurance against medical and wage loss resulting from accident by automobile. There is nothing new or innovative about such coverage. The Travelers Insurance Company was formed in 1863, over 110 years ago, to sell medical and wage loss protection to travelers on steamships and railways. The newly formed company called its insurance package "travelers" insurance—from which the company derived its name.¹ Such "travelers" insurance has been available to automobile owners on an optional basis for over a quarter of a century as "medical pay" and "automobile income disability" coverage. Another "travelers" or no-fault type of coverage, "automobile collision insurance," has been as familiar to motorists as the horn on their automobile for almost three-quarters of a century. Today it is promoted as no-fault insurance, a term which connotes different ideas to different people—with resulting unfortunate confusion.

The essential difference between the "travelers" insurance for steamship and railway passengers of 1863 and the automobile no-fault insurance of 1974 is that for the automobile passenger it would be compulsory—requiring every motorist to insure himself, members of his household and occupants of his vehicle against medical and wage loss sustained by accident from automobile (as one California journalist so aptly stated, "to insure himself against what some-

* Prep. ed., New Mexico School of Mines and DePaul University School of Commerce; J.D., DePaul University College of Law, 1949. Mr. Ring is a member of the Illinois Bar and head of his own firm in Chicago, Illinois. He is currently the National President of the Association of Trial Lawyers of America and is President-elect of the Appellate Lawyers Association (Illinois). He is also a fellow in The American College of Trial Lawyers, The International Academy of Trial Lawyers, and The International Society of Barristers. Mr. Ring was the trial and appellate counsel in the case of *Grace v. Howlett*, discussed herein, which successfully challenged the Illinois No-Fault Auto Insurance law on constitutional grounds. Other No-Fault articles by the author include *No-Fault Auto Insurance: Hoax or Cure?*, 52 CHIC. BAR REC. 451 (1971) and *Insight into a Successful "No-Fault" Trial*, TRIAL NEWS MAGAZINE, Vol. 8, No. 2 (March-April 1972).

¹ Brainard, *A No-Fault Catechism: Ten Basic Questions Raised and Answered*, 593 INS. L.J. 317 (1972).

one else may do to him"),² a principle which most Americans find hard to swallow as evidenced by the stiff resistance to the enactment of such laws during the past four or five years. But the main opposition is aimed not so much against the compulsory aspect of such coverage as it is against the proponents' attempts to abrogate, in whole or in good measure, the innocent victim's right to recover general damages under the tort system. For example, under a total no-fault system as advocated by the American Insurance Association (AIA), regardless of how seriously injured or how gruesome his disfigurement, the extent of his disability, or the excruciating nature of his lifelong pain, the automobile accident victim would be eligible for reimbursement of only his necessary medical expense. Those employed at the time of the injury (about 35 per cent of the victims) would recover some, but seldom all of their wage loss. Responsibility of the wrongdoer would be totally abolished—as would be, of course, the fundamental rights of the victim. Even the less extreme plans sponsored by other trade associations such as the American Mutual Insurance Association (AMIA) and the National Association of Independent Insurers (NAII) would sharply curtail the right to receive compensation for pain and suffering, impaired earning capacity, temporary disability, and sometimes even permanent disability of more than 90 per cent of the victims. Stated differently, the principal backers of "no-fault," which include many of the eastern stock insurance companies, are not only lobbying for a system that would require every motorist to purchase their "travelers" insurance, but to force the purchase of such insurance by the would-be victim as a *substitute* for his rights to full damages from the wrongdoer under the tort liability system.

The Delaware Plan which retains the right of a victim to sue for general damages while providing for no-fault payment of medical expenses is a more acceptable system that is considered in the conclusion.

II. Insurance Systems in Force Today

A. *Automobile Insurance Systems*

We presently operate under a dual automobile insurance system: "no-fault" and liability (fault). The standard automobile insurance policy in force today offers the motorist varieties of "no-fault" coverage. Medical pay (in multiples of \$500) is offered to cover the medical expense of the driver and every passenger injured in the automobile. About 70 per cent to 80 per cent of insured private passenger cars on the road today carry about \$2,000 or more medical pay coverage. This coverage is on a no-fault basis. That is, it makes no difference how or why the person was injured, whether it be in a two-car collision or in a single-car accident with a lamp post or a tree. Nor does it matter

² An editorialist also had thus anticipated a supporter's disillusionment:

The theory of No Fault is to save some of the millions in legal costs and pass it back in reduced premiums, also giving the courts some welcome relief and additional savings to the taxpayer. A fine theory, but something is getting lost in the translation into law, and the first thing lost is the money that was going to be saved. . . . The result is a right idea gone wrong, a whole concept being half baked.

The Ventura Star Free Press, May 25, 1972.

if the injured victim was the driver or an innocent passenger in the vehicle. Wage continuation benefits are also offered by many major automobile insurers to their policyholders. Thus, a person may generally purchase the amount of protection he needs, depending, of course, on his level of earnings and the other accident insurance he has in force. Accidental death benefits are offered by many automobile insurers, as are funeral expenses in the amount of \$500 or \$1,000.

Collision insurance, the most common no-fault coverage, pays the motorist for damage to his motor vehicle whether caused through his own carelessness or the fault of others; generally, it is sold with a \$50 or \$100 deductible. As previously noted, all the above coverages are on a no-fault basis. Recovery by the victim or his survivors is from his own insurer, and payment is due promptly, upon presentment and verification of loss, just as it would be under the well-publicized "no-fault" plans.

Coverage for bodily injury and property damage (B.I./P.D.) comprises the other half of the dual automobile insurance system. This coverage protects the motorist against claims for bodily injury or property damage he may negligently inflict on others. The bodily injury portion provides indemnity to the motorist for any loss that he may incur by reason of injury or death to any human being. The property damage portion provides the same type of protection to the motorist for physical damage he may cause, *e.g.*, damage to someone else's vehicle, a lamp post, or other property. As a practical matter, it is this coverage, the B.I./P.D., that the injured automobile accident victim looks to for payment of his damages in a tort action, *i.e.*, when he makes a claim or brings suit against the party responsible for his loss.

B. Health Insurance Coverage Other Than Auto

An analysis of the public need for no-fault auto insurance requires some insight into the health insurance plans currently available to the automobile accident victim. By the end of 1971, 180 million Americans were protected by one or more forms of private health insurance. As to persons under age 65, 9 out of 10 had some form of private health insurance. And, despite the Medicare program, 11 million persons, or 5 out of 9 of the estimated 21 million persons age 65 and over, still hold private health insurance policies to supplement benefits received under the Medicare program.³ These plans fall into four general categories: hospital expense, surgical expense, regular medical expense, and major medical expense coverage.

C. Hospital Expense Insurance

These plans provide benefits toward the expense of hospital room and board, x-ray, and other diagnostic charges. At the end of 1971, 180 million people were protected by hospital expense insurance. From 1961 to 1971, the number of people protected by such plans increased by 34 per cent. In 1971, insurance

³ HEALTH INSURANCE INSTITUTE, 1972-73 SOURCE BOOK OF HEALTH INSURANCE 17 [hereinafter cited as SOURCE BOOK].

companies protected nearly 113 million people, or 63 per cent of the total number of persons with hospital expense insurance, while Blue Cross, Blue Shield and medical society-approved plans protected 78 million, or 43 per cent of the total insured. Other plans covered 9 million, or 5 per cent. The number of persons covered exceeds 100 per cent due to some persons having coverage through more than one type of insuring organization.⁴

D. Surgical Expense Insurance

The second most popular form of health insurance is surgical expense coverage. By the end of 1971, 92 per cent of the persons insured against hospital expense were protected against surgical expense. This insurance provides for payment of the surgeons' fees for each surgical procedure, usually with prescribed limits. The number of persons having surgical expense insurance reached more than 165 million by the end of 1971, a 35 per cent growth over the decade. The most dramatic rise in such coverage occurred in the fifteen years preceding 1961.⁵

Insurance companies protected 102 million persons, or 62 per cent, while Blue Cross, Blue Shield organizations and medical society-approved plans protected 69 million, or 42 per cent of the total. More than 11 million persons, or 7 per cent were insured through other plans.⁶ As is obvious from the aggregate percentage (111 per cent), some people were protected under more than one policy.

E. Regular Medical Expense Insurance

Over 144 million persons were protected against regular medical expenses by the close of 1971. Regular medical expense insurance provides benefits toward physicians' fees for non-surgical care rendered in the hospital, at home, or at the doctor's office. Some regular medical expense plans also provide benefits for diagnostic, x-ray, and laboratory expense. From 1961 to 1971 the number of persons insured by private carriers for regular medical expense increased by 82 per cent.⁷ All in all, more than 144 million Americans were protected for such expense through insurance companies, Blue Cross, Blue Shield and other plans.

F. Major Medical Expense Insurance

Major medical expense insurance coverage is also becoming ever more popular. In twenty years the number of insured has grown to 81 million. Benefits under this form of coverage are virtually unlimited and usually cover the policyholder for high dollar amounts. These policies help cover the cost of treatment

⁴ *Id.* at 17. The number of persons covered exceeds 100% due to some persons having coverage through more than one type of insuring organization.

⁵ *Id.* at 20.

⁶ *Id.* at 20.

⁷ *Id.* at 22.

given in and out of the hospital, special nursing care, x-rays, prescriptions, medical appliances, nursing home care, ambulatory psychiatric care, and many other health care needs.

The total number of persons covered under all the various plans outlined above is recapitulated for convenience as follows:⁸

NUMBER OF PERSONS WITH HEALTH INSURANCE PROTECTION BY TYPE OF COVERAGE

In the United States
(000 omitted)

End of year	Hospital expense*	Surgical expense*	Regular medical expense*	Major medical expense	Disability income	
					Short- term†	Long- term
1961	134,417	122,951	93,466	34,138	43,055	‡
1962	139,176	126,900	97,404	38,250	44,902	‡
1963	144,575	131,954	102,302	42,441	44,475	3,029
1964	148,338	135,433	107,686	47,001	45,270	3,420
1965	151,483	139,437	110,922	51,946	49,690	4,457
1966	155,864	143,284	115,453	56,742	50,003	5,002
1967	160,649	148,729	121,522	62,226	51,915	6,632
1968	167,209	153,977	127,994	66,861	55,677	7,718
1969	170,855	158,584	133,686	72,292	57,627	9,076
1970:						
Under 65	164,210	153,352	132,349	76,164	57,833	10,740
65 and over	11,172	9,303	8,368	2,053	—	—
Total	175,382	162,655	140,717	78,217	57,833	10,740
1971:						
Under 65	168,513	155,841	135,970	78,516	58,850	12,011
65 and over	11,387	9,608	8,472	2,158	—	—
Total	179,900	165,449	144,442	80,674	58,850	12,011

G. Medicare, Public Welfare and Medicaid

The foregoing computations do not take into account the 10 million Americans who qualify for Medicare but are not protected by supplemental private insurance programs.⁹ Additionally, millions of people in the United States are recipients of medical care through their state, county and municipal public welfare departments. Still others are currently recipients of Medic-aid, a federally supported health care program for the poor.

⁸ *Id.* at 18.

⁹ *Id.* at 11. Medicare is the hospital insurance system and the supplementary medical insurance for the aged created by the 1965 Amendments to the Social Security Act and operated under the provisions of the Act.

H. *Automobile Medical Pay*

As previously mentioned, 70 to 80 per cent of automobile insurance policyholders carry medical pay coverage. Most such coverage is in the amount of \$2,000, enough to pay the full medical expense of more than 98 per cent of the automobile accident victims. For most people this duplicates coverage they already have under a health insurance plan.

I. *National Health Insurance*

If all the above insurance programs are not enough, Congress has for years been debating enactment of a National Health Insurance program. This would provide medical coverage to every man, woman, and child in the United States. Even if such a plan is not enacted, it seems reasonably certain, judging from the rapid growth of prepaid medical plans, that within the next decade practically no one will be without substantial or total medical coverage.

J. *Loss of Income Protection—Other Than Auto*

The number of persons protected by wage continuation plans in case of accident or illness is also surprisingly high. These plans are designed to provide wage earners with regular weekly or monthly payments in the event their wages are cut off because of disability due to illness or injury. This coverage takes the form of short-term or long-term protection. Short-term policies extend benefits for a maximum period of two years; long-term plans contain benefit periods longer than two years. At the end of 1971, the total national work force was approximately 81 million persons, 71 million of whom were covered by loss of income protection.¹⁰ Of these 71 million, 12 million were covered by long-term disability policies written by insurance companies. This number increased by 12 per cent during 1971, while the increase in short-term plans for that year was 2 per cent. Many persons covered by long-term disability policies also had short-term coverage.

K. *Income Disability Protection By Auto Insurers*

Automobile insurers have been writing income disability coverage (wage loss) for at least 30 years.¹¹ Through 1971, however, only 1 per cent to 2 per cent of automobile policyholders purchased such coverage. While nationwide statistics are currently unavailable for 1972, it is reasonably certain that that figure has grown immensely as a result of the no-fault debates, particularly since the coverage is now being widely offered throughout the nation by major automobile insurers. In the past, there was a total lack of awareness by motorists that such coverage was even available.

¹⁰ *Id.* at 25.

¹¹ Record at 311-12, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N. E.2d 474 (1972). For the cost of automobile disability coverage, see Record, at 287.

The cost of combination medical and wage loss coverage limited to loss resulting from auto accident is exceedingly low. Continental Insurance Company began offering such coverage in 1971 for four to five dollars a vehicle. Concord General Mutual Insurance Company provides \$750 per month income loss indemnity for \$7 a year, provided medical pay coverage is purchased by the motorist at regular rate. State Automobile Casualty Underwriter of Nebraska provides a combination-package of \$10,000 coverage for both medical and wage loss for only \$10 a year to persons above age 65 and \$8 to persons under 65. Wage loss under the plan is limited to \$750 per month. One of the reasons why such coverage is so inexpensive is that the economic loss of the vast majority of automobile accident victims is relatively small. According to a Department of Transportation (DOT) Study completed in 1970, the total economic loss to the date of settlement suffered by automobile accident victims is as follows:¹²

Total Economic Loss	Percentage of Claimants	Cumulative Percentage
\$0 - 499	78.9%	78.9%
\$500 - 999	10.2%	89.1%
\$1,000 - 1,499	4.0%	93.1%
\$1,500 - 2,499	3.2%	96.3%
\$2,500 - 4,999	2.2%	98.5%
\$5,000 - 9,999	1.1%	99.6%
\$10,000 - 24,999	.3%	99.9%
\$25,000 +	.1%	100.0%

Another reason why the cost of such coverage is low is that only about one-third of all auto accident victims sustain wage loss.

It is evident from the foregoing analysis of the vast numbers of people currently insured for medical and wage loss coverage that there is no critical need for compulsory no-fault legislation. The real objective of the proponents of automobile no-fault insurance is to curb or abolish the tort liability system. If they succeed, the automobile casualty writers will gain a captive market not only for medical and wage loss coverage, which they have found to be very lucrative, but also for compulsory bodily injury coverage, yet the carriers will be exposed to liability for general damages in only about two or three per cent of the automobile accident cases. On top of all that, the few victims who would succeed in a tort recovery will have to reimburse their own insurance companies for the medical and wage loss they had previously received, notwithstanding the fact that they paid a premium for that coverage. To be sure, under no-fault the automobile insurance industry would clearly benefit.

¹² DEPT. OF TRANSPORTATION [hereinafter DOT], PERSONAL INJURY CLAIMS (1970). Total loss in medical expense, wages, and replacement services is at time of settlement, 1970.

¹³ The \$500 medical threshold is presently in force in Massachusetts, Kansas, and Utah.

III. Thresholds

The method most commonly advocated by the promoters of no-fault schemes for the abrogation of tort recovery by the victim is that of the medical-threshold. This approach bars the accident victim from asserting a claim for pain, suffering, mental anguish, temporary and sometimes even permanent disability, unless his reasonable medical expenses exceed a certain monetary amount. The most common medical threshold is \$500.¹³ At least two states have thresholds in lesser amounts.¹⁴ One state has \$750 threshold;¹⁵ one has a threshold of \$1,000.¹⁶ (The latter was the amount settled on by the nine signatories to the 1972 "Camel-Back Accord" of the casualty insurance underwriters.¹⁷) To appreciate the impact of such limitations on the right of recovery of the innocent automobile accident victim, the following DOT statistics relating to medical treatment expenses must be taken into account:¹⁸

Total Medical and Hospital Costs	Excluded from Tort Remedy
\$ 500 - \$ 999	92.4%
\$1,000 - \$2,499	96.7%
\$2,500 - \$4,999	98.1%
In excess of \$5,000	99.4%

It is apparent from the foregoing table that more than 92 per cent of automobile accident victims would fail to reach a medical threshold of even \$500. Almost 98 per cent of the victims would be barred from recovery by a \$1,000 threshold. A counterargument frequently encountered is that medical costs have risen since 1970 when the DOT completed its study. This may be true as to hospital costs. But very few automobile accident victims (not much more than 10 per cent) spend a significant amount of time in a hospital. For example, many non-complicated fracture victims are in a hospital for only a few days—just long enough to make sure that their cast is not on so tightly that circulation is impaired, or that the fragments are properly aligned. Others, with more simple fractures, may leave the hospital after a cast has been applied in the emergency room. In either example, the medical bills may be well under \$500 and certainly

14 Connecticut maintains a \$400 medical threshold while New Jersey follows a \$200 threshold.

15 Nevada.

16 Florida.

17 The nine participating companies were Allstate, State Farm, Kemper, INA, Nationwide, Hartford, Fireman's Fund, Liberty Mutual, and Travelers. The document takes its name from the posh Camelback Inn in Phoenix, Arizona, where the nine auto insurance giants met on December 8 and 9, 1972, to establish a "unified industry" position on no-fault. Almost immediately thereafter, the "model industry bill" began to appear in state legislatures around the country as the bible for auto insurance "reform."

18 DOT, AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12. Total loss in medical expense, wages, and replacement services is at time of settlement.

below \$1,000, yet the victim may endure months or years of suffering, and lose weeks or months from school or work.¹⁹

A. Verbal Thresholds

Other forms of thresholds popular with the insurance industry are verbal thresholds. These restrict the right to maintain a tort action to victims sustaining certain types of injuries or permanent disability. Injuries resulting in death, disfigurement, dismemberment, and permanent total or permanent partial disability, were in recent years deemed to be sufficiently "serious" to warrant compensation for pain, suffering and disability.²⁰ According to the testimony of an insurance actuary in the Illinois no-fault case of *Grace v. Howlett*, under that combination of verbal thresholds only 5.4 per cent of automobile accident victims would qualify.²¹

The "Camel-Back Accord" placed an even more restrictive obstacle to the right of recovery for the automobile accident victim. To be deemed "serious" under that agreement, the victim's injury must result in death, dismemberment, *significant* permanent disability (which was left undefined), or *serious* disfigurement. Some variations would require that the disfigurement mar the person's appearance and be irreparable. Less than 3 per cent of fatal and non-fatal automobile accident victims would be able to recover for intangible or "non-economic" loss under these standards.

B. Time Thresholds

Still another approach for abolishing the victim's tort rights is the "time" or "disability" threshold. Under this qualification, the victim must be *continuously* and *totally* disabled for a given period of time. Generally, the "time" threshold is used in combination with other forms of thresholds, and may be for any arbitrary period of time. No state as of yet has passed a time threshold bill, but the one most often encountered in legislative bills is either the thirty- or sixty-day threshold. In other words, the victim would have to establish total disability for thirty or sixty consecutive days in order to be eligible for tort recovery. The Uniform Motor Vehicle Accident Reparations Act (UMVARA) goes further. UMVARA requires total inability to engage in normal activities for more than six months. To grasp the impact of such thresholds on the potential victim, consider the following DOT findings:²²

19 Further offsetting such arguments is the fact that the frequency and severity of injury are steadily decreasing due to better highways and safer cars. This is perhaps the reason that the foregoing statistics were still used by insurance industry officials in their testimony before the Senate Commerce Committee on February 6 and 7, 1973.

20 There were four criteria postulated for the classification of an injury as "serious" in one DOT study. They were hospitalization for two weeks or more, or \$500 or more of medical costs excluding hospital cost, or, if working, three weeks or more of missed work, or if not working, six weeks or more of missed normal activities. DOT, *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* (1970).

21 Record, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). Testimony of Charles Hewitt, Actuary for Allstate Insurance Company.

22 DOT, *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INSURANCE*, *supra* note 20.

Period of Disability	Percentage of Claimants
Less than 1 day	18.6%
One day up to a week	30.6%
More than 1 week—up to 2 weeks	14.9%
More than 2 weeks—up to 3 weeks	9.3%
More than 3 weeks—up to 4 weeks	5.1%
More than 4 weeks—up to 5 weeks	3.6%
More than 5 weeks—up to 6 weeks	3.5%
More than 6 weeks—up to 7 weeks	1.6%
More than 7 weeks—up to 8 weeks	1.7%
More than 8 weeks	11.1%
	<hr/> 100.00%

These figures reached by the DOT were not on a basis of consecutive total disability, but rather the total number of days that the victim was disabled prior to settlement. Far fewer victims could establish a claim under the "total continuous disability" standard. Presumably, disability to any degree was insufficient.

A six-month "time" threshold proposed by UMVARA would be reached only by paraplegics, quadriplegics, severe brain damage victims and a few victims suffering other catastrophic injury. According to the DOT study about .2 of 1 per cent of non-fatal auto accident victims would qualify.²³

C. *The Medical Formula Plan*

Another form of threshold, one even more subtle than the others, is the "formula" plan concocted by the National Association of Independent Insurers and dubbed by them as the "Dual Protection Plan." Under this plan, which was in fact enacted and then held unconstitutional in Illinois,²⁴ the victim is limited in his recovery of general damages to a portion of his medical treatment expenses. The Illinois Plan provided that except in injuries resulting in death, dismemberment, disfigurement and total or permanent partial disability, the victim's maximum recovery for general damages was limited to 50 per cent of all medical expense under \$500, and to a dollar for every dollar medical expense in excess of \$500. The evidence in *Grace v. Howlett* revealed²⁵ that the right of

²³ One DOT study estimated that only 4 per cent of all paid claimants sustained any permanent partial disability, and about 0.2 per cent suffered permanent total disability. DOT, For the memorandum PERSONAL INJURY CLAIMS, *supra* note 12.

²⁴ *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

²⁵ Much has been made of the fact that the right to maintain a traditional tort action for general damages has been preserved in Illinois by Article XXXV. According to the defendants' own exhibits, however, this is a complete farce. Record, Defendants' Exhibits 4 & 5, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). These exhibits, prepared from a study made by Allstate for the U.S. Department of Transportation (DOT), show that 94.6 per cent of all bodily injury claims arising out of automobile accidents would fall within Section 608. Record, Defendants' Exhibit 4, *Id.* This was confirmed by Mr. Hewitt, who conducted and supervised the study. Record at 294, *Id.* Even more shocking was the disclosure that, by application of the formula provided under Section 608, the following consequences would result:

(a) About 50% of the 94.6% (47.3% of all accident victims) would be limited in their recovery to a sum ranging from \$.50 to \$50. This wouldn't even cover the cost of the filing fee.

recovery of 94.6 per cent of all automobile accident victims would be governed by the formula. Of this number, about 90 per cent would have been limited to a maximum recovery of \$250. The Dual Protection Plan indeed provided "dual" protection—but to the industry, not the victim. For the victim the right to general damages was nothing more than an illusion. No one could afford to retain a lawyer to prosecute so minimal a claim, and even if one as a matter of principle were willing to bear the costs, he would still have to prove his case under the tort system.

D. *The Inequity of Thresholds*

Thresholds, whether medical, verbal, or time, would adversely affect almost every potential automobile accident victim, but their impact would be severe on the honest claimant, particularly if poor. The unscrupulous victim could make endless visits to his physician or be admitted to a hospital in order to reach the requisite monetary or time threshold for a tort claim. The highly principled victim on the other hand, may return to part-time employment, may medicate at home with heat pads, heat lamps, or other home diathermy. In return for such conduct, the housewife who performed her chores in constant pain would be barred from tort recovery for her disability and suffering. The same inequity would be heaped upon the conscientious workman who returned to duty after only a few days stay in the hospital with his arm in a cast. Paradoxical as the foregoing hypothetical examples may be, thresholds would have their greatest impact on the poor. Excerpts from a Model Cities Study²⁶ introduced into evidence in the *Grace v. Howlett* case revealed that heads of households of approximately 66 per cent of the families residing within the target area were unemployed females. Another 16 per cent of household heads were unemployed males. The average income of 24 per cent of the households was below \$2,500 a year. Fully 58 per cent had incomes under \$5,000. Many of these families receive medical care through federally supported Medicaid programs or through county welfare, or both. These households and others like them would, through "beneficent" no-fault plans, be compelled to expend as much as 10 to 20 per cent of their meager incomes for medical insurance, which they now get free,

(b) Another 40% of the 94.6% (37.8% of all auto accident victims) would be limited to a claim that would range from \$50 to \$150.

(c) An additional 5% of the 94.6% (4.7% of all auto accident victims) would be limited in their recovery to a sum ranging from \$150 to \$250.

Record, *supra*, at 298. Thus, about 90 per cent of all automobile accident victims could recover less than \$250 through a tort action—if, and only if, they could prove under traditional tort rules.

26 Heads of households who are unemployed are likely to be able to pay for health care whether at the time of service or on a pre-payment basis. Results for the areas follow:

	% Male Household Head Unemployed	% Female Household Head Not Working —Not Retired	Total %
Total Target Areas	11	66	37
Grand Boulevard	10	65	41
Lawndale	7	75	35
Uptown	12	51	28
Woodlawn	15	71	41

and wage loss, which they do not have. Worse still, in order to purchase such coverage, these individuals, like all others, will have to purchase liability and property damage coverage, but should they be injured in an automobile accident, 97 to 98 per cent of them would be barred by subtle "threshold" provisions from recovery of any damages.

This would hold true for the aged and retired. Their medical is covered by Medicare and they have no wage loss. It likewise holds true for the housewife, the student, the pre-school child, the disabled person, and retired veteran. None of them would have wage loss, and almost all of them have Blue Cross/Blue Shield or other prepaid health programs for the payment of their medical expense.

Even self-employed persons may fail to qualify for wage or income loss. A salesman, lawyer or business executive, for example, may carry on all or a substantial part of his business or professional functions from his home or even a hospital bed. What would be his wage loss? All these people nevertheless may be barred from maintaining a tort action by force of a medical or time threshold. In sum, since no more than 35 per cent of the automobile accident victims incur wage loss, it follows that 65 per cent would receive nothing more than the payment of their medical expense. Some might not even recover all of their medical expense where the first party (no-fault) benefits are inadequate.

Moreover, of the small percentage of the public that may recover some wage loss, thresholds may affect their chance of full wage loss recovery. Most no-fault laws provide for a maximum wage benefit of \$200 a week.²⁷ Some provide less.²⁸ Thus, if a workman earns \$300 a week (not uncommon today) and is off three weeks from work, under a \$200 a week no-fault plan he would still lose \$300. If he is barred from maintaining a tort action for general damages by reason of a threshold, how could he recover the difference between his wage loss and the amount of indemnity paid him by his own automobile insurance carrier? No lawyer, no matter how much a neophyte, could afford to take such a small case. Is this what the public is clamoring for, or is it what the insurance industry is after?

IV. Constitutionality

A. Immediate Precedents

To date, only two reported cases have challenged the constitutionality of a no-fault statute. In *Pinnick v. Cleary*,²⁹ the Massachusetts law was upheld. The Illinois Act, on the other hand, was held unconstitutional in *Grace v. Howlett*.³⁰ The Illinois statute provided \$2,000 medical and \$150 weekly wage loss in-

27 Minnesota, Virginia, Connecticut, New Jersey, Utah and Kansas.

28 New York and Florida.

29 271 N. E. 2d 592 (Mass. 1971).

30 51 Ill. 2d 478, 283 N.E.2d 474 (1972). The reader should also note that the Florida and Kansas lower courts have recently held their state No-Fault laws curtailing recovery for personal injury unconstitutional. See *Edwards v. Thompson and United Services Automobile Assoc.*, Circuit Court, Fourth Judicial Circuit, Duval County, Florida, Gen. No. 73-3551 CA Div. A; and *Manzanares v. Bell, et al*, District Court, Shawnee County, First Division, No. 122,937 Kansas.

demnity for 52 weeks to the injured victim.³¹ This was on a first party or no-fault basis. The plan also provided that where the victim sustained injury resulting in death, disfigurement, dismemberment or permanent total or permanent partial disability, the victim's recovery for general damages was limited to 50 per cent of the first \$500 of medical expense and 100 per cent of the medical expense incurred in excess of \$500. The plaintiff, Michael Grace, instituted a taxpayer's suit in which he charged, *inter alia*, that the statute was invalid because it discriminated against the poor and against people in rural areas.

To support his charge of discrimination the plaintiff produced evidence of a wide disparity in hospital and medical costs throughout the state. This evidence revealed that the cost of a semi-private hospital room in Illinois ranged from \$13 to \$115 a day. A survey of the American Hospital Association introduced into evidence showed that the costs of x-rays, clinical, laboratory, medicine and other ancillary hospital expenses also varied widely throughout the state, and almost always were found to be lower in rural areas than in metropolitan centers. Medical costs in the City of Chicago also vary widely. They ranged from \$3 to more than \$20 per visit, a difference of more than 600 per cent. And indisputably, the costs of medical care were less for the poor than the affluent. For example, medical costs for the treatment of a simple fracture of the ulna, which would generally entail only the application of a short cast, were shown to be approximately \$25 to \$35 in low income areas of Chicago, whereas the cost for the same treatment was \$75 to \$100 on Michigan Avenue, one of the more affluent office centers in the City. A similar disparity existed between other medical charges in rural areas and large cities. The plaintiff successfully maintained that, in light of the wide disparity in the cost of medical care in Illinois, the statute was arbitrary and discriminatory, particularly in its application to the poor. In his memorandum opinion, the trial judge called it "discrimination of the rankest kind, impossible for this Court to rationalize, justify or sustain."³² As he further found:

... the discriminatory and arbitrary classifications inherent in the state "no-fault" insurance statute abound and multiply, yet none of them can be found to bear any reasonable relationship to the intended purposes of the act.³³

The case was affirmed by the Illinois Supreme Court, which found that the statute's application to only private passenger automobiles, to the exclusion of other motor vehicles, constituted special legislation in violation of a provision of the Illinois Constitution which prohibited the passage of special laws where a

One additional reported case pertaining to property damage only is *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). In *Kluger*, the Florida Supreme Court held the \$550 property damage exemption unconstitutional since it failed to comply with constitutional provisions that courts shall remain open to every person for redress of any injury.

31 Public Act 77-1430 became effective January 1, 1972 and the Illinois General Assembly added Article XXXV to the Illinois Insurance Code. ILL. REV. STAT. ch. 73, §§ 1065, 150-1065, 163 (1971). Article XXXV was entitled "Compensation of Automobile Accident Victims."

32 *Grace v. Howlett*, 71 Ch. 4737, at 3.

33 *Id.*

general law is or could be made applicable. Accordingly, the court held it unnecessary to review the equal protection issue decided by the trial court (state high courts generally do not decide federal constitutional questions where local constitutional grounds exist for a complete determination of the controversy). It would also appear that, in view of the social implications involved, the Illinois Supreme Court felt that every state should decide for itself whether such a statute would deprive its citizens of equal protection of the laws.

Pinnick v. Cleary,³⁴ on the other hand, held the Massachusetts no-fault law constitutional. The Massachusetts court, however, did not decide whether the \$500 medical threshold discriminated against the poor. On the contrary, it refused to rule on that contention on the ground that the plaintiff failed to introduce any evidence to support his discrimination allegation.³⁵ *Grace* and *Pinnick* may be reconciled by the fact that in *Grace* the plaintiff did introduce evidence to support the charge of discrimination.

B. Constitutional Validity of Medical Thresholds

It seems fair to speculate that, if the Illinois Act in fact denied its citizens equal protection of the laws and invidiously discriminated against the poor, then any form of medical threshold denies equal protection. Under the Illinois Act, the victim's maximum recovery was limited to a percentage of his reasonable medical expense. If his medical expense was less, by reason of the geographical area where he resided or by reason of his poverty, then his maximum recovery was less. If his costs were higher he could recover more.

Under a medical threshold, on the other hand, the injured victim recovers nothing unless his medical expenses exceed the threshold. It would seem that, if it is held that giving the victim with the lower medical bills *less* is unconstitutional, then giving him *nothing* should be unconstitutional. Clearly, therefore, through the proper introduction of *evidence* establishing the disparity in medical expense between the rich and poor or between rural and urban areas, acts based on medical threshold might be successfully challenged. The amount of recovery, to be sure, is in no way related to the nature of the injury, but to the wealth or poverty of the victim, or his place of residence or treatment.

The Governor of New Mexico vetoed a no-fault law patterned after the Illinois Act, in relying in part upon his Attorney General's opinion that the act was unconstitutional.³⁶ On the other hand the Supreme Court of New Hampshire, in an advisory opinion, declared that a \$500 or \$1000 medical threshold, if enacted, would be valid. The 3 to 2 opinion, however, made no reference to *Grace v. Howlett*, nor did it address itself to the issue of discrimination against the poor. Regrettably, the opinion appears to have reached more of an accommodation than a judicial determination of the significant constitutional issues raised.³⁷

34 271 N.E.2d 592 (Mass. 1971).

35 *Id.* at 609-11.

36 Opinion of David L. Norvell, Att'y Gen. of New Mexico, March 28, 1973.

37 New Hampshire Supreme Court advisory opinion on No-Fault, No. 6631 (May 14, 1973).

V. The Uniform Motor Vehicle Accident Reparations Act

A. *Essence*

The Uniform Motor Vehicle Accident Reparation Act, (UMVARA), drafted by the National Conference of Commissioners on Uniform State Laws, contains more stringent restrictions on tort recovery than any act previously recommended for adoption by a state legislature.³⁸ Thus far it has not been favorably received in any state, although the Michigan law closely resembles it. In essence, UNVARA provides:

1. First Party Benefits: Payment of all reasonable medical and rehabilitative expenses without limit.

2. Reimbursement up to an aggregate of \$200 per week for lost earnings. However, benefits received from Social Security, Workmen's Compensation, and state-required non-occupational disability insurance would be subtracted. So would a sum not to exceed 15 per cent for income tax savings.

3. The act also provides reimbursement for the reasonable expense for replacement services. This benefit is subject to a one-week waiting period.³⁹

In fatal cases, a sum not to exceed \$200 a week is made available to those survivors entitled to recover damages for economic loss under the Wrongful Death Act of the particular state.⁴⁰ A \$500 funeral benefit is also recoverable in case of death.⁴¹ These benefits are subject to the same subtractibles as wage loss. Wage loss recovery in excess of \$200 is permissible, but only where the victim dies or is disabled for more than six months. In the non-fatal cases, there is no provision for recovery of the difference between the \$200 weekly benefit and

38 The UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT [hereinafter cited UMVARA] was drafted by the National Conference of Commissioners on Uniform State Laws and approved and recommended by it for enactment in all the states at its Annual Conference Meeting at San Francisco, California, August 4-11, 1972.

39 Under UMVARA, "replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured. The one-week waiting period is governed by Section 12 of UMVARA.

40 UMVARA § 13. Thus, a \$200 aggregate limit during any calendar week on the amount of basic reparation benefits can be recovered for injury to one person as compensation for work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss. Significantly, the \$200 limit provided by this section is a limit on benefits to be paid and not a limit on "loss" or "net loss" which go into the calculation of basic reparation benefits. Thus, for example, if an injured person's only loss was \$225 in wage loss for a one-week period and was subject to a deduction of \$33.75 for income tax advantages in the calculation of net loss, he would be entitled to recover \$191.25. *Id.* § 11(b). Since the basic reparation benefits payable and attributable to work loss for that one-week period would be less than \$200, this Section would not operate to put a ceiling on his recovery.

41 *Id.* § 1(a)(5)(i). The funeral benefit includes a total charge not in excess of \$500 for expenses in any way related to funeral, cremation, and burial. It does not include that portion of a charge for a room in a hospital, clinic, convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless intensive care is medically required.

any higher sum the victim may have earned during the six-month period.⁴² Responsibility of the wrongdoer for the difference is abolished.

B. *Deductibles*

The Act authorizes insurers to offer deductibles of a \$100, \$300, or \$500 from the total of all benefits payable in any one accident.⁴³ UMVARA also permits insurers to offer deductibles of \$1,000 per accident for all benefits payable on account of injury to an operator or passenger on a motorcycle.⁴⁴ As noted earlier, most Americans are already insured against a moderate amount of medical and wage loss. Many plans, however, have a deductible feature that no-fault auto insurance could complement. But due to the high cost of UMVARA, those persons who have gaps in their present coverage would be the ones most likely to choose the highest deductible under UMVARA. The deductible feature, therefore, is counter-productive.

C. *Tort Liability*

The worst feature of UMVARA, however, is the extent to which it restricts tort liability.⁴⁵ UMVARA would deny recovery of the first \$5,000 in non-economic damage (*i.e.*, pain and suffering). In no event, however, would any such damages be recoverable unless the injury results in permanent significant loss of body function, death, permanent serious disfigurement, or more than six months of total disability.⁴⁶ In addition, it would abolish the right to recover the difference between benefits payable by the motorist's insurer and the actual earnings of the victim during the first six months of disability. Tort liability for damage to motor vehicles and the contents therein would also be abolished.

VI. S. 354 — The National No-Fault Bill

Payment to Victims

Title II of the National Standards No-Fault Bill,⁴⁷ favorably reported by the Senate Commerce Committee on August 2, 1973, would compel every owner of a motor vehicle to insure himself for economic loss (*i.e.*, medical and wage loss) incurred as a result of an automobile accident. The Bill, which is presently

42 *Id.* § 13. This provides:

Basic reparation benefits payable for work loss, survivor's economic loss, replacement services loss, and survivor's replacement services loss arising from injury to one person and attributable to the calendar week during which the accident causing injury occurs and to each calendar week thereafter may not exceed \$200. If the injured person's earnings or work are seasonable or irregular, the weekly limit shall be equitably adjusted or apportioned on an annual basis.

43 *Id.* § 14.

44 *Id.* § 14 (a) (4).

45 *Id.* § 5 (a) (7).

46 *Id.* "Complete inability of an injured person to work in an occupation" means inability to perform, on even a part-time basis, even some of the duties required by his occupation for which the injured person was qualified.

47 S. 354, 93d Con., 1st Sess. (1973).

pending in the Senate Judiciary Committee, provides for payment of the victim's total medical and rehabilitation expenses.

Wage loss is geared to \$1,000 per month⁴⁸ but may be pegged above or below that figure depending upon the per capita income of the particular state compared to the national average. In other words, if the state's average per capita income is two-thirds of the national average, the wage loss benefits for that state would be two-thirds of \$1,000 per month (\$666.66). Aggregate wage loss benefits are set at \$25,000, but may be limited by a state to \$15,000, if it found it necessary to do so to keep average premium costs down.⁴⁹

The following table illustrates the way the formula would have worked in 1971 in the states ranked first and last, in a decimalized fashion.⁵⁰

State	Rank	Per Capita Income	Fraction Per Formula	Limit
Conn.	1	\$5,032.	1.216	\$1,216.
Del.	10	\$4,570.	1.114	\$1,140.
Wash.	14	\$4,135.	1.0	\$1,000.
Minn.	20	\$3,974.	.936	\$ 936.
N. H.	30	\$3,708.	.896	\$ 896.
N. Mex.	40	\$3,394.	.820	\$ 820.
Miss.	50	\$2,766.	.668	\$ 668.

It is obvious that each state may enact a different wage loss limitation, and still comply with the national standard. Presumably, the insurance premium rate structure for each state would differ depending upon the state maximum. Moreover, the proposed Act (S. 354) not only limits recovery of wage loss to plus or minus \$1,000, but prohibits recovery of any loss in excess of that sum until the claimant has exhausted the aggregate wage loss benefits applicable to his state.⁵¹ If the victim remains disabled beyond six months, social security benefits to which he would then become entitled would be subtracted from the wage loss benefits. This would further shrink his monthly auto reparations check below the one thousand (\$1,000) dollar mark.

Victims suffering disability who do not incur wage loss may recover "replacement services loss." These are expenses "*reasonably incurred* in obtaining ordinary and necessary services in lieu of those the injured person would have

48 *Id.* § 210 (a) (1).

49 *Id.* § 210 (a) (2).

50 STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA BEFORE THE COMMITTEE ON COMMERCE OF THE UNITED STATES SENATE 36 (April 11, 1973) [hereinafter cited as TRIAL LAWYERS' STATEMENT].

The manner in which this formula will work can be illustrated by the 1971 per capita figures as reported in the Statistical Abstract of the United States, based on data supplied by the U.S. Bureau of Economic Analysis. The average per capita income in the United States in 1971 was said to be \$4,138.

The state which came closest to that figure was Washington, with a per capita income of \$4,135. The state of Washington ranked fourteenth among all the states. This means that in thirteen states, the monthly limitation on wage loss must exceed \$1,000; in thirty-six states it may be less than \$1,000; and in the state of Washington the wage loss monthly benefit could have been exactly \$1,000, at least in the year 1971.

51 S. 354, *supra* note 47, § 210 (a) (2).

performed."⁵² An example of "*replacement* service loss" is the service performed by a housewife. This benefit is more apparent than real, particularly for the poor, who will find it difficult to prove necessity for substitute services and more difficult still to find the money to pay for them. Also, S. 354 benefits would be reduced by benefits received under social security, except for benefits paid under Title 19 of the Social Security Act.⁵³ For most aged and retirees, it would mean they would receive *nothing* in case of injury by auto—an unwarranted discrimination against this class of more than 20 million Americans in our enlightened society.

The aged, disabled, and underprivileged are presently cared for under Title 19 of the Social Security Act.⁵⁴ That Act provides for medical assistance to families with dependent children (Medicaid), and medical assistance to the aged (Medicare), the blind, and the permanently and totally disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services.⁵⁵

The very poor would fare no better. Their medical bills are already provided for under Title 19 of the Social Security Act. Thus, in the event of injury in an automobile accident, many members of this group would receive only some medical expense which they would have received free anyway. This would obtain even though they suffered injuries such as punctured lungs, broken backs and hips, fractured ribs, fractured arms and legs, and the like—all of which Washington apparently deems to be "minor" injuries.

B. Tort Recovery Abolished

Under S. 354, the right to tort recovery is virtually abolished. It would survive only where the accident results in (a) death, (b) serious and permanent disfigurement or other serious and permanent injury, or (c) more than six continuous months of total disability. Total disability means "medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities."⁵⁶ According to the DOT studies,⁵⁷ not more than 4 per cent of all auto accident victims would meet this stringent threshold.⁵⁸ The monetary recovery of this small number would be further shrunk by the provision in the Bill for a mandatory \$2,500 deductible from any award received for "non-economic" detriment.⁵⁹ Aside from the questions of due process

52 *Id.* § 101 (21).

53 Grants to States for Medical Assistance Programs, 42 U.S.C. § 1396 (1965).

54 *Id.*

55 Federal Old-Age, Survivors, and Disability Insurance Benefits, 42 U.S.C. 401 (1965); S. 354, *supra* note 47, § 209 (b) (Calculation of Loss).

56 S. 354, *supra* note 47, § 206 (a) (7).

57 DOT, *supra* note 20.

58 None of the DOT studies gives accurate information as to what proportion of all victims will retain any tort remedy under S. 354. It is estimated that approximately 1 per cent of all auto accident victims suffer death. One exception provides that the tort remedy for non-economic detriment in death cases is not abolished. This preserves a remedy that, for the most part, doesn't exist. It will have limited application for excess losses and for conscious pain and suffering preceding death, but these cases will only be a fraction of 1 per cent.

59 S. 354, *supra* note 47, § 206 (a) (7).

and other constitutional questions raised by the arbitrary thresholds and the \$2,500 deductible for "pain and suffering," the almost total abolition of the right to recover general damages is an unjust and immoral encroachment on the rights of automobile accident victims, two-thirds of whom would be left with nothing more than the mere payment of medical expenses.

C. Title III — S. 354

If a state should fail to enact a law that meets the federal "standards" at the first legislative session following enactment of the federal law, Title III of the federal law would automatically become the law of the state.⁶⁰ Title III, which would remain in force until the state complied, is even more stringent than Title II. Wage loss and medical expense would be paid without limit, but tort recovery would be totally abolished, even for the quadriplegics. This is obviously a club to force the states to enact Title II or suffer even worse consequences.

D. Property Damage Claims

In order to recover for property damage to one's vehicle under UMVARA or S. 354, one must be self-insured. The vehicle owner is given various options: he may purchase insurance providing collision and comprehensive coverage which would indemnify him for loss sustained to his vehicle or property inside the vehicle, or he may purchase "inverse liability coverage."⁶¹ The latter would also pay for the damage to the vehicle and contents and could be obtained at a lower premium. The catch, however, is that in order to collect under the lower cost (inverse property damage) coverage, the insured would have to prove that the damage was caused as a result of the *negligence* of another person. In other words, he would have to prove that someone else was at *fault*.

In addition to the two methods of insuring against loss, a person suffering damage to his vehicle may also recover from the *negligent* person (or party at fault) if the damage was caused while the vehicle was parked in an "authorized area in a public roadway."⁶² The vast majority of property damage is inflicted to motor vehicles "in use," not "parked" along the curb on a public roadway. And although a great number of property damage claims involve rear-end collisions, and it is reasonably simple to establish that some other person is at fault, there are still those cases involving single car collisions, *e.g.*, where the driver damages his own vehicle going in and out of the garage, or strikes a lamp post and the like. Very obviously, therefore, the prudent motorist will be compelled to buy the more expensive collision and comprehensive coverage. But even with collision coverage, he will not be able to recover his entire loss since the act would make \$100-deductible mandatory. The right to recover the deductible is abolished.

60 *Id.* § 301.

61 *Id.* § 213 (b) (1) (2).

62 *Id.* § 213 (c).

At least under the present tort system a person who owns an older model car or a second car could very prudently get by with only liability coverage to protect himself from claims for injury or damage he may cause to others, and remain self-insured for damage to his own vehicle. If he is a reasonably careful driver, the chances are very good that in the event of damage to his vehicle he will be able to recover his *entire* loss from the party causing it.

Under UMVARA or the federal no-fault plan, the automobile owner will be forced to purchase his own insurance and will have no recourse against the wrongdoer at all. This very obviously places an unnecessary burden on the careful driver in the lower income and even the low middle income group. The magnitude of the cost to the consumer takes on even greater significance when one considers that, on the average, about two-thirds of the total premium dollar is spent for collision and property damage coverage.⁶³

VII. Constitutionality of S. 354—Federalism

If a state does not establish a Title II no-fault plan, Title III, the alternative state no-fault plan, would go into effect in that state. In that event, a plethora of affirmative actions would be required of the particular state in the administration of the federal plan.⁶⁴ It is recognized, however, that some states will not, or constitutionally cannot,⁶⁵ enact a Title II plan. S. 354, therefore, employs strong coercive measures to force the states to do so. Clearly the most

63 NAT'L ASS'N. OF INDEPENDENT INSURERS, DUAL PROTECTION 8 (1971). *See also*, DEFENSE RESEARCH INSTITUTE, AN ANALYSIS AND CRITIQUE OF THE PROPOSED UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT, No. 7 (1972).

64 For example, Section 105 requires the State to form and administer an Assigned Risk Plan. Section 105 (a) (5) requires the plan to give favorable rates to the economically disadvantaged; Section 105 (a) (6) purports to make a broad grant of powers to the State Insurance Commissioner, to adopt rules, make orders, enter into agreements with other governmental and private entities, etc.

Section 108 provides for the establishment of an Assigned Claims Plan *requiring* the creation of a fund in each State which has a no-fault plan under Title II (State law) or Title III (Federal law).

Section 108 (b) (1) authorizes insurers to organize an assigned claims bureau. If the plan is not organized, then the Insurance Commissioner is empowered and directed to "organize and maintain an assigned claims bureau and assigned claims plan." The Act states that "he shall" do so. The assigned claims bureau in the State, so organized, must follow certain specific requirements of the Federal act even though the State might wish to solve the problem by other means.

Section 109 (b) requires the State Insurance Commissioner to provide the means to inform purchasers of insurance about rates, Section 109 (c) *compels* the Commissioner to "establish and maintain a program for the regular and periodic evaluation of medical and vocational rehabilitation services," and Section 109 (d) sets forth guidelines which the Commissioner must use in implementing that section.

Section 111(d) requires States that do not have a State vocational rehabilitation agency to create one.

Section 201(d) provides that "the Commissioner in each State *shall* submit to the Secretary of Transportation, periodically, all relevant information which is requested by the Secretary" so that the Secretary may "evaluate the success of such (no-fault) plan in terms of the policy" of the Act.

All of the foregoing provisions, and more, would become applicable to a State operating under a Title III plan (emphasis added).

65 Arizona, Arkansas, Kentucky, Pennsylvania and Wyoming constitutionally prohibit any infringement on the right to recover for personal injury. Furthermore, New York constitutionally forbids any impositions on the right to bring Wrongful Death Actions. *See generally*, *Statement of Dr. Mitchell Wendell on S. 354 before the Senate Committee on the Judiciary*, December 5, 1973.

significant coercive measure adopted is with respect to tort liability. Section 206(a) of Title II abolishes all tort actions except for: (1) unsecured vehicles; (2) persons designing, manufacturing, and servicing vehicles; (3) intentional injuries; (4) certain losses stemming from work loss under Section 204(b)(2), replacement service loss exempted under Section 204(c), and survivor's losses exempted under Section 204(d); and (5) non-economic detriment in excess of \$2,500 if an accident results in death, serious and permanent disfigurement or other injury, or more than six continuous months of total disability. By contrast, Section 303(a), the comparable provision under the "alternative state plan" of Title III, permits tort actions only in the first three categories noted above. It therefore goes considerably further than Section 206(a) in abolishing tort actions, and imposes a more restrictive law on states whose legislatures do not enact a no-fault statute comporting to Title II. This disparity, clearly a punitive measure, underscores the coercive nature of S. 354 and tends to destroy the claim of the Commerce Committee staff that the bill is but another aspect of "cooperative federalism."⁶⁶

The power of Congress to induce states to enact laws consistent with broad federal standards by dangling the "carrot" (euphemistically termed "cooperative federalism"), has long been recognized. Congress, however, cannot compel the States to enact laws contrary to their own will. The leading case is *Steward Machine Co. v. Davis*.⁶⁷ The act involved in that case provided a federal tax credit to each taxpayer of up to 90 per cent of what he had contributed to a state unemployment law, if the state enacted a law which comported to the standards of the federal act. One state, Alabama, did pass such a law, and a resident taxpayer of that state challenged the validity of the Act (Title IX of the Social Security Law), claiming, *inter alia*, that under the tenth amendment "the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states." The Supreme Court, speaking through Justice Cardozo, rejected the argument:

Who then is coerced through the operation of the statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . For all that appears she is satisfied with her choice, and would be sorely disappointed if it were not to be annulled.⁶⁸

66 As Professor Freund has pointed out in *THE SUPREME COURT OF THE UNITED STATES* 23 (1961):

Cooperative federalism has taken many forms, not all of them derived from the commerce clause. Under the power to tax and spend, Congress may make grants to the states upon conditions that are relevant to the federal purposes. Congress may provide a credit for taxpayers against federal taxes on condition that payments are made by the taxpayer under appropriate conditions to his state. . . . Modes of co-operation have been worked out also in the sphere of judicial administration. The federal district courts regularly hear diversity of citizenship cases instituted there or removed from a state court, where the cause of action may rest wholly on state law. Conversely, Congress may require the state courts to entertain causes of action under federal law. . . .

See also, *Testimony of Professor Norman Dorsen Before the Senate Judiciary Committee on S. 354*, February 7, 1974.

67 301 U.S. 548 (1937).

68 *Id.* at 589.

The opinion in *Steward Machine Co.* insistently returns to the vital distinction between "inducement" and "coercion." As a matter of fact, the Court's conclusion that the law was not coercive, in violation of the tenth amendment, was influenced in strong measure by the argument presented by Assistant Attorney General, later Mr. Justice, Robert Jackson, that "there is no compulsion upon the State to adopt any kind of legislation whatever."⁶⁹

The exact opposite is true with respect to S. 354. If a state fails to enact legislation satisfactory to the Secretary of Transportation within a specified time period, Title III automatically goes into effect, with more severe restrictions on tort rights and with detailed requirements on state officials. If this is not "coercion" or "duress," it is difficult to know what these words mean.

No other federal law purports to employ state officials in this way. The federal laws heretofore enacted either totally pre-empt the field or, come into play because a state has chosen not to enact legislation in response to a "federal standards" act. In either case, however, the federal law, when it goes into effect, is *administered and enforced by federal agencies with federal funds*. S. 354, on the other hand, would impose upon states who are unwilling to enact a Title II law, the duty of administering, and indeed even enacting, legislation to implement Title III, which undeniably would be a federal law. The net effect of the statutory scheme thus adopted would be to impair the essence of federalism, or statehood as it is sometimes called, under our Constitution.⁷⁰

Perhaps one of the more eloquent expressions of the constitutional doctrine of federalism and its limit, however imprecise, and the power of the Federal government to control sovereign state action, was stated by Mr. Justice Frankfurter in *Polish Alliance v. NLRB*:

The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity.⁷¹

Very clearly, S. 354 does not meet this test.

The Senate Commerce Committee in its report on the bill relies on *Testa v. Katt*⁷² for constitutional validity. That case held that state courts were obliged

⁶⁹ The source of this limitation on the power of Congress is Article IV sec. 4 of the U.S. Constitution which reads, "The United States shall guarantee to every State in this Union a Republican form of Government," and, to even a greater extent, the Tenth Amendment to the U.S. Constitution which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

⁷⁰ The late Professor Henry M. Hart of the Harvard Law School, in a leading article entitled *The Relations between Federal and State Law*, 54 COLUM. L. REV. 489, 495 (1954), stated that, broadly speaking, "federal substantive law operates in relation to State law in two principal ways." He went on:

As to certain matters, federal law assumes and accepts the basic responsibility of the states, and seeks simply to regulate the exercise of state authority. As to other matters, federal law displaces state law, in whole or in part, and in itself takes over, pro tanto, the basic task of governance of private activity.

⁷¹ 322 U.S. 643, 649-50 (1944).

⁷² 330 U.S. 387 (1947).

to enforce claims under federal law, even if penal in nature, if the state court had "adequate and appropriate [jurisdiction] under established local law to adjudicate the action." However, the duty of state courts to enforce federal law where the judicial machinery is in existence and operating, is a far cry from requiring, as S. 354 does, state administrative agencies to submit to federal authority and administer with state funds, a purely federal law. The former is expressly granted by the supremacy clause, while the latter is forbidden by the tenth amendment.

During the hearings on S. 354 by the Senate Judiciary Committee, it was suggested that S. 354 is analogous to the Clean Air Act.⁷³ That Act authorizes state officials to promulgate rules to implement the Federal Act, and further permits the state to administer and enforce such rules if adopted. Upon failure of the state to promulgate such rules, the Federal Commissioner is thereby authorized to do so. A significant difference, however, between S. 354 and the Clean Air Act is that, under the latter, it is the Federal Commissioner, *not the state* officials, who would administer the federally promulgated rules. Thus, even if the Clean Air Act should ultimately withstand a constitutional challenge, it would not serve as precedent for the validity of S. 354.

Even assuming that Congress has the constitutional power to compel the states to enact a Title II law, the question remains whether it would be wise to coerce the states to do so or to mandamus them to enact legislation necessary to implement Title III should it become the law of that State.⁷⁴ Such an intrusion on states' rights, even if constitutionally upheld, would very likely foredoom the concept of federalism and lead to its complete if not early demise. The overriding policy question for the Congress is whether S. 354 is worth that price.

VIII. The Massachusetts Failure

In 1970, Massachusetts became the first state to enact a compulsory no-fault law. The principal promise was a 15 per cent mandatory rate reduction on total premium, at that time the highest in the nation. Following its enactment, the law's mandatory rate reduction on all but the bodily injury portion of the premium was successfully challenged by the industry on constitutional grounds,⁷⁵ with the net result that the Massachusetts motorist was left with "no-fault" insurance but a rate reduction on only a small portion of the premium.

For the first nine months under the new no-fault system, the total payout by the entire insurance industry was only \$2,296,802, compared to \$11,308,925 for the first nine months of 1970, the last year of the fault system.⁷⁶ After successive efforts by John Ryan, the Massachusetts Insurance Commissioner, a 27.4 per cent bodily injury (BI) premium reduction was accomplished. This, plus

73 42 U.S.C. § 1857 *et seq.* See also *Testimony of Professor Norman Dorsen Before the Senate Judiciary Committee on S. 354*, February 7, 1974.

74 Dean Griswold in his testimony before the Senate Judiciary Committee on January 30, 1974 suggested mandamus against State legislatures as a means of compelling them to enact such laws as would be necessary. He refrained, however, from taking a position on the wisdom of such action.

75 *Aetna Casualty & Surety Co. v. Comm'r. of Ins.*, 358 Mass. 272, 263 N.E.2d 698 (1970).

76 Brief for Plaintiff at 13, *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

the mandatory 15 per cent reduction on BI coverage, has resulted in a cost reduction in bodily injury coverage, but any erroneous notions which the public may harbor about the "success" of the Massachusetts experiment are quickly dispelled by an examination of the following table,⁷⁷ which sets forth the cost of total automobile insurance coverage for the City of Boston for the year 1970, the last year under the fault system, and each succeeding year to date.

	1970 (Tort System)	1972 (No-Fault)
Compulsory Bodily Injury	\$117	\$ 74
10/20 Coverage	26	22
Property Damage	49	21
Medical Payments	15	9
Uninsured Motorists	2	2
Comprehensive	126	133
Collision (\$100 deductible)	161	294
Total	\$496	\$555

It is clearly evident that the bodily injury portion of the premium has, indeed, been reduced, but the overall cost of insuring a car in Massachusetts is about the same today as it was in 1970. The only difference is that now the insurance industry is retaining more of the premium dollar, while less is being paid to the victims.

Dr. Calvin H. Brainard, Professor of Finance and Insurance at the University of Rhode Island, recently noted that if the Commissioner had not succeeded in reducing the bodily injury premium in Massachusetts through the forceful measures he took, the industry would have increased their gross margin of profits two-and-one-half times.⁷⁸ It is small wonder that the insurance industry is enamored by the no-fault concept.

Policy Year ⁷⁹	Premiums	Losses	Gross Margin	Loss Ratios
1971	\$111.2	\$48.9	\$62.3	44%
1970	\$130.6	\$99.2	\$31.4	76%
1969	\$126.0	\$97.1	\$28.9	77%
1968	\$121.8	\$93.9	\$27.9	77%

Even more interesting, Professor Brainard pointed out that while 38,000 victims who would not have been eligible for tort recovery were paid some economic loss benefits in 1971, 88,000 tort eligible victims did not present claims that year.⁸⁰ This may be due in part to fear of cancellation by their insurer. At

⁷⁷ Schwartz, *Faulty-No-Fault: Let the Consumer Beware*, 22 CATHOLIC U.L. REV. 746, 767 (1973).

⁷⁸ Brainard, *The Impact of No-Fault on Underwriting Results of Massachusetts Insurers*, 44 MISS. L.J. 174 (1973).

⁷⁹ *Id.* at 176. Earned premiums incurred and developed losses including allocated claim expense, and gross margins (before expenses) are in millions of dollars.

⁸⁰ *Id.* at 178-79.

any rate, it seems that under no-fault we would have to adjust to a new sense of mores. The negligent victims would receive compensation, while the innocent victims would not.

IX. Principal Arguments of No-Faulters

The excuses for these drastic encroachments on the individual's basic right to recover the full measure of his loss have alternatively been given as delay in settlement of claims, difficulty in establishing fault, crowded court dockets, and high insurance rates. Other arguments frequently encountered are that the seriously injured victim is undercompensated, and that legal fees consume a major portion of the premium dollar under the tort system. The truth of the matter is that the insurance industry, having experienced unexpectedly high profits from its Massachusetts no-fault venture, has come to realize that no-fault is infinitely more profitable and less difficult to administer. Understandably, the industry likes it. Equally significant, improved highway design and the adoption of federal safety standards on late model vehicles have combined to reduce the frequency and severity of injury, with a resulting decrease in bodily injury rates in most "fault" states.⁸¹ No-fault insurance promises to provide a good replacement market for the cash flow which the automobile casualty insurance companies expect to lose from the trend toward lower bodily injury premiums.⁸²

X. Criticisms of the Current System

A. *Delay in Settlement of Claims*

The contention that there is delay in settlement of tort claims also does not withstand close scrutiny. According to insurance industry studies, 80 per cent of all bodily injury claims are settled within six months,⁸³ while 90 per cent are settled within a year.⁸⁴ There is no delay in payment of claims for medical and wage loss to automobile accident victims who are covered by such insurance (70-80 per cent of auto insurees carry such coverage).⁸⁵ Moreover, some medical and wage loss is all that about 97 per cent of automobile accident victims would receive under the average no-fault scheme anyway; so no logical reason exists for abolishing the victim's tort rights.

B. *Difficulty in Determining Fault*

According to insurance industry studies,⁸⁶ fault can easily be determined in 90 per cent of all automobile accident cases from a simple reading of the police report. Police reports would still be necessary under a "no-fault" system. If more persons would be eligible for benefits under no-fault as contended, a good

81 Spangenberg, *No-Fault, Fact, Fiction and Fallacy*, 44 Miss. L. J. 15 (1973).

82 *Id.* at 17-18.

83 DOT, *AUTOMOBILE PERSONAL INJURY CLAIMS*, *supra* note 12 at 84.

84 NAT'L. ASS'N. OF INDEPENDENT INSURERS, *supra* note 63.

85 Record, testimony of Charles Hewitt [Insurance Actuary for Allstate Insurance Co.], *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E. 2d 474 (1972).

86 NAT'L ASSN. OF INDEPENDENT INSURERS, *supra* note 63.

argument can be made that investigation costs under no-fault should be more. Every accident would not only have to be investigated for liability, but the medical and employment history of the greater number of claimants would have to be checked as well.

C. Court Congestion

Court congestion exists only in a few metropolitan areas.⁸⁷ In the vast majority of states it is virtually non-existent. For example, a case can be tried in Iowa within 5.2 months after the case is ready for trial;⁸⁸ in New Hampshire, 3 months;⁸⁹ Kansas, 7 months;⁹⁰ and in Miami, Florida, 8½ months.⁹¹ In Tennessee, South Dakota, Oklahoma and North Dakota, a case can be reached for trial between 5 and 6 months from the time the answer is filed;⁹² reaching the same requires point less than 9 months in Oregon.⁹³ In most jurisdictions, there is no noticeable delay whatsoever. Even Chicago, which had long been regarded as one of the worst cities in the country for court congestion, is practically current.⁹⁴ From all present indications, cases filed in 1971 will have been called for trial by September, 1973.⁹⁵ Whatever delay might exist in the few jurisdictions having crowded dockets concerns claims for general damages, *i.e.*, disability and pain and suffering (which the proponents would abolish anyway), not payment of medical and wage loss. And to say that the way to cure this "delay" is by abolishing the right of recovery altogether, as the no-faulters do, is pure mad-hatter logic.

D. High Cost of Insurance

This argument is equally misleading. According to the DOT, the total premium actually paid for combined bodily injury and property damage liability insurance in 1968 on private passenger cars was surprisingly low.⁹⁶

The National Average cost for the combined coverage was \$88.20.⁹⁷ This broke down to \$55.40 for bodily injury and \$32.80 for property damage. On the average, 30 per cent of the combined premium cost is for property damage.

E. The Seriously Injured Victim

One of the most strident arguments of the no-faulters is that under the

87 1969 DEFENSE RESEARCH INSTITUTE, RESPONSIBLE REFORM, A PROGRAM TO IMPROVE THE LIABILITY SYSTEMS 14 (No. 8, 1970).

88 INSTITUTE FOR JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY — 1971 (1972).

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 119 CHI. L. BULL., 115 (1973).

95 *Id.*

96 See also DOT AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12.

97 See also DOT, AUTOMOBILE PERSONAL INJURY CLAIMS, *supra* note 12. The average premium cost for Illinois outside of Cook County was \$51.00 in 1970. The last cost of B/I coverage is further put in proper focus when we consider that 30 per cent of B/I P/D is for property damage, so 25/50 liability policy in Illinois only costs \$33.00.

present system the seriously injured are undercompensated while the less seriously injured victims are overcompensated. According to DOT study based on a sample of 1,376 cases,⁹⁸ the fatal and nonfatal "serious injury" cases number 513,098 annually (out of a total of four to five million). The total economic loss of this class is estimated at \$5,126,595 per year. This is an average loss of \$9,991 per victim.⁹⁹

The DOT found that this class recovered a net amount of only 16 per cent of its loss from the tort system, and an additional 33 per cent from other systems for a total recovery of 49 per cent.¹⁰⁰ However, a closer study of the sample data reveals that the average recovery of the entire class is relatively low due to the extremely high loss sustained by a very small number of catastrophically injured claimants (less than one per cent). As a matter of fact, all victims who have an economic loss of \$10,000 or less to the date of settlement recover on the average their total loss from the multiple reparation systems in force. Victims who sustain a loss in excess of \$10,000, but less than \$25,000, recover 92 percent of their total loss from the combined systems.¹⁰¹ The sub-class of catastrophe cases whose economic loss averages in excess of \$25,000 (45,153 persons annually) has been computed at \$76,341. The total economic loss, including future loss of this one per cent of the total number of victims, has been established at \$3,447 billion.¹⁰²

Since automobile casualty insurers pay out approximately 60 per cent of the premium dollar in benefits, \$5,463 billion in net annual premium would be needed to satisfy the claims of the one per cent (45,153) whose losses exceed \$25,000.¹⁰³ The total standard limit premium at 1967 loss levels, adjusted upward to reflect more additional compulsory premium payers, would generate only \$3.5 billion.¹⁰⁴ Thus, it would require a 56 per cent increase in standard bodily injury premium just to compensate this one per cent of the victims—even if no payment whatever were made for the economic loss of the remaining 99 per cent. No one seems to be willing to pay this price.

By the same token, unless we are willing to double or triple premiums (or abolish the private insurance industry), there is no justification to abolish tort rights of 95 per cent or more of automobile accident victims. Most no-fault systems thus far proposed would pay only the smaller losses which are presently

98 The DOT, in its automobile accident compensation study, published data on seriously injured victims entitled *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES*. See also Spangenberg, *Exposing a Half-truth*, TRIAL MAGAZINE (Nov.-Dec. 1972).

99 TRIAL LAWYERS' STATEMENT, *supra* note 50 at 26.

100 *Id.* at 27.

101 *Id.* at 28.

102 *Id.* at 277.

103 All systems show deficiencies when the losses exceed \$25,000. The subclass of catastrophe cases is said to number 45,153 persons annually, or 8.8 per cent of the whole class of fatal/serious cases. Note, however, that the total number of all injury victims annually, serious and non-serious as defined, is variously estimated between 4 million and 5.5 million. The number adopted by the Department of Transportation in its final report was 4.2 million. DOT, *MOTOR VEHICLE CRASH LOSSES*. The small number of catastrophe cases, estimated at 8.8 per cent of the class of "serious injured or fatality victims" is only 1.07 per cent of the entire group of all accident victims. The small subclass of fatally/seriously injured persons who recover inadequately under the tort systems also recover inadequately from all the other systems such as life insurance, health and accident insurance, social security, medical pay auto insurance, sick leave, and wage continuation plans.

104 TRIAL LAWYERS' STATEMENT, *supra* note 50, at 31.

being fully compensated by the combined reparations systems. The seriously injured would gain little. Theoretically they would retain the right to recover in full if innocent. However, the limits for bodily injury insurance (which pays for pain and suffering and disability, etc., under the tort system) under most proposed plans would remain inordinately low—between \$10,000 and \$25,000 per victim. It is obvious, therefore, that the "unlimited" right of recovery in tort for the seriously injured victim would be illusory.

F. *Lawyer Fees*

Perhaps the most reckless argument of the no-fault proponents is that only 44 cents of each premium dollar is paid in benefits.¹⁰⁵ This contention is based on the erroneous assumption that every claimant retains a lawyer and that 22 cents of each premium dollar is paid to attorneys. On a national average, less than one-third of the claimants retain counsel. A DOT study revealed the following¹⁰⁶:

ATTORNEY REPRESENTATION BY STATE

Number of Claimants per 1,000

State	No		Attorney			
	Attorney		No Suit		Suit	
California	621	(12)	236	(10)	143	(6)
Colorado	710	(7)	192	(15)	98	(11)
Connecticut	315	(18)	332	(4)	353	(2)
Georgia	765	(1)	139	(19)	96	(12)
Illinois	471	(15)	390	(2)	139	(7)
Indiana	764	(2)	158	(18)	78	(14)
Massachusetts	208	(16)	599	(1)	193	(4)
Michigan	686	(9)	248	(8)	66	(18)
Minnesota	712	(5)	185	(16)	103	(9)
Missouri	668	(10)	229	(11)	103	(9)
New Jersey	440	(16)	304	(5)	256	(3)
New York	352	(17)	278	(6)	370	(1)
North Carolina	744	(3)	202	(13)	54	(19)
Ohio	660	(11)	263	(7)	77	(16)
Pennsylvania	608	(13)	242	(9)	150	(5)
Texas	711	(6)	200	(14)	89	(13)
Washington	726	(4)	165	(17)	109	(8)
Wisconsin	702	(8)	226	(12)	72	(17)
Florida	587	(14)	335	(3)	78	(14)

Note: Numbers in parentheses are rank.

¹⁰⁵ R. Keeton, *Automobile Insurance Reform Tailored to the Need* 1-8, March 11, 1969 (statement prepared for the Joint Comm. on Ins., Mass.). See also Spangenberg, *supra* note 81, at 32.

¹⁰⁶ DOT, ATTORNEY REPRESENTATION BY STATE (1972).

There would be even less lawyer involvement if the insurance industry would pay claims promptly and fairly. Be that as it may, the automobile casualty insurers pay out an average of 60 to 62 cents out of each premium dollar in benefits.¹⁰⁷ This is a much better performance record than that of most other private insurers. By contrast, non-group accident and health carriers pay only 45 cents in benefits out of each premium dollar. At any rate, legal fees of claimants' attorneys average only 6 to 7 per cent of the premium dollar, not 22 per cent. Moreover, the DOT found that, on the average, claimants who retained attorneys fared much better than their counterparts.¹⁰⁸ This does not mean, of course, that all claimants who did not retain attorneys fared poorly. But we may reasonably surmise that the mere ability of the citizen to retain a lawyer influenced many a claim adjuster to make a fair offer in settlement.

The other half of the argument is that the lawyers' stake in the tort system is a billion dollars per year. Sometimes the amount of lawyers' fees has been ballooned to between one-and-a-half and two billion dollars. The latter figure would account for approximately half of the total bodily injury premium collected in 1969.

The DOT estimate for claimants' attorneys' fees was \$794,000.¹⁰⁹ But even this figure is subject to question. The DOT estimates were arrived at by including four Northeastern states which experienced a high lawyer retention rate. The sample was further weighted in favor of large fees because it comprised a great number of cases actually tried to verdict. This obviously would result in greater aggregate fees. Since most of the fees recovered involve seriously injured cases, it is doubtful if the abolition of the tort rights of 95 per cent or more of the automobile accident victims would save more than a third of the total fees paid to claimants' attorneys. Even at today's inflated prices, the total savings would be less than a third of a billion dollars per year. This is a far cry from the billion, billion-and-a-half, or two billion dollars per year figures manufactured by the well-oiled no-fault propaganda machine.

XI. Legitimate Reforms

A. Needed Reform in the Insurance System

We do not pretend that the present insurance system is perfect. There is much room for improvement. Laws prohibiting the arbitrary cancellation of insurance policies and the arbitrary refusal to renew policies must be enacted; the indefensible practice of some insurance carriers to reject applicants for automobile insurance not on their driving record but because of race, or color, or the area wherein they live, must be eliminated. The unethical practice of some in-

107 Spangenberg, *supra* note 81, at 26. If present premiums are divided 40 per cent to the insurer and 60 per cent to innocent claimants, then at the same level of premiums under no-fault, only 60 cents of the premium dollar will still be available to pay *both* the innocent and guilty drivers, and the single-car accident drivers who do not now participate in the system at all.

108 TRIAL LAWYERS' STATEMENT, *supra* note 50, at 97.

109 *Id.*

surers in rejecting applicants, thus forcing them into an assigned risk plan at higher rates, must be stopped. Many of the abuses enumerated above, as well as some of the bad claims practices which have incurred public wrath, have diminished thanks to the threat of federal regulation of the insurance industry. But there is still room for improvement.

B. Needed Reform in Tort System

We also do not pretend that the tort system is perfect. Many states still cling to archaic guest statutes which deny an injured victim any recovery unless the driver can be proven guilty of wilful and wanton conduct. Some states still retain governmental immunity which shields them, their municipalities, and other political subdivisions from liability for their negligent or wrongful acts. Other states still maintain a death limit. In addition, liability insurance coverage is often too low; most states still require the minimum 10/20 coverage, *i.e.*, \$10,000 maximum coverage for any one person injured or killed and \$20,000 for the aggregate loss of all persons killed or injured in any one accident. And, human nature being what it is, there admittedly is abuse under the present system by a small minority of claimants who would exaggerate their injury or economic loss. This human frailty, however, will not be changed by converting to a no-fault system. In any event, as Chief Justice Tauro reasoned in his special concurring opinion in *Pinnick v. Cleary*, "no plan . . . should resort to burning down the barn to get rid of the mice."¹¹⁰

XII. Conclusion

No-fault insurance has been around for 110 years. It is simply first party medical and wage loss coverage. Most people have multiple sources of medical wage loss recovery, in addition to the automobile no-fault benefits available to them. The automobile casualty company's version of no-fault would abolish or severely restrict the victim's right to recover general damages, *i.e.*, for disability and suffering, and limit the victim to recovery of his medical and some wage loss. Much of the confusion connected with no-fault stems from the "no-fault" label. "Fault" is and always will be present. It is only *responsibility* for fault that would be abolished by the insurance industry's proposals. This is the fault with no-fault.

A true consumer no-fault plan can furnish both "butter and guns."¹¹¹ The Delaware Plan, which has been in force for almost two years, has reduced claims by more than 70 per cent.¹¹² Lawyer representation has been reduced to the

¹¹⁰ 271 N.E. 2d 609, 613 (1971).

¹¹¹ Schwartz, *supra* note 66.

¹¹² The "Delaware Motorists Protection Act" became effective January 1, 1972. Under this article no threshold was established—the act simply providing that: (1) Automobile insurance coverage is compulsory for all automobiles registered in the state; (2) all companies will add the no-fault coverage to existing policies at no inconvenience to the policyholder; (3) there will be direct payment of benefits for medical and hospital costs, loss of wages, and expenses for services to the insured by his own company, regardless of fault; (4) the insured will continue to have the liability coverage that he needs; (5) insurance companies have the responsibility of explaining to their policyholders all changes in coverage.

same extent. In Delaware, medical and wage loss is paid to the victim regardless of fault, but there is no abridgement of the victim's rights to general damages. The Delaware experience has indeed proven that, where the victim has received his medical and wage loss, the incentive to make further claim is extinguished in all but the most serious cases. This has been accomplished merely by precluding the injured victim from recovering medical and wage loss which he had previously received from his own auto insurance carrier. The Delaware Plan, or some variation of it, is all that is needed to reform the automobile insurance system, at least from the standpoint of the consumer.