

Issue Analysis

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Auto Insurance Reform Options: How to Change State Tort and No-Fault Laws to Reduce Premiums and Increase Consumer Choice

By Peter Kinzler, J.D.

Executive Summary

Motorists and insurers have been deeply concerned about rising auto insurance costs and premiums in a number of states in recent years and many states have reacted to these concerns by considering reforms. Starting in the early 1970s, 16 states adopted no-fault laws as a way to reduce premiums, although no-fault also promised better compensation by eliminating much of the lawsuit system with its high overhead costs of attorneys and pain and suffering awards.

The momentum towards no-fault stopped in the late 1970s, and much of the debate since then has been over whether to reform or repeal the no-fault laws. In most no-fault states where this debate has occurred recently – Colorado and Florida are notable examples – the extant systems were so badly flawed by runaway medical costs or weak thresholds, or both, that they required serious overhauls in order to fulfill no-fault's promise of fair compensation and lower premiums. All too often, the proposed reforms were transparent attempts to maintain the status quo, leading interest groups and policymakers who would normally support the no-fault concept to reject disingenuous "reforms" in favor of outright repeal.

On the other hand, some tort states have considered converting to no-fault, though few have considered reforming their tort systems. This paper finds the "tort versus no-fault" reform paradigm to be a false choice and, instead, offers a series of recommendations to lower premiums and, in some cases, improve compensation and increase choice in both tort and no-fault states.

A. The Case against the Tort System

Starting in 1932, numerous studies have criticized the tort system in auto accident cases – under which an injured person can recover only if another party is legally "at-fault" and, generally, the injured person is less at fault – for providing poor compensation at an excessive cost. Specifically, the critics have documented the following:

- **The System is Inefficient.** It pays more for attorneys' fees for both parties than for legitimate medical bills and lost wages.
- **The System is Overly Costly.** The U.S. Congressional Joint Economic Committee (JEC) estimates that consumers could save \$47.7 billion a year, a reduction of 56 percent in the bodily injury portion of their premium, were states to adopt a good no-fault system.

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Weak thresholds raise both the cost of lawsuits and the cost of no-fault benefits, as injured people inflate their losses in order to sue for pain and suffering.

- **The System is Incomplete.** Approximately 30 percent of all injured persons recover nothing under the tort system.
- **The System Allocates Benefits Poorly.** People with minor injuries recover, on average, several times the amount of their economic loss while people with serious injuries recover far less than is needed to pay their economic losses.
- **The System Overburdens the Courts.** Auto insurance cases represent more than half of all tort cases in large counties.
- **The System Does Little if Anything to Mitigate Crash Losses.** The risk of harm to oneself is the major deterrent to reckless driving and liability insurance undermines any significant deterrent effect.

B. Auto Insurance Reform Efforts of the 1970s and 1980s: What Went Wrong

The failures of the tort system led 16 states to adopt no-fault laws during the 1970s. While all of them have resulted in better compensation for injured persons, several have failed to deliver on the promise of lower premiums. Good no-fault laws require tight “thresholds” (i.e., limits on lawsuits), in order to balance out the increased cost of no-fault benefits. Unfortunately, most of the 16 no-fault states have “weak” thresholds that were inserted into the laws at the urging of the opponents of no-fault, the tort bar. Weak thresholds subvert the no-fault ideal by allowing too many lawsuits, generating costs that cause premiums to rise. Meanwhile, reforms to the liability insurance systems in tort states also improved compensation (though to a much lesser degree than the no-fault laws did), but also increased costs.

- **The Mixed Success of No-Fault Laws.** In all of the 12 states that continue to

offer no-fault insurance, all injured people recover economic loss benefits in a more timely fashion than under the tort system. However, weak thresholds allow too many people with non-serious injuries to file lawsuits. It is telling that no state no-fault law adopted the stringent threshold that was written into the original model state no-fault law. Weak thresholds raise both the cost of lawsuits and the cost of no-fault benefits, as injured people inflate their losses in order to sue for pain and suffering.

- **Changes in the Tort and Liability Insurance System Filled Some of the Compensation Gaps but Also Raised Premiums.** Replacing the doctrine of contributory negligence, which denies recovery if a person contributed in any way to an accident, with comparative negligence was one of several modifications of tort law that enabled more people to recover. On the insurance side, the introduction of underinsured motorist coverage, under which one can recover from one’s own insurer if an at-fault driver has insufficient coverage to pay your losses, increased the amount of compensation for injured people. These changes in the tort and insurance systems improved compensation for injured people somewhat, but they also produced significant increases in costs.

C. Cost Drivers in Tort and No-Fault States

The cost drivers in both kinds of states are the same: perverse incentives for injured parties and their attorneys to inflate claims, combined with rising medical costs. The result is that, despite lower accident frequencies, people are filing more claims for more dollars today than ever before.

- **Cost Drivers in Tort States.** Payments for non-economic loss (commonly referred to as “pain and suffering”), which are roughly based on the amount of economic loss, remain the primary motivating force for unscrupulous people and their doctors and lawyers to inflate medical bills. The advent of new and more costly diagnostic procedures and greater utilization of, and dramatic increases in charges by, chiropractors, physical therapists and other alternative treatment professionals contribute to increased costs. The Insurance Research Council (IRC) estimates that between 18 and 27 percent of all tort claims contain apparent fraud or buildup, primarily to increase the recovery of noneconomic damages. The annual cost to consumers is in the billions, perhaps tens of billions, of dollars.

- **Cost Drivers in No-Fault States.** Too many states failed to adopt restrictions on lawsuits that were sufficient to pay for the increased costs associated with paying no-fault (“PIP”) benefits to all injured persons. The result has been that in most putatively no-fault states, more dollars are paid out for tort claims than for no-fault claims. The RAND Institute for Civil Justice (RAND) estimates that limiting lawsuits to claims for uncompensated economic loss only, and not for pain and suffering, would reduce personal injury costs in no-fault states by approximately 61 percent. Lower premiums would enable low-income people to better afford cars to get to where the jobs are and pay for other vital expenses. They would permit people with more income to lower their premiums or increase coverage for more serious losses.

Weak thresholds are the major cause for inflated PIP claims, as the

unscrupulous inflate their medical bills to cross the thresholds and recover the pain-and-suffering pot of gold. In addition, PIP costs are unnecessarily high because, for the most part, they operate outside the mainstream of governmental and private health insurance, with few cost controls. As with the tort system, more costly diagnostic tests and the use of chiropractors, physical therapists and other alternative treatment professionals have also raised costs. The IRC estimates that between 12 and 17 percent of all PIP claims contain the appearance of fraud or buildup. As a result of these abuses, several states – including New York, Florida and Colorado (which repealed its no-fault law in 2003) – have experienced significant increases in costs and premiums that have required legislative changes. Thus far, however, neither New York nor Florida has been willing to enact—or even to seriously consider—measures to significantly tighten their weak lawsuit thresholds. Colorado did consider reforms that included tight thresholds but chose, instead, to repeal its no-fault law.

D. Changing the Auto Insurance Reform Paradigm: Reforms to Lower Premiums, Improve Compensation of Economic Loss and Increase Choice in Tort and No-Fault States

Experience suggests that it is time to get past the idea that the only alternative to reform the costly tort system is to adopt a no-fault law, particularly given the prevalence of weak lawsuit thresholds in nearly all the states that have adopted no-fault systems. Instead, states should consider reforms to improve both tort and no-fault laws.

- **Tort System Reforms.** Among the options that would reduce costs are:

Weak thresholds are the major cause for inflated PIP claims, as the unscrupulous inflate their medical bills to cross the thresholds and recover the pain-and-suffering pot of gold.

There are a multitude of reform options available to address problems in both tort and no-fault states, all of which would lower premiums and some of which would improve compensation and/or consumer choice.

- **Repeal or modification of the collateral source doctrine** to discourage people from running up medical bills in order to get a tort recovery for the same bills, when health insurers do not track tort claims and recoup what they paid their insureds from the successful tort claim.
- **A higher standard to recover pain and suffering** while maintaining the negligence standard to recover economic loss.
- **Early offers** that would enable consumers to recover economic damages from an insurer in a more timely fashion, avoiding both the delays and the uncertainties of recovery of the tort system.
- **Full tort versus economic tort option** that would permit motorists to elect to forego pain and suffering damages in return for significantly lower premiums.
- **Adopt strong verbal thresholds based on the model state law.** While the savings would not be as great as those in a pure no-fault system, they would be dramatic in states where the thresholds do not effectively restrict lawsuits to cases involving genuinely serious and permanent injuries.
- **Permit motorists to choose between the no-fault law in their state and pure no-fault.** As with the first option, it would permit motorists to choose pure no-fault coverage that would reduce their premiums dramatically, while allowing those who wish to remain in the present system to do so. Motorists choosing the existing state option would pay higher premiums commensurate with the greater costs associated with the present system.
- **PIP system reforms**, of which many are discussed, are primarily designed to make the PIP system look more like the typical health insurance system. Applying normal health care cost containment measures to the PIP system would rein in excessive PIP costs.

All of these tort system reforms would lower costs by reducing the incentives provided by pain and suffering damages, and the last two would also increase consumer choice.

- **No-Fault System Reforms.** Among the options are the following:
 - **“Pure” no-fault: Replace weak state thresholds with thresholds that permit lawsuits only for uncompensated economic loss and not for pain and suffering.** This proposal would come close to a pure no-fault system and would reduce personal injury premiums in states with major metropolitan areas by approximately 60 percent or more.

- **Choice between Tort and No-Fault Systems.** This is the reform that would give consumers the most choice and could be implemented in either a tort or a no-fault state. Model legislation exists that would enable people who elect either system to experience directly the consequences of their choice, both in terms of cost and compensation.

In sum, there are a multitude of reform options available to address problems in both tort and no-fault states, all of which would lower premiums and some of which would improve compensation and/or consumer choice.

Introduction

Auto insurance reform has been a hotly debated topic since the 1930s, as commentators have criticized both the cost of the system and its effectiveness in delivering compensation promptly and efficiently when people are injured. Since 1965, the auto reform debate has been largely framed as one between retaining the tort and liability insurance system and replacing it with some form of no-fault insurance.

This issue analysis examines the arguments against the tort system and its various no-fault successors in different states and identifies the major reasons for increasing premiums in both systems. It concludes that accepting the tort system as is or replacing it with no-fault is a false choice in most states. Instead, it argues that reform in tort and no-fault states should be looked at separately. Finally, it offers recommendations to increase consumer choice and lower premiums in tort states and separate recommendations to accomplish the same goals in no-fault states.

A typical private passenger auto insurance policy consists of coverages that afford protection against damage to the vehicle and to individuals. Collision pays for the repair of damage to your vehicle in an accident, regardless of fault. Comprehensive pays for damage to your vehicle or its contents from such perils as fire or theft. Property damage liability pays for damage to the *other* driver's vehicle and property if you are legally at fault in an accident. In 2004, these coverages represented approximately 59 percent of the claims dollar.¹

The other 41 percent consisted of coverages that protect you in the event of an accident that causes personal injury. Bodily injury liability (BI) protects your assets when you have to pay for injuries *to others* because you are legally at fault in an accident. Medical payments (MedPay) and personal injury protection (PIP) pay for your economic losses, regardless of fault. Uninsured motorist (UM) and

underinsured motorist (UIM) pay for your economic and noneconomic losses when you are injured by an at-fault driver who is uninsured or who lacks sufficient liability insurance to cover all your losses.

In recent years, there have been significant increases in bodily injury costs which have increased premiums for all motorists but have been particularly difficult for low-income drivers. This report will focus on the key factors – the systems and medical costs – that are driving increases in the bodily injury portion of the dollar and what can be done to lower costs in the future. It will not focus on the potential savings from permitting rate competition because many other authors have already addressed that issue in detail.² It will also not focus on the property damage side of the dollar for three reasons: (1) there are few incentives for motorists to inflate collision or comprehensive claims because they do not benefit from such claims (their cars are simply repaired); (2) there are no incentives for lawyers to encourage fraud in property damage claims because these claims are settled through a system of subrogation between insurers that does not involve attorneys for the damaged car's owner and; (3) insurers have taken effective measures to reduce costs by using generic after-market crash parts and operating their own auto body repair shops.

State Auto Insurance Bodily Injury Systems

Auto insurance in the United States is defined and regulated on a state-by-state basis, with the federal government playing no role. There are four different types of laws – tort, tort add-on, no-fault, and choice no-fault.

A. Tort States

A majority of states, 28, operate under the tort system or, more accurately, the tort and liability insurance system. Under this system, a person who is injured in a motor vehicle accident is entitled to recover damages for injury from the other driver only if s/he can identify and prove that (1) the driver of the

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other vehicle was legally at fault and (2) the injured person was either not at fault or less at fault than that driver. That is the tort part of the system. The “liability insurance” part of the system flows from the fact that the states require motorists to purchase BI insurance to pay claims when one is legally at fault.

Because the tort system does not pay for people who are injured by either their own negligence or when there is no at-fault driver—such as when a motorist skids on the ice and is injured when the car hits a tree—all states permit motorists the option to purchase MedPay coverage. As discussed above, MedPay pays one’s medical bills, without regard to fault.

Additional insurance is also available to address two other shortcomings of the tort system. First, if the injured person cannot identify the at-fault motorist or that person is uninsured, then the injured person’s only source of recovery is from one’s own UM coverage. Second, an injured person’s recovery, even if s/he prevails in a lawsuit or through a settlement, is, as a practical matter, usually limited to the amount of BI insurance carried by the at-fault driver. Often in a serious injury case, the other driver does not carry enough BI coverage to pay for all the losses. Insurers offer UIM coverage to fill this gap. In both situations, the injured motorist recovers from her/his own insurer, but only if one can establish that the other person was legally at-fault.

B. Tort Add-on States

Ten states operate under what are often called add-on no-fault systems, in which all insured injured people, regardless of fault, are entitled to receive PIP (no-fault) benefits for medical and work loss, up to the limits of their policies. The benefits are “added on” to any benefits an injured person might be entitled to receive through the tort system. Because they do not contain any restrictions on the right to sue – the basic trade-off in no-fault states of limiting litigation to pay for the added cost of no-fault benefits for all injured persons – they do not warrant

the name no-fault. Because there are no restrictions on the right to sue and the benefits are simply added on to the tort system, it is more appropriate to call them tort add-on states.

Eight of the 10 add-on states are nearly identical to the 28 tort states in other important respects. They do not require the purchase of no-fault benefits (it is optional)³ and the amount of no-fault coverage, if purchased, is similar to or less than the average amount of MedPay coverage (\$5,000)⁴ carried by most drivers in a tort state.⁵

Thus it is probably more accurate to say there are 36 tort states and two tort add-on states. Oregon and Delaware are different from the other eight states because the purchase of PIP coverage is mandatory and the level of no-fault benefits -- \$15,000 for one person and \$30,000 for two or more in Delaware and \$39,500 in Oregon -- is far higher than the average amount of MedPay coverage.⁶

C. No-Fault States

Nine states have no-fault laws that combine the purchase of mandatory no-fault benefits with a restriction (a “threshold”) on the right to sue for non-economic damages, commonly called “pain and suffering.” The no-fault portion of the law was designed to improve compensation for injuries by assuring timely payment of economic losses to all injured persons. The threshold limitation on lawsuits was the trade-off for a better compensation system. It is necessary to reduce the cost of lawsuits sufficiently so that the total bodily injury costs of the no-fault system—for both the no-fault benefits and for lawsuits that cross the—won’t exceed that of the pre-existing tort system. Proponents of no-fault believed it was politically essential that the costs of the no-fault system not exceed, and preferably reduce, those of the tort system it was replacing.

All but one of the original no-fault laws contained “monetary” thresholds, whereby a person can sue for pain and suffering if the economic loss exceeds a specific dollar

amount, such as \$500 or \$1,000. One state, Michigan, adopted a “verbal” threshold under which one could sue for pain and suffering only if the injury fit into one of several defined categories of serious injury. Since the adoption of these laws in the 1970s, Florida, New York, New Jersey and Pennsylvania have changed from monetary thresholds to verbal thresholds and Kansas, Massachusetts, Hawaii, Minnesota, North Dakota and Utah have increased the amount of their dollar thresholds in an effort to control costs. Only Kentucky has kept its dollar threshold where it was when it adopted its no-fault choice system in 1974.

D. Choice No-Fault States

Three states permit motorists to choose between two forms of insurance. In Kentucky, motorists can choose between the tort system and a no-fault system which permits lawsuits if the injured person has \$1,000 or more in medical expenses.

Pennsylvania and New Jersey have amended their laws to permit a choice between tort add-on and no-fault systems. In Pennsylvania, all motorists must purchase PIP benefits but they can reduce their auto insurance costs if they accept a limit on their right to sue for pain and suffering.

In New Jersey, motorists may make the same election between tort add-on and no-fault laws. New Jersey has one additional wrinkle which permits motorists to purchase a “basic” no-fault policy with lower PIP benefits in order to reduce their premiums further.

The Case against the Tort System

When motorists purchase auto insurance they are concerned about two matters—cost and compensation. This section addresses how the tort and liability insurance system—the only auto insurance system in place throughout the United

States from the beginning of auto insurance until 1971 and the only option in 36 states today—has functioned.

There is a long history of criticisms of the tort system. In 1932, a Columbia University study of compensation for auto accident victims concluded:

The generally prevailing system of providing damages for motor vehicle accidents is inadequate to meet existing conditions. It is based on the principle of liability for fault which is difficult to apply and often socially undesirable in its application; its administration through the courts is costly and slow, and it makes no provision to ensure the financial responsibility of those who are found to be liable.

[N]o system based on liability for fault is adequate to meet existing conditions.⁸

Tort States	Tort Add-On States	No-Fault States	Choice States
Alabama	Arkansas	Florida ⁷	Kentucky
Alaska	Delaware	Hawaii	New Jersey
Arizona	Maryland	Kansas	Pennsylvania
California	Oregon	Massachusetts	
Colorado	South Carolina	Michigan	
Connecticut	South Dakota	Minnesota	
Georgia	Texas	New York	
Idaho	Virginia	North Dakota	
Illinois	Washington	Utah	
Indiana	Wisconsin		
Iowa			
Louisiana			
Maine			
Mississippi			
Missouri			
Montana			
Nebraska			
Nevada			
New Hampshire			
New Mexico			
North Carolina			
Ohio			
Oklahoma			
Rhode Island			
Tennessee			
Vermont			
West Virginia			
Wyoming			

Any system that requires attorneys for both plaintiffs and defendants to adjudicate fault before compensating accident victims is going to be an inefficient compensation system.

The Columbia study then recommended adoption of a no-fault solution:

The Committee favors the plan of compensation with limited liability and without regard to fault, analogous to that of the workmen's compensation laws. Such a plan would eliminate the use of the principle of negligence, would place the burden of economic loss on the owner or operator to whose activity the loss is chiefly due, would provide for an equitable distribution of the insurance fund according to the extent of the economic loss, and would provide a prompt remedy at small cost to the injured person or his family.⁹

Professors Robert E. Keeton and Jeffrey O'Connell authored the next major critique of the tort system in auto accidents in 1965 in a book entitled *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*.¹⁰ The book also was highly critical of the tort system and recommended replacing it with a no-fault insurance system. More than any single document, the book became the basis for 16 states and the Commonwealth of Puerto Rico adopting no-fault laws during the 1970s, as well as for nearly a decade of consideration of no-fault legislation at the federal level.

The U.S. Department of Transportation (DOT) thereafter conducted an exhaustive 26 volume study of the tort system and published its findings in 1971. The DOT summarized its indictment of the tort system as follows:

[T]he existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of

its performance and the logic of its operation, it does little if anything to minimize crash losses.¹¹

The DOT recommended that the states replace their tort laws with no-fault.¹²

Let's examine these critiques in detail, considering whether they still apply to the tort system today.

A. The System Is Inefficient

Any system that requires attorneys for both plaintiffs and defendants to adjudicate fault before compensating accident victims is going to be an inefficient compensation system. According to the IRC's latest data, the vast majority of bodily injury liability dollars are paid out to claimants who retain attorneys: 47 percent of bodily injury liability claimants retained attorneys and those claimants received 79 percent of all such dollars paid to injured persons.¹³

As Figure 1 shows, the JEC has found that it takes 25.5 cents in attorneys' fees to deliver 55.6 cents of economic and noneconomic damages (including 16.3 cents in fraudulent and excessive claims) to auto accident claimants.¹⁴ Attorneys are paid more than injured people receive for their legitimate medicals bills and lost wages.¹⁵ By contrast, health insurance systems deliver their benefits without any attorneys' fees.

B. The System Is Overly Costly

The JEC's estimate of cost savings under Auto Choice legislation – 56 percent on the bodily injury portion of the premium with a maximum total potential savings of \$47.7 billion per year – demonstrates the potential for savings under one particular reform proposal.¹⁶ The magnitude of these savings support the argument that the system is overly costly. Other reforms discussed later in this analysis could also result in significantly lower premiums for policyholders.

C. The System Is Incomplete

This finding is based on the fact that approximately 30 percent of all injured persons receive no compensation from the

tort system.¹⁷ The largest single category of cases is single-car accidents, such as where a car skids on the ice and hits a tree, where no one is legally at fault.

D. The System Is Slow

This finding is based on the fact that it takes a long time for a successful plaintiff to recover, as there are no interim payments in the tort system and many of our courts have significant backlogs. For example, a U.S. Department of Justice study of the largest 75 counties found that 26.2 percent of auto tort cases took two to four years to resolve and 6.9 percent took more than four years to resolve.¹⁸

A recent IRC study also documents how slow the tort system is. It found that only 16 percent of bodily injury claimants received their first payment within 30 days and only another 15 percent received their first payment within 31-90 days. By contrast, in first party PIP claims in no-fault states, where losses are paid as they occur rather than in one lump sum at the end of tort claim, 35 percent of PIP claimants received their first payment within one month of the time they reported the injury to their insurer and an additional 45 percent received their first payment within 31-90 days. At the other extreme, 27 percent of bodily injury claimants did not receive their first payment until more than one year later, as contrasted with 4 percent of PIP claimants.¹⁹

E. The System Allocates Benefits Poorly

All of the studies cited above and many more point out that the tort system allocates benefits poorly, overcompensating those with minor injuries

and undercompensating those with serious injuries.

For example, RAND found that people with economic losses between \$1 and \$2,000 recover on average 250 percent of those losses, i.e., 2 ½ times the amount of economic loss (with the excess over 100 percent being considered recovery for pain and suffering). On the other hand, RAND found that those with economic losses of \$25,000-\$100,000 recover on average 56 percent of those losses and those with losses over \$100,000 recover on average only 9 percent of their economic losses.²

There are two main reasons for this profile: (1) the incentives provided by pain and suffering damages, whereby plaintiffs in the tort system receive payments for pain and suffering which are roughly based on the amount of economic loss; and (2) the limited amount of bodily injury liability insurance carried by motorists.

Here is how these factors play out to produce the inequitable profile of recoveries.

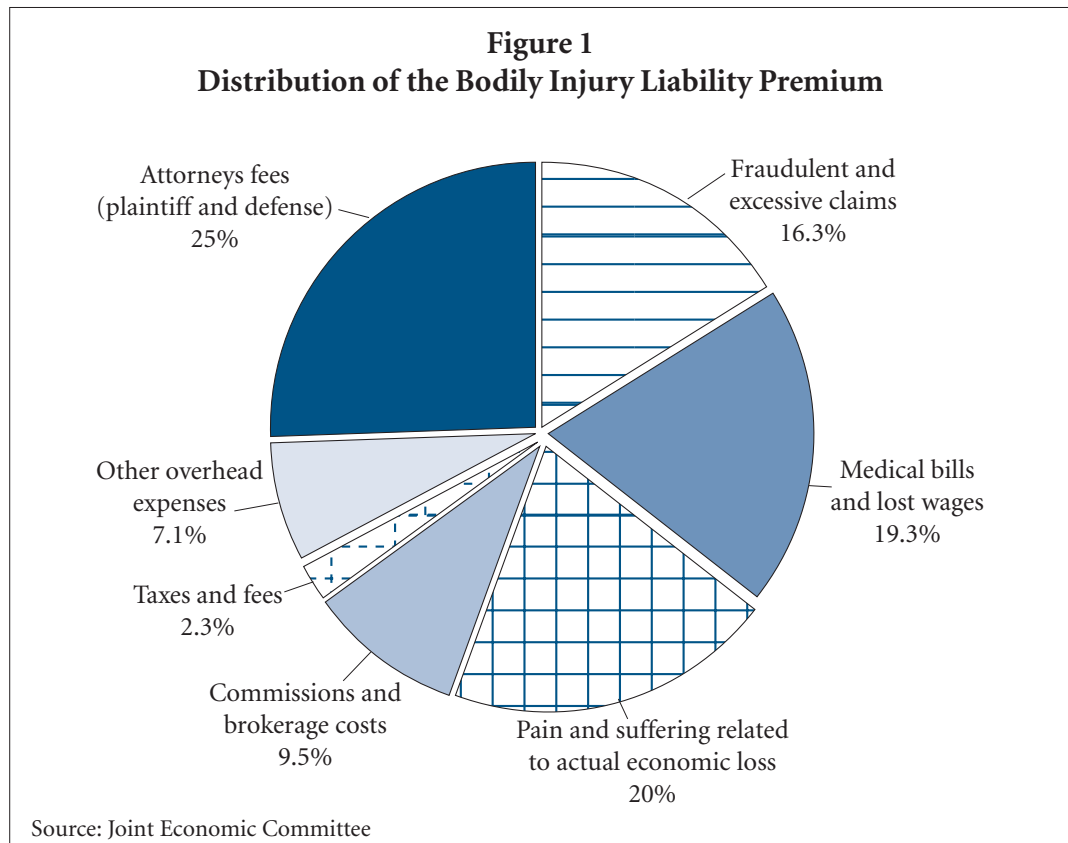
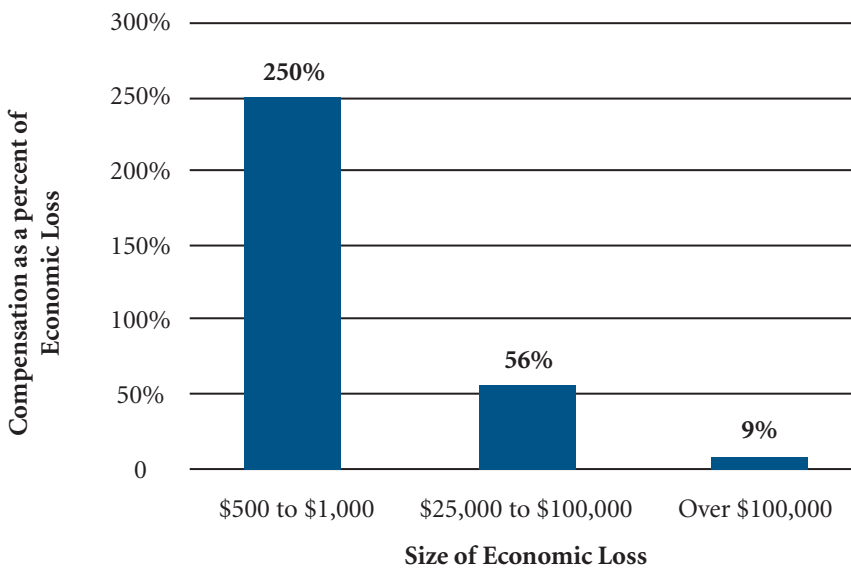


Figure 2
Compensation of Auto Injuries Under the Tort System



Source: Carroll, et al.

In the tort system, people with minor injuries often recover pain and suffering while those with serious injuries rarely do, with the average recovery for serious injuries falling far below economic loss.

In cases with minor injuries, the injured person and his or her attorney have an incentive to build up economic loss in order to recover pain and suffering damages. Courts and juries often use a multiplier of economic loss as a proxy for noneconomic loss because it is impossible to place a specific dollar figure on pain and suffering.

As the RAND data in Figure 2 show, a person with \$500 of medical bills could expect to recover approximately \$1,250, including \$750 for pain and suffering. However, should that person decide to have an MRI and make 15 or 20 visits to chiropractors and physical therapists, s/he could well wind up with economic losses of \$5,000 instead and then, according to the RAND data, recover approximately \$10,000. RAND found that the ratio of payment-to-economic loss started dropping after about \$10,000 and then fell below 100 percent of economic loss shortly after \$25,000.²¹ Other beneficiaries of this system include doctors and lawyers, with plaintiffs' attorneys typically receiving one-third of the entire settlement.

Insurers, who are legally obligated to defend their insureds, have strong incentives

to pay off in cases of relatively small losses. First, it costs insurers more to litigate or have prolonged negotiations than to pay off in cases involving a few thousand dollars. Second, it is often difficult to determine the difference between necessary and unnecessary diagnostic exams and chiropractor visits. From the perspective of the plaintiff and his or her attorney, if the defendant is insured, they know there is a guaranteed pot of money, the mandatory BI limits, from which to recover. In the majority of states, that amount is \$20,000-\$25,000 for one injured person. These factors are the main reason why people with minor injuries recover on average far more than their economic loss.

At the other end of the injury scale – where economic losses are significant – there are two major constraints on the recovery of damages.

The first is the limited amount of liability insurance coverage by the average driver which, incidentally, is caused by the high cost of even low limits of coverage. When one considers the coverage carried by all motorists – from those who drive uninsured to those who carry the minimum amount required by state law to those who carry higher limits – the average amount today is approximately \$75,000. The second major constraint on recovery is the cost of the plaintiff's attorneys' fees, typically about one-third of the recovery.²² So, for example, if a person with \$100,000 of economic loss is injured by the average driver, s/he can recover a maximum of \$75,000. That inadequate gross recovery is then reduced by the attorney's \$25,000 fee, resulting in a net recovery of \$50,000 – one-half of the injured person's economic loss. And that is in the best case scenario, where the injured person is completely free from fault so that there is no reduction for comparative negligence.

In sum, in the tort system, people with minor injuries often recover pain and suffering while those with serious injuries rarely do,²³ with the average recovery for

serious injuries falling far below economic loss.

F. The System Overburdens the Courts

Auto cases continue to occupy a significant amount of judicial time. In 2001, tort cases represented 66.7 percent of the civil trials disposed of in the nation's 75 largest counties. Auto cases were the single largest category, constituting 53 percent of all tort cases.²⁴

G. The System Does Little if Anything to Mitigate Crash Losses

The tort system is designed to accomplish two purposes – compensation and deterrence. The inadequacies described above might be tolerable if the system deterred reckless driving, thereby reducing the number of accidents over what they would be under a no-fault system. However, the most comprehensive study of accidents in tort and no-fault states found no correlation between the presence of no-fault auto insurance and a state's fatal accident or overall accident rate or the rate of driver negligence.²⁵

The conclusion make sense because (1) the risk of death or serious bodily injury from reckless driving is a serious deterrent, and (2) liability insurance undermines any significant deterrent effect of the tort system by paying the losses of the at-fault party. The only civil penalty for reckless driving is an increase in the motorist's premium, exactly the same as the penalty for reckless driving in a no-fault system.

The Auto Insurance Reform Effort of the 1970s and 1980s: What Went Wrong

A review of how the tort and liability insurance system works in theory and practice reveals many shortcomings, but it begs the question of whether alternative approaches would be preferable. This section examines the experience of state

reform efforts, both the switch to no-fault auto insurance in 16 states during the 1970s and changes in the tort system in the states that retained the tort system. The section analyzes the reforms from both a cost and compensation perspective.

A. The Sham of Tort Add-on Laws

Not surprisingly, the trial bar, which stood to lose billions of dollars a year in fees if the states adopted true no-fault laws, had a different perception of why compensation was inadequate for injured people. They claimed that most injured persons sued because insurers treated them badly. They contended that "(m)ost people with smaller claims just want their losses paid" and if insurers simply paid them without a hassle, injured people would experience the "happiness factor" and not file suits.²⁶

Their solution was the add-on system – "add-on" medical and work loss benefits for all and you would not have to place any limits on lawsuits because people with minor injuries would accept the payments and not file suits.

The theory might have worked to some degree, except for one problem – the trial bar did not propose doing away with the pain and suffering payments in minor injury cases. The result was a more expensive system because injured people used their PIP benefits to finance their lawsuits, i.e., the guaranteed compensation for economic loss meant that they could afford to wait longer to pursue additional amounts through a lawsuit. The longer they could afford to wait, the more leverage shifted to their side. In 2001, both tort add-on states were expensive: Delaware ranked third and Oregon 22nd in injury loss costs.²⁷

B. The Mixed Success of State No-Fault Laws

The theory behind no-fault was simple. No-fault would provide a trade-off of guaranteed prompt recovery of economic loss for all injured persons, regardless of fault, in return for eliminating lawsuits for people with minor injuries. In essence, the tort system would

In 2001, tort cases represented 66.7 percent of the civil trials disposed of in the nation's 75 largest counties. Auto cases were the single largest category, constituting 53 percent of all tort cases.

Many of the laws have failed to keep premiums in check because of thresholds that the trial bar succeeded in weakening.

be changed from a lottery to primarily a system of health and accident insurance. The 30 percent who received nothing under the tort system would all be entitled to recover economic loss benefits and the thresholds would eliminate enough of the lawsuit system costs to keep the total personal injury costs at or below the costs of the pre-existing tort system.

That was the theory, before it entered the realm of politics. In practice, many of the laws have failed to keep premiums in check. The main reason for this lies in the thresholds that the trial bar succeeded in weakening, as a matter of self-interest, before the laws were adopted. Also, in recent years the cost of no-fault benefits has risen, sometimes dramatically, in the wake of fraudulent schemes and the buildup of claims. The fraud and buildup is often designed to breach the threshold and qualify for a lawsuit.

It is important to note that, on the compensation side, no-fault states achieved their stated goal of paying more injured people more promptly. A U.S. Department of Transportation study in 1985 documented these improvements in compensation:

Significantly more motor vehicle accident victims receive auto insurance compensation in no-fault States than in other States; ... compensation payments under no-fault insurance are made far more swiftly than under traditional auto insurance; [and]... no-fault insurance systems pay a greater percentage of premium income to injured claimants than do traditional liability systems.²⁸

1. Weak Dollar Thresholds

When the trial bar could not defeat no-fault reform efforts outright or convince states to adopt sham tort add-on laws, they worked to weaken the thresholds in the no-fault laws so that more lawsuits for pain and suffering would remain than the no-fault proponents supported.

The first state no-fault law in the country was adopted in Massachusetts in 1970. It was a modest law by any standard—\$2,000 of no-fault benefits and a dollar threshold under which an injured person could sue for pain and suffering²⁹ if s/he had more than \$500 of medical expenses. The original bill introduced by Representative Michael Dukakis had a far more restrictive threshold, but the weak \$500 threshold was substituted for the original one by other legislators on behalf of the trial bar.

From 1970 to 1975, 16 states and Puerto Rico adopted no-fault laws. All but one of them, Michigan, included a dollar threshold. The main problem with these thresholds was that they did not eliminate enough of the tort system to pay the cost of the new no-fault system, thereby resulting in higher premiums than intended by the authors. In the most dramatic example of an unbalanced law, New Jersey required the purchase of unlimited medical benefits while permitting suits for pain and suffering if a person incurred as little as \$200 in economic loss.

Dollar thresholds had other problems as well. Instead of limitations, they often became targets. In Hawaii, for example, the threshold was approximately \$8,000 in the mid-1990s. The high dollar amount resulted in many people with injuries below that amount running up unnecessary medical expenses to reach the threshold, thus resulting in not only more BI costs but in more PIP costs as well. A RAND study demonstrated this effect dramatically. It showed that Hawaii PIP claims for soft tissue injuries rose quickly and then flattened out, just as was the case in New York with its verbal threshold.³⁰ However, while New York claims continued to fall, Hawaii claims suddenly “turn up again and rise sharply through the threshold. The Hawaii distribution peaks above the threshold, and finally, fall off.”³¹ The study concluded that, “compared to New York, the distribution of adjusted medical costs in Hawaii is shifted substantially to the right [higher], as one would predict given the incentives built into the state’s insurance system.”³²

Another problem with dollar thresholds is that they are inequitable. A \$500 medical bill in New York City, the original threshold in the state, required far less medical care than a \$500 bill in the upstate town of Glens Falls. Thus, under a dollar threshold system, as between people with similar injuries and medical treatment, one might be entitled to sue for pain and suffering but not the other.

Today, most no-fault states that retain a dollar threshold are rural ones where the buildup of claims is far less than it is in states with large metropolitan areas.

2. Undermined Verbal Thresholds

Early on in the no-fault debate, proponents supported the adoption of verbal or descriptive thresholds, whereby one could sue for pain and suffering only if the injured person suffered a serious and permanent injury. The idea was to define the nature, not the cost, of the injury, thereby reducing claims buildup and restricting lawsuits only to the most serious injury cases. If successful, the theory went, the cost of BI coverage would drop so much that people could afford to purchase a high level of PIP benefits and dramatically improve compensation for serious injuries.

This concept was memorialized in 1972 by the National Conference of Commissioners on Uniform State Laws in its model no-fault law, the Uniform Motor Vehicle Accident Reparations Act (UMVARA). Section 5(a)(7) of UMVARA called for a threshold that permitted lawsuits for pain and suffering damages only if the damages were in excess of \$5,000 and only “if the accident causes death, significant permanent injury, serious permanent disfigurement, or more than six months of inability of the injured person to work in an occupation.”³³

The commentary accompanying this provision describes its centrality to the no-fault reform:

This is the key provision of the Act, designed to eliminate the bulk

of tort claims for personal injury arising from the maintenance or use of motor vehicles.... Savings from the elimination of controversies over fault and the abolition of actions for less-than-severe pain and suffering will be used to pay for the extensive benefits (which included payment for all reasonable medical and rehabilitation expenses without limit) provided under basic reparation insurance.

Again, the no-fault proponents of strong verbal thresholds ran into the reality of trial lawyer power in legislatures when they tried to enact verbal thresholds such as the one in UMVARA. The one state that came close to adopting the model law was Michigan, whose law authorizes unlimited medical benefits and includes a verbal threshold that is similar but uses the standard of “serious impairment of body function,” instead of “significant permanent injury.” The result is the one state where the cost of PIP benefits far exceeds the costs of lawsuits. In 2005, for example, the average loss costs for lawsuits as a percentage of PIP benefits and BI costs combined was only 17 percent.³⁴

3. Weak Thresholds and High PIP Costs

Given that most thresholds have significant weaknesses that can be exploited, it follows logically that much of the buildup of PIP claims is intended to enable injured people to file claims for pain and suffering. An IRC survey confirmed that suspicion. It found that 54 percent of suspicious PIP claims appeared to involve buildup for the sake of inflating the general damages settlement, i.e., in response to the availability of pain and suffering damages once one crosses a weak threshold, and 37 percent of such claims were built up in order to overcome tort thresholds.³⁵

Inadequate medical cost controls also played a significant role in the phenomenon of rising PIP costs that started in the mid to late 1990s. This issue is examined in detail in a later section.

An IRC survey found that 54 percent of suspicious PIP claims appeared to involve buildup in response to the availability of pain and suffering damages once one crosses a weak threshold.

The most telling failure of most threshold no-fault laws is that they do not eliminate enough of the tort system to keep the cost of premiums in line.

4. *The Balance between Thresholds and PIP Benefits*

The U.S. Department of Transportation studied the relationship between the level of no-fault benefits and the tort threshold in no-fault states in the mid-1980s and concluded that there is a direct correlation:

There is a close relationship between the percentage of automobile accidents which are removed from the tort system by the threshold, and the total amount of money that can be paid to accident victims in the form of no-fault (PIP) benefits and to third-parties in the form of bodily injury liability (BI) damages, without an adverse effect...in the form of an increase in premium rates beyond the rate of inflation... ”³⁶

The study suggested that “no-fault insurance works best when there is a cost-stabilizing **balance** between the PIP benefits provided to automobile accident victims and the number of lawsuits permitted against third-party wrongdoers.”³⁷ [Emphasis added]

Several no-fault states have changed from dollar thresholds to verbal thresholds since their enactment in the 1970s. However, in no case has a state coupled the concepts of serious and permanent in all of its categories and this trial lawyer-implanted defect has resulted in laws that pay more dollars for lawsuits than for PIP benefits, a far cry from the intentions of the creators of the no-fault concept and of the state legislators who sought enactment of true no-fault laws.

In sum, the most telling failure of most threshold no-fault laws is that they do not eliminate enough of the tort system to keep the cost of premiums in line. For example, in contrast to Michigan, New York has a more modest benefit level of \$50,000 in the aggregate but a verbal threshold that permits lawsuits when “permanent [but not necessarily serious] loss of use of a bodily organ.” Its average loss costs for lawsuits as a percentage of the cost of no-fault benefits

and bodily injury liability costs combined was 61 percent of the premium.³⁸ That figure is well above the 17 percent in Michigan and anything but a primarily first party system.

C. Changes in Tort Laws and Insurance Coverage Have Improved Compensation But at a Cost – Higher Premiums for Motorists

1. *Tort Changes Increased the Number of People Who Could Recover but Also Increased Premiums*

While most of the reform attention was focused on no-fault insurance during the 1970s, most tort states amended their laws to address the compensation gap issues raised by Professors Keeton and O’Connell and others. Many of these changes were recommended by the American Bar Association (ABA),³⁹ whose goal was to assure the continued role of both plaintiff and defense attorneys in resolving auto personal injury cases.

The most prominent change, which was adopted in almost all states, was the abolition of the doctrine of contributory negligence whereby an injured person is not entitled to compensation through the liability system if s/he contributed in any way to the accident. “Reform” took the form of modified comparative negligence, whereby one can still recover if the other driver was more than 50 percent responsible for the loss. The injured person’s recovery is lessened to the degree of one’s own fault.

Many states stopped there, but others adopted the doctrine of “pure” comparative negligence. This doctrine permits a person to recover damages even if s/he was more than 50 percent responsible for the accident, to the extent that the other driver was partially at fault. For example, if Driver A is 90 percent at fault, say he was drunk, but Driver B was 10 percent at fault, both drivers can recover. If Driver A’s losses were \$50,000, he could recover 10 percent of that amount or \$5,000. If Driver B’s losses were \$500, s/he could recover 90 percent of that amount

or \$450. Thus, under the doctrine of pure comparative negligence, in this example, the driver who was overwhelmingly at fault would recover more than 10 times the amount that the driver who was minimally at fault could recover. By contrast, in a simple comparative fault state, only Driver B could recover and s/he would recover \$450.

This example makes it clear how such changes improved compensation for injured people. What state legislators ignored was the costs associated with them. Under the admittedly harsh contributory negligence regime, no one would have recovered because both of the drivers were at fault to some degree. By contrast, under modified comparative negligence, the system costs would be \$450. Under pure comparative fault, the system costs would be \$5,450. These improvements in compensation, however worthy or warranted, were not cost-free. The costs were passed along to all policyholders in the form of higher premiums.

The changes in the doctrine of contributory negligence are just one example, albeit the most dramatic one, of the tort system changes that improved compensation in tort states, mostly in the 1970s and 1980s.

Most states also swept away other antiquated doctrines that restricted recovery for injured persons. They abolished “host/guest” statutes, under which a person (guest) riding in a friend (host)’s car could not sue the friend if her or his negligence caused an accident that injured the guest. States also abolished other immunity statutes—family, governmental and charitable—under which one could not sue anyone in these categories regardless of their culpability. Most states also removed statutory limitations on recovery in wrongful death actions.

All of these changes did increase the number of people who could recover in auto accidents. The increase can be seen from the different findings in the 1971 DOT study and the RAND study 20 years later. In the DOT study, 54 percent of all injured persons had no recovery under the tort

system.⁴⁰ Twenty years later, RAND found that the number had dropped to 30 percent.⁴¹ The single largest category of uncompensated victims now is those involved in single car crashes.

And, as mentioned above, there was no effort to make changes to offset the increased costs. How steep was the cost? In 1978, one the nation’s top actuaries estimated that adopting the tort system changes recommended by the ABA would increase the average premium by 58 percent.⁴² The five changes included in the package were a change from contributory to comparative negligence; abolition of host/guest statutes; removal of statutory limits in wrongful death actions; universal compulsory automobile liability insurance with mandatory uninsured motorist coverage; and an increase in the required bodily injury coverage from \$10,000/\$20,000 to \$50,000/\$100,000. Most states adopted the first four changes and raised the required limits but not as high as the ABA recommended.

2. Insurance Changes Increased the Amount of Recoveries but Also Raised Premiums

At the same time, the insurance industry tried to address the compensation gaps by selling underinsured motorist (UIM) coverage. It provides that if one’s tort recovery is insufficient because the other driver lacks adequate BI insurance to cover your loss, then you can file a claim based on fault against your own insurer to recover the difference between your loss and the at-fault driver’s coverage, up to the limits of your UIM coverage.

If changes in doctrines such as contributory negligence increased the *number* of people who could recover, then UIM coverage increased the *amount* they could recover.

For example, assume that an at-fault driver injures you and your losses amount to \$50,000. If the other driver has 15/30 BI coverage, then the maximum you can recover is \$15,000. If you carry 50/100 in UIM, then you can file a claim against your own insurer for the remaining \$35,000 in loss, the difference between the other driver’s BI coverage and your loss. If you use an attorney

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The new factor in increasing auto insurance costs in the 1990s and 2000s is the explosion of medical costs, driven by new technology and the use and cost of non-traditional medical providers.

in both cases, then your \$50,000 recovery will be reduced by her/his fee, approximately \$17,000. In this example, UIM increases your net recovery from \$10,000 to approximately \$33,000. At the same time, the \$35,000 you recover from your UIM is an insurance cost that all policyholders pay for through higher premiums.

Whatever the policy merits of these changes, they addressed only one of the issues associated with bodily injury liability coverage—compensation. They did not address the issue of the cost of auto insurance. They improved compensation but also raised the cost of auto insurance.

This had at least two adverse societal results. First, it sometimes prevented low-income people from being able to afford to drive, a matter that took on more and more significance over time as many jobs moved from central cities where there often was mass transit to the suburbs where most often one could only get there by car. Second, to the extent that some low-income people elected to drive uninsured, when they were at fault in accidents, the injured motorist had to resort to her or his own UM or UIM coverage for compensation, thereby raising premiums for drivers who did purchase coverage.

The actual impact of these changes is hard to measure as they have been in place for a considerable period of time. However, they are important to remember in any debate in which one of the options is to replace an existing no-fault system with the tort system. After all of these tort system changes, repeal of a no-fault law would not result in a return to your grandmother's tort system. Instead, it would represent a change to a far more expensive tort and liability insurance system than grandmother grew up with.

Cost Drivers in Tort and No-Fault States: The 1990s and 2000s

The main cost drivers in both tort and no-fault states today are basically the same: (1) pain and suffering damages in the

legal system, which encourage unnecessary costs in all cases in tort states and encourage these same costs in order to breach the weak tort thresholds in many no-fault states, and (2) rising medical costs.

The new factor in increasing auto insurance costs in the 1990s and 2000s is the explosion of medical costs, driven by new technology and the use and cost of non-traditional medical providers.

Public and private health insurers have developed a number of ways to control costs, such as deductibles, copayments, discounted charges for medical providers and prescription drugs, health maintenance organizations, medical fee schedules and protocols. Despite all these measures, the public continues to struggle with the cost of health insurance.

The problem is even worse for auto insurance. While it, too, pays billions of dollars for injured motorists' medical costs, auto insurance generally lacks the cost controls found in health insurance.

Legal system and medical cost containment issues play out differently in the tort and no-fault systems because of their different natures, but the only way to assure reduced system costs and, in turn, lower policyholder premiums is to address both of them.

One final note before turning to the specifics of cost drivers. This analysis focuses on costs and ways to reduce them, not on compensation. In comparing compensation under one system versus better compensation under a variation of the same system, the equation is simple: the more compensation you provide, the more costly the premiums. For example, a tort and liability insurance system with pure comparative negligence and minimum liability requirements of 50/100 would provide better compensation to injured persons than a system with contributory negligence and 15/30 minimum liability. However, this correlation does not hold true in comparing tort to no-fault systems because a higher percentage of the insurance dollar can be paid to injured people in a good no-fault system because

fewer dollars are paid to attorneys. A good no-fault system can provide more compensation for economic loss for the same or lower premiums than the tort system can.

The rest of this section examines in more detail state cost experience in tort and no-fault states before the subsequent section examines reforms that would lower costs and thus consumers' premiums. Most of the cost discussion is based on information culled from recent studies by the IRC. The data for these studies is based on a 2002 closed claim study of 72,354 claims. The studies are multitudinous and complex and this paper will only address the major conclusions. For those who wish to delve more deeply into the details, I encourage you to read them all.

A. Cost Drivers in Tort States

The Ongoing Incentive of Pain and Suffering Damages

Perhaps the most striking IRC finding is that while the seriousness of auto injuries has decreased between 1987 and 2002,⁴³ largely as a result of new safety features such as airbags and anti-lock brakes and the increased usage of seat belts, the cost of fewer injuries has risen significantly and often dramatically. This conclusion is true for both tort and no-fault states.

The IRC uses property damage (PD) claim frequency as a proxy for auto accident rates. From 1980 to 2003, PD claim frequency dropped an impressive 20 percent.⁴⁴ During the same period, however, there was a 19 percent increase in bodily injury (BI) claim frequency.⁴⁵

The IRC study found that, "Taken together, these findings suggest that BI claim frequency increases have been influenced by claiming behaviors."⁴⁶ The IRC study recognizes the key role of pain and suffering in the filing of fraudulent and excessive BI claims:

Why had BI claim rates increased
...when other evidence suggests
that auto accidents were producing

fewer serious injuries (and that auto accident rates were decreasing)? One possible explanation is an increased litigiousness among auto accident claimants, or an increased motivation to seek general damages awards for injuries during this time. *Because BI claims allow for pain and suffering, or general damages awards, these awards can motivate accident victims to file BI claims even for relatively minor injuries.* [Emphasis added]⁴⁷

The IRC data confirm this suspicion. The IRC found that "more than two-thirds of suspicious BI claims (68 percent) appeared to involve buildup for the sake of inflating general damages."⁴⁸ Thirty-three percent of suspicious claims were to get more money for the medical provider and 12 percent to overcome a no-fault threshold.

Five percent of suspicious BI claims and 10 percent of suspicious UIM claims were because the claimant had multiple benefit sources, i.e., "claimants can collect money from more than one payment source (for example, auto insurance, workers' compensation and health insurance plans) for the same damages. These additional sources heighten the incentive to exaggerate reported losses."⁴⁹

Higher Costs for Non-Traditional Providers and Greater Use of More Expensive Diagnostic Procedures Are Driving Higher Medical Costs

What are the main components of fraud and buildup in tort claims? They are the same as in the no-fault systems—increased usage and costs of chiropractors and physical therapists and of more expensive diagnostic procedures, as well as more attorney involvement. For example, while the CPI—Medical Care index rose 22 percent between 1997 and 2002, the average total claimed medical expenses rose 39 percent in Texas, 25 percent in California and 24 percent in Illinois, but only 9 percent in Washington.⁵⁰

With respect to medical providers, there was little change in the providers seen and

Because BI claims allow for pain and suffering, or general damages awards, these awards can motivate accident victims to file BI claims even for relatively minor injuries.

Among claimants who were not seriously injured, claimants represented by attorneys claimed three times as much average economic loss as nonrepresented claimants.

the number of visits but some significant increases in the amounts charged by chiropractors and physical therapists in some states. For example, the average per-visit charge for a chiropractor in Washington increased from \$117 to \$158, or 35 percent. In Texas, the average per-visit charge for a physical therapist increased from \$135 to \$229, or 70 percent.⁵¹ It's hard to imagine that many, if any, private health insurance plans reimburse physical therapists for charges that exceed the rates of many attorneys.

While increases in the cost of medical providers varied widely among the states and many increases in provider charges were reasonable, the average total charged for newer diagnostic tests jumped dramatically in all four states in the IRC study of California, Illinois, Texas and Washington. The average total charge for MRIs rose 36 percent in California, while the cost of a CT scan rose 82 percent. Most of the states also experienced a significant jump in the use of the more expensive diagnostic procedures, accompanied by a reduction in the use of x-rays. Overall, the increases in the cost of diagnostic procedures varied among the four states: the average per claimant costs for all diagnostic procedures increased 63 percent in Texas, 37 percent in California, 24 percent in Washington and 14 percent in Illinois.⁵²

Attorney involvement in claims is associated with claimant use of more providers and diagnostic procedures and claimed higher economic losses: "They [claimants] visited more medical professionals, incurring costs that were at least 170 percent higher than nonrepresented claimants."⁵³ While one would anticipate higher costs because such cases might involve more serious injuries, it is important to note that among claimants who were not seriously injured (where the most serious injury was either a neck or back sprain or strain), "claimants represented by attorneys claimed three times as much average economic loss as nonrepresented claimants."⁵⁴

Overall, nationally, the IRC estimates that between 18 and 27 percent of all BI claims contain the appearance of fraud or buildup, as compared to between 12 and 17 percent for PIP.⁵⁵ The high fraud and buildup rates are a direct cause of the 121 percent increase in BI claim severity and the 161 percent increase in BI loss costs, compared to a 123 percent increase in the CPI – All Items, which the IRC found between 1980 and 2003.⁵⁶

What is the cost of claims abuse? The IRC estimates the cost at between 10.7 percent and 15.1 percent for BI or between \$2.4 billion and \$3.4 billion in 2002, with an additional \$300 - \$500 million for UM/UIM claims abuse. The total cost of claims abuse for all bodily injury coverages is more than double the IRC estimate of \$1.3 billion to \$1.6 billion for PIP abuse. One should keep in mind, of course, that the IRC measured PIP costs in only 22 states (no-fault and add-on states) as contrasted with the BI costs of all 50 states.⁵⁷

RAND, using earlier 1992 IRC data and a different methodology, estimated that "excess consumption of health care in the auto arena in response to tort liability incentives accounted for about \$4 billion of health care resources in 1993."⁵⁸ When pain and suffering damages and insurance overhead costs were added to excess medical claims, RAND estimated that "excess medical claims cost auto insurance purchasers across the country \$13-\$18 billion dollars. Put another way, the costs generated by excess medical claiming added \$100-\$130 to every auto insurance policy."⁵⁹

B. Cost Drivers in No-Fault States
Overall Performance of No-Fault Laws

Recent dramatic increases in some states in treatment costs, in severity and, on a few occasions, in the overall costs of PIP coverage has led some to question the efficacy of no-fault laws in holding down costs. As a result of these increases, New York, Florida and New Jersey have amended their laws to reduce PIP costs. The most recent Fast Track data support the general conclusion

that these efforts have been successful at lowering PIP costs; in some cases rolling them back to levels not seen in 10 years. One state, Colorado, repealed its no-fault law and replaced it with the tort system.

In deciding how to address any problems with the PIP system, it is important to understand the context. The PIP system is primarily a health insurance system and health costs have been rising well beyond the average increase in the Consumer Price Index. Because of that, the Bureau of Labor Statistics developed an index, CPI – Medical Care, to track health care costs separately. Moreover, as discussed previously, the PIP payment system is far more generous than most health insurance plans, with few cost containment elements and a requirement to pay a penalty, including attorneys' fees, if a claimant prevails in a suit for overdue benefits.

Despite the generosity of the PIP system, there was relatively little fraud and buildup during the first 25 years or more of its existence, i.e., from 1971 to the late 1990s. Even with the recent problems, in the aggregate, PIP loss costs increased *less* than the CPI – Medical Care index from 1980 to 2003, 247 percent compared to 297 percent, while the increase in PIP claim severity was comparable at 298 percent.⁶⁰

In assessing concerns about state no-fault laws, it is essential to keep in mind that no two no-fault systems are alike, or even close. Benefits range from \$3,000 in Utah to unlimited medical and rehabilitation benefits in Michigan. Thresholds range from \$1,000 in Kentucky to a strong verbal threshold in Michigan. In general, logically, higher benefit levels are more costly than lower levels. Similarly, thresholds that limit lawsuits for pain and suffering to very serious injuries will reduce the BI portion of the premium more than thresholds that present targets for the unscrupulous to run up PIP bills unnecessarily and thus permit far more lawsuits than the proponents of no-fault anticipated. Weak thresholds violate the basic trade-off of a good no-fault system – guaranteed benefits for all injured parties

paid for by limiting the cost of lawsuits.

There are two other matters to keep in mind in assessing no-fault laws. First, many of them were adopted in states with high vehicle densities, such as New Jersey and New York, which will always have higher costs than more rural states for the same no-fault or tort system. Second, because many of the proponents of no-fault in the 1970s sold it as a way to reduce premiums, no-fault systems are often measured against tort systems on costs alone. Such a comparison fails to take into account the other virtues of no-fault systems, including the fact that it is a more equitable and faster way to compensate injured people for their economic losses

In sum, these are tricky waters and it is best to keep in mind the tale of the six foot tall economist who drowned in a stream whose average depth was three inches. Most of the 12 no-fault and choice laws are operating fine. What we are talking about is a limited number of states in which PIP and sometimes BI costs have skyrocketed in recent years, at least for brief periods of time.

Let's now examine the three main causes for the problems in some of these states, how the states have responded and whether their changes have been effective at reducing costs. This analysis will enable us to evaluate the likely implications of different ways to remedy the problems, from changes in the no-fault system to a return to the tort system. In examining the wealth of data and trying to draw policy conclusions, it is important to keep in mind the admonition of the IRC:

It is difficult to draw incontrovertible conclusions about the effectiveness of tort versus no-fault in controlling auto insurance costs based solely on these data. One reason is that some no-fault states have relatively low tort thresholds. The claim environment of such states may resemble *de facto* tort states and allow frequent BI claims to enter the auto insurance system.⁶¹

The first problem is weak tort thresholds. Because lawsuits are supposed to be restricted

In assessing concerns about state no-fault laws, it is essential to keep in mind that no two no-fault systems are alike, or even close.

While the appearance of fraud and buildup in PIP and BI claims was significantly above the country average in Massachusetts, Florida and New York, it was well below average in Michigan, Pennsylvania and Kansas.

in order to pay for the cost of PIP benefits, one would expect BI costs to be relatively low in no-fault states and, in general, that is correct. However, the no-fault state of Massachusetts has the highest BI loss costs in the country. That is the result of three factors. One, its no-fault law permits a person to sue for pain and suffering if the person suffers \$2,000 of medical expenses. Such a low threshold represents barely a speed bump to a lawsuit, even if one does not inflate one's medical expenses. Two, in substantial part because of its urban density, Massachusetts has the highest accident rate in the country which would make it a high cost state regardless of the nature of its insurance system. Three, it has an active plaintiffs' bar, as suggested by the fact that it has the highest ratio of attorneys to population of any state.⁶²

As a result, Massachusetts had the highest BI loss cost per insured car of any state, tort or no-fault, in 2003, \$223.82.⁶³ In sharp contrast, Michigan, with its rich benefit levels and a tight threshold, had BI loss costs of only \$56.81.⁶⁴ Of course, Michigan's rich benefit package was far costlier than that of Massachusetts, with only \$8,000 in benefits. Michigan PIP loss costs per insured car were \$239.07, while those of Massachusetts were only \$48.19.⁶⁵

The second problem, the lack of control of medical costs, which is a significant factor in higher BI costs, is an even bigger problem for PIP. The IRC found increased usage of and charges for chiropractors, physical therapists and alternative professionals such as massage therapists and acupuncturists, more usage of costly diagnostic treatments and attorney representation-driven costs.⁶⁶ For both PIP and BI claims for similar injuries, claims with the appearance of fraud or buildup had significantly more treatment by these non-traditional medical professionals, as well as more use of MRIs and EMGs, than claims with no appearance of fraud or buildup.⁶⁷ Other common factors associated with fraud and buildup included delays in seeking treatment, reporting injury and filing claims with an insurer.⁶⁸

As almost always in this discussion, it is dangerous to draw universal conclusions from the data because they vary from state to state. In this area, it is worth noting that while the appearance of fraud and buildup in PIP and BI claims was significantly above the country average in Massachusetts, Florida and New York, it was well below average in Michigan, Pennsylvania and Kansas.⁶⁹

As discussed in the section on cost drivers in tort states, the appearance of fraud or buildup and estimated excess payments are lower for PIP claims than for BI claims.⁷⁰

The primary reasons for buildup among PIP claims with suspected appearance of buildup are as follows: 57 percent are built up to get more money for the medical provider, 54 percent to inflate the general damages settlement and 37 percent to overcome the tort threshold. The first reason has to do with the fact that the PIP system remains the last health insurance system in the United States that remains largely free of the constraints found in other health insurance systems and many doctors seem to use the generous payments from no-fault to compensate for constrained payments from other forms of health insurance. This problem is exacerbated by the fact that claimants have little interest in controlling costs, unless they are likely to bump up against PIP benefit limits and by the fact that claimants often assign their claims to the medical providers.⁷¹

The second reason for built up claims, to inflate the general damages awards, is a result of the incentive of pain and suffering damages, just as it is in a tort state. The last reason, to breach the threshold, reflects the fact that most no-fault states have inadequate thresholds and too often have become targets for the unscrupulous rather than the limitation on the number of lawsuits necessary to make the no-fault trade-off work to keep costs from rising when no-fault benefits are provided for all injured persons.

For all the increases in medical care and the resultant significant increases in average economic losses, it is noteworthy that these losses do not automatically translate into higher insurer payouts. Between 1997 and

2002, the annualization rate of inflation, as measured by the CPI – Medical Care index, was 4.0 percent. Average PIP *losses* jumped 6.9 percent per year but the average *payment* rose only 4.5 percent, a rate not much higher than the medical CPI.⁷²

The third major problem is attorney involvement. While one would expect represented claimants to incur more medical expenses because their injuries are likely to be more serious than those of unrepresented claimants, it is worth noting that the IRC has found that attorney involvement results in significantly higher medical losses *even when claimants with the same injury and disability status are compared*. In its study of BI claimants in Colorado, Florida, Michigan and New York, the IRC found that represented claimants whose most serious injury was a sprain or strain and had fewer than 10 days of restricted activity “incurred medical losses that were almost 60 percent higher in Colorado, more than 400 percent higher in Florida, and almost 600 percent higher in New York than nonrepresented claimants.”⁷³ As noted above, attorneys are even involved in significant numbers in representing PIP claimants, a notion that is antithetical to the whole concept of no-fault. Once again, Massachusetts leads all no-fault states in this category, with attorneys representing 53 percent of all PIP claimants in 2002. New Jersey was a close second at 45 percent.⁷⁴

Let’s briefly examine the experience in some of the no-fault states that have had problems recently so that one can identify reforms that are tailored to the circumstances giving rise to the problems.

New York: A Broken PIP System Fixed

The New York law has been flawed since its inception. With \$50,000 in benefits, its initial \$500 threshold was inadequate to reduce the number of lawsuits sufficiently to pay for the cost of the no-fault benefits. It didn’t take New York long to realize this problem and, in 1977, New York replaced its dollar threshold with a verbal threshold. Unfortunately, the opponents of no-fault,

the trial bar, managed to weaken the threshold so that many non-serious injuries have continued to result in lawsuits.

In 2002, more than half of the BI claimants in New York overcame the threshold although they had not sustained a serious injury and payments to those claimants accounted for 28 percent of BI payment dollars.⁷⁵

The most common bases for suing, for both serious and non-serious injury BI claimants, were 90 days of disability and permanent loss of use of a bodily function,⁷⁶ two categories that are easy to exploit. An easily “exploitable” threshold is the main reason why the cost of BI coverage has been higher than the cost of PIP coverage since the adoption of the no-fault law. In the fourth quarter of 2005, BI was 60 percent of the pure premium (the amount of the premium needed to pay expected losses) and PIP was only 40 percent.⁷⁷

Nevertheless, it was a dramatic rise in PIP costs starting in 1997 that triggered legislative action in New York. Between the fourth quarter of 1996 and the fourth quarter of 2000, the pure premium for PIP rose by an astounding 74 percent.⁷⁸

What caused this increase, what did New York do about it and how have the changes affected PIP loss costs?

The data show significant jumps in the cost of minor injuries, largely focused in the New York metropolitan region. Between 1997 and 2002, average PIP losses for claimants whose most serious reported injuries were neck or back sprains increased 84 percent, from \$3,831 to \$7,041.⁷⁹ Between 1996 and 2000, there was a 68 percent increase in claim severity.⁸⁰ Some other statistics jump out. The percentage of PIP claimants reporting three or more different injuries increased from 34 percent to 47 percent in the New York City area between 1997 and 2000.⁸¹ The percentage of claimants receiving treatment from four more different types of medical providers in the New York City area increased from 9 percent to 27 percent.⁸² More than half of New York City metropolitan area claimants who received physical therapy visited physical

In 2002, more than half of the BI claimants in New York overcame the threshold although they had not sustained a serious injury and payments to those claimants accounted for 28 percent of BI payment dollars.

While the news with respect to the effectiveness of PIP reforms is excellent, BI costs continue to be much more costly to New York motorists than PIP costs because of the weakness of the threshold.

therapists more than 25 times, compared to just one-third of claimants in the rest of the state.⁸³ Claims with a moderate or high degree of suspicion of fraud were six to 18 times higher in the New York City metropolitan area than in the rest of the state. While 18 percent of New York City metro area claims had a high suspicion of fraud, 40 percent of such claims were viewed as highly suspicious in Brooklyn.⁸⁴

The other key ingredients were delays in reporting injuries and in submitting claims. About twice as many New York City metropolitan area claimants delayed reporting their injuries for more than 30 days and those claims were associated with far more visits to medical providers and diagnostic tests. The same was true for claimants who waited more than 45 days after their first treatment to submit their medical bills.⁸⁵

According to the New York Insurance Frauds Bureau, the no-fault system was attracting a hardened criminal element, with many of the suspects in fraud cases having multiple prior arrests for such crimes as gun possessions, narcotics violations, robberies, etc.⁸⁶

New York took several steps to address the problems. In 2002, “the legislature implemented Regulation 68, which decreased the amount of time claimants have to report auto injuries (from 90 to 30 days) and to submit related medical bills (from 180 to 45 days).”⁸⁷ The rationale behind the reform was to give insurers more time to review claims and it has worked.

In addition, the New York Insurance Frauds Bureau and local prosecutors began to work together, insurers ran a media awareness campaign and federal, state and local law enforcement officials jointly conducted long term investigations that uncovered scams using medical clinics, runners and jump-ins. No-fault arrests by the New York Insurance Frauds Bureau rose from 50 in 2000 to 182 in 2002 and fraud reports began to fall by 2004.⁸⁸

New York also enacted legislation requiring the state to set standards and

procedures for investigating and decertifying health care providers who engage in deceptive billing or fraudulent practices. Such providers would be banned from receiving payment for medical services under the no-fault law.⁸⁹

The reforms have worked. Since pure premium peaked in 2001 (except for one quarter in 2002), it has dropped precipitously. As of the fourth quarter of 2005, it was actually below the level in 1996.⁹⁰ Most of this drop occurred from 2003 to 2005.

While the news with respect to the effectiveness of PIP reforms is excellent, BI costs continue to be much more costly to New York motorists than PIP costs because of the weakness of the threshold. They could see dramatically lower overall bodily injury premiums were the state to adopt some of the reforms outlined in the last section of this paper.

Colorado Repeals Its No-Fault Law

Colorado’s law was flawed from the beginning. By the early 2000s, after being amended, it had roughly \$130,000 of benefits but only a \$2,500 threshold. The DOT II study in 1985 had warned that the system was out of balance, i.e., had a threshold that was too weak to prevent premiums from rising beyond the level of inflation: “A low threshold... results in balance in a very low-benefit State... but not in higher-benefit States like... Colorado.”⁹¹

The threshold was so low that insureds didn’t even need to build up their claims in most cases to qualify to sue for pain and suffering. It is not surprising that the IRC found that, in 2002, 45 percent of PIP claimants were eligible for a liability claim, a figure that was higher than such notoriously litigious states as New York and Florida.⁹²

However, it was not the cost of BI coverage that led the Colorado legislature to repeal its law. Starting in the late 1990s, PIP losses and costs skyrocketed. Between 1997 and 2002, average PIP economic losses and PIP payments more than doubled.⁹³ The reason? The IRC described it this way:

“Colorado no-fault laws required insurers to cover virtually any type of medical treatment, creating an opportunity for abuse of the system and contributing to the jump in medical losses.”⁹⁴

It is instructive to look at just a couple of changes in claimant behavior between 1997 and 2002. In 1997, 7 percent of Colorado claimants used alternative treatment professionals, such as acupuncturists and massage therapists. By 2002, the percentage had jumped to 18 percent and even included bills for hot tubs and fish tanks for vision therapy.⁹⁵ In addition, the average total charge per claimant for alternative professionals rose by 69 percent increase.⁹⁶ There were also dramatic jumps in usage and average charges for chiropractors. Between 1997 and 2002, the number of claimants visiting chiropractors jumped from 27 percent to 34 percent and the average total charge per claimant went from \$2,085 to \$4,804, an increase of 130 percent.⁹⁷ The effect on payments to PIP claimants was huge: the increase in average total payment rose from \$4,614 in 1997 to \$10,118 in 2002, an increase of 119 percent.⁹⁸

The Colorado Legislature, faced with a sunset of its no-fault law in 2003, considered two reform alternatives. One option would have given Colorado motorists a choice between its then-present no-fault system and a system with a threshold that would have permitted lawsuits only for uncompensated economic loss. The JEC had estimated the average personal injury savings for those who chose the new option at 51 percent.⁹⁹ However, the savings would likely have been less because the JEC estimate was based on 1997 IRC data, before the huge increases in PIP costs. Using the 2002 IRC data, the savings from the reduction in BI premium would likely have been closer to 28 percent,¹⁰⁰ with additional savings on the PIP side because motorists could no longer breach the threshold by increasing their economic losses.

The legislature also considered a second reform option that, among other things,

would have reduced PIP coverage to \$25,000, instituted a verbal threshold and eliminated treatment of chiropractic and non-traditional medical treatments. The estimated savings for the total package was 47 percent to 60 percent of the personal injury premium.¹⁰¹

Colorado did not adopt either of the reform proposals and, instead, on July 1, 2003, returned to the tort system. What has been the experience since then? A 2005 survey of premiums found savings on the personal injury coverages ranging from 17.3 percent to 27.5 percent, depending on the city, between June 2003 and July 2005.¹⁰²

Discussions with state officials indicate that there was considerable initial consumer confusion about the changeover, much of which was no doubt caused by the fact that the changeover to tort took place in only six weeks. Consumers struggled to understand the new coverage and to decide whether to buy such optional coverages as MedPay.

Since 2003, the number of consumer complaints filed with the Insurance Department has declined. This is not surprising as premiums have declined and cost is always a major source of consumer complaints.

Meanwhile, the legislature has examined the implications of the return to tort on other parts of the health system. In 2005, the General Assembly established an Interim Committee on Auto Insurance that, among other things, looked at the impact of the change on trauma care and other emergency care facilities, as well as on the transfer of some auto insurance costs to the health insurance system. Subsequently, members introduced bills to require first party coverage for emergency care and mandatory offers of other first party benefits similar to PIP benefits. None of these bills passed.

But the legislature was asking the right questions. The return to tort has lowered costs but it has also recreated the problems discussed earlier with respect to compensation. Had Colorado adopted either of the no-fault reform proposals, consumers likely would have experienced greater reductions in premiums than they

Colorado no-fault laws required insurers to cover virtually any type of medical treatment, creating an opportunity for abuse of the system and contributing to the jump in medical losses.

One thing is clear in the no-fault states that have experienced or are experiencing dramatic increases in PIP costs—the primary source is the growth in medical costs.

have had with the return to the tort system and have maintained the significantly better compensation system that no-fault provides.

Minnesota: Reform or Repeal?

Minnesota is also debating reform versus repeal of its no-fault law. While space constraints do not permit more than a cursory analysis of the situation, it is worth noting that even though the average pure premium for both PIP and BI decreased between 1996 and 2005,¹⁰³ the average PIP loss rose by 27.2 percent and the average BI loss rose by 13.9 percent during this same period,¹⁰⁴ largely because of the law’s weak threshold and disproportionately generous PIP benefits. As a result, the average Minnesotan pays among the highest auto insurance premiums in the Upper Midwest. The chart below shows average premiums and national rank for Minnesota and four neighboring states based on data from 2003:

State	Average Premium	National Rank*
Minnesota	\$836.12	18 th
South Dakota	\$563.18	50 th
North Dakota	\$536.30	51 st
Wisconsin	\$620.15	44 th
Iowa	\$580.15	49 th

Source: Insurance Information Institute, *The I.I.I. Fact Book 2006* (New York, NY, 2006), pp. 43-44. Minnesota and North Dakota are both no-fault states. The others are traditional tort states.

Recent studies show how changes to the existing law could significantly reduce premiums for Minnesota motorists. The JEC estimates that moving to a threshold that permits only lawsuits for uncompensated economic loss would save the average motorist 69 percent, or \$240, per year.¹⁰⁵ Further, a recent actuarial study estimates that if the state switched to a verbal threshold, the premium savings for the average policyholder on the state mandated liability coverages (personal injury and property damage coverages combined) would be 6.8 percent. If a verbal threshold were coupled with a reduction

in PIP benefits from \$40,000 to \$20,000, a medical fee schedule and other cost containment provisions, the savings would be 23.3 percent.¹⁰⁶ By contrast, the study estimates a cost savings of 7.8 percent if the state repealed law and motorists purchased \$2,500 in MedPay.¹⁰⁷ It should be noted that repeal would also substantially reduce compensation for injured Minnesota motorists.

Summary

One thing is clear in the no-fault states that have experienced or are experiencing dramatic increases in PIP costs—the primary source is the growth in medical costs. As the IRC data demonstrate:

The growth in medical losses appears to be caused by shifts towards more expensive treatment alternatives and by increases in the charges for services provided. One theory [for the increases] is that some participants in the medical care system, with their revenues under pressure from cost-controlling measures from governmental and private health insurance plans, are depending on one of the few remaining sources of unmanaged care – auto injury insurance – to fortify their balance sheets.¹⁰⁹

New York has taken effective steps to address the problems while Florida and Minnesota are debating between reform and repeal, although PIP pure premiums has increased only 2 percent in Florida over the past three years and has actually declined by 11 percent in Minnesota during the same time period. Colorado, on the other hand, chose to repeal its no-fault law.

As no-fault states continue to consider how to address difficulties on both the PIP and BI sides of their systems, it is important to keep in mind the IRC’s admonition about reform versus repeal:

It is difficult to draw incontrovertible conclusions about the effectiveness of tort versus no-fault in controlling auto insurance costs based solely on these [trend] data. One reason is that some no-fault states have relatively low tort thresholds. The claim environment of such states may resemble *de facto* tort states and allow frequent BI claims to enter the auto insurance system.”¹¹⁰

One needs to be careful not to use simple state-to-state comparisons of auto injury loss costs to assess which system would be less costly in a particular state because factors other than state insurance laws and benefit levels influence loss costs. Some of the key ones are the inclusion of large urban centers, more traffic congestion, higher accident rates and higher costs of living.¹¹¹

With these admonitions in mind, it is noteworthy that the IRC trends study found that, “Regions with the highest auto injury loss costs in 2001 included states with relatively large concentrations of urban population. These states were also geographically concentrated on the east coast.”¹¹² The top 10 highest auto injury loss jurisdictions included the no-fault states of New Jersey, New York, Florida and Colorado, the tort states of Rhode Island, Connecticut, Alaska and Louisiana, the add-on state of Delaware and the District of Columbia (not in that order), which permits one to choose tort or no-fault *after* the accident occurs. Most of the lowest cost states were in the Midwest, with the two lowest being North Dakota and Kansas, both no-fault states. What they have in common is relatively low urban population percentages.¹¹³

After noting a similar correlation between population density and the cost of auto insurance, a Florida Senate report reached a conclusion about reform in Florida that would also apply to all legislative reforms in high density states:

Though certain legislative changes in Florida’s auto insurance laws would have an effect on premium cost, the correlation between population density and auto-premium cost is unlikely to be eliminated regardless of whether Florida utilizes a no-fault or tort system.¹¹⁴

In sum, the major cost drivers in no-fault states are increasing medical costs, fraud and buildup of medical claims and weak tort thresholds. The problems are connected. While fraud and buildup is driven in part by weak cost controls in the PIP system, the major reason for fraud and buildup is to take advantage of the pain and suffering payments that are available if one can run up enough medical costs to cross the threshold.

Changing the Auto Insurance Reform Paradigm: State Auto Insurance Laws Vary and So Should Reforms to Lower Premiums

Since 1965, auto insurance reform efforts, at both the state and federal levels, have primarily taken the form of replacing the tort system with no-fault insurance. In more recent years, two states – Pennsylvania and New Jersey – amended their no-fault laws to provide motorists with a choice between tort add-on and no-fault. There was also a failed federal effort to give motorists a choice to decide whether to buy tort-based auto insurance or a no-fault system with modest benefits and the right to sue for uncompensated economic loss only, with individual states having the right to reject application of the federal law.

During the same time, while changes in tort law and insurance coverage significantly increased the cost of BI insurance, there have been few efforts to reduce costs in the 36 tort and two tort add-on states.

This section of the paper attempts to take the lessons learned from experience in both tort and no-fault states and to suggest some options for reform of state laws that

While fraud and buildup is driven in part by weak cost controls in the PIP system, the major reason for fraud and buildup is to take advantage of the pain and suffering payments that are available if one can run up enough medical costs to cross the threshold.

A review of state tort laws indicates that the last 30 years have seen changes in the legal and insurance systems that have increased costs and thus premiums. There has been little or no effort to enact tort reforms that would reduce costs.

would increase the efficiency of the system, reduce fraud and waste and lower premiums for consumers and, in some cases, improve consumer choice and victim compensation and reduce court congestion. These reforms could produce a win-win situation for consumers and insurers.

After suggesting tort system reforms, the paper then offers reforms to the no-fault laws. Finally, the paper discusses the potential benefits of permitting consumers to choose between the tort and liability insurance system and an effective, balanced no-fault system.

A. Tort System Reforms

A review of state tort laws indicates that the last 30 years have seen changes in the legal and insurance systems that have increased costs and thus premiums. There has been little or no effort to enact tort reforms that would reduce costs. In addition, fraud and buildup in medical costs continues in response to the incentive of pain and suffering damages. The cost of dishonest claims practices, which is greater than the cost of similar practices in no-fault states, runs into the billions of dollars annually and so reforms that reduce these incentives could result in significantly lower premiums for motorists.

What follows is a brief description of reform options.

1. *Repeal of the collateral source doctrine.* Tort law does not permit defendants to deduct from a judgment the amount that the injured person has received or is entitled to receive from other sources, such as health insurance and workers' compensation. The rationale is that the defendant should not be the beneficiary of the plaintiff's foresight and cost in purchasing such coverage. The collateral source is entitled to recover any amount paid to the plaintiff that is duplicated by the plaintiff's tort recovery. However,

in practice, collateral sources often do not spend the time and resources to track tort claims, which can take years to resolve.

The downside of the collateral source doctrine is that it creates an incentive for motorists to build up their medical costs. If successful in their tort claim, they can not only recover pain and suffering damages but also receive double recovery for their medical expenses—once from the health insurer and once from the tort claim—when the health insurer fails to pursue its right to recover what it paid its insured from the insured's recovery as a plaintiff in a lawsuit.

If the collateral source doctrine is repealed, the injured person would be made whole for her/his economic loss (from health insurance and/or the tort settlement) but elimination of duplicative recovery would mean lower auto insurance costs. It would also lower health insurance costs by eliminating one of the incentives for plaintiffs to run up unnecessary medical bills. How large might the savings be? The answer on the auto insurance side is suggested by the IRC finding that five percent of suspicious BI claims and 10 percent of suspicious UIM claims appear to involve buildup to take advantage of multiple benefit sources.¹¹⁵

2. *Modify the collateral source doctrine to permit collateral sources to recover directly.* Alternatively, one could couple repeal of the doctrine with a direct right of subrogation (assuming the rights of the injured person) by the collateral source against the defendant. Such an approach would preserve the original

goal of the doctrine but lower auto and health insurance costs by eliminating the plaintiff's incentive to run up medical bills. Subrogation would also reduce costs because it is less costly than litigation because insurers typically handle such claims between themselves and rarely wind up in court.

3. *Requiring a higher standard of misconduct for recovery of noneconomic damages: Permit plaintiffs to recover economic damages plus a reasonable attorney's fee where they can establish negligence only. Permit plaintiffs to recover noneconomic damages also when they can prove that the defendant was grossly negligent.* As has been discussed previously, pain and suffering payments provide huge incentives to run up unnecessary medical bills. Paying noneconomic damages also seems particularly inapt with respect to auto accidents because they rarely involve any intention to inflict damage.

To the contrary, most motorists have every incentive to drive safely because reckless driving can result in serious bodily injury or death *to oneself*. This incentive is far stronger than the incentive provided by the fact that the motorist's premium may go up if s/he is found to be legally at fault in an accident, the real world penalty for reckless driving. Not surprisingly, most studies show that factors outside the control of the driver – such as inexperience or environmental conditions – are responsible for causing accidents.

By assuring a person injured by someone else's legal

“negligence” recovery of economic damages *plus* a reasonable attorney's fee, this proposal would make the injured person economically whole.

To make sure that truly bad actors – such as drunk drivers, those who seek to intentionally injure another and those who wantonly or recklessly ignore the rules of the road – are held for their behavior, the reform would retain suits for pain and suffering in situations where the plaintiff can establish that the defendant's conduct was grossly negligent.

The proposal would reduce premiums significantly because it would eliminate most pain and suffering damages and because the incentive to pad bills would disappear in most cases.

4. *“No pay/no play”*: Penalize uninsured motorists for their unlawful behavior by prohibiting them from suing for noneconomic damages. Despite the fact that many states impose significant penalties on unlawfully uninsured motorists, approximately 14 to 15 percent of motorists drive uninsured.¹¹⁶ Yet when they are involved in an accident, in almost all states, they are legally entitled to recover damages from an at-fault motorist. Not only do most people find that result inequitable, it is also unfair that insured motorists pay higher costs for those who drive uninsured because insureds have to purchase UM coverage to cover their own losses when they are hit by an uninsured motorist.

Five states – Alaska, California, Michigan, New Jersey and Louisiana – have adopted no pay/no play laws. They provide an incentive for the uninsured to purchase insurance without

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Early offers would reduce system costs significantly. The injured party would have no, or at least a significantly diminished, incentive to run up unnecessary economic costs. Most noneconomic costs would be eliminated. And both defendants and plaintiffs would have far less need for attorneys.

leaving them destitute in the event of an accident caused by the fault of another driver (because such an uninsured could still recover for economic loss). It would send the proper signal about the responsibilities of driving and could also reduce premiums. For example, RAND estimated that the adoption of a no pay/no play law in Texas would have reduced the average Texas driver's auto insurance premiums by 3 percent.¹¹⁷

5. *Early offers: Authorize the insurer of an at-fault driver to make a timely offer to pay the injured person her/his net economic loss plus a reasonable attorney's fee. If the injured motorist turns down the offer, s/he could recover in a lawsuit only by proving, beyond a reasonable doubt, that the defendant was grossly negligent.*

This reform would benefit the injured person in many ways. A statutory early offer would guarantee prompt payment – in a few months rather than the years it often takes in the tort system – for economic loss not covered by other sources. It would eliminate the uncertainty as to recovery (some recover and some don't) and the amount, which would be standardized (but now varies widely based on such factors as the particular judge, jury, plaintiff, defendant and locale within a state). It would also limit the need and cost of attorneys' fees for both plaintiffs and defendants and save even more money by eliminating noneconomic damages (which are largely associated with minor injuries in the tort system).

The proposal would preserve the plaintiff's ability to sue for

economic and noneconomic damages if the plaintiff believed that the defendant's conduct was more than "accidental" and the plaintiff was willing to take the risk and spend the time needed to maintain a lawsuit. However, to encourage people to accept the benefits of early offers in most cases, the injured party could recover in a suit only if s/he met higher standards of proof (beyond a reasonable doubt) and conduct (gross negligence) than are required today.

Early offers would reduce system costs significantly. The injured party would have no, or at least a significantly diminished, incentive to run up unnecessary economic costs. Most noneconomic costs would be eliminated. And both defendants and plaintiffs would have far less need for attorneys and their fees.

For a detailed description of an early offer proposal and the rationale behind it, see the Committee for Economic Development report entitled *Breaking the Litigation Habit: Economic Incentives for Legal Reform* (2000).

6. *Choice to opt out of pain and suffering: A motorist would have the option to elect not to sue for pain and suffering in the event of an accident. In turn, the motorist would be immune from suits for pain and suffering. The consumer payback from opting out of the pain and suffering lottery would be dramatically lower premiums.*

Today, only Pennsylvania, New Jersey and Kentucky offer consumers a choice between auto insurance coverages. They permit a choice between no-fault and tort add-on systems, not between two

tort choices, as in this proposal.

Tort and liability insurance in the 36 tort and two tort add-on states that utilize the tort system is a standardized product that permits motorists few options in terms of BI coverage. Most of those options relate to the level of protection against being found at fault, i.e. whether to buy the basic coverage (most typically, 25/50), or higher limits to protect one's assets.

This choice approach would bring competition to auto insurance in the form of an election as to whether to retain a right to sue for pain and suffering or not. The savings for those electing the economic loss-only option would come primarily from the elimination of payments for pain and suffering and attorneys' fees associated with such suits. This option would also reduce the incentive for people to run up unnecessary medical bills because they would not be rewarded with pain and suffering damages. Lower medical bills would, in turn, add to premium savings.

Everyone who elected this option would see lower premiums. It might be particularly attractive to people with good health and disability coverage who already have economic loss protection and wouldn't have to pay for duplicative coverage. It would likely also be attractive to low-income people who might prefer to spend their limited resources on more essential items. For example, a study of people living at half the poverty level in a county around Phoenix, AZ, shows just how costly tort

and liability insurance is for low-income people. The study found that they spent 31.6 percent of their income on auto insurance, with many putting off buying basic necessities such as food, health services and housing costs in order to pay their auto insurance premiums.¹¹⁸

The most difficult intellectual problem in a choice system is how to connect insurance coverages equitably when motorists involved in an accident have chosen different coverages. This problem was solved by Professor Jeffrey O'Connell and Robert H. Joost in the context of a tort versus no-fault choice back in 1986¹¹⁹ and its solution would work equally well in the context of a tort-versus-tort choice.

The two systems would be linked through an expanded UM coverage to assure recovery for a driver who is not at fault and has chosen to stay in the pain and suffering tort system. When accidents involve only people who stay in the full tort system, nothing would change from how they are handled today. When accidents involve only people who have elected to opt out of the pain and suffering system, they could sue each other on a fault basis for uncompensated economic loss and a reasonable attorney's fee only under the state's tort rules. The problem that O'Connell and Joost solved was how to assure each party of their choice in inter-system accidents – between people who elect different insurance options – without distorting the costs of the underlying insurance systems.

Here is how it would work in an economic tort versus full tort context: The person who has

The most difficult intellectual problem in a choice system is how to connect insurance coverages equitably when motorists involved in an accident have chosen different coverages.

Those who opt out of the pain and suffering system could anticipate dramatic savings on their BI liability coverage.

elected to opt out of the pain and suffering system (the “economic loss” driver) would give up the right to sue an at-fault “full tort” driver for pain and suffering and, in return, would be immune from being sued for pain and suffering if s/he were at fault in an inter-system accident. To assure the full tort driver her/his expectations, the full tort driver who is not at fault in an accident with an economic loss driver could recover only uncompensated economic loss and a reasonable attorney’s fee from the at-fault driver. However, the full tort driver could file a claim against her/his UM coverage for pain and suffering, just as s/he does today when the other driver is uninsured.

RAND, in the context of a tort/no-fault choice bill, determined that this device would enable both drivers to get what they bargained for without either being disadvantaged economically. The reason why is simple. While the full tort driver would pay *more* for the expanded UM coverage, s/he would pay *less* for BI coverage because the full tort driver would not be responsible for paying the economic loss driver damages for pain and suffering when s/he was at fault in an accident. The full tort driver would get what s/he wanted, the right to recover pain and suffering when the other driver was at-fault. The only difference would be that the full tort driver would recover from her/his UM coverage instead of the other driver’s BI coverage. RAND found that, in a tort/no-fault choice system, the tort driver’s premiums would actually be slightly less than under

today’s tort system.¹²⁰ On the other hand, the economic loss driver would also get exactly what s/he bargained for, a system without pain and suffering damages and substantially lower premiums.¹²¹

In sum, those who opt out of the pain and suffering system could anticipate dramatic savings on their BI liability coverage, probably on the same order of magnitude estimated by the JEC for a no-fault system without noneconomic damages – 56 percent on personal injury coverages¹²² – while those who remain in the full tort system would pay the same or a little less than they do today.

Letting people vote with their pocket books is a quintessentially American value. The societal interest in compensation would be protected by permitting people in the economic loss-only system to recover damages that would make them economically whole. The tort system’s interest in deterrence would continue to be effectuated through the insurance system just as it is today, with increased premiums for bad driving under both choices.

All of these reforms would reduce fraud and abuse in the tort system and lower costs for insurers and thus result in lower premiums for consumers. Some of them would also provide greater predictability of outcome and timeliness of payment.

B. No-Fault System Reforms

Because there are no “pure” state no-fault laws, laws that permit no lawsuits, “no-fault” is somewhat of a misnomer. All state no-fault laws contain two forms of bodily injury coverage. The first, PIP or no-fault, is really an accident and health policy that compensates one without regard to fault for medical and work loss costs. The second, BI liability, is a tort coverage for accidents that breach

the threshold. The rules for such suits are determined by the tort law of the specific state.

While most of the proponents of the early state no-fault laws and their subsequent reforms did not advocate for pure no-fault, they did support the basic trade-off of cost-effective no-fault laws: a tight enough restriction on lawsuits to pay for the cost of the PIP benefits. When this balance is lost, premiums are higher than they need to be. The weakness of most no-fault laws is apparent in the fact that the BI portion of the premium is *more* expensive than the PIP portion. The good news is that this problem is easily fixable, with enough political will, by tightening weak thresholds.

Reforms that approach pure no-fault contain enormous potential to reduce costs without sacrificing the promise of no-fault to provide timely economic loss benefits to all injured people. One can get some sense of what weak thresholds are costing consumers by examining the estimates of potential savings by the JEC for a law that would limit lawsuits to uncompensated economic loss only. For all states, tort and no-fault, the JEC estimates that savings on the bodily injury portion of the premium – BI, UM/UIM and PIP or MedPay – would average 56 percent or a potential annual national total of \$47.7 billion. The savings in no-fault states would be substantial. For example, the average premium savings in North Dakota, which presently has the nation's lowest premiums, would be 69 percent or \$133. In New York, which has the highest premiums, the average driver would save 61 percent or \$409.¹²³

The reform proposals in this section are split into two categories. The first are ones that would tighten the thresholds to reduce lawsuits. The second are ones that would address the PIP fraud that has resulted in higher premiums in some no-fault states in recent years. The proposals are not exclusive and, used in combination, would reduce costs more than if adopted alone. Also, they are connected in that tighter thresholds not only reduce BI costs, they also reduce PIP

costs as people stop running up medical bills in order to breach weak thresholds.

Threshold Reforms

1. *“Pure” no-fault: Replace weak state thresholds with thresholds that permit lawsuits for uncompensated economic loss only and not for pain and suffering.* This proposal, based on the savings estimates of the JEC, would go further, but not all the way, towards pure no-fault than any state law has gone. It is designed to reduce the cost of unnecessary lawsuits and the PIP fraud associated with running up unnecessary medical bills to breach the threshold. Removing the pain and suffering incentives of the tort system would eliminate the major reason the IRC found why people inflate their medical bills in no-fault states.

To see how effective this reform would be in states that are either considering reforms to their no-fault laws or whose no-fault laws have been the subject of multiple reform efforts through the years, one need only look at the JEC estimates of the impact of this reform on the average personal injury savings (PIP and BI liability coverages combined, but not the property damage coverages—collision, comprehensive PD—which would be unaffected by the change). The JEC estimates savings of 61 percent in Florida, 69 percent in Massachusetts, 61 percent in Michigan, 69 percent in Minnesota, 62 percent in New Jersey, 61 percent in New York and 52 percent in Pennsylvania.¹²⁴ Had the State of Colorado adopted this threshold instead of repealing its no-fault law, the JEC estimates it would have reduced the cost of the average personal injury premium by 51 percent, a savings

Replace weak state thresholds with thresholds that permit lawsuits for uncompensated economic loss only and not for pain and suffering.

Trial attorneys have sometimes succeeded in undermining thresholds through litigation. For example, in 2005 attorneys won a case in the Supreme Court of New Jersey that weakened previous court interpretations of the threshold.

far higher than that found in a 2005 insurer survey of premiums in different parts of the states¹²⁵ – and motorists would have still had \$130,000 in guaranteed PIP benefits in the case of a very serious injury.

For people who value pain and suffering coverage, they could purchase it on a PIP basis. Such coverage for a defined list of serious injuries would be less expensive than tort BI coverage and more valuable to the injured person because it would assure compensation, regardless of fault. Also, the dramatic reduction in cost from adopting this pure no-fault system would enable motorists to increase their PIP coverage for economic loss if they wished.

2. *Verbal thresholds: Replace weak thresholds with verbal thresholds that limit lawsuits for noneconomic damages to cases of “death, significant permanent injury, serious permanent disfigurement, or more than 6 months of complete inability of the injured person to work in an occupation,” as proposed in the model state law in 1972.* It makes little sense for a state to utilize a dollar threshold. As pointed out previously, they are unfair to people in low-cost areas of a state, erode with inflation over time and too often become targets instead of true thresholds, resulting in higher PIP costs than necessary as unscrupulous people run up unnecessary medical bills so that a lawsuit can be filed. They work adequately to keep costs down in states that are not urban and have a limited amount of PIP benefits, such as North Dakota, a no-fault state with

the nation’s lowest premiums. While there is thus little push to change North Dakota’s law, its citizens would experience even lower premiums with a verbal threshold.

Florida, New Jersey, New York and Pennsylvania all have verbal thresholds that could be tightened to the benefit of their insurance consumers. All of these laws were weakened – and thus made more expensive – for the benefit of trial lawyers, not for the benefit of policyholders. As described earlier, it was the failure of any of them to couple “serious” or “significant” with “permanent” that is the fatal flaw in all of them. Lawsuits seeped through such intended cracks as “permanent” where an injured person, for example, could in the extreme sue for a minor percentage permanent loss of use of a pinkie. The result has been that in all of these states, the cost of BI remains well above the cost of PIP, an absurdity for a no-fault state.

In addition to putting “poison pills” into legislation to weaken thresholds, trial attorneys have sometimes succeeded in undermining thresholds through litigation. For example, in 2005 attorneys won a case in the Supreme Court of New Jersey that weakened previous court interpretations of the threshold. The Court had previously interpreted the prior threshold law that enumerated statutory categories that qualified for pain and suffering suits also to require a showing that the injury caused a “serious life impact.” In effect, the Court added “serious” to the statutory “permanent” requirements.

In 1998, the New Jersey

Legislature enacted a new law that was designed to reduce insurance premiums by, among other things, overhauling the existing threshold. Despite the expressed goal of the new law, in *DiProspero v. Penn et al.*, 183 N.J. 477; 874 A. 2d 1039; 2005 N.J. LEXIS 604 (Sup. Ct of N.J., June 14, 2005), the Supreme Court of New Jersey decided that the Legislature did not intend to carry forward the judicially-added serious life impact standard, basing its decision primarily on the fact that the Legislature did not incorporate this specific language into the new statute. The result in the case was to permit the plaintiff to pursue a pain and suffering claim in a case of back and neck pain.

Regardless of the accuracy of the Court's interpretation of the intent of the Legislature, the result will be more successful lawsuits, including many for injuries that while permanent, are not serious, and higher premiums. Of course, the Legislature could have avoided the problem entirely had it adopted the model state law provision requiring a showing that an injury is both "permanent" and "significant." The Court's decision leaves in doubt whether the threshold will be strong enough to keep premiums in line, given the substantial PIP benefits in the law.

While premium increases for PIP coverage in Florida, New Jersey, New York and Pennsylvania over the last decade are not out of line with medical inflation, all of these states have experienced significant PIP

fraud and buildup. Most of it has been by people with non-serious injuries and much of it has been designed to enable people to breach the threshold. Replacing these weak thresholds with strong verbal ones would lower both BI costs, because there would be fewer lawsuits, and PIP costs, because more visits to the doctor would not improve the chances of being able to maintain a claim for pain and suffering. Moreover, the recommended verbal threshold would not deny truly seriously injured people of the opportunity to sue for pain and suffering. As with the pure no-fault threshold, with lower premiums, motorists could afford to purchase higher levels of PIP benefits to protect against serious injuries.

It would also make sense to have a judge decide whether a particular injury fits into one of these categories as a matter of law rather than make it a question of fact for a jury.

How much would the savings be? While no actuarial estimate has been done for all the states, the savings would likely be substantial.

- Pain and suffering schedule: Establish a fixed dollar amount for death and defined cases of very serious injuries.* Legislators could identify precisely which injuries they believe warrant suits for noneconomic damages and then establish a fixed schedule of damages for everyone who has an injury that fits into a particular category. The schedule could replace the threshold and set the amount of damages for all people with such injuries who can establish the fault of a driver. Alternatively, a state could make the noneconomic benefits available

The recommended verbal threshold would not deny truly seriously injured people of the opportunity to sue for pain and suffering.

The first principle of PIP reform should be to make the PIP system look more like other health care insurance systems.

to persons with such injuries on a no-fault basis through the PIP system.

Many workers' compensation statutes contain such schedules, often tied to a formula based on the nature of the injury multiplied by the injured worker's weekly wage. Because it is hard to argue that similarly injured people experience different amounts of pain and suffering, at least not based on one's income, should a state choose to adopt this approach, it should seriously consider establishing specific amounts for all people in each category of injury. This was the approach taken by Ken Feinberg, the Special Master of the Federal September 11th Victim Compensation Fund of 2001.

4. *Choice: Give motorists a choice between the existing no-fault law and a no-fault law with a threshold that permits lawsuits for uncompensated economic loss only and not for pain and suffering.* This approach would work similarly to the tort-versus-tort choice discussed in the tort options section. The potential savings are enormous, as cited in option 1 above.

Reforms to Reduce PIP Fraud

The first principle of PIP reform should be to make the PIP system look more like other health care insurance systems. There appears to have been relatively little PIP fraud and buildup for the better part of 25 years after the first no-fault law went into effect in Massachusetts in 1971. PIP fraud and buildup became a significant problem in several no-fault states starting generally in the mid to late 1990s. While IRC data and studies suggest that much of the fraud and buildup is associated with efforts to breach state thresholds, a problem that can be solved largely by tightening the thresholds, a substantial portion of it appears to be a result of the fact that, for the most part,

state PIP systems remain outside of the mainstream of cost control developments in health care. Some doctors seem to view the PIP system as a way to compensate themselves for perceived shortfalls in revenue from the cost controls of Medicare, Medicaid, workers' compensation and private health insurance. Because it rarely has an impact on the injured person who, in some cases, never even sees the bills, auto accident victims have little or no incentive to monitor and control their medical bills.

What follows are a few suggestions to alleviate the fraud and create a fairer PIP payments system for insurers and providers, to the ultimate benefit of injured persons and policyholders:

1. *Make private health insurance "primary" to auto insurance, i.e., have health insurance pay the medical bills of injured persons before PIP dollars are expended.* In most no-fault states today, an injured motorist recovers from her/his PIP insurer and only recovers from private health insurance if s/he exhausts the PIP benefits. While there is a good intellectual rationale for this approach, tied to the principle of internalizing costs within the system that causes them, the fraud and buildup that have resulted now overwhelm the rationale for the original approach. One way to rein in this free-wheeling PIP medical system would be to require those injured in auto accidents to exhaust their private health benefits first. Thus, people would look to their private health insurance system – with its deductibles, copayments and often managed care – for recovery, regardless of the source of their injury or illness.

This system would result in higher costs for private health insurance but such costs would be more than offset by lower costs for auto insurance. The reduction would

be greater because benefits would be paid out in the first instance through a system that contains traditional cost controls that are generally absent from the PIP system today.

2. *Require PIP insureds to utilize their private health insurance first but permit health insurers to recover their costs directly from PIP insurers.* Insureds have made a conscious choice, in most circumstances, to choose to be treated by a particular set of providers under a particular set of rules for health care so this approach would meet their expectations. At the same time, it would bring more controls into the PIP system, eliminating many of the medical claims mills that have cropped up to take advantage of the PIP system's lack of cost controls.

Again, this approach would put the PIP system in line with private health care and its cost controls. Because health insurers would recover their costs associated with an auto accident from the PIP insurer, the cost of auto accidents would remain internalized but the greater controls in the private health insurance system should reduce auto insurance costs and premiums for all policyholders.

3. *Authorize PIP insurers to provide for reasonable deductibles and copayments and utilize managed care and have states adopt medical fee schedules and medical protocols.* This is another way of making the PIP system look more like private health insurance. This approach would permit PIP insurers to utilize devices that health insurers have used for years to control costs. As for fee schedules and medical protocols, several states have taken this approach and, depending on the details of their system, found that

they lower PIP costs.

As always, one must be careful not to set reimbursement levels so low that they discourage good doctors from participating in the program. One must also be careful to establish a fair review board for any complaints. Insurers complained, for example, that the PIP examination panel in Colorado was ineffective at controlling costs because it consistently ruled in favor of claimants. There are many arbitration models that would assure a balanced review panel.

As indicated earlier, chiropractor and physical therapist charges for treatment of PIP claimants have risen dramatically in recent years, as has the total amount charged for such treatments. This is an area that deserves special attention in any medical fee schedules and treatment protocols.

4. *Shorten the time between when an accident occurs and when the insured must report it to the insurer and the time between when an injured person receives medical treatment and when a bill for treatment is submitted to the insurer.* Two ways that unscrupulous people have been able to game the PIP system is by waiting excessively long times before reporting the accident and treatment for injuries. The effect is that insurers have often been left with only 30 days, the required time in most states to pay PIP benefits after submission of a bill, to investigate suspicious claims or risk paying penalties for late payment.

The long reporting times were viewed as a key component of the sudden dramatic rise in loss costs in New York between 1997 and 2002, when PIP pure premium rose 76 percent. In 2002, the New York legislature amended its no-fault law to shorten the time for reporting accidents and submitting bills from

One must also be careful to establish a fair review board for any complaints. Insurers complained, for example, that the PIP examination panel in Colorado was ineffective at controlling costs because it consistently ruled in favor of claimants.

It should be possible to strike a better balance in no-fault states that are experiencing significant PIP fraud, one that would provide strong incentives for timely payment but not increase policyholder costs because insurers pay on false claims rather than risk paying the penalties.

180 and 90 days to 45 and 30 days, respectively. The latest Fast Track data, from the fourth quarter of 2005, finds that New York's PIP pure premium has now dropped *below* what it was in 1997. While the changes in reporting times were not the sole cause of the drop in rates, they are considered to be a major cause of the cost reduction. Modifying other state no-fault laws to adopt these time periods might also help curb fraud and buildup. These time periods appear to give insurers enough time to investigate suspicious claims, without placing an undue burden on insureds.

5. *Require medical providers to give patients a written bill.* It seems like a simple thing but it can help reduce costs by making insureds aware of what services doctors are charging their insurers for and how much. The requirement was part of the 2002 New York reforms.
6. *Strengthen criminal penalties for auto insurance fraud and increase the number of staff assigned to prosecute these cases.* In states where auto insurance fraud is a significant problem, it is important to raise the priority of state prosecutors to reduce such fraud. Tougher penalties and more prosecutions were a key part of the New York no-fault reforms.
7. *Eliminate or limit the payment of attorneys' fees when PIP benefits are paid late.* All no-fault states require the prompt payment of PIP benefits, typically within 30 days of receipt of a bill. To encourage insurers to pay on time, they also provide that, in a successful suit for late PIP benefits, an insurer must pay an interest penalty and a reasonable attorneys' fee. When these laws were enacted in the early to mid-1970s, no-fault proponents

thought such penalties were needed to assure timely payment. In fact, such penalties are out of the mainstream of health insurance and have generated far too many lawsuits in a PIP system that was designed to operate as health insurance does, without lawyers. Most private health insurance plans do not require payment within a specific period of time and they do not have penalties for late payment. That does not mean that insurers are immune to penalties for misconduct. Health insurers who routinely fail to pay in a timely manner may be subject to "bad faith" suits for their actions. It seems as if it would be possible to strike a better balance in no-fault states that are experiencing significant PIP fraud, one that would provide strong incentives for timely payment but not increase policyholder costs because insurers pay on false claims rather than risk paying the penalties.

One way to achieve a better balance might be to eliminate the attorneys' fee portion of the penalty, leaving the interest penalty portion and permit arbitration of late payment claims. One could, alternatively, limit attorneys' fees to no more than the greater of \$1,000 or the amount of the contested bill.

The first option would mimic private health insurance which seems to work well in the vast majority of cases. Arbitration has been tried in some states and is worth considering. The second approach would prevent attorneys from using the system as a cash cow, running up thousands of dollars in fees over a claim of a few hundred dollars. The no-fault system was designed to reduce overhead costs and such behavior is antithetical to the whole purpose of no-fault.

8. *Permit insureds in states with high mandatory levels of PIP benefits to purchase lower amounts.* New Jersey

is one state that permits low-income insureds to buy a lesser level of PIP benefits. To assure consumers adequate compensation, the amount should probably not be lower than an amount equal to the BI coverage in the state.¹²⁶ The savings would be significant. If permitted for all motorists, they could decide the best way to balance compensation and cost to meet the needs of their families.

These are just some options for reducing PIP fraud. The Florida Senate Report contains a number of additional suggestions and S. 2941, the federal Auto Choice Reform Act of 2004, also contains some other options, which are found in sections (5), (7) and (9).

C. Choice between Tort and No-Fault Systems

In a society where competition and choice are the keystones, auto insurance is an anomaly. Only three states – Pennsylvania, New Jersey and Kentucky – permit motorists to choose among different auto insurance system. In all other states, motorists have only one choice, either tort or no-fault.

Could any of these laws serve as a model? Not likely. They all lack a rational mechanism for dealing with accidents involving people from different systems.

The keys to a fair choice system are to give consumers a choice between options they value and to deal with inter-system accidents in a way that gives each party the benefits of the system they choose while assigning the costs of such choice equitably between the systems. Unfortunately, the existing choice states fail on both counts. First, the no-fault option is not a good one, in each case undermined by a weak threshold that leaves too many cases in the tort system. Second, they lack a fair and rational mechanism for assigning costs to the appropriate system.

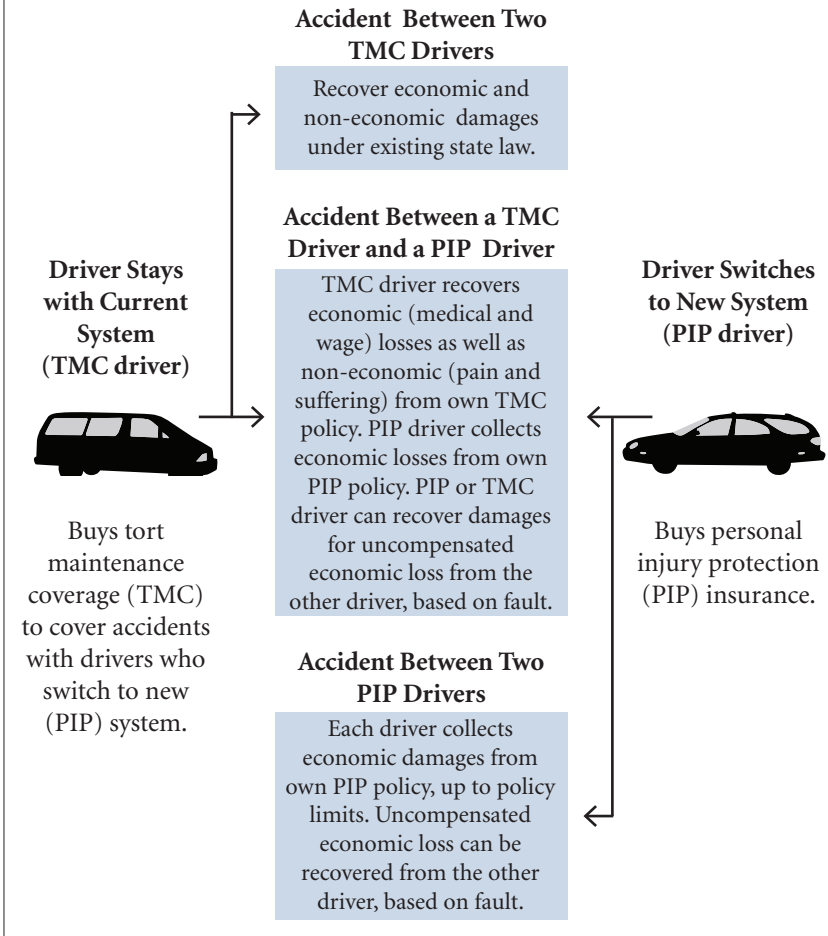
Choice proposal: Adopt state-appropriate versions of the Auto Choice Reform Act. The Auto Choice Reform Act is federal legislation that incorporates the intellectual work of Professor Jeffrey O’Connell, Bob Joost, and Michael Horowitz, the latter of the Hudson Institute. While the Senate and House held several hearings on the legislation in the late 1990s, it failed to attract a critical mass of support and was never considered by either the full Senate or House. One of the major reasons it failed to move, a concern for states’ rights, would not apply to state legislation. The other, opposition from the highly self-interested trial bar, would still be relevant.

The federal bill represents a good starting point for any state – tort or no-fault – interested in giving its citizens a choice in auto insurance. The federal legislation would have given motorists a choice between the existing system in their state and a no-fault option with a strong threshold. A state that already has no-fault might consider, instead, offering a choice between tort and the strengthened no-fault system.

The no-fault choice would be closer to pure no-fault than any state has adopted in that it would permit lawsuits for uncompensated economic loss only. The no-fault option reflects what has been learned about what makes a good no-fault system from 35 years of state experimentation. By eliminating suits for pain and suffering, it would accomplish two important goals: (1) it would include a threshold for suit that cannot be breached by game-playing by injured people, their lawyers and doctors and (2) it would permit insureds to reduce their premiums dramatically, as many of them would like. The estimated savings for people who elect the no-fault choice – 56 percent for personal injury coverages (PIP and BI) on the average or 21 percent on the total premium (which also includes collision, comprehensive and property damage liability) – would be substantial. On a national basis, were all insureds to elect the no-fault option, the JEC estimated that savings in 2003 would have been \$47.7 billion.¹²⁷ Importantly, these numbers are grounded in real world data.

A state that already has no-fault might consider, instead, offering a choice between tort and the strengthened no-fault system.

How Auto Choice Works



The pain and suffering payment, which increases an injured person’s payment by roughly the amount of one’s economic damages, continues to provide incentives for wasteful and even dishonest behavior by injured persons and their doctors and lawyers.

They were derived, in the first instance, from closed claim data developed by the IRC based on 42,000 insurance claims, and then from work by the highly respected RAND Institute for Civil Justice and the U.S. Congressional Joint Economic Committee.

How would choice work? It would work exactly as the full tort versus economic loss-only tort choice described earlier in the tort reforms section. The difference would be that the no-fault option described in the previous paragraph would replace the economic loss-only tort option. Thus, tort electors would use an expanded version of the UM coverage to pay them for their pain and suffering in an accident where the no-fault driver was at fault.¹²⁸ The no-fault elector could sue an at-fault tort driver for uncompensated economic loss only and, in turn, would be immune from lawsuits except for uncompensated economic loss. The tort

driver would also see a slight reduction in premium for two reasons: (1) s/he could not be sued for pain and suffering by a no-fault driver when the tort elector was at fault in an accident and (2) s/he could not be sued by the no-fault driver for any PIP or health insurance benefits the no-fault driver received.

The chart opposite shows the rights of drivers when involved in the four different accident scenarios for drivers under this choice system.

For a copy of the Auto Choice Act of 2001 and a full section-by-section analysis, see the article by Professor O’Connell, Peter Kinzler and Hunter Bates.¹²⁹

Conclusion

The 38 states that rely almost exclusively on the tort and liability insurance system and the 12 states that have some form of no-fault insurance are experiencing significant fraud and buildup in the claims system that are making personal injury costs – and, therefore, premiums – unnecessarily high. Further, because only three states offer consumers any choice between different insurance systems, motorists are denied the benefits that could flow from competition.

Over the past 30 years, changes in law, such as the elimination of the doctrine of contributory negligence, have increased the number of injured persons eligible to recover damages in tort states. Changes on the insurance side, such as the sale of UIM coverage, have increased the amount of damages eligible persons can recover. The combination of these changes has improved compensation for injured people in tort states but has also increased premiums significantly. There has been one constant throughout. The pain and suffering payment, which increases an injured person’s payment by roughly the amount of one’s economic damages, continues to provide incentives for wasteful and even dishonest behavior by injured persons and their doctors and lawyers. Despite aggressive efforts by insurers to rein in such behavior, fraud and buildup continues to occur regularly in the tort

system, more often than in the no-fault systems.

The no-fault laws that were adopted as a means of reforming the tort system have all been successful in providing more timely compensation to all injured persons more in accordance with their economic losses. However, most of them suffer from two major defects. The first, the product of the primary opponents of no-fault, the trial bar, is weak thresholds that permit too much of the tort system to remain to offset the increased costs of providing PIP benefits. The temptation of weak thresholds is the major cause of the buildup of PIP benefits and sometimes even fraud. This problem is abetted by the absence of most of the cost controls that exist in private and governmental health insurance systems.

For the better part of 35 years, the auto insurance reform paradigm has consisted of tort or no-fault, with little or no thought given to reforms of the tort system that would lower premiums or to giving consumers the option to choose from more than one system. There are a variety of reforms that would reduce the incentives of pain and suffering payments that could save consumers a great deal of money. Also, giving consumers the option to opt out of the pain and suffering system would enable tort system consumers to enjoy the benefits of competition, as each family determines the best balance for them between compensation and cost.

Consumers in most no-fault states would benefit from tighter thresholds that would lower premiums directly by limiting lawsuits to more serious injuries and indirectly by reducing the incentives to run up unnecessary PIP costs in order to sue. There are also a variety of PIP reforms that would lower costs by making the PIP system look more like health insurance with its cost controls.

Finally, tort and no-fault states alike should consider permitting consumers to choose between the tort system and a nearly pure no-fault system. Such an approach would dramatically expand auto insurance

choices for consumers and create opportunities for people to tailor coverage to meet their particular needs. Such a choice system would be particularly beneficial to low-income people because the cost of insurance is so high in some places that they cannot afford a car, which may well be their ticket to work and a better life.

Endnotes

¹ Insurance Information Institute, *The I.I.I. Fact Book 2006* (New York, NY, 2006), p.48. Percentage figures based on author's calculations.

² See, e.g., Robert Detlefsen, Ph.D., *The Case for Underwriting Freedom: How Competitive Risk Analysis Promotes Fairness and Efficiency in Property/Casualty Insurance Markets* (Indianapolis, IN: National Association of Mutual Insurance Companies, September 2005).

³ Robert H. Joost, *Automobile Insurance and No-Fault Law 2d* (Deerfield, IL: Clark Boardman Callaghan, 2002), pp. 5-68-69. [hereinafter "Joost"]

⁴ Stephen Carroll et al., *No-Fault Approaches to Compensating People Injured in Automobile Accidents* (Santa Monica, CA: RAND Institute for Civil Justice, 1991), pp. 80-86 [hereinafter "No-Fault Approaches"]; National Association of Independent Insurers, *Automobile Experience* (Des Plaines, IL, 1992).

⁵ Joost, op. cit., pp. 5-68-69. Only Arkansas, with required benefits of \$15,920 and Washington, at \$27,000, are significantly above the \$5,000 level.

⁶ Ibid.

⁷ The 2003 Legislature in Special Session "A" passed legislation providing that, effective October 1, 2007, the Florida no-fault law is repealed, unless it is reenacted by the legislature during the 2006 Regular Session. The legislature did pass a law to reenact the no-fault law in the 2006 regular session, but the governor vetoed it. Despite the law passed in 2003, Florida could still enact a law to continue no-fault after October 1, 2007.

Consumers in most no-fault states would benefit from tighter thresholds that would lower premiums directly by limiting lawsuits to more serious injuries and indirectly by reducing the incentives to run up unnecessary PIP costs in order to sue.

⁸ Columbia University Council for Research in the Social Sciences, *Report by the Committee to Study Compensation for Automobile Accidents* (Philadelphia, PA: Press of International Printing Co., 1932), pp. 216-217.

⁹ *Ibid.*, p. 217.

¹⁰ Boston, MA: Little, Brown and Company, 1965.

¹¹ United States Department of Transportation, *Motor Vehicle Crash Losses and Their Compensation in the United States, A Report to the Congress and the President* (Washington, D.C.: U.S. Government Printing Office, 1971), p. 100. [hereinafter “DOT I”]

¹² *Ibid.*, pp. 101ff.

¹³ Insurance Research Council, *Auto Injury Insurance Claims: Countrywide Patterns in Treatment, Cost, and Compensation* (Malvern, PA: December 2003), p. 112. [hereinafter, “Countrywide Patterns”]

¹⁴ Joint Economic Committee, *Choice in Auto Insurance: Updated Savings Estimates for Auto Choice* (Washington, DC: July 2003), p. 4. [hereinafter “JEC”]

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 12. The JEC estimate assumes that all motorists would elect to purchase insurance that provides for the payment of no-fault benefits and permits lawsuits for economic losses only, to the extent that they are not already compensated by either the no-fault benefits or other sources of compensation for the loss.

¹⁷ Stephen J. Carroll and Allan F. Abrahamese, *The Effects of a Choice Automobile Insurance Plan on Insurance Costs and Compensation: An Updated Analysis* (Santa Monica, CA: RAND Institute for Civil Justice, 1998), p. 11, footnote 9. [hereinafter “Effects of a Choice Plan”]

¹⁸ Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 1996* (Washington, DC: U.S. Department of Justice, September 1999), p. 13. In 1970, when U.S.

courts were far less congested, it took an average of 16 to 18 months on average for an injured person to receive payment. *DOT I*, op. cit., p. 43.

¹⁹ *Countrywide Patterns*, op. cit., p. 91.

²⁰ *No-Fault Approaches*, op. cit., p. 187.

²¹ *Ibid.*

²² The IRC estimated the cost of attorneys’ fees and court costs for represented plaintiffs at 32 percent. *Paying for Auto Injuries: A Consumer Panel Survey of Auto Accident Victims, 2004 Edition* (Malvern, PA; 2004), p. 6.

²³ A seriously injured person can recover pain and suffering if s/he is “lucky” enough to be hit by Bill Gates or a U.S. government vehicle.

²⁴ Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 2001* (Washington, DC: U.S. Department of Justice, April 2004), p.2. [hereinafter “Civil Trial Cases”]

²⁵ David Loughran, *The Effect of No-Fault Automobile Insurance on Driver Behavior and Automobile Accidents in the United States* (Santa Monica, CA: RAND Institute for Civil Justice, 2001).

²⁶ Testimony of Craig Spangenberg, Esq., on behalf of the Association of Trial Lawyers of America, *No-Fault Motor Vehicle Insurance Hearings* (Washington, DC: Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, U.S. House of Representatives, July 23, 1975), p. 692.

²⁷ Insurance Research Council, *Trends in Auto Injury Claims, 2004 Edition* (Malvern, PA, December 2004), p. 49. [hereinafter “Trends in Auto Injury Claims”]

²⁸ U.S. Department of Transportation, *Compensating Auto Accident Victims: A Follow-up Report on No-Fault Auto Insurance Experiences* (Washington, DC: May 1985), pp. 3-4. [hereinafter “DOT II”]

²⁹ Under all no-fault laws and proposals, injured people can always sue for any

economic loss that would not otherwise be compensated.

³⁰ Stephen Carroll, Allan Abrahamese, Mary Vaiana, *The Costs of Excess Medical Claims for Automobile Personal Injuries* (Santa Monica, CA: 1995), p. 15. [hereinafter “*Excess Medical Claims*”] New York amended its no-fault law in 1977 to change from a dollar threshold to a verbal one.

³¹ Ibid.

³² Ibid, p. 16.

³³ Legislation in the U.S. Congress during the 1970s mimicked the UMVARA standard. For example, section 206(a)(5) of S. 354, the National No-Fault Motor Vehicle Insurance Act, in the 93rd Congress (in 1973) authorized suits for pain and suffering in accidents that resulted in “death, serious and permanent disfigurement, or other serious and permanent injury.”

³⁴ Insurance Services Office, Property Casualty Insurers Association of America and the National Independent Statistical Service, *Private Passenger Auto - Fast Track Data* (2006). [hereinafter “*Fast Track Data*”] This figure does not, however, address the concern with rising PIP costs that in recent years have driven total personal injury costs higher. This issue is addressed later in the analysis.

³⁵ Insurance Research Council, *Fraud and Buildup in Auto Injury Insurance: 2004 Edition* (Malvern, PA, December 2004), p. 16 [hereinafter “*Fraud and Buildup*”]

³⁶ *DOT II*, op. cit., p. 95.

³⁷ Ibid.

³⁸ *Fast Track Data*, op. cit.

³⁹ American Bar Association, *Automobile No-Fault Insurance: A Study by The Special Committee on Automobile Insurance Legislation* (Chicago, IL: 1978), pp. 46ff.

⁴⁰ *DOT I*, op. cit., p. 36.

⁴¹ *Effects of a Choice Plan*, op. cit., p 11, footnote 9.

⁴² Estimate of Dale Nelson, then the chief actuary of State Farm.

⁴³ *Countrywide Patterns*, op. cit., p. 4

⁴⁴ *Trends in Auto Injury Claim*, op. cit., pp. 3 - 4.

⁴⁵ Ibid, p. 9.

⁴⁶ Ibid.

⁴⁷ Ibid, p. 19.

⁴⁸ *Fraud and Buildup*, op. cit., p. 16.

⁴⁹ Ibid, p. 17.

⁵⁰ Insurance Research Council, *Analysis of Auto Injury Insurance Claims from Four Tort States: California, Illinois, Texas, Washington* (Malvern: PA, June 2005), pp. 4, 16.

⁵¹ Ibid, p.18.

⁵² Ibid, pp. 20-21.

⁵³ Ibid, p. 22.

⁵⁴ *Countrywide Patterns*, op. cit., p. 119.

⁵⁵ *Fraud and Buildup*, op. cit., pp. 4, 17.

⁵⁶ *Trends in Auto Injury Claims*, op. cit., p. 11.

⁵⁷ *Fraud and Buildup*, op. cit., pp. 77-78.

⁵⁸ *Excess Medical Claims*, op. cit., p. 23

⁵⁹ Ibid.

⁶⁰ *Trends in Auto Injury Claims*, op. cit., p. 12.

⁶¹ Ibid, p. 7.

⁶² In 2003, Massachusetts had 7.26 attorneys per 1,000 population, more than any other state and twice the countywide average of 3.65. The population data is from the U.S. Census Bureau and the data for the number of attorneys is from the American Bar Association (online at www.abanet.org/marketresearch/2004nbrolawyersbystate.pdf). As indicated in the text, urban population density and the nature of the legal system are also key factors in premium costs. Another indicator of an “active” trial bar can be found in the recent study by Lawrence J. McQuillan and Hovannes Abramyan, “U.S. Tort Liability Index: 2006” (San Francisco, CA: Pacific Research Institute,

2006). It ranks the state tort systems, with the “better tort systems [,] meaning they have lower relative monetary tort losses and threats, and have more substantive and procedural tort reforms.” Ibid, p. 8. According to the study, Massachusetts ranks 41st among the states on its U.S. Tort Liability Index, with one representing the “best” state. Ibid, p. 56.

⁶³ Ibid, p. 42.

⁶⁴ Ibid.

⁶⁵ Ibid, p. 45.

⁶⁶ Insurance Research Council, *Analysis of Auto Injury Insurance Claims from Four No-Fault States: Colorado, Florida, Michigan, New York* (Malvern, PA: October 2004), pp 3, 22, 30. [hereinafter “*Four No-Fault States*] Increased charges for chiropractors and physical therapists were significantly higher among PIP claimants than among BI claimants; however, because of such things as medical fee schedules in some states, the increase in PIP payments has been far more modest. *Countrywide Patterns*, op. cit., pp. 5-8.

⁶⁷ *Fraud and Buildup*, op. cit., pp. 60-61.

⁶⁸ Ibid, pp. 86-88.

⁶⁹ Ibid, p. 25

⁷⁰ Ibid, pp. 17-18, 78-79.

⁷¹ Ibid, p. 16.

⁷² *Countrywide Patterns*, op. cit., pp. 8-9.

⁷³ *Four No-Fault States*, op. cit., p. 50.

⁷⁴ *Countrywide Patterns*, op. cit., p. 109.

⁷⁵ *Four No-Fault States*, op. cit., p. 5.

⁷⁶ Ibid, p. 47.

⁷⁷ *Fast Track Data*, op. cit.

⁷⁸ Ibid.

⁷⁹ *Four No-Fault States*, op. cit., p. 16.

⁸⁰ *Fast Track Data*, op. cit.

⁸¹ Insurance Research Council, *Claiming Behavior in New York’s No-Fault Auto Insurance System: An Analysis of Closed PIP Claims* (Malvern, PA: December 2001), p. 5.

⁸² Ibid, p. 6

⁸³ Ibid, p. 7.

⁸⁴ Ibid, p. 11.

⁸⁵ Ibid, p. 10.

⁸⁶ Statement by August D’Aureli, Supervising Investigator of the Insurance Frauds Bureau in the New York State Insurance Department, before the New York Senate Standing Committee on Insurance (February 9, 2004); See *No Fault Fraud in New York State* fn 166 at p. 2; *The 2000 Report to the Governor and the Legislature of the State of New York on the Operations of the Insurance Frauds Prevention Act* (New York Insurance Frauds Bureau: January 115, 2001).

⁸⁷ *Trends in Auto Injury Claims*, op. cit., p. 54.

⁸⁸ Robert Hartwig, *New York PIP Insurance Update: Is New York’s No-Fault Crisis Solved?* (Insurance Information Institute: New York, NY, June 2, 2005).

⁸⁹ The legislation, bill AO8376, was signed into law on August 2, 2005.

⁹⁰ *Fast Track Data*, op. cit.

⁹¹ *DOT II*, op. cit., p. 95

⁹² *Four No-Fault States*, op. cit., p. 13.

⁹³ Ibid, pp. 15-16.

⁹⁴ Ibid, p. 19.

⁹⁵ Ibid, p. 21.

⁹⁶ Ibid, p. 22.

⁹⁷ Ibid.

⁹⁸ Ibid, p. 17.

⁹⁹ JEC, op. cit., p. 31.

¹⁰⁰ *Trends in Auto Injury Claims*, op. cit., pp. 42, 45. The figure would have been somewhat higher because of lower insurer transaction costs.

¹⁰¹ Stephen G. Lehmann, *Colorado No-Fault Automobile Insurance: Actuarial Study* (Bloomington, IL: Miller, Herbers, Lehmann, & Associates, December, 2002), p 14.

¹⁰² Property Casualty Insurers of America and Rocky Mountain Insurance Information Association, *Colorado Automobile Insurance Rate Example Survey* (Greenwood Village, CO: July, 2005). www.rmiia.org/Auto/Colorado_Auto_Insurance_Rates.htm

¹⁰³ *Fast Track Data*, op. cit.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* The lower pure premium figures reflect drops in paid claim frequency during the period.

¹⁰⁶ JEC, p. 12.

¹⁰⁷ Pinnacle Actuarial Resources, Inc., *Minnesota Automobile No Fault Study* (Bloomington, IL: February, 2006), pp. 16-17.

¹⁰⁸ *Ibid.*, p. 25.

¹⁰⁹ *Countrywide Patterns*, op. cit., p. 2.

¹¹⁰ *Trends in Auto Injury Claims*, op. cit., p. 7.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, p. 14.

¹¹³ *Ibid.*, pp. 48-49.

¹¹⁴ Committee on Banking and Insurance, *Florida's Motor Vehicle No-Fault Law* (Tallahassee, Florida: November 2005: Report Number 2006-102, Florida Senate), p. 49.

¹¹⁵ *Fraud and Buildup*, pp. 16-17.

¹¹⁶ *Press Release, Uninsured Motorists* (Insurance Research Council: Malvern, PA: August 12, 1999).

¹¹⁷ Stephen J. Carroll and Allan F. Abrahamese, *The Effects of a No-Pay/No-Play Plan on the Costs of Auto Insurance in Texas* (Santa Monica, CA: RAND Institute for Civil Justice, 1998), p. 1

¹¹⁸ Professor Robert Lee Maril, *The Impact of Mandatory Auto Insurance upon Low Income Residents of Maricopa, Arizona* (Unpublished manuscript: 1993), p. 1.

¹¹⁹ Professor Jeffrey O'Connell and Robert H. Joost, *Giving Motorists a Choice between Fault and No-Fault Insurance*

(Charlottesville, VA: University of Virginia Law School, 1986), 72 Va. L. Rev. 61.

¹²⁰ Stephen J. Carroll and Allan Abrahamese, *The Effects of a Choice Automobile Insurance Plan on Insurance Costs and Compensation: An Analysis Based on 1997 Data* (Santa Monica, CA: RAND Institute for Civil Justice, 1999), p. 23.

¹²¹ *Ibid.*

¹²² JEC, op. cit., p. 12.

¹²³ *Ibid.*, pp. 12-13.

¹²⁴ *Ibid.*

¹²⁵ Property Casualty Insurers Association of America Research Bulletin 05-015, *Colorado Personal Auto Rate Trends form No-Fault to Tort* (August 31, 2005). The survey found average personal injury rate drops of between 17.3 percent and 27.5 percent.

¹²⁶ Peter Kinzler and Professor O'Connell discuss how a person purchasing PIP benefits equal to the state's minimum requirements for BI liability coverage would, in a serious accident, recover on average more than they would if injured in a tort state. Thus, this discussion is also applicable to the question of how much compensation a seriously injured person with the minimum amount of PIP benefits would recover under the no-fault option in a choice system relative to her/his recovery under the tort option. "More for Less under Auto Choice," *The Economics and Politics of Choice No-Fault Insurance* (Norwell, MA: Edward L. Lascher, Jr. and Michael R. Powers, Kluwer Academic Publishers, 2001), Chapter 11.

¹²⁷ JEC, op. cit., p. 12.

¹²⁸ If the no-fault driver's coverage was insufficient to pay the economic losses of the tort system driver, the tort elector could recover any excess economic loss as well as pain and suffering from her/his UM coverage.

¹²⁹ *A Federal Bill, with Commentary, to Allow Choice in Auto Insurance* (Hartford, CT: Connecticut Insurance Law Journal, Volume 7, Number 2, Spring 2001). For other materials on auto choice, see www.autoreform.org.

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