93 HJ: MOTOR VEHICLE INSURANCE

National Conference of Commissioners on Uniform State Laws
1155 East 60th Street, Chicago, Illinois 60637 — (312) 493-0533

Article 3

AUTO INSURANCE PROPOSAL DESIGNED TO ELIMINATE SUITS

By JOHN M. McCABE
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on Uniform State Laws

The "key provision" of a proposal designed to avoid financial disaster for auto accident victims would eliminate nearly all litigation now arising from motor vehicle accidents.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) believes curtailing auto accident law suits would provide dollars to help the victims and their families. More than half of each auto accident bodily injury liability premium dollar now is siphoned off to pay for administration, sales and claim adjustment. Most experts believe most of the remaining premium money goes to overcompensate small claims merely because of their "nuisance value."

NCCUSL drafted its Uniform Motor Vehicle Accident Reparations Act (UMVARA) to eliminate overpayment of small claims. NCCUSL also sought to end the present auto insurance industry practice of fighting large claims regardless of merit. These practices both are encouraged by the present "third-party" system which forces claimants to deal with the insurance company of "the other guy" involved in the accident. This adversary system requires that every case be explored in detail because it has the potential to end up in court.

UMVARA would replace the present third-party, adversary approach with a first-party system which would allow claimants to receive payments from their own insurance company on a "no fault" basis.

The load of the present "fault," or "tort," system of reparations falls most

- more -

heavily on the half million Americans seriously injured in auto accidents each year, and the survivors of the more than 50,000 killed on the nation's streets and highways. But the load also is borne by all citizens through taxes needed to pay for a court system which expends 17 per cent of its resources on the 200,000 auto accident suits filed each year.

Other hidden costs of the present system include: higher premium payments for health insurance because the auto insurance system does not begin to deal with the medical costs of accident victims; taxes to support accident victims who must rely on state support because of accident injuries; high accident rates due in part to refusal to deal with traffic accidents as a problem involving everyone instead of just "bad drivers;" high premiums for low-income drivers who must pay for losses their cars might "cause" to high-priced cars and high-income motorists and pedestrians.

DOT Secretary John A. Volpe told Congress in 1971 his department was "confident that by orienting the reparations system to first-party, no-fault insurance, the major problems which have plagued the states will be eliminated."

The State of New York Insurance Department and the American Insurance Association are among the organizations which have joined DOT in calling for elimination, or drastic curtailment, of the "fault" system of auto accident insurance reparations.

NCCUSL sought to eliminate more than 95 per cent of all suits involving "tort liability" (fault) in auto accidents. UMVARA would abolish legal action in motor vehicle accidents except for:

(1.) Damage to property other than the motor vehicles involved.

(2.) Economic loss, such as work loss, when the total amount exceeds that covered by the victim's insurance which would provide unlimited coverage for

medical expenses and up to $200 a week for lost wages. Even then NCCUSL recommends no suits be allowed for economic loss except in the case of death, or an injury causing the victim to be disabled for more than six months.

(3.) "Non-economic detriment," such as "pain and suffering," but only if the accident caused "death, significant permanent injury, serious permanent disfigurement, or more than six months of complete inability of the injured person to work in an occupation." In these cases, the commissioners recommend that any judicial award automatically be reduced $5,000. This means a jury award of $10,000 for "pain and suffering" would result in only $5,000 for the claimant.

The act would limit the power to sue only in cases involving "ownership, maintenance, or use of a motor vehicle." This would retain a right to sue for defective manufacture, or repair. Accidents involving railroad trains also would remain a source of suits as would commercial parking lot accidents. Suits also could result from cases involving "intentionally caused harm to person or property."

Thus, UMVARA would end nearly all suits for economic losses such as medical expenses, lost wages and out-of-pocket expenses. It also would end nearly all suits for damage to motor vehicles and their contents. The small claim for "pain and suffering" would be eliminated. These actions should result in drastic cuts in administrative and claims adjustment costs as well as overpayment of small claims.

NCCUSL drafted UMVARA to make these savings to provide vastly expanded funds to pay the medical expenses, wage loss and out-of-pocket expenses of all victims of motor vehicle accidents and their survivors. These benefits will be explained in the next article in this series.

- 0 -

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Article 4

AUTO VICTIMS COULD RECOVER ALL ECONOMIC LOSS

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on Uniform State Laws

Auto accident victims would be covered for everything from brain surgery to baby sitting through auto insurance required by the Uniform Motor Vehicle Accident Reparations Act (UMVARA).

UMVARA — drafted and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) — represents the boldest effort yet offered to compensate motor vehicle crash victims for all economic losses. The 250 commissioners who are members of NCCUSL are urging their state legislatures to enact UMVARA which would require all motorists to purchase "basic reparation" insurance to pay for:

* All medical and rehabilitation services for all auto accident victims.

* Up to $200 per week for earnings lost because of an accident. The payments would go to injured breadwinners or to dependents of breadwinners killed in accidents.

* Reimbursement for "ordinary and necessary services" which the accident victim would have provided "not for income but for the benefit of himself or his family." Under the required insurance plan, these benefits — which begin seven days after an accident — plus any lost earnings payments could not exceed a total of $200.

High-income motorists could purchase additional coverage for wage and other losses.

Basic reparation benefits would be payable with no limits on the time period — or the total amount — of the payments. These benefits would extend to

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all members of an insured motorist's household. All benefits would be paid within 30 days after a claim was filed. Overdue benefits would bear 18 per cent interest.

NCCUSL decided UMVARA should not require motorists to maintain insurance for vehicle damage. But auto insurance companies would offer optional coverage for physical damage to vehicles, including collision coverage. Motorists also would have the option of purchasing $100 deductible collision coverage as well as a special coverage applicable only when the other driver was found to be "at fault" in the accident.

All these payments for medical and out-of-pocket expenses and lost earnings as well as payments for damage to the vehicles and their contents would be made by the insurance company of the person involved. For example, if a child was injured while driving in a car owned by a friend's parents, the child still would be covered by his family's policy and not that of the car-owner. If a pedestrian covered by an auto insurance policy were injured, he would be reimbursed by his insurance company and not be forced to seek economic loss damages from the company of the driver of the vehicle involved.

UMVARA provides for a system of payments which would compensate nearly all auto accident victims against economic loss. For example, it would create an assigned risk plan to make basic reparation insurance available to all motorists at nondiscriminatory rates. It would create an assigned claims plan for person injured who have no insurer of their own. This would include "hit and run" pedestrian victims without basic reparations insurance.

NCCUSL members drafted the act to make all accident victims in a state eligible for basic reparation benefits. This includes out-of-state drivers. UMVARA converts the policies of all auto insurers to a basic reparations policy when out-of-state motorists are driving in an UMVARA state. The act also stipu-

lates that if UMVARA-insured motorists drive in another state their basic and optional reparations benefits still apply.

The problem of a "no fault" state driver having an accident in a "fault" state was the prime reason that the compulsory basic reparations package includes liability coverage for $25,000 for bodily injury damages and $10,000 for property damage resulting from an accident.

The human need for unlimited benefits for medical expenses and at least minimum wage loss benefits charted the course followed by NCCUSL in drafting UMVARA to help those Americans involved in 16 million motor vehicle accidents each year. How the philosophy of UMVARA is reflected in provisions devoted to rehabilitation will be discussed in the next article in this series.

- 0 -

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Article 5

ADVERSARY SYSTEM NEGLECTS REHABILITATION

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A professor who once practiced law in a rural area explains how the present adversary system of auto accident reparations works against the the innocent victim:

"The victim is desperate for money. The victim's lawyer wants his fee. The insurance company wants to close the victim's file. The judge wants to clear his docket. The result is a lump sum settlement which can ruin the life of the innocent victim of an auto accident."

That's why the National Conference of Commissioners on Uniform State Laws (NCCUSL) discourages lump sum settlements in the Uniform Motor Vehicle Accident Reparations Act (UMVARA). UMVARA also clearly states that an insurer against auto accident injuries:

"...is responsible for the cost of a procedure or treatment for rehabilitation or a course of rehabilitative occupational training if the procedure, treatment, or training is reasonable and appropriate for the particular case, its cost is reasonable in relation to its probable rehabilitative effects, and it is likely to contribute substantially to rehabilitation, even though it will not enhance the injured person's earning capacity."

UMVARA recognizes that rehabilitation should be the first goal of any reparations system for accidental injury. The present system of deciding auto accident injury reparations on a "fault" basis places a low priority on rehabilitation. In fact, an orthopedic surgeon is quoted in a Department of Transportation

- more -

study:

"I despair to undertake the treatment of any patient who has litigation pending — they simply do not respond to therapy as they should and do not recover as quickly nor as completely as similar patients who do not have such litigation pending."

The surgeon did not comment on how the adversary system discourages rehabilitation by encouraging exaggeration of injuries to obtain a better settlement of the law suit which seems inevitable in serious cases under present auto insurance practices.

John Henle who pointed out that fact in DOT's study of the Rehabilitation of Auto Accident Victims in 1970 also said:

"Not only must fault and degree of disability be agreed to by opposing sides, but a bargain must be struck and dollar value assigned to the damages. Where the claimant has retained legal counsel, the settlement must cover his fees and expenses. The size of the attorney's fee is directly dependent on the size of the settlement, thus heightening the adversary nature of the settlement environment. Thus, considerable time, energy and expense must be devoted to controversy just when rehabilitation measures might most benefit the victim."

To prevent lump sum settlements when they impede rehabilitation, UMVARA prohibits lump sum settlements of more than $2,500 without court approval. The act directs the judge to make his decision solely "in the best interest of the claimant." Drafters of the act said lump sum settlements might be justified in some cases, "for example, by showing that it would contribute to the claimant's rehabilitation, or that the claimant plans to invest the proceeds in a promising small business that allows him to be self-employed."

But the courts also are directed to require protective steps be taken to safeguard proceeds of the settlement and to insure that it is used for the proper purposes.

In the area of installment payments of a settlement, UMVARA allows the courts to modify the amounts to reflect changing circumstances such as "newly-discovered evidence concerning the claimant's physical condition, loss, or rehabilitation..."

But lump sum and installment settlements may be set aside if the court finds an agreement was procured by fraud, or is "unconscionable" — a term used by NCCUSL to mean unfair, or unjust.

The final article in this series will discuss how such provisions would provide many times the value of the present premium dollar in terms of value received.

- 0 -

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Article 6

UMVARA OFFERS INCREASED VALUE FOR PREMIUM DOLLARS

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on Uniform State Laws

On the basis of benefits received for premium dollars expanded, the Uniform Motor Vehicle Accident Reparations Act (UMVARA) would provide many times the value offered by the present "fault" (third-party adversary) approach to auto accident reparations.

At its best, the current system provides only a possibility of recovery, and inadequate recovery at that. Recovery under UMVARA would be swift and sure. Payments for medical expense, wage loss and out-of-pocket expenses would be due each 30 days. Benefits would be paid by an insurance company selected by the claimant. All of these factors would be important to the half-million Americans who are seriously injured each year in auto accidents.

If the victim receives any compensation, he receives it all at once under the "fault' system. UMVARA benefits would be payable for an unlimited time and for unlimited total cost. This could be a priceless provision for a victim and his family whom the present adversary system of auto reparations could drive to poverty. The present system was created to limit the liability of the alleged wrongdoer against the claim of the injured. UMVARA, by contract, provides security and real assurance that economic losses will be paid for as long as necessary.

The current cost of automobile insurance rests largely upon the high cost of administration, adjustment, and litigation. Direct, first party benefits will predictably reduce these costs. The savings should be passed on to the motoring public.

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Additionally, UMVARA provides that all available benefits be considered in compensating the accident victim. For example, medicare payments would be deducted in the calculation of net loss. One who is entitled to medicare payments should then receive the benefit of some premium savings when he insures himself under UMVARA. But UMVARA does more than provide a deduction for payments received through medicare, workmen's compensation, or other governmentally supported program. It provides that coverage may be sold excluding benefits paid from other insurers such as health insurers. Thus, the insurance consumer can avoid the expense of carrying double coverage. There is no reason, for example, why medical coverage under UMVARA could not be provided under a group health plan, with attendant savings. Indeed, with benefits provided on a first party basis, there is no reason that the entire system of first party benefits cannot be offered on a group basis, with attendant and significant savings to the insurance consumer. UMVARA gives to insurers the opportunity to market the insurance product more effeciently and the result should be reflected in premium savings.

UMVARA would also save tax dollars now required to process about 200,000 auto accident law suits a year. Other dollars would be saved by state insurance regulators who must process complaints produced by the "fault" system. The State of New York Department of Insurance reports that it receives about four complaints against "fault" insurance policies for every complaint filed on "no-fault" insurance coverages such as health and accident, fire, theft, and life.

The insurance consumer should benefit in premium savings from all of these factors. The consumer certainly will receive more of substance for his premium dollar spent. However, no one really knows if motor vehicle insurance premiums will be universally cut by UMVARA. There are a number of reasons for this. General inflation is one factor. Inflation in the number of motor vehicle accidents per year also is a factor. Costs in any system of reparations will continually increase if inflation is not stemmed and if highway safety does not improve.

The current motor vehicle accident picture also varies from state to state. For example, the more urban states have predominantly greater numbers of collisions between two or more vehicles. More rural states have greater numbers of single vehicle accidents. There is no liability payout in single vehicle accidents. Therefore, insurance premiums are generally less in the rural states. Under UMVARA, these single vehicle accident victims would be compensated. The total effect of increased payout may mean premium increases. Whether these would offset, in most cases, the gains because of better efficiency is simply not known.

The type of vehicle may make a difference in the development of a composite cost picture. Under the current system, motocycles are not rated the same as passenger cars or trucks or snowmobiles. All of these vehicles are rated according to the liability payout with respect to the class of vehicle. Some classes of vehicles have very favorable payout pictures under the "fault" system. Motorcycles are an example. Motorcycles are involved in proportionately large numbers of serious accidents. The great majority of these accidents are single vehicle accidents for which there is no liability payout. Of the collisions that occur, the preponderance of fault is assessed against the other vehicles involved. Therefore, motorcycle liability policies are cheap. Of course, the great number of the injured receive nothing at all. First party coverage would turn the current system all around.

Trucks are an example of an exact opposite phenomenon. Trucks are exposed and have a high claims frequency. The claims frequency for trucks is roughly two and one-half to three times the claims frequency for private passenger cars. Trucks appear to pay a disproportionate amount of the cost of accidents in which they are involved. The insurance premiums for trucks reflect this fact. A first-party benefit system, it can be predicted, would ease the burden for the consumers of truck insurance. This would likely occur in spite of any reallocation of costs

to truck insurers because of the greater proportionate damage such vehicles contribute to any collision in which they are involved with lighter vehicles. Thus, another class of vehicles would likely benefit from UMVARA in terms of immediate premium savings.

The current "fault" system is exceedingly complex. Precise effects of changing the system through UMVARA are not easily predicted in terms of costs. Some general rules will prevail, however. If UMVARA raises costs in a given class of cases, it will occur because people who had gone uncompensated under the old system would receive compensation under UMVARA. If costs are reduced under UMVARA, it will be because undue burdens carried by a class of the motoring public under the "fault" system have been relieved. The "fault" system has resulted in such misallocations of the burden of cost with respect to motor vehicle accidents, that equitable reallocations of these costs may result in some dramatic changes in the premium picture. The changes should result in a better balanced allocation of these costs, and greater justice to all insurance consumers.

While it was drafting UMVARA, the National Conference of Commissioners on Uniform State Laws asked three insurance associations to have their actuaries estimate UMVARA's impact on premiums. The positions of the associations on "no-fault" auto insurance were reflected in the estimates.

The American Insurance Association (AIA) which favors "no-fault" said premiums would be reduced 17 percent nationally. The American Mutual Insurance Alliance (AMIA) which favors a little "no-fault" but believes UMVARA goes "too far" predicted a savings of 7 percent nationally. The National Association of Independent Insurers (NAII), which opposes "no-fault" and supports the present system, said premiums would increase 12 percent nationally.

Estimates were also made for individual states with about the same results. The American Insurance Association (AIA) would show a premium savings. The American Mutual Insurance Alliance (AMIA) would predict either less savings or

slight increases in costs. The National Association of Independent Insurers (NAII) would predict more substantial increases. For example, in California the AIA would predict 18-20% decreases in average premium levels; the AMIA would predict 9-10% decreases in premium levels; and the NAII would predict 6-8% increases in general premium levels. In Arizona, as another example, the AIA would predict 10-13% improvement in premium levels; the AMIA would predict from 3% improvement to 1% increases in average premium levels; and the NAII would predict 15-19% increases in premium levels. In Illinois, the AIA would predict 15-16% decreases in average premium levels, the AMIA would predict 5-6% decreases, and the NAII would predict 11-12% increases in average premium levels. A general pattern similar to each of these states prevails through the estimates of all the states.

The estimates at their best are based largely on guesswork. The best assessment of the value given for the value received by UMVARA must be made in terms of people. The people involved include all those who might be ruined by catastrophic loss if they become one of the half-million Americans seriously injured in traffic accidents each year in the United States. These victims would be served by insurance designed to help them get well and keep their families together, instead of an adversary system geared to prove the victim "caused" his own injuries and deserves no help.

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NO-FAULT INSURANCE DEVELOPMENTS IN PERSPECTIVE

by Robert E. Keeton*

Before the current decade ends, no-fault automobile insurance will have become the primary source of compensation for traffic victims in the United States.

If this prediction is in any sense rash or risky, it is not because of the forecast of a much reduced role for fault and liability insurance but instead because of the forecast that in 1980 automobile insurance will still have a greater role in compensating traffic victims than more broadly based health care and accident compensation systems. That is, if you step back from current preoccupation with specifics of the controversy over automobile insurance reform and try to understand longer range trends that are already evident, you are likely to conclude, I believe, that no-fault automobile insurance is definitely coming. The questions that remain in doubt are when it will come, in what form, and whether soon enough and in a form sufficient to forestall more drastic changes.

This is not to deny that reform of human institutions is generally a relatively slow process, especially in comparison

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with the pace of change we have come to expect in the fields of science and technology. The President of the American Insurance Association, T. Lawrence Jones, noted this comparison in his remarks at a seminar in mid-June, 1972. He reminded his audience that the American Insurance Association had announced its support of "complete no-fault reform" in October, 1968.[1] Between that time and June, 1972, only four states (Massachusetts, Florida, Connecticut and New Jersey) enacted what he considered genuine no-fault statutes. Meanwhile, Mr. Jones observed, American astronautes made five landings on the moon.[2]

But already the fifth genuine no-fault statute has been enacted. The Michigan legislature acted on October 6, 1972. And it is a near certainty that several more states will act in 1973. An issue that remains in doubt is whether Congress as well will enact a no-fault statute in 1973. And the outcome of that issue depends very much on what state legislatures do early in 1973.

Massachusetts was the first state to enact a statute of the type to which the term "no-fault" has come to be applied. That state enacted its Personal Injury Protection Act in August, 1970, to take effect January 1, 1973.[3] Other states have since enacted statutes of this general type: Florida,[4] in 1971, to take effect in 1972, and Connecticut[5] and New Jersey[6] in 1972, to take effect in 1973. Michigan has just enacted a potentially more far-reaching "no-fault" law, to become effective late in 1973.[7]

Other states have enacted laws that, though of a very different type, are referred to by some observers as "no-fault" laws. These states are Delaware, Oregon, Minnesota, South Dakota, and Maryland.[8]

Illinois enacted a fourth type of so-called "no-fault" legislation in 1971, to take effect in 1972.[9] However, the Illinois law was declared unconstitutional.[10] The decision was grounded on the court's interpretation of provisions of the Illinois constitution that might not carry over to the interpretations of other state constitutions by other state courts of last resort. Both for that reason and because of distinctive features of the Illinois statute that made it more vulnerable than others to attack on constitutional grounds, it is not a safe inference that other state courts are likely to declare their spective statutes unconstitutional, though it does seem likely that constitutional attacks will be mounted in several other states. In Massachusetts, a massive constitutional attack had already failed before the Illinois decision.[11]

Though each of the statutes thus far enacted is different in some details from any other, some patterns have emerged. The Chart appearing with this article presents a brief comparison of some key features, disclosing these patterns.

Levels of No-Fault Benefits

The no-fault benefits of all the seven state laws enacted before 1972 were relatively low -- ranging from $2,000 to $10,000. Four more statutes were enacted in 1972. Two of these -- in Connecticut and Maryland -- provided very low no-fault benefits. The other two -- the New Jersey and Michigan laws -- provide for coverage of medical expense with no "cap"-- that is, no overall limit. The New Jersey statute is like all the preceding enactments however, in providing a low "cap" on wage loss coverage. The Michigan law, in contrast, provides not only unlimited coverage of medical expense but also substantially higher coverage for wage loss--up to $36,000 in benefits.

The proposed Uniform Law recommended in August, 1972, by the National Conference of Commissioners on Uniform State Laws would pay wage loss as well as medical expense with no "cap". Both the Michigan law and the Uniform Law provide what have been called "internal" limits. For example, under the Uniform Law benefits for wage loss do not exceed $200 per week. Under the Michigan law, they do not exceed $1,000 per month.

Coercion to Obtain Insurance

For some decades now, every state of the United States has imposed some degree of coercion on motorists to obtain insurance.

The most common form of coercive legislation has been the "one free bite" law. The term refers to a common law proposition that every dog has one free bite and suggests that every motorist has on . free accident. Neither dogs not motorists are in fact treated that generously by the law. But it is the case that under these statutes, which are also commonly called financial responsibility laws, a motorist is not required to have insurance until he has run afoul of the law by having an accident and failing to discharge his legal liabilities arising from it or, under many of the laws, by being convicted of a serious moving violation. The underlying theory is that although the law may actually come into application against relatively few drivers, it will encourage many more to obtain insurance even before they run afoul of the law, so they will not be in trouble if they do. This is a relatively mild form of coercion, but coercion nonetheless.

Some states have adopted more forceful forms of coercion to obtain automobile insurance. The most coercive type of law makes it a criminal offense for a motorist to operate or permit his vehicle to be operated without specified insurance coverage. These laws are commonly called compulsory insurance laws, whether or not they also privide for a registration system under which it is impossible to register a vehicle without proof of insurance coverage. Massachusetts has had a compulsory liability

insurance law since 1927, NewYork since 1956, and North Carolina since 1957. Florida and Delaware joined this group by statutes enacted in 1971; Connecticut, Maryland, New Jersey, and Michigan by statutes enacted in 1972. Thus, there are now nine states with compulsory liability insurance laws. In seven of these states (Massachusetts, Florida, Delaware, Connecticut, Maryland, New Jersey, and Michigan) some form of so-called no-fault insurance also is compulsory.

A statute establishing a mandatory coverage, as that term is commonly used, falls between compulsory and "one free bite" laws in the degree of coercion it imposes. A mandatory coverage, as used in this context, is one the insurer must include in every automobile liability policy it writes in the state. For some years now, uninsured motorist coverage has been mandatory in many states. No-fault coverage is now mandatory in Oregon.

Tort Exemption

Although "no-fault" insurance is sometimes used in a broad sense to include any kind of insurance under which benefits are paid without regard to fault, the term first came into vogue in relation to proposals for a compensation system founded on a two-fold plan of paying basic benefits for out-of-pocket loss on a no-fault basis and creating an exemption (either total or partial)

from liability based on fault. That is, the plan eliminates at least some of the tort actions in which awards are made not only for out-of-pocket losses but also for pain and suffering.

The American Insurance Association, in October, 1968, declared itself in favor of a "complete no-fault" plan--that is, a plan abolishing vertually all tort actions and relying almost exclusively on no-fault insurance as the source of compensation for traffic victims.

In August, 1972, The National Conference of Commissioners on Uniform State Laws approved a proposed Uniform Motor Vehicle Accident Reparations Act (UMVARA) that would provide lifetime no-fault benefits and would eliminate tort actions except in cases of very severe injury. Thus this proposal would not go as far in eliminating tort actions as a "complete no-fault" plan, but it goes farther in that direction than any of the other "partial no-fault" plans.

At the time of our proposal of the Basic Protection Plan in 1965, Professor O'Connell and I recommended a "partial no-fault" plan that would have eliminated tort actions except in cases of severe injury. Thus our definition of the threshhold of severity prerequisite to a tort action, though allowing somewhat more tort actions that UMVARA, would have eliminated tort actions for minor and moderate injuries. Probably this is also true of the Michigan bill enacted in

October, 1972, to be effective late in 1973. Rather than relying on a medical threshhold it requires, as a basis for a tort action for pain and suffering, that the injury result in death or that it produce serious impairment of body function or permanent serious disfigurement.

Many proposals and several enactments have scaled down both the no-fault benefits and the elimination of tort actions. Among the states sometimes referred to as having adopted no-fault laws, those that have adopted a "scaled-down no-fault" plan are in the order of enactment, Massachusetts, Florida, Connecticut, and New Jersey.

None of the other states sometimes referred to as having enacted "no-fault" legislation has in fact a "no-fault" law in the sense of a law founded on the two-fold principle of coupling no-fault insurance with at least partial elimination of tort actions. Instead, they simply add no-fault insurance on top of the old system, leaving claimants free, as before, to claim in every case for pain and suffering as well as out-of-pocket loss. Two of the states enacting laws of that type have made the no-fault coverage compulsory. Those states are Delaware and Maryland. Three others have made the no-fault coverage noncompulsory. They are Oregon, Minnesota, and South Dakota.

Criteria of Effective Reform

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

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

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

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

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

Under the present system your insurance company usually settles small claims made against you just to get rid of them. And as a result you pay higher "liability" insurance premiums. Your company does this because under the "liability" system a claim of pain and suffering has a substantial amount of nuisance value, on top of any value it may have on the merits. The reason is that it would cost the insurance company more than a thousand dollars to fight the case through an appeal. In practice, the insurance companies find it less expensive to pay than to fight. And when the claimant's out-of-pocket loss is less than $100 and he has an attorney, on the average the companies pay more than seven times the out-of-pocket losses to settle. In contrast, the insurance companies find it worthwhile to fight in cases of serious injuries, and a claimant who has out-of-pocket losses of $2500 or more has to be lucky just to get his out-of-pocket loss paid.

Costs of insurance under a genuine no-fault system--one coupling no-fault insurance with partial elimination of tort actions--have proved to be far lower than Professor O'Connel and I imagined when we offered the Basic Protection Plan of 1965. Of course there continue to be wide variations in cost estimates, even after the surprisingly favorable experience in Massachusetts has developed. But the zone of the range is now rather clear. For example, the estimates submitted to the Special Committee on UMVARA from the three major segments of the industry, who disagree sharply about the desirability of no-fault insurance, ranged only from modest savings to modest increases in comparison with costs of the existing system, on average, for policyholders carrying liability insurance coverage of $25,000 per person and $50,000 per accident. An appropriate way, then, of putting one question of choice now before us is this: You can have either of two forms of insurance for approximately the same price. The first gives you a right to recover for both economic losses and pain and suffering if you have a valid claim based on fault, but no right to recover either kind of damages in other cases and no assurance of the financial responsibility of the negligent party above $25,000. The second gives you a guaranteed life-time coverage for economic losses regardless of fault but no chance of recovering damages for pain and suffering unless you sustain a very severe injury. Which would you take?

My preference is for lifetime coverage for economic loss. Thus, I recommend enactment of the Uniform Motor Vehicle Accident Reparations Act. I would choose to continue to pay about the same insurance costs as now and receive this greatly improved protection, rather than enacting a "scaled-down no-fault" law that would reduce insurance costs. And for even stronger reasons, I would choose the Uniform Act over continuing to pay as much or more for the poor insurance protection we receive under the present system.

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3. Mass. Laws Ch. 670 (1970), as amended by Mass. Laws Ch. 744 (1970).

4. Florida Laws 71-252 (1971).

5. Conn. Laws P.A. No. 273 (1972).

6. New Jersey Laws Ch. 70 (1972).

7. Michigan Senate Substitute for Senate Bill 782, as amended (October 6, 1972).

8. Delaware Laws Ch. 98 (1971); Maryland Laws Ch. 73 (1972); Minnesota Laws Ch. 713 (1971); Oregon Laws Ch. 523 (1971); South Dakota Laws Ch. 270 (1971).

9. Illinois Laws S.B. 976 (1971).

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

11. Pinnick v. Cleary, 271 N.E. 2d 592 (Mass. 1971).

NO-FAULT LAWS ENACTED BEFORE 1973

*In case of death--$10,000

A	B	C			D		E		F		
		Degree of Compulsion			Tort Exemption for Bodily Injury		Tort Exemption for Damage to Vehicles		Approximate BI No-Fault Benefits "cap"		
Plan	Effective Date	Compulsory	Mandatory	Neither	Partial	None	Yes	No	Medical	Wage	Combined
Connecticut	1/1/73	X			X			X			$ 5,000
Delaware	1/1/72	X				X		X			$10,000
Florida	1/1/72	X			X		above $550				$ 5,000
Illinois	declared unconstitutional										
Massachusetts	BI 1/1/71 PD 1/1/72	X			X		X				$ 2,000
Maryland	1/1/73	X				X		X			$ 2,500
Michigan	10/1/73	X			X		X		no cap	$36,000	
Minnesota	1/1/70			X		X		X	$2,000	$ 3,120	*
New Jersey	1/1/73	X			X			X	no cap	$ 5,200	
Oregon	1/1/72		X			X		X	$3,000	$ 6,000	
So. Dakota	1/1/72			X		X		X	$2,000	$ 3,120	*

PROCEDURES

The Conference meets annually to consider drafts of proposed uniform legislation. Proposals that uniform acts be drafted, received from many sources, are referred to a Committee on Scope and Program which makes an investigation, sometimes hears interested parties, and reports to the Conference whether the subject is one on which it is desirable and feasible to draft a uniform law.

If the Conference decides to take up a subject, a special committee of state commissioners is appointed to prepare a draft of an act. Frequently, the draft considered by the committee is prepared by a commissioner, but for some of the longer and more complicated acts it has been customary to secure the help of an expert draftsman. Tentative drafts are not submitted to the Conference until they have received extensive committee consideration.

A draft act submitted to the whole Conference must be discussed and considered section by section by at least two annual meetings before the Conference may decide by a vote of states whether to promulgate the draft as a Uniform Act. Each state is entitled to one vote, and an act is not promulgated until a majority of the states represented at an annual meeting and at least twenty jurisdictions have approved the draft. In addition, each Uniform Act is submitted for approval to the House of Delegates of the American Bar Association. But long before this final action of the American Bar Association, the drafting committees of the Commissioners have established liaison with the American Bar Association through the appropriate committees and sections of that organization. In a real sense the Commissioners on Uniform State Laws are not only the expert draftsmen of the state governments but also of the American Bar Association.

NON-PARTISAN ORGANIZATION FOR LAW BETTERMENT

The organizational and operational plan of the Conference makes its non-partisan nature self-evident While the state commissioners are obligated to endeavor to obtain passage of uniform acts, they have no special interest to represent.

The Commissioners also work for betterment of state law in other ways. The Conference sometimes drafts model acts on subjects which do not directly affect relationship among the states, but which involve problems common to many if not all of the states. In cooperation with the Council of State Governments, the Conference sometimes uses its expert drafting abilities to draft model legislation for this agency of state governments. Sometimes it drafts model legislation on subjects where state legislation could help implement international treaties of the United States or where world uniformity would be desirable.

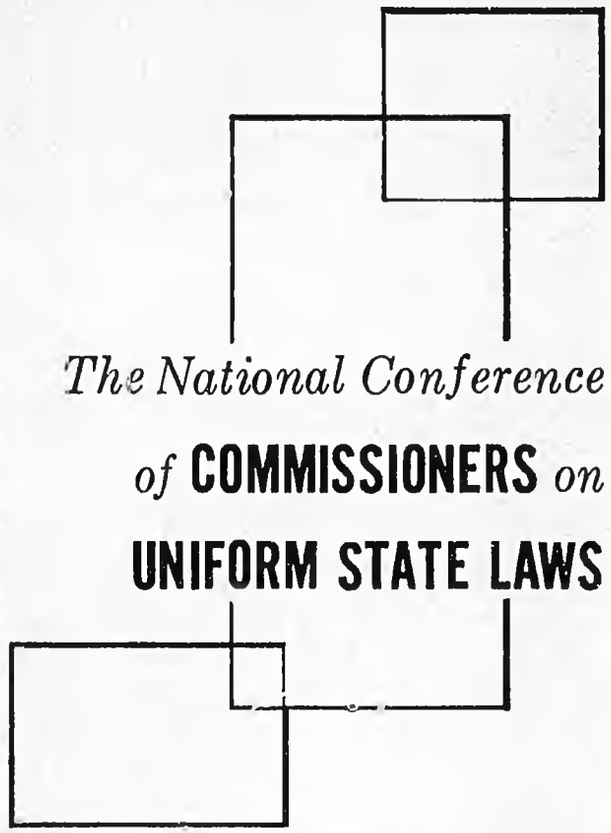
PUBLICATIONS

The text of each approved uniform and model act, with notes and comments, is published in pamphlet form by the Conference.

In addition, it publishes annually a Handbook of the National Conference of Commissioners on Uniform State Laws, which contains the proceedings of the annual conference and basic statistical data about the various uniform and model acts promulgated by the Commissioners, including a list of the acts adopted and the states which have adopted them.

Copies of the acts and the Handbook are available at a nominal charge from:

The National Conference of Commissioners on Uniform State Laws
1155 East 60th Street
Chicago, Illinois 60637



The National Conference of COMMISSIONERS *on* UNIFORM STATE LAWS

PURPOSE – The National Conference of Commissioners on Uniform State Laws is the national organization of the state commissioners appointed by the Governor of each state, the District of Columbia, and Puerto Rico to promote uniformity in state law on all subjects where uniformity is desirable and practicable. Through the Conference, the Commissioners participate in drafting specific acts, and from the Conference the Commissioners on Uniform State Laws of each state obtain help in their endeavor to secure the enactment by ordinary legislative procedures of identical acts in each state so that uniformity can be achieved.

ORGANIZATION

The National Conference is composed of Commissioners on Uniform State Laws from each state, usually three in number. In addition, the principal officer of the state agency, such as a legislative reference bureau, charged with responsibility of drafting legislation for the legislature and executive is an associate member of the Conference. The governors of the states have appointed lawyers, judges, and law school professors as commissioners. While the usual term is three years, it is common practice for governors to reappoint, without regard to their political affiliation, commissioners who have actively participated in the work of the Conference. If a Commissioner has served by official appointment for twenty or more years he may become a life member. All Commissioners are members of the Bar.

HISTORY

The Conference, one of the oldest of state organizations designed to encourage interstate cooperation, was organized in 1892 to promote uniformity by voluntary action of each state government. Since its organization, the Conference has drafted over two hundred uniform laws on numerous subjects and in various fields of law, many of which have been widely enacted.

The first act drafted and approved before the turn of the century, the Uniform Negotiable Instruments Law, concerned checks and other negotiable instruments and was adopted in all jurisdictions. The latest major commercial act promulgated, the Uniform Commercial Code, is probably the greatest single achievement of the Conference since it consolidates and modernizes a number of earlier uniform acts and simplifies and expedites interstate commerce generally without the intervention of any federal act.

With the development of rapid transportation and communication the states have become increasingly interdependent socially and economically so that a single transaction may cross many state lines and involve citizens in many states. A confusion of laws among the several states may present in some fields a deterrent to the free flow of goods, credit, services, and persons between the states; restrain full economic and social development; and generate pressures for federal intervention to compel uniformity. The Conference seeks to alleviate these problems.

While the work of the Conference has grown over the years, its staff in its office in the American Bar Center in Chicago is small. The primary basis of its effectiveness has been the active and dedicated participation of the state commissioners. The Conference is a working organization. Commissioners themselves draft many acts; they discuss, consider, and amend drafts of others; they decide whether to recommend an act as a Uniform Act and once it has been promulgated by the Conference, they endeavor to procure the enactment of a Uniform Act in their own state legislatures.

FINANCIAL SUPPORT

The Conference actually is a state organization. The major part of its financial support comes from state appropriations. The expenses are apportioned among the states upon the basis of their relative size and financial abilities. No state appropriates more than $10,000 for the support of the Conference. Individual Commissioners receive no salary or compensation and in many cases they pay their own expenses to attend the annual conference. The American Bar Association also makes a yearly contribution to the conduct of Conference business. Where a proposed uniform act requires extensive research, expert draftsmen working on a sustained basis, and numerous meetings of advisors, the Conference has sought financial help from foundations and other public spirited persons and groups. Because the Conference is composed of Commissioners designated by the states, prepares uniform acts for states and is supported by states, the Internal Revenue Service has recognized it as qualified to receive tax deductible contributions under the federal law as contributions to state government or organizations of state government for public purposes.

UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-FIRST YEAR
AT SAN FRANCISCO, CALIFORNIA
AUGUST 4-11, 1972

OFFICIAL DRAFT
WITH
PREFATORY NOTE AND COMMENTS

November 1, 1972 Edition

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Motor Vehicle Accident Reparations Act was as follows:

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NATIONAL CONFERENCE OF COMMISSIONERS ON
UNIFORM STATE LAWS
1155 East Sixtieth Street, Chicago, Illinois 60637

TABLE OF CONTENTS

PREFATORY NOTE

UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT

PURPOSE

The Act creates a complete system of reparations for injuries and loss arising from motor vehicle accidents. To a large extent, though not completely, economic losses from vehicle accidents would be compensated without regard to fault through first party insurance coverages and tort liability for those losses would be abolished.

BASIC REPARATION BENEFITS

Basic reparation benefits are the minimum benefits which, with few exceptions, are provided without regard to fault for all persons injured and the dependent survivors of persons killed in motor vehicle accidents. They are:

1. payment of all reasonable medical and rehabilitative expenses without limit;

2. reimbursement up to an aggregate of $200 per week

   a. for lost earnings from work the injured person would have performed but for the injury. In computing the amount of work loss benefits payable, earnings received from substitute employment and benefits received from social security, workmen's compensation, and state-required nonoccupational disability insurance would be subtracted as would an amount not to exceed 15% for actual income tax savings, and

   b. reimbursement for the reasonable expense of replacement services which the injured person would have performed for himself or his family but for the injury. For the first week after injury, such expenses are excluded from benefits;

3. in the case of death, payment up to $200 per week to those survivors who would be entitled to recovery under the State's wrongful death laws for the economic support and value of necessary replacement services which they would have received from the decedent but for the injury causing death, subject to subtractions and exclusions similar to those mentioned above; and

4. in the case of death, payment of funeral or burial expenses not to exceed $500.

Losses to be reimbursed by basic reparation benefits are not

limited either as to aggregate amount or as to time period over which incurred.

OPTIONAL DEDUCTIONS AND EXCLUSIONS FROM BASIC REPARATION BENEFITS

Insurers are required to offer, with appropriate premium reductions, certain specified optional deductions and exclusions from basic reparation benefits applicable only against benefits otherwise payable to the named insured and members of his family unit. These include:

1. flat deductibles of $100, $300, and $500 from the total of all benefits payable on account of any one accident;
2. a flat deductible of $1,000 per accident from all benefits payable on account of injury to an operator or passenger on a motorcycle;
3. an exclusion of ten percent of the benefits which would otherwise be payable for work loss and survivor's loss; and
4. an exclusion of all replacement services loss.

In addition, insurers may, but need not, offer an optional contingent exclusion of benefits actually received from other specified sources of benefits.

DENIAL OR RESTRICTION OF BENEFITS TO CERTAIN PERSONS

These persons who would otherwise be entitled to basic reparations benefits are excluded from or restricted in the recovery of benefits.

1. A person who intentionally causes or attempts to cause injury or death to himself or another is disqualified from all benefits for injury or death arising from his acts. In the event of death of a person who intentionally injures himself, his survivors are disqualified.
2. An intentional converter of a motor vehicle and, in the event of his death, his survivors, are excluded from all benefits for losses arising from use of the converted vehicle except under an insurance policy under which he is a basic reparation insured. However, a converter who is under the age of fifteen may recover benefits through the assigned claims plan.
3. A person who has the legal responsibility (usually an owner) to maintain required security for payment of tort judgments and basic reparation benefits either by having insurance

or by being an approved self-insurer and fails to do so is denied benefits from the assigned claims plan to the extent of $500 for each year of continuous noncompliance, and is subject to all optional exclusions and deductibles.

TORT EXEMPTIONS AND RETAINED TORT LIABILITIES

Tort liability arising from ownership, maintenance, or use of a motor vehicle is abolished, except as to:

1. owners, including a government, who have not provided security for payment of basic reparation benefits and tort judgments as provided by the Act;

2. intentionally caused harm to person or property;

3. damages for work loss, replacement services loss and survivor's loss of support and services uncompensated by basic reparation benefits by reason of the standard weekly limit of $200 on such losses, but only if the injured person dies or is disabled for more than six months;

4. damages for noneconomic detriment (*i.e.*, pain and suffering, e. . but not punitive damages) in excess of a statutory figure (the suggested amount being $5,000) if there is death. significant permanent injury, serious permanent disfigurement, or more than 6 months of total disability;

5. damage to property other than motor vehicles and their contents; and

6. damage to motor vehicles caused by operators of parking lots and storage garages.

As the modification of the tort law is only in the form of an exemption from tort liability arising from ownership, maintenance, or use of a motor vehicle and there is no tort liability created by the Act, tort liability is retained only to whatever extent it now exists. Auto manufacturers, repair shops, and railroads all remain potentially liable in tort under present law when they are causally involved in motor vehicle accidents.

As damage to motor vehicles or their contents is not covered by basic reparation benefits, the only source of recovery for damage to a vehicle and its contents resulting from an accident causally involving only motor vehicles would be optionally purchased first party collision insurance on the vehicle. Insurers are required to offer various alternative forms of first party collision coverage, including a limited form based upon fault.

Insurers providing basic or added reparation benefits have a right of subrogation to tort recoveries to the extent the damages

recovered are of a type compensated for by the insurance. An insurer having paid medical expenses and wage loss under basic reparation benefits coverage is not entitled to subrogation to proceeds of a claim for pain and suffering damages.

SECURITY FOR BASIC REPARATION BENEFITS AND TORT LIABILITY, PRIORITY OF SOURCE, ASSIGNED CLAIMS PLAN, ADDED COVERAGES, ASSIGNED RISKS

Every owner (including the State and its political subdivisions) of a motor vehicle registered *or* permissively operated in the State is required to provide and maintain security for the payment of basic reparation benefits and for the payment of tort liabilities. The minimum required limit for tort liability security is $25,000 per person per accident for bodily injury and $10,000 per accident for property damage. Other governmental owners, including the federal government, may come under the Act by voluntarily providing security. As to private owners, security may be provided by qualifying insurance or approved self-insurance. A governmental owner may provide security by lawfully obligating itself to pay benefits as well as by insurance or approved self-insurance.

In general, the source of basic reparation benefits for a person incurring injury or loss in a motor vehicle accident would be as follows, in order:

1. for any occupant of a vehicle used in the business of transporting persons or property, including the driver, and for any employee or member of his family driving or occupying a vehicle furnished by his employer, the insurance on the vehicle;

2. for any person insured under a policy of basic reparation insurance, either as named insured or as resident member of his family unit, that policy of insurance, even if he is a pedestrian or occupant of a vehicle owned by another at the time of injury;

3. for any person not insured under a policy of basic reparation insurance but injured while occupying a vehicle, the insurance covering that vehicle;

4. for any person not insured under a policy of basic reparation insurance and not injured while an occupant of a vehicle (*e.g.*, a pedestrian) the insurance covering any vehicle involved in the accident;

5. for any person for whom a responsible source of benefits does not exist or cannot be identified (*e.g.*, uninsured occupant of uninsured vehicle, uninsured pedestrian injured by hit and run, insolvent insurer), the assigned claims plan which insurers

are required to establish and operate under supervision of the insurance commissioner.

There are various provisions in the Act designed to achieve maximum compliance with the requirement that security be provided by insurance or self-insurance. Provision is also made for the administrative regulation of the terms of the insurance policies.

Insurers may offer a range of optional coverages and provisions referred to as "added reparation benefits" (*e.g.*, additional work loss and survivor's loss protection, additional funeral expense coverage, pain and suffering coverage, etc.), subject to approval of the insurance commissioner who may require that certain optional coverages and provisions be offered.

To assure that the necessary insurance coverages will be conveniently afforded to all persons at reasonable rates, the Act provides for an assigned risk plan or comparable facility under the supervision of the insurance commissioner.

TERRITORIAL REACH OF THE ACT

The Act applies to any motor vehicle accident occurring within the State without regard to where any involved vehicle is registered or how long it has been in the State. It converts any motor vehicle liability insurance policy, including one issued elsewhere, into a basic reparation policy while the insured vehicle is operated in the State. Also the benefits provided by a policy of basic reparation insurance are applicable to injuries or losses occurring outside of the State to the insured and members of his family and to any occupant of the insured vehicle.

PAYMENT OF BENEFITS

Ordinarily, benefits are payable as economic loss accrues, rather than in a lump sum. Commutation of benefits, other than medical and rehabilitation expenses, by lump sum or instalment award may be ordered by a court if the value of future benefits is not more than $1,000 or if the court finds that it will contribute to the health or rehabilitation of the injured person or if it is otherwise in the best interest of the injured person and the parties consent. Claims for benefits may be settled by agreement, but only with judicial approval if the amount of the anticipated loss exceeds $2,500.

Benefits must be paid within 30 days after accrued and claimed. Overdue benefits bear interest and the suggested rate is 18%.

Except for very limited purposes, rights to future benefits are not assignable. Benefits for work loss, replacement services loss, and survivor's loss are exempt from execution or garnishment to the extent provided by applicable state or federal law dealing with wage exemptions. Benefits for allowable expense are, with one limited exception, exempt.

The Act prescribes necessary discovery procedures. Specific provision is made for the adjudication of disputes over costs of rehabilitative procedures. Also, the refusal of the injured person of reasonable rehabilitative treatment is a ground for limitation of benefits.

The Act provides a special statute of limitations, applicable to claims for basic and added reparation benefits.

ATTORNEY'S FEES

Reasonable attorney's fees are accorded for successful representation in the collection of overdue or disputed benefits, the fee to be paid by the insurer unless the claim was in some respect fraudulent or unreasonably excessive in which case part or all of the fee may be charged against benefits otherwise due the claimant. If the claim was fraudulent or so excessive as to have no reasonable foundation, the defending insurer may be awarded attorney's fees and offset them against benefits otherwise due.

REALLOCATION OF COSTS

The Act provides for reallocation of loss costs among insurers on the basis of the injury-causing potential of different kinds of vehicles according to rules formulated by the insurance commissioner or by agreement among insurers with the approval of the commissioner. If no other method is adopted, the Act requires the implementation of a reallocation system based on vehicle weight. Rates will then reflect the probability and magnitude of loss causation, assuring, for example, that operators of heavy trucks will pay their fair share of accident costs.

CANCELLATION AND NONRENEWAL OF INSURANCE

Except during an initial underwriting period, insurers are prohibited from cancelling or nonrenewing basic reparation and liability insurance contracts at less than annual intervals for any reason other than nonpayment of premium. At the request of the policyholder, the reason for any cancellation or nonrenewal of insurance at any time must be given.

ACKNOWLEDGMENTS

In connection with the preparation of this Act, the National Conference of Commissioners on Uniform State Laws has received the cooperation of innumerable public and private groups, and the National Conference is deeply indebted to those groups. In addition, the National Conference wishes to express its gratitude for the assistance of the Council of State Governments, and particularly for the financial assistance supplied by the Ford Foundation and the United States Department of Transportation.

During its deliberations, the drafting committee had the advice and counsel of the following advisory and observer groups: Harold Scott Baile, Philadelphia, Pa.; James E. Bailey, Washington, D.C.; James Baylor, Chicago, Ill.; Phillip Bies, New York, N.Y.; Paul C. Blume, Chicago, Ill.; Howard B. Clark, Washington, D.C.; Jacob Clayman, Washington, D.C.; Herbert S. Denenberg, Harrisburg, Pa.; John S. Hamilton, Jr., Chicago, Ill.; John Hanna, Chicago, Ill.; Thomas A. Harnett, New York, N.Y.; Richard J. Hayes, Chicago, Ill.; Jean C. Heistand, Bloomington, Ill.; Charles T. Houston, Kansas City, Mo.; Eunice P. Howe, Belmont, Mass.; T. Lawrence Jones, New York, N.Y.; Edward F. Kearney, Washington, D.C.; Edward J. Kelly, Des Moines, Ia.; James S. Kemper, Jr., Chicago, Ill.; Raymond H. Kierr, New Orleans, La.; Dean Spencer L. Kimball, Madison, Wisc.; John J. Kircher, Milwaukee, Wisc.; Dean Guy O. Kornblum, San Francisco, Calif.; Bronson Lafollette, Madison, Wisc.; Harry A. Lansman, Chicago, Ill.; Dr. M.C. Mackey, Tampa, Fla.; Donald P. McHugh, Bloomington, Ill.; Arthur C. Mertz, Chicago, Ill.; Ernest Michna, Chicago, Ill.; Robert E. Montgomery, Jr., Washington, D.C.; John J. Murphy, Garden City, N.Y.; C. Emerson Murry, Bismarck, N. Dak.; R. Harrison Pledger, Jr., Washington, D.C.; Hon. John T. Reardon, Quincy, Ill.; Edmond Rondepierre, Philadelphia, Pa.; Craig Spangenberg, Cleveland, Ohio; Richard F. Walsh, Washington, D.C.; Dean Arthur C. Williams, Jr., Minneapolis, Minn. The Council of State Governments was represented by the following: Sen. W. Hughes Brockbank, Salt Lake City, Utah; Atty. Gen. William J. Brown, Columbus, Ohio; Atty. Gen. Francis B. Burch, Baltimore, Md.; Sen. Charles L. Delaney, Winooski, Vt.; Gov. Daniel J. Evans, Olympia, Wash.; Gov. Warren E. Hearnes, Jefferson City, Mo.; Rep. James H. Heinze, Battle Creek, Mich.; Gov. Richard B. Ogilvie, Springfield, Ill.; Speaker Ray S. Smith, Jr., Hot Springs, Ark.; Gov. John C. West, Columbia, S.C.

UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT

SECTION 1. [*Definitions*]

(a) In this Act:

(1) "Added reparation benefits" mean benefits provided by optional added reparation insurance (Section 16).

(2) "Basic reparation benefits" mean benefits providing reimbursement for net loss suffered through injury arising out of the maintenance or use of a motor vehicle, subject, where applicable, to the limits (Section 13), deductibles (Sections 14 and 18), exclusions (Sections 12, 14, and 15), disqualifications (Sections 21 and 22), and other conditions provided in this Act.

COMMENT

The terms used within this definition are themselves the subject of elaborate definitions. "Loss" is defined in Section 1(a)(5). "Net loss" is defined in Section 1 (a)(8). "Injury" is defined in Section 1(a)(4). "Maintenance or use of a motor vehicle" is defined in Section 1(a)(6). "Motor vehicle" is defined in Section 1(a)(7). The right to receive basic reparation benefits is provided in Section 2. The obligation of reparation obligors to pay basic reparation benefits is established by Section 3. Basic reparation benefits do not compensate for harm to property (Section 15).

(3) "Basic reparation insured" means:

(i) a person identified by name as an insured in a contract of basic reparation insurance complying with this Act (Section 7(d)); and

(ii) while residing in the same household with a named insured, the following persons not identified by name as an insured in any other contract of basic reparation insurance complying with this Act: a spouse or other relative of a named insured; and a minor in the custody of a named insured or of a relative residing in the same household with a named insured. A person resides in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

COMMENT

The definition of "basic reparation insured" is similar to the term "insured" in standard tort liability insurance policies. Its function is, however, different. In a tort liability context, the insured is the tortfeasor whose conduct provides a basis for the victim's claim. Under this Act, the victim of an automobile accident will normally press his claim for basic reparation benefits against his own insurance company (Section 4), and if there is an issue whether the victim is insured under a specific policy the contest will be among insurance companies as to which company is responsible for the loss. In only limited situations—where an accident occurred outside the State (Section 2) or where the injured person converted the vehicle (Section 21)—will the issue determine whether the injured person has any right at all to basic reparation benefits. The term is of significance also in determining the persons whose claims under a particular policy are subject to some optional deductibles and exclusions (Section 14) and, depending on policy terms, may be of significance in determining who is entitled to optional added reparation benefits (Section 16).

The parts of the definition which refer to a "relative" of a named insured are adapted from current automobile policies. The term includes relatives by marriage as well as blood relatives. No attempt, however, is made to spell out the myriad details of consanguinity, affinity, and adoption which qualify one as a relative. A non-related child residing in the same household as a named insured is a basic reparation insured if a named insured or a relative residing in the same household has "custody" over him. The term "custody" is used here in a broader sense than it is often used in a domestic relations context, since its operative effect is limited to unrelated children. It covers, for instance, a foster child only temporarily placed in the care of a foster parent who is a named insured or a relative residing in the same household as the named insured. However, a relative or minor in custody who is not named in the policy, but is named in another policy of basic reparation insurance, is not an additional basic reparation insured. This qualification serves to ameliorate the problems of identifying the policy which provides coverage where there is more than one basic reparation policy covering members of the same family unit.

The last sentence, dealing with family members who temporarily live elsewhere, covers such situations as the college student residing away from home during the school year.

(4) "Injury" and "injury to person" mean bodily harm, sickness, disease, or death.

COMMENT

This definition is taken from tort liability policy forms and is used throughout the Act to distinguish personal injury from harm to property. These terms do not distinguish between "mental" and "physical" illness. Distinctions between economic detriment and such intangible harm as pain and suffering are marked by the use of the terms "loss" (Section 1(a)(5)) and "noneconomic detriment" (Section 1(a)(9)).

(5) "Loss" means accrued economic detriment consisting only of allowable expense, work loss, replacement services loss, and, if injury causes death, survivor's economic loss and survivor's replacement services loss. Noneconomic detriment is not loss. However, economic detriment is loss although caused by pain and suffering or physical impairment.

(i) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care. The term includes a total charge not in excess of $500 for expenses in any way related to funeral, cremation, and burial. It does not include that portion of a charge for a room in a hospital, clinic, convalescent or nursing home, or any other institution engaged in providing nursing care and related services, in excess of a reasonable and customary charge for semi-private accommodations, unless intensive care is medically required.

(ii) "Work loss" means loss of income from work the injured person would have performed if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those he would have performed for income, reduced by any income from substitute work actually performed by him or by income he would have earned in available appropriate substitute work he was capable of performing but unreasonably failed to undertake.

(iii) "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured.

(iv) "Survivor's economic loss" means loss after decedent's death of contributions of things of economic value to his survivors, not including services they would have received from the decedent if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of decedent's death.

(v) "Survivor's replacement services loss" means expenses reasonably incurred by survivors after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for

their benefit if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of the decedent's death and not subtracted in calculating survivor's economic loss.

COMMENT

The concept of "loss" is a basic starting point in calculating basic reparation benefits. (See Section 1(a)(2).) Loss is defined in a sense which is limited to economic detriment, and is further defined to include accrued loss only, consistent with the provision on reparation obligor's duty to respond to claims (Section 23) that "loss accrues not when injury occurs, but as .. loss ... is incurred." The statement that noneconomic detriment is not loss is a restatement, for clarity, of a proposition that is implicit in the limitation of loss to its five components: allowable expense, work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss.

"Allowable expense" is restricted to charges that are "reasonable" in amount and are for "products, services, and accommodations" which are "reasonably needed" by the injured person. The requirement that services be "reasonably needed" is further defined, in the case of rehabilitation programs, in the provision on rehabilitation treatment and occupational training (Section 34(a)). Two specific restrictions are contained here in the general definition. One is that, unless intensive care is medically required, coverage for a hospital room is limited to a "reasonable and customary charge for semi-private accommodations." The limitation applies only to the cost of an ordinary hospital room, and is inapplicable to charges for use of such hospital facilities as surgery and recovery rooms. A second restriction limits total charges for funeral, cremation, and burial to $500, including charges for casket and undertaker's service and other charges such as those for flowers, a burial vault or cemetery plot, and honoraria for clergy or fees of musicians. Added reparation coverage may be purchased (Section 16) to provide reimbursement for higher charges for hospital rooms or funeral expenses. The term "medical care" is broad enough to include reasonable charges for reasonably needed remedial treatment and care rendered in accordance with a religious method of healing (I.R.S. Rev. Rul. 55-261, 63-913).

"Work loss," as are the other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss, even if his employer continues his wages under a formal wage continuation plan or as a gratuity. Employer payments in this situation are collateral source payments rather than wages since they are not payments for work done during the time the employee was absent. Nor would the wage continuation payments be subtracted in the calculation of net loss. (See Section 11.) Work loss is not restricted to the injured person's wage level at the time of injury. For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after the injury, for work

he would then be performing had he not been injured. Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment. Work loss includes not only lost wages, but lost profit which is attributable to personal effort in self-employment (as distinguished from profit attributable to investment) or the cost of hiring a substitute to perform self-employment services. Finally, the definition contains an explicit reference to the doctrine of avoidable consequences—work loss is computed by subtracting not only income from work which the injured person undertook in lieu of that which his injury prevented him from performing but also income which he might have earned in available appropriate substitute work. As under the common law doctrine of avoidable consequences, the issue is whether claimed work loss is justly attributable to the injury. Subtraction of potential income from alternate work which the injured person declines is proper only where, under all the circumstances, the alternate work is "appropriate" and the injured person's refusal to undertake the work is "unreasonable."

"Replacement services loss" is defined to exclude recovery for loss of the capacity to perform useful services, and is limited to recovery of reasonable expenses incurred, such as those in hiring a substitute to perform the services. For example, a housewife whose injury prevented her from performing services in the home could not attribute loss to the incapacity itself, but loss would be suffered if domestic help were hired to perform those services. Under the standard replacement services loss exclusion (Section 12), however, that loss sustained within the first week after injury would be excluded in calculating basic reparation benefits.

"Survivor's economic loss" and "survivor's replacement services loss" are defined in a way analogous to standards for damages for wrongful death except that, as is the case for "work loss" and "replacement services loss," allowable items are more rigorously limited to genuine economic loss. As under typical wrongful death statutes, the measure of damages is loss to the survivors which results from death. Thus, in calculating benefits, the decedent's probable life expectancy had he not been injured and the extent to which the survivors would have received contributions of things of economic value or the extent to which the decedent would have performed services for his survivors must be taken into account. It is also necessary to subtract expenses which the survivors avoided by reason of the decedent's death, although the same avoided expenses cannot be subtracted twice from both survivor's economic loss and survivor's replacement services loss. For example, in the case of death of a child who had regularly contributed small personal earnings to his family and performed services in the home, there might be no survivor's economic loss or survivor's replacement services loss after the expenses avoided by reason of his death were subtracted from the value of the earnings and the cost of replacement services he would have contributed to the family. The term "survivor" is defined in Section 1(a)(12).

(6) "Maintenance or use of a motor vehicle" means maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (i) con-

duct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (ii) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.

COMMENT

The definition of "maintenance or use of a motor vehicle" is important for two disparate reasons. First, it establishes the scope of the abolition of tort liability, which is limited to tort liability arising from the "ownership, maintenance, or use of a motor vehicle" (Section 5). Second, it describes initial eligibility for the receipt of basic reparation benefits, which cover "loss suffered through injury arising out of the maintenance or use of a motor vehicle" (Section 1(a)(2)).

While "use" has a broader meaning than operating or driving a vehicle, the requirement that use of the motor vehicle be "as a motor vehicle" qualifies the term so that both the tort exemption and the availability of basic reparation benefits are more nearly limited to activities whose costs should be allocated to motoring as part of an automobile insurance package. For example, it has no application to an injury which occurs when a person slips and falls inside a travel trailer which has been parked at a camp site. The activities in operating a motor vehicle service garage are excluded if occurring on the business premises. It should be noted, however, that in this last situation, the availability of basic reparation benefits and the scope of the tort exemption are not co-extensive. A mechanic suffering injury in an accident while road testing a motor vehicle would be entitled to basic reparation benefits, because his injury arose from maintenance or use of the vehicle, but tort liability is retained for injury arising from a defect in the vehicle caused by the mechanic's negligence in making the repair, even though the repair is made on the road (Section 5(a)(2)).

The indefiniteness of the defined term has produced litigation in cases arising under automobile liability policies. In some cases, in part because of a tendency to construe an ambiguous term against the interests of the companies drafting the policy, and, in part to assure a solvent source of payment to a person injured by an admitted wrongdoer, it is arguable that courts have included accidents too far removed from the general activity of motoring and that a narrower construction of the term would be more consistent with the policy of this Act. Other than specifying that injury arise out of maintenance or use "as a vehicle," it has not been possible to define the general concept more specifically, so borderline cases are left to the courts, as they have been under current automobile insurance policies. However, in the case of "loading and unloading" the vehicle, the term which has produced some of the most extreme interpretations in litigation over policy forms, basic reparation benefits are not available unless the conduct in loading or unloading took place while the injured person was occupying, entering into, or alighting from the vehicle. This limitation produces coverage which is narrower than present medical payments coverage under automobile insurance policies, but is consistent with the philosophy of this Act, to compensate losses resulting directly from motoring accidents and to

leave to other forms of insurance and compensation systems those losses which are tangential to motoring. Existing tort liability is not altered for accidents arising from loading and unloading which are outside of this definition (see Section 5) and coverage for that liability is specifically included in the required tort security (Section 10).

(7) "Motor vehicle" means:

(i) a vehicle of a kind required to be registered under [the laws of this State relating to motor vehicles] or

(ii) a vehicle, including a trailer, designed for operation upon a public roadway by other than muscular power, except a vehicle used exclusively upon stationary rails or tracks. "Public roadway" means a way open to the use of the public for purposes of automobile travel.

COMMENT

As is true of the definition of "maintenance or use" (Section 1(a)(6)), the definition of "motor vehicle" is important in defining the availability of basic reparation benefits (Section 1(a)(2)) and the scope of the exemption from tort liability (Section 5). The criteria are in the alternative, so that a vehicle falls within the definition if either of them is met. Thus a snowmobile, if it were required to be registered under state motor vehicle laws, would qualify as a "motor vehicle" even if it were not designed to be operated on a public roadway. Under this provision, states which have adopted this Act may determine which vehicles not designed for public roadway use should be covered by basic reparation insurance and implement those decisions by requiring the registration of those vehicles under state motor vehicle laws, or by referring at this point to laws requiring the registration of such vehicles. An ordinary passenger automobile, even if it were not required to be registered for some reason, would qualify as a vehicle designed to be operated on a public roadway. On the other hand, such vehicles as farm tractors and fork lift trucks are not covered. The exclusion of vehicles operated by muscular power excludes such vehicles as bicycles which are wholly operated by muscular power.

The definition of "motor vehicle" also determines the criteria for compulsory maintenance of security for basic reparation benefits and tort liabilities, which is required for a "motor vehicle" registered or operated in the State (Section 7). Referring back to the examples in the previous paragraph, the owners of the registered snowmobile and unregistered automobile would be required to maintain security.

The definition of "public roadway" excludes from it trails which are open to the public but are designed solely for off-the-road vehicles. A motorcycle designed for operation solely on motorcycle trails, and not required to be registered under State law is thus not a motor vehicle. However, once it is determined that a vehicle is a motor vehicle, neither the availability of basic reparation benefits nor the scope of required security for basic reparation benefits and tort liabilities turns on whether injury resulted from operation of the motor vehicle on a public roadway. Thus, in the case of a motorcycle designed for public roadway use or registered under appropriate state laws,

basic reparation benefits are available for injury arising from its operation on a motorcycle trail, and the required security for tort liabilities would cover liability arising from its operation in that location.

(8) "Net loss" means loss less benefits or advantages, from sources other than basic and added reparation insurance, required to be subtracted from loss in calculating net loss (Section 11).

COMMENT

Under the definition of basic reparation benefits (Section 1(a)(2)), basic reparation insurance reimburses a person suffering loss only for "net loss." Calculation of net loss, however, does not in itself determine the amount of an injured person's basic reparation benefits, since there must also be taken into account, in order to calculate basic reparation benefits (Section 1(a)(2)), "limits ..., deductibles ..., exclusions ..., disqualifications ..., and other conditions provided in this Act."

(9) "Noneconomic detriment" means pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage recoverable under the tort law of this State. The term does not include punitive or exemplary damages.

COMMENT

The primary function of the defined term is to distinguish economic detriment or "loss" (Section 1(a)(5)) for which basic reparation benefits are paid without reference to fault (Section 3(a)) and detriment incapable of dollars-and-cents measurements for which tort actions are retained, subject to significant limitations (Section 5(a)(7)). Since Section 5 creates no new tort remedies, but merely preserves a portion of existing State law, nothing in the definition of "noneconomic detriment" purports to determine the kinds of harm which are appropriately compensable under tort law. The definition instead refers to those categories of nonpecuniary damage otherwise compensable under applicable law.

Because punitive damages are not noneconomic detriment, punitive damages may not be recovered even if the injured person meets the threshold tests of the retained tort action for damages for noneconomic detriment (Section 5(a)(7)). Those few States which limit recovery for wrongful death solely to punitive damages should consider, therefor, whether the language of the sentence stating that punitive damages are not noneconomic detriment should be modified, to exclude from it punitive damages in death actions. Along with other damages, punitive damages allowed by appropriate State law may be recovered from the tortfeasor under the retained tort action for intentionally caused harm (Section 5(a)(3)).

(10) "Owner" means a person, other than a lienholder

or secured party, who owns or has title to a motor vehicle or is entitled to the use and possession of a motor vehicle subject to a security interest held by another person. The term does not include a lessee under a lease not intended as security.

COMMENT

The definition of "owner" is significant in identifying the person required to maintain security for payment of tort liabilities and basic reparation benefits (Section 7).

(11) "Reparation obligor" means an insurer, self-insurer, or obligated government providing basic or added reparation benefits under this Act.

(12) "Survivor" means a person identified in [the statute of this State concerning liability for wrongful death] as one entitled to receive benefits by reason of the death of another person.

COMMENT

The term "survivor" identifies a person entitled to recover benefits for "survivor's economic loss" (Section 1(a)(5)(iv)) and "survivor's replacement services loss" (Section 1(a)(5)(v)), in case of the death of a person arising from the maintenance or use of a motor vehicle. If a person is killed in a motor vehicle accident, there may also be a retained tort action for noneconomic detriment (Section 5(a)(7)). In order to vest the claims for basic reparation benefits and tort wrongful death benefits in the same persons, the Act incorporates by reference the relevant portion of existing State wrongful death statutes. The bracketed phrase should be replaced with citation to the appropriate statute.

(b) Other definitions appearing in this Act and the Sections in which they appear are:

(1) Basic reparation insurance—Section 7(i).

(2) Obligated government—Section 7(g).

(3) Secured vehicle—Section 7(h).

(4) Security covering the vehicle—Section 7(h).

(5) Self-insurer—Section 7(g).

SECTION 2. [*Right to Basic Reparation Benefits*]

(a) If the accident causing injury occurs in this State, every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic reparation benefits.

(b) If the accident causing injury occurs outside this State, the following persons and their survivors suffering loss from injury arising out of maintenance or use of a motor vehicle have a right to basic reparation benefits:

(1) basic reparation insureds; and

(2) the driver and other occupants of a secured vehicle, other than (i) a vehicle which is regularly used in the course of the business of transporting persons or property and which is one of 5 or more vehicles under common ownership, or (ii) a vehicle owned by an obligated government other than this State, its political subdivisions, municipal corporations, or public agencies.

COMMENT

All persons injured in motor vehicle accidents within this State are entitled to receive basic reparation benefits for the loss suffered, with two limited exceptions. Limited disqualifications are provided for some converters of motor vehicles (Section 21) and those intentionally causing injury to themselves or other persons (Section 22). The scope of basic reparation benefits for out-of-State accidents depends on the existence of security providing basic reparation benefits. As to accidents occurring outside this State, basic reparation insureds and persons occupying the secured vehicle are entitled to basic reparation benefits. Non-occupants, such as pedestrians who are not basic reparation insureds, are not entitled to basic reparation benefits solely because they have been injured in an out-of-State accident involving a secured vehicle. The term "secured vehicle" is defined in Section 7(h).

The precedent for extending basic reparation benefits to out-of-State accidents causing injury to occupants of a secured vehicle who are not basic reparation insureds is the similar territorial coverage for medical payments insurance now commonly included in automobile insurance policies. The owner of a private passenger vehicle would ordinarily desire such coverage for passengers in his vehicle, whether or not the injury-causing accident occurred in this State. That out-of-State protection is not provided, however, for occupants of a secured vehicle which is one of five or more vehicles under common ownership, and which is regularly used in the business of transporting persons or property, or a vehicle owned by the United States or other states. Otherwise, the out-of-State occupant provisions would produce such anomalous results as entitling a passenger on an interstate bus, no part of whose journey involved this State, to recover basic reparation benefits under this State's law if the vehicle was registered in this State.

To the extent this Section entitles persons to basic reparation benefits for injury caused by accidents outside this State, there are no territorial limits to that entitlement. Basic reparation insureds are thus covered for motor vehicle injury accidents on a world-wide basis, and occupants of a secured vehicle are covered wherever the vehicle is operated. The required security for tort liability (Section 10) and optional added reparation insurance (Section 16), however, may be limited to injury arising from accidents within the United States, its territories and possessions, and Canada.

The term "basic reparation benefits" is defined in Section 1(a)(2). The term "accident," as used in this Section and Section 5, does not draw the distinction as to whether, from the point of view of the person causing the accident, the injury was accidental or intentional. From the point of view of the victim who did not intentionally injure himself, injuries are the result of "accident" whether the person causing the injury intended to do so or not. Thus, the term "accident" is, as used in these Sections, a generic term applied to the incident which immediately gives rise to liability. Persons intentionally causing injury to themselves are disqualified from recovery of basic reparation benefits (Section 22). On the other hand, the term "accident" as applied to the obligation to maintain security for tort liability, refers to events which are "accidents" from the point of view of the person causing harm (Section 10).

SECTION 3. [*Obligation to Pay Basic Reparation Benefits*]

(a) Basic reparation benefits shall be paid without regard to fault.

(b) Basic reparation obligors and the assigned claims plan snall pay basic reparation benefits, under the terms and conditions stated in this Act, for loss from injury arising out of maintenance or use of a motor vehicle. This obligation exists without regard to immunity from liability or suit which might otherwise be applicable.

COMMENT

As Section 2 defines the right of injured persons to obtain basic reparation benefits, this Section states the obligation of reparation obligors to pay those benefits. Identification of the basic reparation security applicable to a particular injury is determined by the provisions on priority of applicability of security (Section 4). The scope of the obligation to provide security is defined by the provisions on security covering the vehicle (Section 7). The requirement that basic reparation benefits be paid without reference to fault is an explicit statement of that which is implicit throughout this Act. (There are, however, limited disqualifications for some converters of motor vehicles (Section 21) and those intentionally causing injury to themselves or other persons (Section 22).) The last sentence, while primarily directed at governmental and charitable immunities, provides that no immunity from tort liability nor immunity from suit affects the obligation to pay basic reparation benefits.

SECTION 4. [*Priority of Applicability of Security for Payment of Basic Reparation Benefits*]

(a) In case of injury to the driver or other occupant of a motor vehicle, if the accident causing the injury occurs while the vehicle is being used in the business of transporting persons or property, the security for payment of basic reparation benefits is the security covering the vehicle or, if

none, the security under which the injured person is a basic reparation insured.

(b) In case of injury to an employee, or to his spouse or other relative residing in the same household, if the accident causing the injury occurs while the injured person is driving or occupying a motor vehicle furnished by the employer, the security for payment of basic reparation benefits is the security covering the vehicle or, if none, the security under which the injured person is a basic reparation insured.

(c) In all other cases, the following priorities apply.

(1) The security for payment of basic reparation benefits applicable to injury to a basic reparation insured is the security under which the injured person is a basic reparation insured.

(2) The security for payment of basic reparation benefits applicable to injury to the driver or other occupant of an involved motor vehicle who is not a basic reparation insured is the security covering that vehicle.

(3) The security for payment of basic reparation benefits applicable to injury to a person not otherwise covered who is not the driver or other occupant of an involved motor vehicle is the security covering any involved motor vehicle. An unoccupied parked vehicle is not an involved motor vehicle unless it was parked so as to cause unreasonable risk of injury.

(d) If two or more obligations to pay basic reparation benefits are applicable to an injury under the priorities set out in this Section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible, but he is thereafter entitled to recover contribution pro rata for the basic reparation benefits paid and the costs of processing the claim. Where contribution is sought among reparation obligors responsible under paragraph (3) of subsection (c) proration shall be based on the number of involved motor vehicles.

COMMENT

This Section determines which basic reparation security will provide compensation to a person qualified to receive basic reparation benefits under Section 2. The underlying principle, as set out in paragraph (1) of subsection (c), is that, insofar as possible, a person suffering loss should make his claim for basic reparation benefits against his own reparation obligor. This principle cannot be strictly adhered to because not all persons suffering

loss will be basic reparation insureds. If the injured person is not a basic reparation insured, as defined in Section 1(a)(3), but is an occupant of a vehicle, he receives benefits from the security covering the vehicle. Pedestrians and other persons not occupying a motor vehicle, who are injured in motor vehicle accidents, but who are not basic reparation insureds, may claim against the security covering any "involved" vehicle.

Other provisions of this Section provide exceptions to the principle that each person claims against his own reparation obligor, for the purpose of requiring the owners of certain vehicles to bear the cost of injury to occupants. When a motor vehicle is used in the business of transporting persons or property, under subsection (a) the insurer of that vehicle is responsible for all claims arising from injury to its occupants while it is being so used. Thus, a passenger in a bus or taxicab will look to the security covering the vehicle. If, when injury occurs to its occupants, the vehicle is not being used in the business of transporting persons or property, the provisions of subsections (b) or (c) are applicable.

If an employer furnishes a motor vehicle to an employee, under subsection (b) the security covering that vehicle is responsible for claims arising from injury to the employee or his spouse or other relative residing in the same household while driving or occupying the vehicle. This is so whether or not the employee is acting within the course of his employment at the time he is injured. The term "relative residing in the same household," used in this subsection, is slightly narrower in scope than the similar term used in the definition of "basic reparation insured" (Section 1(a)(3)). If neither the employee nor the members of his family own another vehicle, injury to family members while occupying the employer-furnished vehicle would be covered by the vehicle's security in any event under paragraph (2) of subsection (c). If, however, there are family policies covering other vehicles, unrelated minors who are basic reparation insureds under those policies, will look to them for payment of benefits. The simpler definition of the family unit used here will make it somewhat easier for the reparation obligor providing security for the employer-furnished vehicle to determine the scope of its obligation to members of the employee's family.

Where the person required to maintain security has not done so, or where the insurer is insolvent, the injured person may collect basic reparation benefits from the assigned claims plan (Section 18). Thus, a pedestrian who is not a basic reparation insured, injured by an uninsured vehicle, will not be denied benefits. However, if a person is a basic reparation insured under a policy issued by a solvent insurer, he is not required in any case to prosecute his claim under the assigned claims plan. An occupant of a motor vehicle being used in the business of transporting persons or property, and an employee occupying an employer-furnished vehicle, are entitled to benefits under their own basic reparation policies if the vehicle is uninsured.

SECTION 5. [*Partial Abolition of Tort Liability*]

(a) Tort liability with respect to accidents occurring in this State and arising from the ownership, maintenance, or use of a motor vehicle is abolished except as to:

(1) liability of the owner of a motor vehicle involved in an accident if security covering the vehicle was not pro-

vided at the time of the accident;

(2) liability of a person in the business of repairing, servicing, or otherwise maintaining motor vehicles arising from a defect in a motor vehicle caused or not corrected by an act or omission in repair, servicing, or other maintenance of a vehicle in the course of his business;

(3) liability of a person for intentionally caused harm to person or property;

(4) liability of a person for harm to property other than a motor vehicle and its contents;

(5) liability of a person in the business of parking or storing motor vehicles arising in the course of that business for harm to a motor vehicle and its contents;

(6) damages for any work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss, not recoverable as basic reparation benefits by reason of the limitation contained in the provisions on standard weekly limit on benefits for those losses (Section 13), that occur after the injured person is disabled by the injury for more than [6] months or after his death caused by the injury; and

(7) damages for noneconomic detriment in excess of [$5,000], but only if the accident causes death, significant permanent injury, serious permanent disfigurement, or more than 6 months of complete inability of the injured person to work in an occupation. "Complete inability of an injured person to work in an occupation" means inability to perform, on even a part-time basis, even some of the duties required by his occupation or, if unemployed at the time of injury, by any occupation for which the injured person was qualified.

(b) For purposes of this Section and the provisions on reparation obligor's rights of reimbursement, subrogation, and indemnity (Section 6), a person does not intentionally cause harm merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of harm.

COMMENT

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. Economic loss from personal injury is compensated by basic reparation benefits, payable to automobile accident victims without reference to fault (Section 2). Harm to motor vehicles and their contents, along with

other harm to property, is not compensated by basic reparation benefits (Section 15). 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 provided under basic reparation insurance.

Neither basic reparation benefits nor the tort actions specifically retained by the 7 paragraphs of subsection (a) are the exclusive remedies for victims of automobile accidents. Benefits available under existing state and federal law which are not based on tort are unaffected by this Section. Significant examples of those benefits are workmen's compensation and social security disability benefits. (See the Comment to Section 6 with reference to the effect of the tort exemption on the right of subrogation under the Workmen's Compensation Act.) Under the provision on calculation of net loss (Section 11), however, both workmen's compensation benefits and social security benefits are excluded in calculating basic reparation benefits. Moreover, the only tort actions which are abolished are those which arise from the defendant's ownership, maintenance, or use of a motor vehicle. Among the potential tort actions thus retained by an automobile accident victim would be those against an automobile manufacturer for products liability or against a railroad in the case of an automobile-train collision.

There are 7 specific exceptions to the general principle abolishing tort actions arising from the ownership, maintenance, or use of a motor vehicle. In the case of all the exceptions, this Act creates no new tort liabilities or remedies, but merely retains tort liability to the extent that it exists under the relevant law. For example, if relevant law of the State of enactment permits survival of a decedent's claim for relief for conscious pain and suffering prior to death, paragraph (7) preserves that claim subject to the [$5,000] exemption. On the other hand, if no claim for relief survives under relevant law, paragraph (7) creates no claim for the decedent's pain and suffering prior to death.

This Section limits the application of the general tort exemption to liability arising from motor vehicle accidents within the State. The victim of an out-of-State automobile accident would be entitled to whatever tort remedy is allowed him by the state where the accident occurred, even if he is also entitled to basic reparation benefits as a basic reparation insured or as an occupant of an insured vehicle (Section 2). If basic or added reparation benefits are paid, the insurer is subrogated to the injured person's tort recovery (Section 6).

5(a)(1). The rationale for denying the tort exemption to persons failing to comply with the requirement of providing security (Section 7) is that such persons have not contributed to the payment of basic reparation benefits which are intended to replace much of existing tort liability. For example, the State is not empowered to require that the United States government post security for the payment of basic reparation benefits. The United States' obligation to pay the victims of accidents involving government motor vehicles is limited to paying "tort claims, in the same manner, and to the same extent as a private individual under like circumstances" (28 U.S.C. § 2674). Under the provisions on security covering the vehicle (Section 7), the United States government may elect to provide security for its vehicles. If the United States provides security, it would be exempt from tort liability. But, under this paragraph, if it elected not to do so, it would continue to be liable in tort "to the same extent as a private individual" who had not complied with the security requirement. This paragraph retains

tort liability only for the owner of the unsecured vehicle, since, under the provisions on security covering the vehicle, only the owner is required to furnish such security. The driver of an unsecured vehicle who is not the owner is not liable in tort under the tort action retained by this paragraph. The owner's vicarious liability under owner-consent statutes or principles of the law of agency is retained, however, as if the driver's tort liability had been retained as well.

5(a)(2). The retained tort action provided by this paragraph is intended to alleviate an anomaly which would otherwise arise from the definition in Section 1(a)(6) of "maintenance or use of a motor vehicle." Under that definition "conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles" is included only if "the conduct occurs off the business premises." The primary purpose of that provision is to disallow basic reparation benefits to a person injured by automobile maintenance activities in a motor vehicle service garage, while allowing benefits to persons injured by such conduct as road testing the vehicle on a highway. A subsidiary purpose of the definition is to retain tort liability if a person is injured on the highway or there is harm to property as a result of negligent repair. The exception in this paragraph assures that the availability of tort recovery to a person who is injured on the highway or whose vehicle is damaged as a result of a faulty repair will not depend on whether the repair took place on or off the business premises of the mechanic.

5(a)(3). The retained tort action for intentionally caused harm encompasses, among others, traditional liability for assault and battery. The tort liability insurance required by the provisions on requirement of security would not insure against the liability retained by this paragraph (see the Comment to Section 10).

5(a)(4). The retained tort action for harm to property provided by this paragraph, leaves harm to property other than a motor vehicle and its contents to the existing tort liability system. However, the tort exemption extends to motor vehicles and their contents. By eliminating tort claims for vehicle damage, a State will effect lower total insurance costs for vehicular damage. As in the case where the issue of fault is eliminated in compensating persons for bodily injury, total insurance costs will be reduced because there can be no quarrel over culpability and no administrative expense in assigning ultimate responsibility. This aspect of the savings for vehicle damage will not equal the percentage savings in the bodily injury area because there is no equivalent to the savings in the bodily injury area from the elimination of all but the most severe claims for pain and suffering. Savings will result, however, from a motorist's having to carry only one coverage applicable to vehicle damage (an optional collision coverage on his own car (Section 16(b)), whereas under the present system two coverages are commonly carried (collision, a nonfault coverage, and property damage liability, a fault coverage). Where a motorist chooses not to insure his own vehicle, his premium for property damage will reflect only his exposure to out-of-State accident liability and liability for damage to non-vehicular property. For a motorist owning an expensive automobile, optional full collision coverage may cost more than his premiums under the present system for collision and property damage liability, since his present collision coverage expense is reduced by subrogation of the insurer to tort claims against other drivers. For those owning less expensive automobiles, total premium costs will be reduced, even for the owner who carries the optional full

collision coverage. This underscores a major argument for removing damage to vehicles and their contents from the tort liability system. That is, if tort liability for vehicle damage is retained, owners of less expensive cars are required to pay liability insurance premiums which reflect the exposure to loss of other persons' more expensive vehicles. Owners may also elect an inverse-liability collision coverage (Section 16(b)(2)), covering the vehicle when the driver of the other vehicle is at fault. This would give the owner the benefits that he might collect from other drivers under the fault system. With this coverage, however, the owner of a less expensive vehicle is not required to pay a premium covering the loss exposure of other, more expensive vehicles.

5(a)(5). The primary purpose of the tort action retained by this paragraph is to retain the tort action of a person who has left his car in a parking lot or parking garage and whose vehicle has been damaged because of the conduct of an employee of the lot or garage.

5(a)(6). Basic reparation benefits are not tied to the injured person's current wage level, but provide for recovery of future loss caused by the injured person's inability to engage in work. (See the definition of work loss (Section 1(a)(5)(ii).) On the other hand, basic reparation benefits for work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss is restricted to a total limit of $200 in any one week period (Section 13).

A threshold requirement of the retained tort action for excess economic loss is that the injured person be continuously "disabled" for more than [6] months or die from his injuries. In the light of the subject of this paragraph, the term "disabled" should be interpreted in the sense of inability to engage in employment or perform those services for which recovery is sought. Recovery is limited to excess loss which follows [6] months' continuous disability, or death. Where an injured person has purchased added reparation insurance providing protection beyond the $200 limit, but qualifies for the tort action for his excess loss under this paragraph, his recovery is subject to the reparation obligor's right of subrogation (Section 6).

If an injured person qualifies for recovery of excess economic loss under this paragraph, he is not entitled to recover for all economic loss for which basic reparation benefits have not been or will not be paid, but only that which is excluded from payment of basic reparation benefits by reason of the limitation contained in the provisions on standard weekly limit on benefits for certain losses (Section 13). He cannot recover for loss unrecoverable because he has elected certain optional exclusions, or deductibles. (For comment on calculation of the $200 limit, and its relationship to optional deductibles and exclusions, see the Comments to Sections 13 and 14.) Thus, if a person has elected to exclude all benefits for replacement services loss (Section 14(a)(3)) that loss would be unrecoverable as basic reparation benefits because he had elected the exclusion and not because of the limitation contained in Section 13. Hence, no matter the size of his loss, his tort recovery pursuant to this paragraph would not include damages for replacement services loss.

5(a)(7). The thrust of this paragraph is to preserve tort actions for non-economic detriment only for persons who have suffered very serious injury. This is accomplished through two separate, but related, devices. First is the requirement that one of four alternate threshold tests be met. Of the three threshold tests other than death, two require that there be permanent injury.

The third refers to temporary disability for 6 months and is narrowly defined to require complete inability of the injured person to work in his occupation. Permanent injuries which do not completely disable the person from engaging in work may qualify under the threshold tests relating to significant permanent injury or serious permanent disfigurement.

Second, if a threshold test is met, any recovery is reduced by the [$5,000] exemption. The threshold tests other than "death" will inevitably require judicial interpretation. For this reason, the thresholds are coupled with an exemption designed to reduce the area of contention whether minor injuries fall within one of these threshold tests, and to reduce the cost to the system by eliminating recovery of damages for noneconomic detriment by those less seriously injured. It should also reduce the incentive for litigation, on the part of those with trivial injuries, as to whether one of the threshold tests for recovery of damages for noneconomic detriment has been met. Without a significant exemption, many accident victims whose claims for economic loss had been fully compensated by basic reparation benefits and who had not suffered very serious injury, would have an arguable case, with some settlement value, for recovery beyond their out-of-pocket losses.

5(b). This subsection is designed to eliminate the possibility that "intentionally caused harm," as used in paragraph (3) of subsection (a) of this Section and in Section 6(c), will be misconstrued to include cases where the defendant's conduct created a grave risk of serious harm, where the defendant intended the act which resulted in harm, or where the defendant engaged in conduct he knew to be reckless or negligent.

SECTION 6. [*Reparation Obligor's Rights of Reimbursement, Subrogation, and Indemnity*]

(a) A reparation obligor does not have and may not directly or indirectly contract for a right of reimbursement from or subrogation to the proceeds of a claim for relief or cause of action for noneconomic detriment (Section 5(a)(7)) of a recipient of basic or added reparation benefits.

(b) Except as provided in subsection (a), whenever a person who receives or is entitled to receive basic or added reparation benefits for an injury has a claim or cause of action against any other person for breach of an obligation or duty causing the injury, the reparation obligor is subrogated to the rights of the claimant, and has a claim for relief or cause of action, separate from that of the claimant, to the extent that (i) elements of damage compensated for by basic or added reparation insurance are recoverable and (ii) the reparation obligor has paid or become obligated to pay accrued or future basic or added reparation benefits.

(c) A reparation obligor has a right of indemnity against a person who has converted a motor vehicle involved in an accident, or a person who has intentionally caused injury to person or harm to property, for basic and added reparation benefits paid to other persons for the injury or harm caused

by the conduct of that person, for the cost of processing claims for those benefits, and for reasonable attorney's fees and other expenses of enforcing the right of indemnity. For purposes of this subsection, a person is not a converter if he uses the motor vehicle in the good faith belief that he is legally entitled to do so.

COMMENT

Under Section 5, there are substantial areas in which tort liability remains in effect for injury related to motor vehicle accidents. As to these possible tort recoveries, it is desirable to prevent duplication of recovery by the injured person for the same elements of loss and to vest control of the right of recovery in the person having the real economic interest.

To accomplish this result, Section 6 allocates the beneficial interests in and control over the remaining tort and related causes of action or claims between the injured person and the reparation obligor on the basis of the kind of loss for which recovery is sought. Thus, subsection (a) deprives a reparation obligor of any right of subrogation or reimbursement from the proceeds of a claim or cause of action for noneconomic detriment because those kinds of loss are not compensable by basic reparation insurance.

On the other hand, subsection (b) provides that to the extent that a claim or cause of action arising from an injury is for recovery of elements of damage which are compensable by basic or added reparation insurance, and a reparation obligor has paid benefits or is obligated to pay future benefits, the claim or cause of action is vested by subrogation separately in the reparation obligor. To the extent that other elements of damage not compensable by reparation benefits are recoverable, the claim or cause of action remains with the injured person or his survivors. The subrogation provision is not limited to "tort" claims, but extends to claims "for breach of an obligation or duty causing the injury" in order to assure that there will be reimbursement from recoveries such as those for products liability if they are based, in a particular state, on legal theories other than tort.

A number of collateral issues are posed by the division of these claims or causes of action between the injured person, or his survivors, and the reparation obligor. These include questions of joinder, estoppel, and other procedural implications. These matters, however, are resolved by reference to other laws of the enacting State and are beyond the provisions of this Act.

Under subsection (c), the reparation obligor is entitled to indemnity against intentional tortfeasors and converters. The liability to indemnify is not likely to be underwritten by insurance. Under this subsection, however, if one of those persons has assets to satisfy a judgment, a reparation obligor is entitled to collect from him its full outlay for benefits paid to other persons whether or not the intentional tortfeasor or converter is liable to the injured person. The conversion concept used in this Section and in the provisions on converted vehicles (Section 21) is that of the common law of torts, with reference to dominion and control of the converted vehicle. The mental element is significantly different, however. For example, one who takes a vehicle without permission is not a converter, as the term is used in this Section and Section 21, if he has an honest belief (whether or not that belief was reasonable) that he has permission to do so. Under the

provisions on deduction and set-off (Section 30), a reparation obligor may not refuse to pay benefits to a basic reparation insured injured in the course of converting a motor vehicle (see Section 21) and may not offset its indemnity rights against benefits due. (See, also, the provisions on exemption of benefits (Section 31).)

To the extent that workmen's compensation carriers are now subrogated to an injured workman's third-party tort claims, that right has been substantially eliminated by Section 5 as to workmen's compensation benefits paid for injuries arising out of the maintenance or use of a motor vehicle. Where tort liability is retained, however, there has been no attempt under this Act to affect existing rights of subrogation under workmen's compensation acts, as this section deals only with subrogation rights of reparation obligors.

SECTION 7. [*Security Covering Motor Vehicle*]

(a) This State, its political subdivisions, municipal corporations, and public agencies shall continuously provide pursuant to subsection (d) security for the payment of basic reparation benefits in accordance with this Act for injury arising from maintenance or use of motor vehicles owned by those entities [and operated with their permission].

(b) The United States and its public agencies and any other state, its political subdivisions, municipal corporations, and public agencies may provide pursuant to subsection (d) security for the payment of basic reparation benefits in accordance with this Act for injury arising from maintenance or use of motor vehicles owned by those entities [and operated with their permission].

(c) Except for entities described in subsections (a) and (b), every owner of a motor vehicle registered in this State, or operated in this State by him or with his permission, shall continuously provide with respect to the motor vehicle while it is either present or registered in this State, and any other person may provide with respect to any motor vehicle, by a contract of insurance or by qualifying as a self-insurer, security for the payment of basic reparation benefits in accordance with this Act and security for payment of tort liabilities, arising from maintenance or use of the motor vehicle.

(d) Security may be provided by a contract of insurance or by qualifying as a self-insurer or obligated government in compliance with this Act.

(e) Self-insurance, subject to approval of the [commissioner] of insurance, is effected by filing with the [commissioner] in satisfactory form:

(1) a continuing undertaking by the owner or other

appropriate person to pay tort liabilities or basic reparation benefits, or both, and to perform all other obligations imposed by this Act;

(2) evidence that appropriate provision exists for prompt and efficient administration of all claims, benefits, and obligations provided by this Act; and

(3) evidence that reliable financial arrangements, deposits, or commitments exist providing assurance, substantially equivalent to that afforded by a policy of insurance complying with this Act, for payment of tort liabilities, basic reparation benefits, and all other obligations imposed by this Act.

(f) An entity described in subsection (a) or (b) may provide security by lawfully obligating itself to pay basic reparation benefits in accordance with this Act.

(g) A person providing security pursuant to subsection (e) is a "self-insurer." An entity described in subsections (a) or (b) that has provided security pursuant to subsection (d) is an "obligated government."

(h) "Security covering the vehicle" is the insurance or other security so provided. The vehicle for which the security is so provided is the "secured vehicle."

(i) "Basic reparation insurance" includes a contract, self-insurance, or other legal means under which the obligation to pay basic reparation benefits arises.

[(j) A motor vehicle may not be registered in this State unless evidence satisfactory to the [registrar of motor vehicles] is furnished that security has been provided as required by this Section.]

COMMENT

This Section broadly requires the maintenance of security for payments of basic reparation benefits and tort liability for all vehicles operated or registered in this State, except those owned by the United States, other states, or their entities. Under subsection (e), the out-of-State owner of a motor vehicle registered in another state whose automobile is operated with his permission in this State must maintain security while the vehicle is present in this State. There is no waiting period, nor does this Section permit operation in the State for a short period of time without the required security. Under Section 9(b), however, existing policies of liability insurance covering out-of-State vehicles are converted to required basic reparation and tort liability insurance. With reference to motor vehicles which are not registered in this State, the obligation to provide security exists only if the vehicle has been operated in this State by the owner or with his permission, and only while the vehicle is present in this State. On

the one hand, it may be concluded in some cases that a person entrusted with the vehicle has the owner's permission to operate the vehicle in this State, even if the owner has not expressly authorized operation in this State. On the other hand, operation of a motor vehicle in this State by a thief would not of itself constitute operation with the owner's permission. Borderline cases concerning "scope of permission" must be decided on a case-by-case basis, as they have been under current owner-consent statutes. If the vehicle is registered in this State, or has been operated in this State by the owner or with his permission, the required security applies even if the vehicle was operated by a thief or other converter at the time of the accident.

The requirement for maintenance of security may be met by a policy of insurance or through self-insurance. Subsection (f) gives governmental entities a third method, peculiar to them, of complying with the security requirement under this Section. Thus, the United States government, if it obligates itself to pay basic reparation benefits, is treated as an owner of vehicles who has provided the required security, and is relieved of the tort liability which is imposed on owners of unsecured vehicles (Section 5(a)(1)).

Subsection (j), which is bracketed, is optional. Those states which decide to enforce the security requirement for registered vehicles by making evidence of security a condition precedent to registration should include this provision.

SECTION 8. [*Obligations Upon Termination of Security*]

(a) An owner of a motor vehicle registered in this State who ceases to maintain security as required by the provisions on security (Section 7) [shall immediately surrender the registration certificate and license plates for the vehicle to the [registrar of motor vehicles] and] may not operate or permit operation of the vehicle in this State until security has again been provided [and proof of the security furnished] as required by this Act.

(b) An insurer who has issued a contract of insurance and knows or has reason to believe the contract is for the purpose of providing security (Section 7(d)) shall immediately give notice to the [registrar] of motor vehicles of the termination of the insurance.

(c) If the [commissioner] of insurance withdraws approval of security provided by a self-insurer or knows that the conditions for self-insurance have ceased to exist, he shall immediately give notice thereof to the [registrar] of motor vehicles.

(d) The requirements of subsections (b) and (c) may be waived or modified by rule of the [registrar] of motor vehicles.

COMMENT

The requirement of subsection (a) for surrender of registration certifi-

cates and license plates is optional, but the provision may be included in the statute whether or not Section 7(i), requiring evidence of security as a condition precedent to registration, has been included. The requirements of subsections (b) and (c) for notice to the [registrar of motor vehicles] are designed to implement subsection (a). Under subsection (d), the [registrar of motor vehicles] may adopt rules which dispense, in whole or in part, with the notice requirements of subsections (b) and (c) if he determines those notice requirements are not necessary for the purpose of keeping unsecured vehicles off the road.

SECTION 9. [*Included Coverages*]

(a) An insurance contract which purports to provide coverage for basic reparation benefits or is sold with representation that it provides security covering a motor vehicle (Section 7) has the legal effect of including all coverages required by this Act.

(b) Notwithstanding any contrary provision in it, every contract of liability insurance for injury, wherever issued, covering ownership, maintenance, or use of a motor vehicle, except a contract which provides coverage only for liability in excess of required minimum tort liability coverages (Section 10), includes basic reparation benefit coverages and minimum security for tort liabilities required by this Act, while it is in this State, and qualifies as security covering the vehicle.

(c) An insurer authorized to transact or transacting business in this State may not exclude, in any contract of liability insurance for injury, wherever issued, covering ownership, maintenance, or use of a motor vehicle, except a contract providing coverage only for liability in excess of required minimum tort liability coverage (Section 10), the basic reparation benefit coverages and required minimum security for tort liabilities required by this Act, while the vehicle is in this State.

COMMENT

Subsection (a) assures that every contract purporting to do so contains the mandated basic reparation and liability coverages regardless of the language actually used in the contract.

Subsection (b) explicitly applies to an insurer even though the insured is a nonresident of this State, the insurer is not qualified to do business in this State, and the only contact of the insurer with this State is that its insured permitted operation of the insured vehicle in this State. The effect of this provision is to convert a foreign insurer's automobile or motor vehicle liability policy or contract to the coverages required under this Act if the insured vehicle is registered in this State or operated in this State

with the owner's permission. Since only "liability" insurance contracts are converted, an insurance contract limited to collision and comprehensive coverages is unaffected by this provision. Given the ready ability of the owner of a motor vehicle to drive his vehicle from state to state within a few days over an interstate highway system, it is unreasonable for an insurer to argue that it could not contemplate out-of-state use of the motor vehicle, or that it could only contemplate or foresee use within a limited geographic area. Accordingly, operation of the insured vehicle within the State, standing alone, should be a sufficient contact allowing the State to impose its substantive laws upon the out-of-State insurer of an out-of-State vehicle. Cf. *Clay* v. *Sun Ins. Office*, 377 U.S. 179 (1964).

Subsection (c) is, in part, a safety valve in the event subsection (b) were held to be unconstitutional. Without reference to where the contract is written, it requires, if the insurer is authorized to transact or is transacting business in this State, that the coverages required by this Act be included in any automobile or motor vehicle liability insurance contract if the insured vehicle is registered or operated in this State. Another purpose of subsection (c) is to preclude insurers from including provisions in their out-of-State liability contracts which might mislead insureds to suppose they were not protected under their policies for basic reparation benefits when their vehicles were operated in this State.

Policies of insurance which provide coverage only for liability in excess of the required minimum tort liability limits (Section 10) are expressly excluded from the operation of subsections (b) and (c).

SECTION 10. [*Required Minimum Tort Liability Insurance and Territorial Coverage*]

(a) The requirement of security for payment of tort liabilities (Section 7) is fulfilled by providing:

(1) liability coverage of not less than $25,000 for all damages arising out of bodily injury sustained by any one person as a result of any one accident applicable to each person sustaining injury caused by accident arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle;

(2) liability coverage of not less than $10,000 for all damages arising out of injury to or destruction of property, including the loss of use thereof, as a result of any one accident arising out of ownership, maintenance, use, loading, or unloading, of the secured vehicle; and

(3) that the liability coverages apply to accidents during the contract period in a territorial area not less than the United States of America, its territories and possessions, and Canada.

(b) Subject to the provisions on approval of terms and forms (Section 17), the requirement of security for payment of tort liabilities (Section 7) may be met by a contract

the coverage of which is secondary or excess to other applicable valid and collectible liability insurance. To the extent the secondary or excess coverage applies to liability within the minimum security required by this Act, it must be subject to conditions consistent with the system of compulsory liability insurance established by this Act.

COMMENT

Subsection (a) prescribes the minimum limits and coverages for required tort liability insurance. There is no "per accident" or aggregate limit on damages arising from bodily injury, although there is a "per accident" limit for damage to property. The required tort security will cover liability under the retained tort actions (Section 5) (except that for intentional harm (Section 5(a)(3))). It covers, as well, liability for tortious conduct in loading and unloading the vehicle, and tort liability arising from accidents outside this State. Under paragraph (3), the out-of-State liability coverage must extend, at least, to the United States, its territories and possessions, and Canada.

The required tort liability coverage is broader than that applicable to basic reparation benefits insofar as it includes liability for torts in the course of loading and unloading the vehicle. (See Comment to Section 1(a)(6).) Many property-owners' liability policies broadly exclude tort liability arising from maintenance or use of motor vehicles, and themselves contain a broad definition of maintenance or use which includes loading and unloading. Use of the same broad concept for purposes of motor vehicle tort liability coverage leaves existing tort liability insurance coverages as they are at present, and will assure that a person with a homeowner's policy and an automobile liability policy will not be left, unknowingly, with a hole in his tort liability coverage for injury arising from loading and unloading of motor vehicles.

The required security for tort liabilities is limited to those which are for "accidents." Here the term "accident" is used from the point of view of the insured tort defendant. Accordingly, as is true of current automobile policies, the required security for tort liability need not provide for payment of judgments for battery by automobile, nor other judgments which are permitted by the retained tort action for intentionally caused harm (Section 5(a)(3)).

Subsection (b) permits the [commissioner] of insurance to approve, as meeting the security requirement for tort liabilities (Section 7), limited kinds of other insurance clauses in liability coverage. For example, the [commissioner] might approve a clause declaring that one person's Drive-Other-Cars liability coverage is excess to liability coverages of the policy on another person's vehicle that he is driving with permission. The [commissioner] might also permit a clause declaring that, if the other liability coverage meets the minimum requirements of this Act, this excess coverage is subject to added conditions that would be inapplicable to the required minimum security because inconsistent with a system of compulsory liability insurance.

SECTION 11. [*Calculation of Net Loss*]

(a) All benefits or advantages a person receives or is entitled to receive because of the injury from social security, workmen's compensation, and any state-required temporary, nonoccupational disability insurance are subtracted in calculating net loss.

(b) If a benefit or advantage received to compensate for loss of income because of injury, whether from basic reparation benefits or from any source of benefits or advantages subtracted under subsection (a), is not taxable income, the income tax saving that is attributable to his loss of income because of injury is subtracted in calculating net loss. Subtraction may not exceed 15 per cent of the loss of income and shall be in a lesser amount if the claimant furnishes to the insurer reasonable proof of a lower value of the income tax advantage.

COMMENT

This Section is one of several providing for coordination of benefits received from basic reparation obligors and payments received from other sources for the same injury. Coordination of basic reparation benefit payments with tort claims available to the injured person is accomplished by the provisions giving the reparation obligor a right of subrogation (Section 6). The contingent exclusion, which insurers may offer under the provisions dealing with optional deductibles and exclusions (Section 14(b)(2)), may provide for the deduction of payments from other sources identified in the basic reparation contract. Assigned claims are subject to additional collateral source deductions (Section 18(c)).

Subsection (a) concerns the effect of collateral sources of benefits on the right to receive reparation benefits under this Act. In calculating net loss for the purpose of determining reparation benefits one must subtract only those benefits or advantages he is entitled to receive from (1) social security, (2) workmen's compensation, and (3) state-required temporary, nonoccupational disability insurance (sometimes referred to as cash sickness benefits). "Social security" includes all benefits under the federal Social Security Act, including Medicare and disability benefits. It does not include benefits provided under Title XIX of the Social Security Act ("Medicaid"), which are not paid through the Social Security System. As to social security benefits, a generic term is used rather than statutory citation so that this Act need not be amended to conform to later amendments to the Social Security Act. The reference to "workmen's compensation" includes recoveries under similar plans voluntarily undertaken by an employer with no statutory obligation to do so, but excludes recoveries under laws where the recovery is keyed to a finding of employer fault, such as the Federal Employers' Liability Act. At present, there are only six jurisdictions that have state-required temporary, nonoccupational disability insurance: California (Cal. Unemp. Ins. Code §§ 2800-04 (West 1956), Hawaii (Hawaii Rev. Laws §§ 392-01 to -101 (supp. 1971), New Jersey (N.J. Rev. Stat. §§ 43:21-25 to -55 (1962)), New York (N.Y. Workmen's Comp. Law §§ 200-42

(McKinney 1965)), Puerto Rico (P.R. Laws, Title II, § § 201-202 (1970)), and Rhode Island (R.I. Gen. Laws Ann. § § 28-39-1 to -40 (1956)). The general language which refers to workmen's compensation and state-required temporary nonoccupational disability insurance should not be replaced with specific statutory references to the law of this State. Such benefits should be subtracted if the victim is entitled to receive them under the law of another state.

Only the collateral source payments which are specified in this Section may be subtracted in calculating net loss. For example, in the case of an employee receiving wage-continuation payments during the time he is absent from work because of injury not covered by workmen's compensation, the wage-continuation payments would not be subtracted in calculating net loss whether the payments were made by the employer or through insurance. (See Comment to Section 1(a)(5)(ii).) An employee covered by a generous wage-continuation plan, however, may be able to avoid indirectly paying for duplicative wage loss benefits through the contingent exclusion authorized by Section 14(b)(2).

Subsection (b) concerns the problem which arises because basic reparation benefits, social security benefits, workmen's compensation payments, and temporary, nonoccupational disability benefits are not subject to income taxation under the Internal Revenue Code. Without this provision, an injured person would receive in basic reparation benefits and deductible collateral source payments an amount in excess of his usual take-home pay, because he would not be taxed on any of it. To avoid administrative costs and delay in payment of claims, which might be necessary if the exact income tax consequences were calculated for each claimant, there is a presumption that the value of the tax advantage is 15 per cent of the loss of income. In order to preclude unfair application of this provision to a low-income claimant, the presumption is rebuttable by proof offered by a claimant of a lesser value of the tax advantage to him. In no event may the subtraction exceed 15 per cent of the loss of income.

For the interrelation of collateral source and income tax deductions and the $200 per week limit on loss other than allowable expense, see the Comment to Section 13.

SECTION 12. [*Standard Replacement Services Loss Exclusion*]

All replacement services loss sustained on the date of injury and the first 7 days thereafter is excluded in calculating basic reparation benefits.

COMMENT

Under this Section, a person will not receive any basic reparation benefits for replacement services loss, as defined in Section 1(a)(5)(iii), sustained within the first seven days after the injury occurs, excluding the day of injury. Thus, if an injury occurs during the day of January 1, only that replacement services loss incurred after 12:01 a.m. on January 9 will be included in calculating basic reparation benefits. This is a customary form of deductible found in insurance plans, particularly workmen's compensa-

tion and disability insurance, and is employed to avoid the relatively high cost to the system of handling the small claim. Since replacement services loss is also the type of loss that can be and usually is absorbed by relatives and friends for short periods after injury, it also serves the purpose of a co-insurance factor by requiring that the insured bear this cost for the first week after injury. Section 14 provides for optional additional exclusions of benefits for replacement services loss.

SECTION 13. [*Standard Weekly Limit on Benefits for Certain Losses*]

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

COMMENT

This paragraph provides for a $200 aggregate limit during any calendar week on the amount of basic reparation benefits that can be recovered for injury to one person as compensation for work loss, replacement services loss, survivor's economic loss and survivor's replacement services loss (defined in Section 1(a)(5)(ii-v)).

A wage earner, for example, with a larger potential wage loss exposure in the event of injury may protect himself with optional added reparation insurance (Section 16). There is no aggregate limit on allowable expense which covers medical and other related costs as defined in Section 1(a)(5)(i). A tort action is retained in some cases for loss which exceeds the $200 per week limit (Section 5(a)(6)). Significantly, the $200 limit provided by this Section is a limit on benefits to be paid and not a limit on "loss" or "net loss" which go into the calculation of basic reparation benefits. Thus, for example, if an injured person's only loss was $225 in wage loss for a one week period and was subject to a deduction of $33.75 for income tax advantages (Section 11(b)) in the calculation of net loss, he would be entitled to recover $191.25. Since the basic reparation benefits payable and attributable to work loss for that one week period would be less than $200, this Section would not operate to put a ceiling on his recovery. For examples of the interrelationship of the $200 limit and optional deductibles and exclusions, see the Comment to Section 14.

If earnings or work are seasonal or irregular, the intent is to adjust or apportion the weekly limit on an annual basis so that persons falling in these categories are not treated unfairly. For example, if a person earned $10,000 a year, but all of his income was attributable to personal effort normally expended in a concentrated six month period, his work loss should not be reduced by the limit contained in this Section if his injury incapacitated him during the entire year. Without a special provision for

apportionment or annualization however, his recovery might be substantially less than a wage-earner incapacitated for the same period and with the same yearly income, but working throughout the entire year. The variety of situations involving irregular or seasonal earning or work is so great, however, that it is undesirable to draft a single comprehensive formula, and too complex to put all the appropriate formulae in the body of the statute. The principle of apportionment or annualization for seasonal or irregular earnings or work is stated here with the belief that through industry practice, administrative regulation, and the judicial process all such cases can be brought within it.

SECTION 14. [*Optional Deductibles and Exclusions*]

(a) At appropriately reduced premium rates, basic reparation insurers shall offer each of the following deductibles and exclusions, applicable only to claims of basic reparation insureds and, in case of death of a basic reparation insured, of his survivors:

(1) deductibles in the amounts of $100, $300, and $500 from all basic reparation benefits otherwise payable, except that if 2 or more basic reparation insureds to whom the deductible is applicable under the contract of insurance are injured in the same accident, the aggregate amount of the deductible applicable to all of them shall not exceed the specified deductible, which amount where necessary shall be allocated equally among them;

(2) an exclusion, in calculation of net loss, of 10 per cent of work loss and survivor's economic loss;

(3) an exclusion, in calculation of net loss, of all replacement services loss and survivor's replacement services loss; and

(4) a deductible, in the amount of $1,000 per accident from all basic reparation benefits otherwise payable for injury to a person which occurs while he is operating or is a passenger on a two-wheeled motor vehicle.

(b) Subject to the provisions on approval of terms and forms (Section 17), basic reparation insurers may offer the following additional exclusions, applicable only to claims of some or all basic reparation insureds and, in case of death of a basic reparation insured, of his survivors:

(1) exclusions, in calculation of net loss, of a part of replacement services loss and survivor's replacement services loss; and

(2) exclusions, in calculation of net loss, of any of those amounts and kinds of loss otherwise compensated by benefits or advantages a person receives or is uncondi-

tionally entitled to receive from any other specified source, if the other source has been approved specifically or as to type of source by the [commissioner] of insurance by rule or order adopted upon a determination by the [commissioner] (i) that the other source or type of source is reliable and that approval of it is consonant with the purposes of this Act, and (ii) if the other source is a contract of insurance, that it provides benefits for accidental injuries generally and in amounts at least as great for other injuries as for injuries resulting from motor vehicle accidents.

COMMENT

Subsection (a) requires basic reparation insurers to offer, at appropriately reduced premiums, a number of deductibles and exclusions to the insured. The deductibles and exclusions, if elected, apply only to basic reparation insureds, as defined in Section 1(a)(3), under the policy, and, in case of death of a basic reparation insured, his survivors, as defined in Section 1(a)(12).

While both deductibles and exclusions are designed to reduce premium costs by reducing benefits payable, it is significant that exclusions are subtracted from loss in calculating net loss, while deductibles are subtracted from basic reparation benefits otherwise payable. The most significant impact is upon the $200 standard weekly limit (Section 13). Suppose, for example a wage-earner whose only loss was wage loss for two weeks' work, and, after subtracting income tax benefits (Section 11(b)), his net loss was $300 for each week. His maximum basic reparation recovery for wage loss would be $200 for each week. If his claim were subject to the ten per cent exclusion, (Section 14(a)(2)), his net loss would still exceed $200 and his basic reparation benefits payable would be unaffected. On the other hand, if his claim were also subject to the $100 deductible, which is deducted from "benefits otherwise payable," his basic reparation benefits would be reduced by $100 and, assuming no other loss, for the first week he could recover only $100 in benefits. See, also, the Comment to Section 13.

The first deductibles required to be offered give the insured a choice of $100, $300, and $500 deductibles. These are "aggregate" deductibles "per accident." Thus, for example, if a husband, wife and two children were injured in a single motor vehicle accident, and all were basic reparation insureds under a single policy, the deductible would not be subtracted from each of their claims but only once from the total amount of benefits due.

The second option excludes ten per cent of all work loss (Section 1(a)(5)(ii)) and survivor's economic loss (Section 1(a)(5)(iv)).

The third option excludes all replacement services loss (Section 1(a)(5)(iii)) and survivor's replacement services loss (Section 1(a)(5)(v)).

The last option deals with the motorcyclist, who presents a high risk to a basic reparation insurer since his exposure to bodily injury is so great. This permits some reduction from the premium which would be charged if insurers were required to write basic reparation coverage for two-wheeled vehicles without offering a special deductible. The deductible allows a

motorcyclist to forego the first $1,000 of reparation benefits, regardless of kind.

Subsection (b) authorizes insurers to offer the specified exclusions, and does not require that they be offered as does subsection (a) in regard to the options listed there. The reference to the requirement that there must be compliance with Section 17, which deals with approval and regulation of terms and forms by the [commissioner] of insurance, emphasizes that Section's policy of not confronting the consumer with so many varieties of coverage that he cannot intelligently make cost comparisons.

Exclusions for a part of replacement services loss or survivor's replacement services loss may be offered, under paragraph (1) of subsection (b). Full exclusion of such losses must be offered under paragraph (3) of subsection (a).

For some persons, the optional exclusion authorized by subsection (b), paragraph (2), may present the most significant cost reduction opportunity in the purchase of a mandatory basic reparation policy. The provision permits, but does not require, reparation insurers to offer an exclusion from basic reparation benefits of loss otherwise compensated by benefits received from other specified sources of benefits which are approved by the insurance [commissioner] as meeting certain standards.

The insurance [commissioner] must determine, in order to approve offering of an exclusion of this type, that the other source of benefits is reliable, that its approval is consistent with the purposes of the Act, and, if it is an insurance contract, that it is one which provides its benefits generally for accidental injuries rather than one which is specially tailored for motor vehicle accident coverage. These requirements are designed to assure that the exclusion will only be applied to other sources which will accord the anticipated benefits certainly and expeditiously and to prevent the exclusion from being used deliberately to evade the consumer protective provisions of the Act. Thus, the insurance [commissioner] in evaluating another source presumably will be concerned, among other questions, with its financial solidity, its practices and efficiency in claims administration, and the clarity and certainty with which its benefits are identified.

Further protection to the consumer is accorded by the fact that under Section 23(c), the exclusion is an excess provision only. The automobile reparation insurer remains liable to provide benefits as required by the Act if the other source fails to do so promptly. Therefore, it is probable that reparation insurers will exercise considerable restraint in offering these "collateral source" exclusions.

Hence, at the time a person purchases basic reparation insurance, he is unlikely to receive significant cost reductions in his premium for basic reparation insurance through a collateral source exclusion unless it is reasonably certain that the specified collateral source payments will be available at the time of injury. The cost reductions may be significant, however, in the case of an insurer offering to sell basic reparation policies to the employees of a large employer, who have defined, generous wage-continuation and accident and health benefits under a common employer-furnished or trade union plan. The exclusion also may be of considerable use in coordinating with various governmental sources of benefits.

SECTION 15. [*Property Damage Exclusion*]

Basic reparation benefits do not include benefits for harm to property.

COMMENT

Basic reparation insurance does not include coverage for harm to property, but is limited to coverage for loss as a result of bodily harm, sickness, disease, or death, as set out in Sections 1(a)(4) and (5). Basic reparation insurers are required, however, under Section 16(b) to offer added reparation insurance coverage for harm to motor vehicles and their contents. Basic reparation insurers may offer, under Section 16(a), if they wish, other types of added reparation insurance that covers property damage. Tort actions are preserved for harm to property other than a motor vehicle and its contents (Section 5(a)(4)).

SECTION 16. [*Benefits Provided by Optional Added Reparation Insurance*]

(a) Basic reparation insurers may offer optional added reparation coverages providing other benefits as compensation for injury or harm arising from ownership, maintenance, or use of a motor vehicle, including benefits for loss excluded by limits on hospital charges and funeral, cremation, and burial expenses, loss excluded by limits on work loss, replacement services loss, survivor's economic loss, and survivor's replacement services loss, harm to property, loss of use of motor vehicles, and noneconomic detriment. The [commissioner] of insurance may adopt rules requiring that specified optional added reparation coverages be offered by insurers writing basic reparation insurance.

(b) Basic reparation insurers shall offer the following optional added reparation coverages for physical damage to motor vehicles:

(1) a coverage for all collision and upset damage, subject to a deductible of $100;

(2) a coverage for all collision and upset damage to the extent that the insured has a valid claim in tort against another identified person or would have had such a valid claim but for the abolition of tort liability for damages for harm to motor vehicles (Section 5(a)(4)); and

(3) the same coverage as in paragraph (2), but subject to a deductible of $100.

(c) Subject to the provision on approval of terms and forms (Section 17), basic reparation insurers may offer other optional added reparation coverages for harm to motor vehicles or their contents, or both, or other like

coverages subject to different deductibles or without deductibles.

(d) An insurer of the insured's choice may write separately coverages for harm to motor vehicles.

(e) All added reparation coverages offered apply to injuries or harm arising out of accidents and occurrences during the contract period in a territorial area not less than the United States, its territories and possessions, and Canada.

COMMENT

To comply with this Act, the owner of a motor vehicle registered or operated in this State must provide security to cover: (1) tort liability for bodily injury and property damage in limits not less than those prescribed by Section 10; and (2) basic reparation benefits. These are the only compulsory coverages in this Act. This Section concerns supplementary coverage, called added reparation insurance (Section 1(a)(1)).

Subsection (a) authorizes basic reparation insurers to develop and offer a variety of added reparation coverages, some of which are listed, providing benefits as compensation for harm arising from the ownership, maintenance, or use of a motor vehicle. The [commissioner] of insurance also is given the power to require that particular coverages be offered. The [commissioner] of insurance also has authority, under his general regulatory powers (Section 41), to assure that procedures are followed in the marketing of insurance which adequately inform consumers of the range of choices open to them, and the consequences of various choices. Nothing contained in this Section limits the authority of insurers under present State law to offer coverages which provide benefits substantially similar to added reparation insurance.

Tort liability for unintentional harm to motor vehicles and their contents is abolished when the liability arises from the ownership, maintenance, or use of a motor vehicle. (Section 5(a)(4)). An owner can no longer collect from the tortfeasor in those situations and must insure the risk or bear it himself. Although the market place would probably provide such insurance, subsection (b) assures that at least two forms of added reparation coverage will be offered the consumer for damage to motor vehicles and that they will be available from the insurer who sells him basic reparation insurance. One form of coverage includes all damage arising from collision and upset, subject to a deductible of $100. The second form of required coverage is an "inverse liability" coverage, which provides collision and upset damage benefits to the extent the insured has or would have had a tort claim against another person. (See the Comment to Section 5(a)(4).) Insurers must offer this coverage both without a deductible and subject to a deductible of $100. This subsection also authorizes insurers to offer other vehicle coverage without a deductible, with lower deductibles, or with higher deductibles. Nothing contained in this Section limits the authority of insurers under present State law, who do not sell basic reparation insurance, to sell collision and comprehensive coverages only. Nor is the consumer, if he wishes to insure his vehicle, required to purchase collision or compre-

hensive coverages from his basic reparation insurer.

Subsection (c) requires that all added reparation benefits be made available for harm caused by accidents or occurrences within the United States of America, its territories and possessions, and Canada, so that the insured will not be misled as to his coverage in the case of accidents outside this State.

SECTION 17. [*Approval of Terms and Forms*]

Terms and conditions of contracts and certificates or other evidence of insurance coverage sold or issued in this State providing motor vehicle tort liability, basic reparation, and added reparation insurance coverages, and of forms used by insurers offering these coverages, are subject to approval and regulation by the [commissioner] of insurance. The [commissioner] shall approve only terms and conditions consistent with the purposes of this Act and fair and equitable to all persons whose interests may be affected. The [commissioner] may limit by rule the variety of coverages available in order to give insurance purchasers reasonable opportunity to compare the cost of insuring with various insurers.

COMMENT

The policy terms of liability insurance and basic and added reparation insurance are only generally controlled by this Act and insurers are subject to further detailed regulation by the [commissioner] of insurance in developing terms, conditions, and other policy provisions and forms. In this regard, the [commissioner] is specifically authorized to standardize coverages to allow consumers to make meaningful cost comparisons. The [commissioner] is not authorized, however, to approve terms of basic reparation contracts which provide lesser coverages than those mandated by this Act, such as deductibles and exclusions in excess of those permitted by Section 14.

SECTION 18. [*Assigned Claims*]

(a) A person entitled to basic reparation benefits because of injury covered by this Act may obtain them through the assigned claims plan established pursuant to the provisions relating thereto (Section 19) and in accordance with the provisions on time for presenting claims under the assigned claims plan (Section 20) if:

(1) basic reparation insurance is not applicable to the injury for a reason other than those specified in the provisions on converted vehicles (Section 21) and intentional injuries (Section 22);

(2) basic reparation insurance is not applicable to the

injury because the injured person converted a motor vehicle while he was under 15 years of age;

(3) basic reparation insurance applicable to the injury cannot be identified;

(4) basic reparation insurance applicable to the injury is inadequate to provide the contracted-for benefits because of financial inability of a reparation obligor to fulfill its obligation; or

(5) a claim for basic reparation benefits is rejected by a reparation obligor for a reason other than that the person is not entitled under this Act to the basic reparation benefits claimed.

(b) If a claim qualifies for assignment under paragraphs (3), (4), or (5) of subsection (a), the assigned claims bureau or any reparation obligor to whom the claim is assigned is subrogated to all rights of the claimant against any reparation obligor, its successor in interest or substitute, legally obligated to provide basic reparation benefits to the claimant, for basic reparation benefits provided by the assignee.

(c) Except in case of a claim assigned under subsection (a)(4), if a person receives basic reparation benefits through the assigned claims plan, all benefits or advantages he receives or is entitled to receive as a result of the injury, other than by way of succession at death, death benefits from life insurance, or in discharge of familial obligations of support, are subtracted in calculating net loss.

(d) An assigned claim of a person who does not comply with the requirement of providing security (Section 7(c) and (d)) for the payment of basic reparation benefits, or of a person as to whom the security is invalidated because of his fraud or willful misconduct, is subject to (1) all the optional deductibles and exclusions to the maximum required to be offered under this Act (Section 14(a)) and (2) a deduction in the amount of $500 for each year or part thereof of the period of his continuous failure to provide security, applicable to any benefits otherwise payable.

COMMENT

Subsection (a) determines under what circumstances a person may assert a claim for basic reparation benefits against the assigned claims plan, set up in Section 19, so that provision is made for all persons who qualify for basic reparation benefits under this Act.

Paragraph (1) applies where a person entitled to receive basic reparation

benefits (Section 2) suffers loss and there is no basic reparation coverage applicable to the person. This paragraph would be applicable, for example, where a person was injured in an accident in the enacting State involving a motor vehicle in which he was a passenger, and neither he nor the owner had insurance. It would also be applicable when a pedestrian who is not a basic reparation insured was struck by an uninsured vehicle in the enacting State.

Paragraph (2) permits a claim where the injured person has converted a motor vehicle and is less than 15 years of age. Under the provisions on converted vehicles (Section 21), if such a person were from a car-owning family and were a basic reparation insured, he would be entitled to benefits from his family policy. The limited provision in this paragraph permitting an assigned claim avoids the harsh result of denying all recovery when a very young person from a family, owning no automobile, is injured while joy-riding in a converted vehicle.

Paragraph (3) applies to cases where it cannot be shown that there is no basic reparation insurance, but that, even though it is possible or probable such exists, it cannot be identified. This closes any gap left by paragraph (1), as in the case of the hit-and-run driver.

Paragraph (4) applies to cases of insolvency of insurers.

Paragraph (5) applies, for example, to cases where an insurer refuses to pay basic reparation benefits on the ground that they are due from another source or where an out-of-State liability insurer denies that it can constitutionally be subjected to the requirement that it pay basic reparation benefits (see Comment to Section 9). To eliminate any possible dilemma for the claimant, who is entitled to payment from some source, he is permitted to assert his claim against the assigned claims plan. This paragraph is inapplicable if an insurer refuses payment solely because it claims that no loss resulted or that loss did not arise from ownership, maintenance, or use of a motor vehicle. Since, in those cases, there is controversy over whether the claimant is entitled to recover benefits at all, there is no point to transferring that controversy from one insurer to another.

The availability of an assigned claim to an injured person who has been denied basic reparation benefits coverage by a reparation obligor does not require the injured person to pursue his claim under the assigned claims plan. He may bring an action against the applicable reparation obligor, without pursuing his assigned claim. Moreover, as his assigned claim may be subject to additional collateral source deductions under subsection (c), filing an assigned claim does not extinguish the injured person's claim for those benefits which the applicable reparation obligor is required to pay. After the claim is paid, in any case where a claim has been assigned under paragraph (3), (4), or (5), under subsection (b), reimbursement can be sought from the party who was otherwise legally obligated to process and pay the claim.

Except in insolvency cases, subsection (c) provides for additional collateral source subtractions from an assigned claim. The collateral source subtraction is broader than that mandated by the provisions on calculation of net loss (Section 11), in that it subtracts all collateral source payments other than life insurance, those received in discharge of familial obligations of support, or by way of succession at death. The assigned claims cost will be shared by all those who meet the requirement of security (Section 7). A significant part of that cost may be attributed to payments to the families

of vehicle owners who have not met the security requirement. While it is inappropriate to impose a penalty, as under subsection (d), on innocent family members when the vehicle owner has failed to provide security, it is equally inappropriate to burden the assigned claims plan with the cost of benefits which duplicate other benefits the injured party is entitled to receive.

In addition to the collateral source subtraction under subsection (c), subsection (d) provides a penalty for a person who is required to maintain security for the payment of basic reparation benefits under Section 7 but fails to do so and for a person whose security is invalidated because of fraud or willful misconduct (Section 36(g)). A person falling within either category is not disqualified from receiving basic reparation benefits, as he is entitled to be paid from the assigned claims plan. He is penalized, however, by reducing his benefits so that it does not become profitable for him to fail to comply with this Act. Consistent with that policy, his basic reparation claim is treated as if he had purchased a minimum policy required by this Act, with the maximum of all the deductibles and exclusions required to be offered (Section 14 (a)), and is subject to a further deduction of $500 for each year of non-compliance. (See, also, the provision on penalties (Section 37) and the Comment thereto.)

SECTION 19. [*Assigned Claims Plan*]

(a) Reparation obligors providing basic reparation insurance in this State may organize and maintain, subject to approval and regulation by the [commissioner] of insurance, an assigned claims bureau and an assigned claims plan and adopt rules for their operation and for assessment of costs on a fair and equitable basis consistent with this Act. If they do not organize and continuously maintain an assigned claims bureau and an assigned claims plan in a manner considered by the [commissioner] of insurance to be consistent with this Act, he shall organize and maintain an assigned claims bureau and an assigned claims plan. Each reparation obligor providing basic reparation insurance in this State shall participate in the assigned claims bureau and the assigned claims plan. Costs incurred shall be allocated fairly and equitably among the reparation obligors.

(b) The assigned claims bureau shall promptly assign each claim and notify the claimant of the identity and address of the assignee of the claim. Claims shall be assigned so as to minimize inconvenience to claimants. The assignee thereafter has rights and obligations as if he had issued a policy of basic reparation insurance complying with this Act applicable to the injury or, in case of financial inability of a reparation obligor to perform its obligations, as if the assignee had written the applicable basic reparation insurance, undertaken the self-insurance, or lawfully obligated itself to pay reparation benefits.

SECTION 19

COMMENT

The policy of the Act contemplates that with few specified exceptions, all who are subject to it and injured in motor vehicle accidents are entitled to prompt payment of basic reparation benefits. To assure that this goal is fully accomplished in all cases, it is necessary to provide a residual source of benefits for those cases where a responsible insurer, self-insurer, or obligated government cannot be identified as an applicable source of immediate benefits. The assigned claims plan in which all reparation obligors providing basic reparation coverage in the State, including insurers, self-insurers, and obligated governments, will be required to participate, is the residual benefit source provided by the Act. Through it the losses and expenses incurred in covering these residual situations indirectly are spread over the entire motor vehicle user economy of the State.

The Section affords the reparation obligors the opportunity in the first instance to organize and operate the plan with the approval and under the regulation of the State insurance [commissioner]. However, if they fail to do so in a manner consistent with the Act, it is the responsibility and power of the insurance [commissioner] to establish and maintain a plan.

The costs of the plan, including both losses paid and other expenses of operation, are to be allocated fairly among all participating reparation obligors. The Section does not purport to be more specific as to the basis of allocation. A number of reasonable bases for allocation might be developed and the determination of the appropriate one to be employed is left to the discretion of the insurance [commissioner].

The Section does not purport to specify the structure or manner of operation of the plan, these being better left to development by the participants and the insurance [commissioner]. Although denominated an "assigned claims" plan, the Section does not require that claims be assigned among all participants and it would be possible to have a plan in which one or a few insurers or the plan (or bureau) itself actually administered claims.

The Section does emphasize that the plan should operate in such a way as to minimize inconvenience to claimants. Claims are to be assigned promptly and the claimant is to be clearly advised as to the entity responsible for his claim. Except in most unusual circumstances, assignments should avoid putting claimants in the position of dealing with more than one assignee or with assignees lacking claims administration facilities convenient to the claimant.

The assigned claim is to be administered, subject to specific exceptions and qualifications otherwise stated in the Act, as if the claimant had a policy of basic reparation insurance. There is an exception to this in those cases where the assigned claim is by a claimant who is covered by basic reparation insurance provided by a reparation obligor which has become unable financially to perform its obligations. In that case, the assigned claims plan provides those basic reparation benefits to which the claimant would have been entitled had the financial inability not intervened.

SECTION 20. [*Time for Presenting Claims Under Assigned Claims Plan*]

(a) Except as provided in subsection (b), a person authorized to obtain basic reparation benefits through the

assigned claims plan shall notify the bureau of his claim within the time that would have been allowed for commencing an action for those benefits (Section 28) if there had been identifiable coverage in effect and applicable to the claim.

(b) If timely action for basic reparation benefits is commenced against a reparation obligor who is unable to fulfill his obligations because of financial inability, a person authorized to obtain basic reparation benefits through the assigned claims plan shall notify the bureau of his claim within 6 months after discovery of the financial inability.

COMMENT

If an injured person presents a timely claim through the assigned claims plan under this Section, the provisions on limitation of actions (Section 28(d)) allow him an additional time after receipt of written notice of the rejection of his claim to bring action against the reparation obligor to whom the claim was assigned.

SECTION 21. [*Converted Motor Vehicles*]

Except as provided for assigned claims (Section 18(a)(2)), a person who converts a motor vehicle is disqualified from basic or added reparation benefits, including benefits otherwise due him as a survivor, from any source other than an insurance contract under which the converter is a basic or added reparation insured, for injuries arising from maintenance or use of the converted vehicle. If the converter dies from the injuries, his survivors are not entitled to basic or added reparation benefits from any source other than an insurance contract under which the converter is a basic reparation insured. For the purpose of this Section, a person is not a converter if he uses the motor vehicle in the good faith belief that he is legally entitled to do so.

COMMENT

The operative effect of this Section is limited to the person who is not a basic reparation insured. A converter who is a basic reparation insured will collect benefits under his family policy without reference to the vehicle he occupied at the time of injury (Section 4(c)(1)), and nothing in this Section operates to deny benefits for which he or his family have paid. In the absence of this Section, however, a converter who is not a basic reparation insured would recover from the security covering the converted vehicle (Section 4(c)(2)). Under this Section and Section 18 (a)(1), a thief or joy-rider who is not a basic reparation insured can recover from neither the owner's policy nor from the assigned claims plan unless the

converter is under 15 years of age. The converter under 15 years of age who is not a basic reparation insured may recover from the assigned claims plan (Section 18 (a) (2)).

The conversion concept used in this Section is identical to that used in the provisions on Reparation Obligor's Rights of Reimbursement, Subrogation, and Indemnity (Section 6 (c)). See the Comment to that Section.

SECTION 22. [*Intentional Injuries*]

A person intentionally causing or attempting to cause injury to himself or another person is disqualified from basic or added reparation benefits for injury arising from his acts, including benefits otherwise due him as a survivor. If a person dies as a result of intentionally causing or attempting to cause injury to himself, his survivors are not entitled to basic or added reparation benefits for loss arising from his death. A person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow. A person does not intentionally cause or attempt to cause injury (1) merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury or (2) if the act or omission causing the injury is for the purpose of averting bodily harm to himself or another person.

COMMENT

While basic reparation benefits are normally payable without reference to fault, this Section and the provision on converted vehicles (Section 21) provide limited exceptions to that principle.

An injured person whose injury stems from acts intended to injure himself or another is disqualified from receiving benefits from any source, including the assigned claims plan (Section 18). Since survivors should not be punished for the decedent's wrongdoing, particularly as to benefits normally paid without reference to fault, survivor's benefits are not denied merely because the decedent intended to injure another person. However, to preclude the possible inducement to suicide in an automobile collision, survivor's benefits are denied if the decendent intended to injure himself.

In order to be disqualified from receipt of benefits, a person must intend "injury", defined as "bodily harm, sickness, disease, or death" (Section 1(a)(4)). Thus, one who has merely intended to frighten another is not disqualified from receipt of benefits. Nor is he disqualified merely because his conduct created great risk of injury, because he knew his acts were negligent or reckless, or because he intended the act which resulted in injury. The final sentence provides that the disqualification is inapplicable where the claimant acted in self-defense or in defense of a third person. No requirement is imposed by this sentence that the claimant's self-defense or defense of a third person be reasonable. Consistent with the general

policy of this Act to pay benefits without reference to fault, it would be inappropriate to deny benefits to those persons who had acted in good faith, although they had acted negligently.

SECTION 23. [*Reparation Obligor's Duty to Respond to Claims*]

(a) Basic and added reparation benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as work loss, replacement services loss, survivor's economic loss, survivor's replacement services loss, or allowable expense is incurred. Benefits are overdue if not paid within 30 days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, unless the reparation obligor elects to accumulate claims for periods not exceeding 31 days and pays them within 15 days after the period of accumulation. If reasonable proof is supplied as to only part of a claim, and the part totals $100 or more, the part is overdue if not paid within the time provided by this Section. Allowable expense benefits may be paid by the reparation obligor directly to persons supplying products, services, or accommodations to the claimant.

(b) Overdue payments bear interest at the rate of [18] per cent per annum.

(c) A claim for basic or added reparation benefits shall be paid without deduction for the benefits which are to be subtracted pursuant to the provisions on calculation of net loss (Section 11(a)) and to the exclusions authorized under Section 14(b)(2), if these benefits have not been paid to the claimant before the reparation benefits are overdue or the claim is paid. The reparation obligor is entitled to reimbursement from the person obligated to make the payments or from the claimant who actually receives the payments.

(d) A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the insured or by a person providing an item of allowable expense. The action may be brought only against the person providing the item of allowable expense, unless the insured has intentionally misrepresented the facts or knew of the misrepresentation. An insurer may offset amounts he is entitled to recover from the insured under this subsection against any basic or added reparation benefits otherwise due.

(e) A reparation obligor who rejects a claim for basic

reparation benefits shall give to the claimant prompt written notice of the rejection, specifying the reason. If a claim is rejected for a reason other than that the person is not entitled to the basic reparation benefits claimed, the written notice shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau.

COMMENT

This Section describes what is intended to be customary practice—paying basic reparation benefits monthly as loss accrues—contrasted to the customary practice of paying tort claims in lump sum settlements or judgments. Lump sum settlements and judgments are, however, permitted in limited circumstances (Sections 26(a), 27(b)). While this Section, consistent with the definition of loss (Section 1(a)(5)), provides that loss occurs only as loss or expense is incurred, in limited circumstances judgments may be entered covering future benefits (Section 27(a)).

The determination of whether benefits are "overdue" governs the start of the running of interest under subsection (b) of this Section, and compensation for the fee of a claimant's attorney (Section 24). The provision requiring payment when reasonable proof is supplied as to only part of a claim but not as to the remainder is consistent with the philosophy of this and subsequent Sections to encourage insurers to pay benefits promptly. The requirement that "reasonable proof" of the claim be submitted implicitly includes a requirement that the claimant furnish information as required by other provisions of this Act (*e.g.*, Section 33(a)(2)).

The provision permitting direct payment to suppliers of products, services, or accommodations is in addition to a provision, contained elsewhere (Section 29), permitting the claimant to assign his claim to the supplier. The direct payment authorized by this Section may be made whether or not an assignment has been executed.

Subsection (b), subjecting overdue payments to [18] per cent interest, is another provision encouraging periodic payment of benefits without delay. The 18 per cent figure is recommended because it is the interest rate which an insured would be required to pay in many transactions involving consumer credit, and it is sufficiently high to induce the reparation obligor to pay promptly. A figure substantially lower, 6 per cent for example, would neither compensate an ordinary consumer for loss of use of the funds nor provide sufficient inducement for prompt payment.

Subsection (c) is intended as a partial solution to the problem which may exist if the claimant's right to payment from a collateral source which is to be subtracted in calculating net loss (Section 11) or subtracted under a contingent exclusion (Section 14(b)(2)), is itself a matter of dispute or is delayed in payment. For example, if there were substantial dispute whether a person's automobile accident injury or death occurred in the course of his employment, a claimant clearly entitled to benefits from some source might be faced with conflicting claims of a workmen's compensation insurer that the accident did not occur in the course of employment and by a basic reparation obligor that it did. There is an explicit provision that the repara-

tion obligor is entitled to reimbursement from the collateral source or the claimant.

Subsection (d) permits a reparation obligor to recover the amounts of payments of benefits which were either inflated, or obtained entirely, by fraud. If the supplier of products or services for which allowable expense benefits have been paid has inflated his bill, but the insured has not been a party to the fraud, recovery is permitted only against the supplier.

Subsection (e), in addition to requiring prompt notice of rejection of a claim, requires the reparation obligor, in those cases in which the injured person may file an assigned claim, to inform the injured person that he may file his claim with the assigned claims bureau.

SECTION 24. [*Fees of Claimant's Attorney*]

(a) If overdue benefits are recovered in an action against the reparation obligor or paid by the reparation obligor after receipt of notice of the attorney's representation, a reasonable attorney's fee for advising and representing a claimant on a claim or in an action for basic reparation benefits shall be paid by the reparation obligor to the attorney. No part of the fee for representing the claimant in connection with these benefits is a charge against benefits otherwise due the claimant. All or part of the fee may be deducted from the benefits otherwise due the claimant if any significant part of his claim for benefits was fraudulent or so excessive as to have no reasonable foundation.

(b) In any action brought against the insured by the reparation obligor, the court may award the insured's attorney a reasonable attorney's fee for defending the action.

COMMENT

This Section has two purposes. One is to encourage the prompt payment of claims. Another purpose is to assure the claimant full reparation for economic loss, which necessitates payment of the claimant's legal expenses in securing recovery of a disputed claim. On the other hand, to discourage unjustified or inflated claims, even though overdue benefits are recovered, the fee may be charged partly or wholly against the claimant if the claim is found to be in some respect fraudulent or unreasonably excessive. While no scale of attorneys' fees is prescribed, there is a requirement that fees be reasonable. A fee which might have been reasonable for collection of a tort recovery of a similar amount will be unreasonable for handling a routine claim for overdue basic reparation benefits, involving issues less complex. The provision on payment of benefits (Section 23(a)) governs the issue of whether benefits are "overdue."

Subsection (b) applies to court proceedings such as a motion for an order compelling physical examination (Section 32(a)), a petition for discovery (Section 33 (c)), an action for determination of responsibility for rehabilitation treatment (Section 34 (c)) or an action for reduction of future bene-

fits because the claimant refused to submit to rehabilitation (Section 34(d)). This Section does not apply to motions or petitions of the reparation obligor in the course of an action by the claimant for the recovery of basic reparation benefits. In those cases, however, if overdue benefits are recovered, claimant's attorney's fees may be awarded under subsection (a). In determining whether to award the fee in cases falling within subsection (b), the court may consider such factors as whether the claimant was the prevailing party and whether the claimant's conduct which precipitated the reparation obligor's action was reasonable or in good faith.

SECTION 25. [*Fees of Reparation Obligor's Attorney*]

A reparation obligor shall be allowed a reasonable attorney's fee for defending a claim for benefits that is fraudulent or so excessive as to have no reasonable foundation. The fee may be treated as an offset to benefits due or which thereafter accrue. The reparation obligor may recover from the claimant any part of the fee not offset or otherwise paid.

COMMENT

This provision, like that disallowing the claimant's attorney's fee in similar circumstances (Section 24), is designed to discourage unjustified or inflated claims.

SECTION 26. [*Lump Sum and Installment Settlements*]

(a) If the reasonably anticipated net loss subject to the settlement does not exceed $2,500, a claim of an individual for basic or added reparation benefits arising from injury, including a claim for future loss other than allowable expense, may be discharged by a settlement for an agreed amount payable in installments, or in a lump sum. If the reasonably anticipated net loss subject to the settlement exceeds $2,500, the settlement may be made with approval of the [ ] court upon a finding by the court that the settlement is in the best interest of the claimant. Upon approval of the settlement, the court may make appropriate orders concerning the safeguarding and disposing of the proceeds of the settlement. A settlement agreement may also provide that the reparation obligor shall pay the reasonable cost of appropriate medical treatment or procedures, with reference to a specified condition, to be performed in the future.

(b) A settlement agreement for an amount payable in installments may be modified as to amounts to be paid in the future, if it is shown that a material and substantial change of circumstances has occurred or that there is newly-

discovered evidence concerning the claimant's physical condition, loss, or rehabilitation, which could not have been known previously or discovered in the exercise of reasonable diligence.

(c) A settlement agreement may be set aside if it is procured by fraud or its terms are unconscionable.

COMMENT

This Section deals primarily with two related problems. First is the extent to which a settlement will be binding on the claimant although it is for less than his claimed net loss. The specific provisions in this Section represent an accommodation between two competing goals. The thrust of this Act is to insure full compensation for the claimant's net loss, even in cases where the extent of that loss may not be wholly apparent until a significant period has elapsed since the accident from which the injuries arose. That goal could be maximized by precluding all settlements or denying them binding effect. If settlements are prohibited, however, disputed issues between reparation obligors and claimants in significant cases will always require litigation. The second problem is the extent to which lump sum, as opposed to installment, settlements will be permitted. While the normal method of payment is to pay benefits monthly as loss accrues (Section 23), there may be disproportionately large administrative expenses when permanent injury results in small continuing losses, and there are cases in which lump sum settlement may be in the claimant's best interest.

Settlements for future loss representing medical and other allowable expenses are not permitted. Given the provisions of this Act mandating the full payment of medical expense, without temporal or dollar limits, such a settlement might prejudice the claimant's ability to obtain future medical treatment or rehabilitation services if his injury should require more ambitious treatment than had been supposed at the time of settlement, and the requirements of subsection (b) for modification of settlements could not be met.

If the amount of the claimant's "reasonably anticipated net loss" which is subject to the settlement is less than $2,500, a binding settlement without court approval is permitted, whether the settlement is in a lump sum or in installments. The $2,500 figure is tied neither to the amount of the injured person's claim nor to the size of the settlement. The issue is whether the parties could reasonably anticipate at the time of the settlement that the claimant's net loss subject to the settlement would exceed $2,500. Since a settlement agreement without court approval is not binding, no matter the size of the settlement, if it is found that the parties could have reasonably anticipated net loss greater than $2,500, there will be an inducement to seek court approval in borderline cases.

In cases where settlement is made with court approval, there is a requirement of an express finding that the settlement is in the claimant's best interest. This should require, if the settlement is for a lump sum rather than in installments as loss accrues, more than a finding that the claimant and reparation obligor desire a lump sum settlement. Lump sum settlement might be justified, for example, by showing that it would contribute to the claimant's rehabilitation, or that the claimant plans to invest the proceeds

in a promising small business that allows him to be self-employed. The court is given express power to require that protective steps be taken to insure that the proceeds of the settlement are safeguarded and used for the purposes represented by the parties.

The last sentence in subsection (a) and a parallel provision concerning judgments (Section 27(a)) are directed to solution of a potential limitation of actions problem. For example, if the accident victim's injury were likely to require medical treatment at some considerable time in the future, but would not result in loss for some years prior to that anticipated medical procedure, there is real danger that the victim's claim for allowable expense will be barred by limitations when the procedure is actually performed (Section 28). It should be noted, however, that under a provision tolling limitation periods for a period, up to ten years, during which the injured person suffers no loss (Section 23(c)), these provisions will only be necessary in most cases where the anticipated future medical expense will occur over fourteen years after the accident or twelve years after the last payment of benefits. A settlement agreement to pay the cost of treatment pursuant to this Section, or a judgment declaring that the reparation obligor is liable for the costs of that treatment when it is performed (Section 27(a)) assures that those claims will not be barred when they arise by the statute of limitations.

Subsection (b) permits either party to seek judicial modification of an installment settlement, as to amounts to be paid in the future, on a showing of changed circumstances or newly discovered evidence. Subsection (c) permits settlements to be set aside on the ground of unconscionability. Subsections (b) and (c) are applicable to settlements both with and without court approval.

SECTION 27. [*Judgments for Future Benefits*]

(a) In an action by a claimant, a lump sum or installment judgment may be entered for basic or added reparation benefits, other than allowable expense, that would accrue after the date of the award. A judgment for benefits for allowable expense that would accrue after the date of the award may not be entered. In an action for reparation benefits or to enforce rights under this Act, however, the court may enter a judgment declaring that the reparation obligor is liable for the reasonable cost of appropriate medical treatment or procedures, with reference to a specified condition, to be performed in the future if it is ascertainable or foreseeable that treatment will be required as a result of the injury for which the claim is made.

(b) At the instance of the claimant, a court may commute future losses, other than allowable expense, to a fixed sum, but only upon a finding of one or more of the following:

(1) that the award will promote the health and contribute to the rehabilitation of the injured person;

(2) that the present value of all benefits other than allowable expense to accrue thereafter does not exceed $1,000; or

(3) that the parties consent and the award is in the best interest of the claimant.

(c) An installment judgment for benefits, other than allowable expense, that will accrue thereafter may be entered only for a period as to which the court can reasonably determine future net loss. An installment judgment may be modified as to amounts to be paid in the future upon a finding that a material and substantial change of circumstances has occurred, or that there is newly-discovered evidence concerning the claimant's physical condition, loss, or rehabilitation, which could not have been known previously or discovered in the exercise of reasonable diligence.

(d) The court may make appropriate orders concerning the safeguarding and disposing of funds collected under the judgment.

(e) Appeals from a judgment for basic or added reparation benefits may be taken in accordance with [the laws or rules of civil procedure of this State].

COMMENT

This Section deals with the criteria under which a judgment may be entered for loss which will accrue after the date of the award. A specific provision prohibits money judgments for future medical expense and other items of allowable expense, parallel to the similar provision in the Section dealing with settlements (Section 26). A judgment for past allowable expense, however, may collaterally estop the parties on particular issues, such as whether a particular injury arose out of the operation of a motor vehicle, which may be in issue when future allowable expense is claimed. The last sentence in subsection (a) has the same purpose as the parallel sentence in the provision on settlements (Section 26(a)).

Subsection (b) deals only with awards that commute future losses to a fixed sum. Those are awards which determine that the claimant is entitled to a fixed sum as compensation for his future loss, and that payment of the sum by the insurer will satisfy the insurer's obligation to pay further compensation for the injury. That form of award is permitted, as in the case of settlements (Section 26(a)), where the parties consent and the court finds it is "in the best interest of the claimant." That form of judgment may not be entered if the claimant prefers periodic payments. If the claimant seeks a judgment commuting future loss, and the reparation obligor does not agree, that form of judgment is permitted in only two cases. If the present value of all benefits for which judgment may be entered is less than $1,000, the administrative expense of future periodic payments may be disproportionately large. The basis upon which a larger judgment commuting future loss

may be entered, that it will "promote the health and contribute to the rehabilitation of the injured person," is narrower than in the case of a settlement or a consent judgment which may be approved when "in the best interest of the claimant" (Section 26). Existing law will require that lump sum awards for future loss be reduced to present value.

Subsection (c) restricts installment judgments authorized in subsection (a) to limited periods of time and to amounts which can reasonably be determined at the time of judgment.

The provisions in subsection (c) as to modification and in subsection (d) as to safeguarding orders are parallel to the similar provisions with reference to settlements (Section 26).

SECTION 28. [*Limitation of Actions*]

(a) If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than 2 years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than 4 years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than 2 years after the last payment of benefits.

(b) If no basic or added reparation benefits have been paid to the decedent or his survivors, an action for survivor's benefits may be commenced not later than one year after the death or 4 years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than 2 years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by an injured person before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or 4 years after the last payment of benefits, whichever is earlier.

(c) If timely action for basic reparation benefits is commenced against a reparation obligor and benefits are denied because of a determination that the reparation obligor's coverage is not applicable to the claimant under the provisions on priority of applicability of basic reparation security (Section 4), an action against the applicable rep-

aration obligor or the assigned claims bureau may be commenced not later than 60 days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(d) Except as subsections (a), (b), or (c) prescribe a longer period, an action by a claimant on an assigned claim which has been timely presented (Section 20) may be commenced not later than 60 days after the claimant receives written notice of rejection of the claim by the reparation obligor to which it was assigned.

(e) A calendar month during which a person does not suffer loss for which he is entitled to basic or added reparation benefits is not a part of the time limited for commencing an action, except that the months excluded for this reason may not exceed 120.

[(f) If a person entitled to basic or added reparation benefits is under legal disability when the right to bring an action for the benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action.]

COMMENT

Rather complex limitation provisions are necessitated by the general principle that loss occurs as expense is incurred or loss is suffered. A simple limitation period, tied to the time when the claim for relief first arose, might result in initial claims filed decades after an accident occurred. On the other hand, a limitation period tied simply to the time of the accident giving rise to the injury would bar many claims before they arose. The general limitation periods in subsections (a) and (b) accordingly extend the limitation period each time benefits have been paid. In addition, the general limitation provisions are qualified by tolling the limitation periods during any period up to ten years in which the injured person suffers no loss (subsection (c)) [and during periods of disability (subsection (f))]. In addition, special provision has been made in the Sections dealing with settlements and judgments (Sections 26 and 27) for situations where it is anticipated that medical treatment will be required for an injury at a time after other benefits have ceased and after limitation periods, even with the generous tolling provisions, have run.

Subsection (a) deals with limitation of actions for claims related to injury other than death. If no basic or added reparation benefits have been paid, and if running of the limitation period has not been tolled, the claimant must bring suit within 4 years of the accident. The claimant must also, however, bring his action within two years after he knows, or should have known, that the claimed loss was caused by the accident. If benefits have been paid, actions for further benefits may be brought within two years after the last payment of benefits. The last mentioned provision encourages out-of-court handling of claims, obviating the necessity for the claimant to

bring an action so long as benefits are being paid, no matter how much time has passed since the accident.

Subsection (b) deals with actions for survivor's benefits. If these benefits have been paid to survivors, as in the case of non-death claims, actions may be brought within two years after the last payment of benefits. And, as in the case of non-death claims, the claimant must bring action within 4 years of the accident if no basic or added reparation benefits have been paid. If benefits have been paid to the decedent before his death, an action for survivor's benefits may be brought within 4 years after the last payment of benefits. In the two cases last mentioned, there is an additional requirement that the survivors bring their action within one year after death.

Subsection (c) deals with the situation where the claimant has brought timely action against a reparation obligor, and it is determined that another reparation obligor is responsible for payment of basic reparation benefits. The claimant is given an additional 60 days to bring action against the appropriate reparation obligor, or the assigned claims plan, if the limitation period would otherwise have run.

Subsection (d) further extends the time for bringing action on an assigned claim in some cases. Under the provisions on time for presenting assigned claims (Section 20), an assigned claim is timely if the claimant notifies the assigned claims bureau within the limitation periods allowed by this Section, or in the case of an insolvency claim where timely action had been filed against the insolvent reparation obligor, within six months of discovery of the financial inability. If a timely claim is presented against the assigned claims plan, and if the general limitation period would otherwise bar the action, the claimant has an additional 60 days after receipt of notice of rejection of his claim by the reparation obligor to which it was assigned to bring an action on the assigned claim.

Subsection (e) is a significant provision, tolling the running of the limitation period during periods of time, up to ten years, when the injured person has not incurred expense or otherwise suffered loss for which he is entitled to benefits. If, for example, an injured person were to require medical treatment for an injury 5 years after he had last received basic reparation benefits for that injury, and had suffered no loss in the interim period, this subsection would toll the two year period (subsection (a)) from the last payment of benefits. Another situation in which the tolling provision of this subsection may be important is that in which the insured has elected a contingent exclusion (Section 14(b)(2)). Suppose for example, that the contingent exclusion in the insured's policy identified benefits under the insured's medical insurance policy to be excluded in the calculation of net loss. If the insured suffered a long-term injury, and for a considerable period of time his only loss was medical expense fully compensated by his medical policy, he would be entitled to no basic reparation benefits during that period of time. In the absence of this subsection, when benefits under the medical insurance policy were exhausted, the insured's claim for reimbursement of further medical expense might be barred. As previously mentioned, this provision is intended to minimize the number of cases where operation of the general limitation period would bar claims prior to the time they arose.

[Subsection (f) is optional, its enactment depending on whether the State's general statutes tolling limitation of actions would apply to this specific statute.]

SECTION 29. [*Assignment of Benefits*]

An assignment of or agreement to assign any right to benefits under this Act for loss accruing in the future is unenforceable except as to benefits for:

(1) work loss to secure payment of alimony, maintenance, or child support; or

(2) allowable expense to the extent the benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee.

COMMENT

One of the objectives of this Act is to pay benefits periodically (see Section 23) to sustain the person suffering loss as expenses are accrued and, incidentally, to reduce the chances that payments will be applied to improvident purposes. This Section prevents that objective from being circumvented by assignment of the right to benefits for future loss. Two types of assignments which are not inconsistent with this objective are authorized. Paragraph (1) allows a person to satisfy familial support obligations through an assignment of rights to benefits for work loss. Paragraph (2) allows an injured person to secure needed products, services, and accommodations by authorizing assignment of benefits to hospitals, physicians, druggists, and others providing those needs. Assignments permitted by paragraph (2) are only of those benefits which are attributable to the cost of the benefits, services, or accommodations provided. Section 23(a) permits an insurer to make direct payment to the suppliers even if no assignment of benefits has been executed.

SECTION 30. [*Deduction and Set-off*]

Except as otherwise provided in this Act, basic reparation benefits shall be paid without deduction or set-off.

COMMENT

This provision has a number of disparate applications, such as: where the injured person is entitled to basic reparation benefits from an insurer asserting a right of indemnity (Section 6(c)); where the same reparation obligor is required to pay tort claims arising from an accident involving an uninsured owner (Section 5(a)(1)) and reparation benefits to the uninsured owner; and where the reparation obligor, having paid reparation benefits to an insured owner and tort claims on his behalf to other persons injured in an accident, asserts a cause of action for damages for breach of the policy's co-operation clause.

SECTION 31. [*Exemption of Benefits*]

(a) Basic or added reparation benefits for allowable expense are exempt from garnishment, attachment, execution, and any other process or claim, except upon a claim of a

creditor who has provided products, services, or accommodations to the extent benefits are for allowable expense for those products, services, or accommodations.

(b) Basic reparation benefits other than those for allowable expense are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law exempting wages or earnings from process or claims.

COMMENT

This Section protects basic reparation benefits, except those for allowable expense which receive greater protection, to the same extent that earnings or wages are protected from process under either applicable state or federal law. While benefits for allowable expense enjoy absolute protection from process under this Section, there is authorization for direct payment by the insurer under Section 23(a), and a creditor with a claim for goods, services, or accommodations which constituted an item of allowable expense may reach benefits for that item of allowable expense.

SECTION 32. [*Mental or Physical Examinations*]

(a) If the mental or physical condition of a person is material to a claim for past or future basic or added reparation benefits, the reparation obligor may petition the [ ] court for an order directing the person to submit to a mental or physical examination by a physician. Upon notice to the person to be examined and all persons having an interest, the court may make the order for good cause shown. The order shall specify the time, place, manner, conditions, scope of the examination, and the physician by whom it is to be made.

(b) If requested by the person examined, the reparation obligor causing a mental or physical examination to be made shall deliver to the person examined a copy of a detailed written report of the examining physician setting out his findings including results of all tests made, diagnoses, and conclusions, and reports of earlier examinations of the same condition. By requesting and obtaining a report of the examination ordered or by taking the deposition of the physician, the person examined waives any privilege he may have, in relation to the claim for basic or added reparation benefits, regarding the testimony of every other person who has examined or may thereafter examine him respecting the same condition. This subsection does not preclude discovery of a report of an examining physician, taking a

deposition of the physician, or other discovery procedures in accordance with any rule of court or other provision of law. This subsection applies to examinations made by agreement of the person examined and the reparation obligor, unless the agreement provides otherwise.

(c) If any person refuses to comply with an order entered under this Section the court may make any just order as to the refusal, but may not find a person in contempt for failure to submit to a mental or physical examination.

COMMENT

This Section and paragraphs (2) and (3) of Section 33(a) provide for discovery of medical information material to claims for reparation benefits. Neither this Section nor Section 33(c) requires that a suit for those benefits be on file before a reparation obligor may petition an appropriate court for a discovery order. The purpose of both Sections is to assure that information relevant to a claim is readily accessible so that benefits may be determined accurately and paid promptly, while properly safeguarding the rights of all concerned.

SECTION 33. [*Disclosure of Facts About Injured Person*]

(a) Upon request of a basic or added reparation claimant or reparation obligor, information relevant to a claim for basic or added reparation benefits shall be disclosed as follows:

(1) An employer shall furnish a statement of the work record and earnings of an employee upon whose injury the claim is based. The statement shall cover the period specified by the claimant or reparation obligor making the request and may include a reasonable period before, and the entire period after, the injury.

(2) The claimant shall deliver to the reparation obligor a copy of every written report, previously or thereafter made, relevant to the claim, and available to him, concerning any medical treatment or examination of a person upon whose injury the claim is based and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and the claimant shall authorize the reparation obligor to inspect and copy relevant records of physicians and of hospitals, clinics, and other medical facilities.

(3) A physician or hospital, clinic, or other medical facility furnishing examinations, services, or accommoda-

tions to an injured person in connection with a condition alleged to be connected with an injury upon which a claim is based, upon authorization of the claimant, shall furnish a written report of the history, condition, diagnoses, medical tests, treatment, and dates and cost of treatment of the injured person, and permit inspection and copying of all records and reports as to the history, condition, treatment, and dates and cost of treatment.

(b) Any person other than the claimant providing information under this Section may charge the person requesting the information for the reasonable cost of providing it.

(c) In case of dispute as to the right of a claimant or reparation obligor to discover information required to be disclosed, the claimant or reparation obligor may petition the [ ] court for an order for discovery including the right to take written or oral depositions. Upon notice to all persons having an interest, the order may be made for good cause shown. It shall specify the time, place, manner, conditions, and scope of the discovery. To protect against annoyance, embarrassment, or oppression, the court may enter an order refusing discovery or specifying conditions of discovery and directing payment of costs and expenses of the proceeding, including reasonable attorney's fees.

COMMENT

This Section sets out the rights and obligations under this Act in regard to disclosure of information relevant to claims for reparation benefits. It is designed to facilitate access to needed information without resort to unnecessary court action.

Subsection (a) describes the types of information in some detail that designated persons shall furnish or make available upon request by a party. The obligation of physicians and other purveyors of medical services, under paragraph (3), to furnish relevant medical records is conditioned upon authorization of the claimant to assure that he is on notice that such records are being inspected. The claimant has an obligation to give such authorization under paragraph (2).

As in Section 32, discovery orders under subsection (c) may be sought although no other action is pending. Before a discovery order may be granted for discovery of records of medical treatment pursuant to this provision, there must be a showing that the material for which discovery is sought is relevant to the injured person's claim. Proceedings under this Section do not permit the reparation obligor to inspect generally all of an injured person's past medical records. Nothing contained in this Section supersedes existing rules for discovery, and broader discovery may be available within the course of a proceeding to recover basic reparation benefits.

SECTION 34. [*Rehabilitation Treatment and Occupational Training*]

(a) A basic reparation obligor is responsible for the cost of a procedure or treatment for rehabilitation or a course of rehabilitative occupational training if the procedure, treatment, or training is reasonable and appropriate for the particular case, its cost is reasonable in relation to its probable rehabilitative effects, and it is likely to contribute substantially to rehabilitation, even though it will not enhance the injured person's earning capacity.

(b) An injured person who has undertaken a procedure or treatment for rehabilitation or a course of rehabilitative occupational training, other than medical rehabilitation procedure or treatment, shall notify the basic reparation obligor that he has undertaken the procedure, treatment, or training within 60 days after an allowable expense exceeding $1,000 has been incurred for the procedure, treatment, or training, unless the basic reparation obligor knows or has reason to know of the undertaking. If the injured person does not give the required notice within the prescribed time, the basic reparation obligor is responsible only for $1,000 or the expense incurred after the notice is given and within the 60 days before the notice, whichever is greater, unless failure to give timely notice is the result of excusable neglect.

(c) If the injured person notifies the reparation obligor of a proposed specified procedure or treatment for rehabilitation, or a proposed specified course of rehabilitative occupational training, and the reparation obligor does not promptly thereafter accept responsibility for its cost, the injured person may move the court in an action to adjudicate his claim, or, if no action is pending, bring an action in the [ ] court, for a determination that the reparation obligor is responsible for its cost. A reparation obligor may move the court in an action to adjudicate the injured person's claim, or, if no action is pending, bring an action in the [ ] court, for a determination that it is not responsible for the cost of a procedure, treatment, or course of training which the injured person has undertaken or proposes to undertake. A determination by the court that the reparation obligor is not responsible for the cost of a procedure, treatment, or course of training is not *res judicata* as to the propriety of any other proposal or the injured person's right to other benefits. This subsection does not preclude an action by the basic reparation obligor or the

injured person for declaratory relief under any other law of this State, nor an action by the injured person to recover basic reparation benefits.

(d) If an injured person unreasonably refuses to accept a rehabilitative procedure, treatment, or course of occupational training, a basic reparation obligor may move the court, in an action to adjudicate the injured person's claim, or if no action is pending, may bring an action in the [ ] court, for a determination that future benefits will be reduced or terminated to limit recovery of benefits to an amount equal to benefits that in reasonable probability would be due if the injured person had submitted to the procedure, treatment, or training, and for other reasonable orders. In determining whether an injured person has reasonable ground for refusal to undertake the procedure, treatment, or training, the court shall consider all relevant factors, including the risks to the injured person, the extent of the probable benefit, the place where the procedure, treatment, or training is offered, the extent to which the procedure, treatment, or training is recognized as standard and customary, and whether the imposition of sanctions because of the person's refusal would abridge his right to the free exercise of his religion.

COMMENT

Subsection (a) states more explicitly the requirement contained in the definition of "allowable expense" (Section 1(a)(5)(i)), that in order for costs of rehabilitation treatment and occupational training to be compensable, the treatment or training must be "reasonably needed." Rehabilitation treatment is not limited to occupational rehabilitation. It includes, for example, rehabilitation programs which do not add to the injured person's earning capacity, but which make it possible for him to function better with his handicap.

Subsection (b) affects only non-medical rehabilitation programs. It is addressed to a situation where the injured person undertook an expensive program of non-medical rehabilitation, obligating himself to pay substantial sums, and where the program may not, in fact, be compensable under the criteria set forth in subsection (a). Notice to the reparation obligor is required within 60 days after expenses of the program exceed $1,000. Failure to give notice results in no penalty if the reparation obligor had actual knowledge of the undertaking, or if failure to give the notice was the result of excusable neglect. In case of unexcused failure to give the required notice, the claimant may still claim up to $1,000 in benefits, or expenses incurred within 60 days prior to a tardy notice plus subsequent expenses, if the program in fact meets the requirements of subsection (a).

Subsection (c) provides for adjudication of disputes as to whether a proposed rehabilitation program meets the criteria of subsection (a).

Whether or not another action is pending, either the reparation obligor or the claimant may seek court determination limited to the issue whether a specific proposed rehabilitation program is reasonably needed.

Subsection (d) is comparable to provisions in workmen's compensation acts imposing sanctions for unreasonable refusal of surgery. The principle is not here limited to surgery, nor to medical treatment, but is broadly applicable to all forms of rehabilitative treatment and occupational training.

A state may prefer to utilize arbitration rather than court litigation to resolve disputes between claimants and reparation obligors concerning programs of rehabilitation. To accomplish that objective, the following subsections (c) and (d) would replace the corresponding subsections and a new subsection (e) would be added.

(c) If the injured person notifies the reparation obligor of a proposed specified procedure or treatment for rehabilitation, or a proposed specified course of rehabilitative occupational training, and the reparation obligor does not promptly thereafter accept responsibility for its cost, the injured person may demand an arbitration for a determination that the reparation obligor is responsible for its cost. A reparation obligor may demand an arbitration for a determination that it is not responsible for the cost of a procedure, treatment, or course of training which the injured person has undertaken or proposes to undertake. A determination that the reparation obligor is not responsible for the cost of a procedure, treatment, or course of training is not *res judicata* as to the propriety of any other proposal or the injured person's right to other benefits. This subsection does not preclude an action by the basic reparation obligor or the injured person for declaratory relief under any other law of this State, nor an arbitration or action by the injured person to recover basic reparation benefits.

(d) If an injured person unreasonably refuses to accept a rehabilitative procedure, treatment, or course of occupational training, a basic reparation obligor may demand an arbitration for a determination that future benefits will be reduced or terminated to limit recovery of benefits to an amount equal to benefits that in reasonable probability would be due if the injured person had submitted to the procedure, treatment, or training, and for other reasonable orders. In determining whether an injured person has reasonable ground for refusal to undertake the procedure, treatment, or training, there shall be taken into account all relevant factors, including the risks to the injured person, the extent of the probable benefit, the place where the procedure, treatment, or training is offered, the extent to which the procedure, treatment or training is recognized as standard and customary, and whether the imposition of sanctions because of the person's refusal would abridge his right to the free exercise of his religion.

(e) All arbitrations under the provisions of this Section shall be conducted in accordance with [the arbitration laws of this State].

SECTION 35. [*Availability of Insurance*]

(a) The [commissioner] of insurance shall establish and implement or approve and supervise a plan assuring that liability and basic and added reparation insurance for motor vehicles will be conveniently and expeditiously afforded, subject only to payment or provision for payment of the premium, to all applicants for insurance required by this