Compulsory No-Fault Medical Insurance for Automobile Owners

William L. Schlosser
University of Michigan Law School

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COMPULSORY NO-FAULT MEDICAL INSURANCE  
FOR AUTOMOBILE OWNERS

I. Introduction

The enactment of the Massachusetts compulsory no-fault insurance bill,¹ and Senator Phillip Hart's recent introduction of national no-fault insurance legislation,² indicate the serious consideration no-fault insurance is receiving as a method of reforming the existing auto accident compensation system. The current tort system of recovery of auto accident medical expenses is inefficient, and, in many cases, does not adequately compensate the injured parties. Compulsory no-fault insurance is well suited to remedy these deficiencies. Under a no-fault insurance plan, benefits would be paid without regard to the question of fault;³ consequently, every accident victim would receive compensation without first having to establish his right to recovery through a costly and time-consuming tort suit.

Because introduction of a no-fault insurance scheme designed to pay the full amount of every accident victim's damages would be a bold step into an unfamiliar area, state legislatures have been unwilling to enact comprehensive no-fault plans.⁴ Instead, the legislatures have tended to initiate insurance reform by considering no-fault plans which provide only limited benefits. The Massachusetts compulsory no-fault insurance bill is such a limited plan. Although it provides coverage for several elements of auto accident damages including medical expenses, lost wages, and certain other out-of-pocket expenses,⁵ the bill requires a minimum liability coverage of only $2,000 per person.⁶ Accident victims with damages not reimbursed by the limited coverage legislation

³ Although payment is made to accident victims without regard to fault, reimbursement among insurers could depend on the fault of the drivers-insured.  
⁴ The Massachusetts House of Representatives passed the Keeton-O'Connell plan, a comprehensive no-fault insurance proposal, in August, 1967, but the Senate subsequently rejected it. The House then reversed itself and similarly rejected the plan. Sugarman & Cargill, The Massachusetts Story: The Public's Reaction, 3 TRIAL, October/November, 1967, at 52.  
⁵ Wage loss compensation is limited to 75% of losses minus payments by any wage continuation plan. Other "out-of-pocket" expenses are payments made to non-family members for the performance of ordinary and necessary services the injured person would have performed himself for the benefit of his family and not for income had he not been injured. Ch. 670, § 2, [1970] Acts of Mass.  
⁶ Id.
retain their capacity to sue in tort for those uncompensated losses.\footnote{Id. § 4.}

At least two auto insurance reform proposals assert that even more limited no-fault coverage is necessary to permit the most effective possible reform. One of these proposals is the Crossover Medical Payment Plan of the American Bar Association. ABA conference groups are now studying and formulating the specific provisions of the plan. The other proposal, the Conard-Skillern,\footnote{Professors Alfred Conard and Frank Skillern’s Automobile Accident Medical Payments Protection Act, revised Aug. 15, 1969 (printed herein as an appendix) (hereinafter, C-S Act); and Proposal for Automobile Accident Medical Payments Protection, revised Aug. 15, 1969 (unpublished). Professor Conard is Professor of Law at the University of Michigan Law School, and Professor Skillern is Assistant Professor of Law at Ohio Northern University School of Law.} has already been extensively developed. Both contend that no-fault insurance reform would produce the greatest benefits if the no-fault coverage included only medical and rehabilitation expenses. The rationale for this limitation is that the deficiencies of the tort system are most damaging in the area of medical expenses recovery, and limited insurance reform would therefore be most effective if the no-fault insurance concentrated its resources on the satisfaction of medical and rehabilitation claims. Since the Conard-Skillern proposal has been specifically formulated, this note will concentrate upon a description and comparison of the Massachusetts Act of 1970 and the no-fault medical insurance proposal of Conard-Skillern.

II. DEFICIENCIES OF THE TORT SYSTEM AND THE PROPOSED REMEDIES

Studies of the tort system for recovery of medical expenses attributable to an automobile accident reveal serious deficiencies. The present tort compensation system, frequently paying only half the total losses of accident victims, does not provide victims of serious automobile accidents with the necessary medical care and rehabilitation.\footnote{DEPT. OF TRANSPORTATION, INSURANCE AND COMPENSATION STUDY (1970) (hereinafter TRANS. SURVEY). This comprehensive study reports the results of a sample survey of police-reported injuries and fatalities due to automobile accidents in forty-eight states and the District of Columbia. \textit{Economic Consequences of Automobile Accident Injuries}, TRANS. SURVEY 1. Seriously injured persons are defined as those who either 1) were hospitalized for two weeks or more, or 2) had $500 or more medical costs, other than hospital costs, or 3) if working, had missed three weeks of work, or 4) if not working, had missed six weeks or more of normal activities. \textit{Id.} For those accident victims seriously injured, the average recovery was reported to be “about half of total personal and family economic loss.” \textit{Id.} at 2. Professor Conard similarly noted this inadequacy of the tort} Even when the recovery is adequate, it is
often received only after the injured party has been forced to forego adequate and immediate medical treatment because of the time-consuming recovery process and insufficient funds during the interim.\textsuperscript{11} Also, the more serious the accident, the greater the deficiency and slower the recovery are likely to be.\textsuperscript{12} No-fault insurance covering the expenses of all injured parties could not only eliminate present deficiencies in the tort system of compensation, but could be administered to avoid the extensive delay between accident and recovery. There are two general types of no-fault insurance proposals, comprehensive and piecemeal.

\textbf{A. Comprehensive Proposals}

Under comprehensive no-fault proposals the tort system of recovery is almost entirely replaced, significantly reducing the necessity of a trial to establish fault. Two examples of comprehensive plans are the Keeton-O’Connell Basic Protection Plan,\textsuperscript{13} and Senator Phillip Hart’s recently introduced legislation for a national no-fault program.\textsuperscript{14} “Basic Protection,” with minimum liability limits of $10,000 per person, and $100,000 for all injuries caused by one accident, is compulsory first-party no-fault
No-Fault Insurance

insurance which covers reasonable expenses, and work loss up to $750 per month.\textsuperscript{15} Recovery is allowed in tort for losses above those compensated by "Basic Protection" insurance;\textsuperscript{16} however, under the plan the victim can recover for pain and suffering only in excess of $5,000.\textsuperscript{17}

Senator Hart at the national level has proposed compulsory first-party no-fault insurance to cover losses above those paid by other compensatory programs (e.g., hospitalization insurance and sick leave). Senator Hart's proposal would insure payment of the victim's entire medical, hospital and rehabilitation costs and incidental expenses.\textsuperscript{18} Under this proposal, lost income would be reimbursed for a period up to thirty months at a maximum of $1,000 a month, and up to $30,000 would be paid in the event of death of a wage earner.\textsuperscript{19}

To date, however, neither the Congress nor any of the state legislatures has enacted a comprehensive plan.\textsuperscript{20} The strong opposition to any proposal for a comprehensive no-fault insurance plan is a product of several factors: abandonment of the fault system may be unfair to careful drivers; a comprehensive plan would completely disrupt the present tort liability insurance systems; the results of such a plan are unpredictable; and no adequate documentation of the deficiencies of the tort system of automobile accident compensation existed before the Department of Transportation survey was published in 1970.\textsuperscript{21}

\begin{center}
\textbf{B. Piecemeal Proposals}
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Piecemeal plans, on the other hand, provide for no-fault insurance which covers only certain elements of the total damages (e.g., medical expenses) in any given auto accident. Consequently, many victims would have to sue in tort for those losses not paid by the plan. Because piecemeal reform does not seriously disrupt the existing liability insurance systems, it may prove politically advantageous for a legislature to experiment with piecemeal

\textsuperscript{15} See Keeton & O'Connell, \textit{A Summary of the Keeton-O'Connell Basic Protection Automobile Insurance Plan}, \textit{51 JUDICATURE} 151 (1967). First-party coverage is basically for the driver and passengers of the insured car, while third-party coverage is for the driver and passengers of any car which collides with the insured auto.

\textsuperscript{16} See Keeton and O'Connell, \textit{supra} note 15, at 155.

\textsuperscript{17} The limitation on pain and suffering damages is intended to keep down the cost of Basic Protection insurance. Keeton & O'Connell, \textit{supra} note 15, at 155.


\textsuperscript{19} Id.

\textsuperscript{20} See note 4 \textit{supra}.

no-fault reform, and decide later whether to expand the plan into one of comprehensive coverage.

The initial problem in developing a piecemeal proposal is to determine which losses to cover with no-fault insurance and which losses to leave to recovery in tort. The Massachusetts Act of 1970 provides compulsory no-fault insurance for medical expenses, seventy-five percent of lost wages, and certain other out-of-pocket expenses. In contrast to the Massachusetts legislation, the Conard-Skillern proposal limits no-fault insurance coverage to medical care and rehabilitation.

As already noted, delayed and inadequate recovery, forcing many injured persons to postpone or forego necessary medical treatment and rehabilitation, is common under the tort system of auto accident compensation. In large part, this delay in providing the injured prompt, complete medical care is caused by the reliance of the tort system upon the adversary proceeding. In auto accident litigation, "the aim is to establish disability, not to achieve recovery [of health]." The plaintiff, proceeding under this premise may be forced to allow his injury to stabilize in order to determine its seriousness. Indeed, he may prefer to remain incapacitated until after his case is concluded, hoping to win a larger cash award or settlement. A postponement of necessary medical attention in many cases would result in aggravation of the injury rendering subsequent rehabilitation more difficult and in some cases impossible.

The inherent inhumanity of the tort system in causing automobile accident victims to neglect needed treatment therefore be-

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23 Money received from any wage continuation plan is subtracted from no-fault insurance benefits for lost wages. In addition to medical expenses and part of lost wages, the insurance pays the expense of hiring non-family members to perform ordinary and necessary services which the injured person would have performed for the benefit of his family and not for income had he not been injured. Ch. 670, § 3, [1970] Acts of Mass.

24 This note uses the term "rehabilitation" in its broad sense to include medical and vocational rehabilitation and any other activity aimed at restoring an injured person to health and working ability. See Henly, Rehabilitation of Auto Accident Victims, TRANS. SURVEY 5.

25 Although publicly financed rehabilitation agencies are available in every state, relatively few auto accident victims go to them, one reason being that few victims are referred to public rehabilitation centers by liability insurance companies. Henly, supra note 24, at 23-24.


27 Id.

28 Id. at 29. The Transportation Survey similarly observed that "(t)he traditional settlement environment for third party auto bodily injury claims offers nothing to encourage and much to preclude the early introduction of rehabilitation." Henly, supra note 24, at 13.

comes obvious. Although early treatment is often essential to provide proper recovery, the tort system generally works to preclude such treatment. As a result, many victims are permanently incapacitated and become dependent upon social insurance such as medicaid, medicare, or workmen's compensation, even though proper rehabilitation might have restored them to health and productive employment.\textsuperscript{30} The authors of the Conard-Skillern proposal consider this loss of healthy, productive human life the principal defect in the tort system of recovery, and, in order to alleviate the needless delays of necessary treatment, propose that piecemeal reform focus upon no-fault insurance coverage of medical expenses.

III. DESCRIPTION OF MASSACHUSETTS ACT AND CONARD-SKILLERN PROPOSAL

A. The Massachusetts Act of 1970

The Massachusetts Act provides limited personal injury benefits to auto accident victims without regard to the negligence of any parties involved.\textsuperscript{31} Personal injury insurance, like liability insurance, is compulsory for all autos registered in Massachusetts,\textsuperscript{32} and each personal injury policy must provide benefits up to at least $2,000 per person injured in an accident and covered by the Act.\textsuperscript{33} However, a car owner not wanting to purchase personal injury and liability insurance has the option of paying $5,000 in money or securities to the state treasurer.\textsuperscript{34} The owner also has the alternative of purchasing personal injury insurance with a "deductible" of $250, $500, $1,000 or $2,000 for himself, members of his household or both.\textsuperscript{35} Thus, an auto owner can in effect purchase no personal injury coverage for himself and his household members by purchasing a deductible of $2,000.

Personal injury insurance pays for the following expenses of a beneficiary: medical, funeral, seventy-five percent of lost wages or diminution of earning power (less benefits from any wage continuation plan), and certain other out-of-pocket expenses.\textsuperscript{36}

\textsuperscript{30} See Berkowitz, at 122, who observes that the resulting economic waste is impressive—it costs as much to support an injured worker and his family on relief for a year as it would have cost to rehabilitate him and make him self-supporting.


\textsuperscript{32} \textit{Id.} § 4.

\textsuperscript{33} \textit{Id.} § 2.

\textsuperscript{34} \textit{Mass. Gen. Laws} ch. 90, § 34D (1967)


\textsuperscript{36} \textit{Id.} § 2.
ery is allowed only for those expenses incurred within two years after the accident and is limited to the policy coverage of the automobile owner, which, as previously stated, need be only $2,000 coverage per injured person.\textsuperscript{37} The tort system remains in effect for losses not compensated by personal injury benefits.\textsuperscript{38} The driver and owner of a car covered by personal injury insurance are exempt from tort liability for the amount that an injured person collects in no-fault benefits, or the amount that the injured person would have collected in personal injury benefits were there not a deductible in his own no-fault insurance.\textsuperscript{39} For accidents occurring in Massachusetts, the personal injury insurer of a car is liable for the expenses of the named insured, both household and non-household passengers riding in the insured car, and all pedestrians struck by the car.\textsuperscript{40} In addition, the insurer is liable for the expenses of the named insured and his household members injured while riding in, or while on foot and struck by, and out-of-state car unless the injured person recovers his loss in tort.\textsuperscript{41} Coverage provisions for accidents occurring outside Massachusetts are the same as those for in-state.\textsuperscript{42} Where the accident is out-of-state, however, the injured person insured in Massachusetts may collect from his personal injury insurer or he may sue the out-of-state party in tort.\textsuperscript{43} Should he do the latter, he will not receive insurance payments until final settlement has been made or until judgment has been entered on the tort claim,\textsuperscript{44} and the no-fault insurance benefits will be reduced by the amount which the victim recovers in tort for the same expenses.\textsuperscript{45} A personal injury insurer is subrogated to any rights of its beneficiaries to sue a negligent driver of an out-of-state car to the extent of no-fault benefits it has paid its beneficiaries.\textsuperscript{46} The insurer who has paid benefits is also entitled to reimbursement from the personal injury insurer of a Massachusetts car whose driver negligently caused the injury even though both the negligent driver and injured person are exempt from tort liability.\textsuperscript{47} If the no-fault insurers are unable to agree on the reimbursement,
the matter is resolved by arbitration. Consequently, a personal injury insurer recovers the amount it pays out in all cases where the tort system would grant recovery to its beneficiaries if the tort system were in effect.

No-fault insurance benefits are generally paid to the injured person as losses accrue; however, a lump sum payment discharging all obligations may be agreed upon. The Act specifies a procedure for asserting claims and for verifying wage loss, and the beneficiary must submit to physical examinations and aid the insurer in obtaining medical reports and other needed information. The penalty for non-cooperation is forfeiture of personal injury benefits. If benefits become more than thirty days overdue, the unpaid party has a breach of contract action against the insurer.

The Massachusetts Act in part restricts the availability of double recovery under the collateral source rule which, in tort, allows an injured plaintiff to collect for losses which have already been compensated by some source other than the tortfeasor. The collateral source recovery of the tort system is abolished by the Act's tort exemption under which a tortfeasor who has no-fault insurance is not liable for the amount the injured person receives in personal injury benefits. An injured party, however, is allowed under the Act to collect additional recovery from his general health and accident insurer for losses compensated by no-fault insurance. Unlike the treatment of collateral recovery for medical expenses, if the injured party is covered by a wage continuation plan (i.e., "sick leave"), no-fault benefits for lost wages are reduced by the amount of the benefits received from the wage continuation plan.

The Massachusetts Act also provides that underwriting no-fault insurance is mandatory for all insurers: every auto liability policy

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48 Id.
49 Id.
50 Id.
51 Id.
52 Id.
53 The tort exemption remains in effect. Id. § 4.
54 Id.
57 While the Act exempts the tortfeasor from liability for expenses paid by personal injury insurance, it does not prohibit additional recovery from the injured person's other first-party insurance, such as general health and accident insurance. Id.
58 If the insured suffers a non-auto caused injury within a year after the accident, and his benefits from the wage continuation plan are decreased because depleted to pay for his auto accident losses, the no-fault insurer will pay wage loss benefits in an amount equal to the decreased wage loss recovery. Ch. 670, § 2, [1970] Acts of Mass.
issued or executed in Massachusetts must contain no-fault coverage. The Act establishes an assigned claims plan to provide no-fault benefits to state residents not members of car-owning households who are injured in accidents which occur inside the state and are not otherwise entitled to such benefits. Finally, the Act states that personal injury insurers may refuse to extend benefits to a driver if his conduct has contributed to his injury in any of the following ways:

1) while under the influence of alcohol or a narcotic drug;
2) while committing a felony or seeking to avoid lawful apprehension or arrest by a police officer; or
3) with the specific intent of causing injury or damage to himself or others.

**B. Conard-Skillern Proposal for Extended Medical Payments Insurance**

The Conard-Skillern proposal for “Extended Medical Payments Insurance” would require, as does the Massachusetts Act of 1970, compulsory no-fault insurance for every automobile registered in the state of enactment and would provide limited recovery for auto accident victims without regard to the negligence of any parties involved. Extended Medical Payments Insurance, however, would cover only medical expenses, and not funeral and wage loss expenses which are covered by the Massachusetts Act.

Although both the Conard-Skillern proposal and the Massachusetts Act require a minimum liability limit of only $2,000 per person, one insurer, under Conard-Skillern, would be liable for all injuries from a single accident up to the amount of the policy limit. Thus, if the insured had only a $2,000 no-fault policy, his insurer would be liable for the medical expenses of each party injured in the accident up to $2,000. Moreover, the right of one

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59 Id. § 4.
60 Id.
61 Id. § 2.
63 C-S Act § 2.1.
64 Id. § 3.1(c).
65 Id. § 1.2(f). Medical expenses must accrue within one year after the accident (Id. § 3.1(b)).
68 C-S Act § 3.1(a).
no-fault insurer to reimbursement from another under Conard-Skillern does not depend on the negligence of any driver. Instead, each no-fault insurer liable for the medical expenses resulting from an accident would automatically have a right to contribution from the others, so that each no-fault insurer would pay a pro rata share of the total medical expenses caused by the accident up to its liability limit.\(^6\) For example, in a collision involving two cars carrying Extended Medical Payments Insurance with adequate policy limits, each car's no-fault insurer would pay for one-half the total medical expenses of drivers and passengers of both cars and injured pedestrians.

Another provision of the Conard-Skillern proposal which is also incorporated in the Massachusetts Act would grant a tort exemption to a negligent driver for amounts which the injured collected in no-fault benefits.\(^7\) For losses not compensated by Extended Medical Payments Insurance, the tort system would remain in effect.\(^7\) Also in accord with the Massachusetts Plan, is the provision of the Conard-Skillern proposal which subrogates the no-fault insurer to the tort rights of its beneficiaries against the negligent driver of an out-of-state car for the amount of benefits the no-fault insurer pays in connection with an in-state accident.\(^7\) Unlike the Massachusetts Act, problems of recovery for out-of-state accidents may not arise since coverage for such accidents is not compulsory under Conard-Skillern.\(^7\) Nevertheless, it is probably safe to assume that should companies provide no-fault insurance for out-of-state accidents, the subrogation provision which covers in-state accidents would apply to out-of-state accidents.

Since an accident victim would not be allowed to sue in tort for losses compensated by no-fault insurance, the collateral source rule of tort recovery is similarly treated by the Conard-Skillern proposal and the Massachusetts Act.\(^7\) Unlike the Massachusetts Act, however, the Conard-Skillern proposal would also abolish all extra recovery for medical expenses;\(^7\) the victim could not collect from his general health and accident insurer for expenses paid by a no-fault insurer. Therefore, if the victim's general health and accident insurer paid for medical expenses covered by no-fault insurance, the no-fault insurer would reimburse the general health

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6. Id. § 4.5.
and accident insurer for its expenditures instead of paying benefits to the victim or his medical creditors. As under the Massachusetts Act, payments would be made as the expenses accrued, but they would be made directly to the victim's doctor and hospital rather than to the victim. The no-fault insurer would pay benefits directly to the accident victim only if the victim had already paid his medical creditors and certified that he would be reimbursed by no other source.

While Massachusetts personal injury insurance is a mandatory part of every auto liability insurance policy, underwriting of Extended Medical Payments Insurance would be voluntary. Any insurer could issue a policy which qualified, and an auto owner could combine partial coverage from different insurers in a contractual agreement which fulfilled the requirements of the plan. The no-fault insurance could not be cancelled for any reason during the period for which the insurer certified that it would be in effect, and no injured driver covered by Extended Medical Payments Insurance could be deprived of benefits because of his flagrant fault, intoxication, or other misconduct.

IV. Recommendations

Because the delayed and inadequate recovery of the tort system creates the most harm by denying necessary medical expenses, no-fault medical expenses should have first priority in compensatory reform. This would require that the primary goal of piecemeal reform be to provide full medical treatment and rehabilitation for auto accident victims, with secondary emphasis on any additional benefits aimed at reducing the exorbitant cost and extensive delay of recovery in tort.

An additional and more pragmatic rationale for concentrating on coverage of medical and rehabilitation expenses to the exclusion of other benefits, (e.g., funeral expenses and lost wages) is to avoid the added cost burden imposed by such extensive coverage. Under a compulsory plan all auto owners including those with small incomes and poor risk ratings will be forced to buy the insurance; thus, it must be affordable. To this end, it may be

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76 C-S Act § 3.1(d).
77 Id.
78 Id.
79 Id. §§ 2.2, 2.3.
80 Id. § 2.3.
81 Id. § 3.1(e).
82 Id. § 3.1(c).
83 The expense of the premiums will be offset to a degree by the lowered cost of liability insurance premiums—liability insurance will not cover medical expenses, because drivers
wise to avoid all expenses which are not essential to the goal of rehabilitation. Additional benefits could of course be purchased to supplement the no-fault medical coverage but would not be compulsory.

By eliminating the non-essential or non-rehabilitative provisions of the no-fault proposal, it would be possible to expand the medical benefits beyond the $2,000 per person minimum liability requirement presently provided in both the Massachusetts Act of 1970 and the Conard-Skillern proposal. Although this would necessarily reduce the savings realized by the elimination of non-medical benefits, an increase in the rehabilitative and medical benefits may be necessary to achieve the goal of comprehensive, immediate medical treatment. The present $2,000 minimum liability limit established in both plans seems inadequate in view of the Transportation Survey's finding that as an injury becomes more serious (and presumably as the need for immediate and comprehensive treatment becomes more pronounced), the probability of an adequate recovery in tort becomes more remote. Furthermore, a significantly increased minimum medical benefit provision would allow doctors and rehabilitation experts to plan the most effective treatment for the individual without giving undue consideration to the restrictions of severely limited funds.

The frequency of interstate transportation makes the question of which accident victims the insurance should cover a difficult one for any state considering a no-fault plan. Since an individual, regardless of where he is injured, will presumably look to the state of his residency should he become disabled for lack of medical treatment, it might be best to provide no-fault coverage for all state residents wherever injured. Non-resident victims, on the other hand, probably should not be covered, since the burden of their disability will generally fall on another state. Moreover,
since non-residents will not be required to buy no-fault insurance, they will not contribute any funds to the operation of the plan. Consequently, the extension of no-fault medical benefits to non-residents would raise the premiums which state residents would have to pay. In order to exclude non-residents from coverage, the insurance should avoid the Conard-Skillern provision which makes a car's no-fault insurer liable for the medical expenses of everyone injured in an accident involving the insured car, even passengers of an out-of-state car which collided with the insured car.87 The insurance could instead use the Massachusetts Act provision which effectively excludes non-residents by limiting a car's insurance coverage to the driver and passengers of, and pedestrians struck by, the insured car.88

To further extend no-fault benefits so that all injured state residents are covered, the insurance could use other Massachusetts Act provisions. First, a car's no-fault insurance could cover the named insured and his household members while riding in, or while on foot and struck by, an out-of-state car unless the injured person recovered his losses in tort.89 Second, state residents, not members of car-owning families, who are injured inside the state while riding in or struck by an out-of-state car are eligible to receive no-fault benefits by an assigned claims plan.90 If the assigned claims plan covered residents injured outside as well as inside the state, the Massachusetts Act provisions would provide no-fault benefits to every state resident injured in an auto accident, a desirable feature for no-fault medical insurance in view of the responsibility of a state for injured residents who become disabled for lack of medical care. Both the assigned claims plan and the no-fault insurance policies should be written to cover injuries from accidents which occur outside the state, so that all state residents are provided benefits no matter where they are injured.91 The assigned claims plan would furnish benefits to

an injured nonresident. In order to protect those creditors, a state could require no-fault insurance which covers nonresidents injured in auto accidents inside the state to the extent of emergency treatment.

87 C-S Act § 3.1(a).
89 Id.
90 Id. § 4.
91 Since there may be a question under conflict of laws about whether the tort exemption could apply to accidents which occurred outside the state (see generally R. Cramton & B. Currie, Conflict of Laws: Cases-Comments-Questions 236-306 (1968)), the following Massachusetts Act provision is recommended: there would be no tort exemption for expenses covered by no-fault insurance, but if the injured person sued, he would receive no benefits until final settlement or judgment, and they would then be reduced by the amount of his tort recovery for medical expenses. Ch. 670, § 4, [1970] Acts of Mass. Perhaps a mechanism should be provided for the victim to waive tort rights for medical expenses, so that no-fault benefits could be paid at once.
families not owning cars at the expense of car owners, which is arguably as it should be, because the enterprise of auto transportation causes the injuries and should arguably bear the cost.\footnote{92}{On the enterprise liability approach, see generally Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).}

Expenses of persons injured in auto accidents should be paid as they accrue to avoid any possible delay in recovery. Payment by the insurer directly to medical creditors, as provided for in the Conard-Skillern proposal,\footnote{93}{C-S Act, § 3.1(d).} would seem to be the more efficient procedure and would assure the doctor and hospital of collecting. The medical creditors, however, should be explicitly empowered to commence a direct contract action against an insurer when payments are thirty days overdue. This would be analogous to the beneficiary’s right to direct action provided by the Massachusetts Act.\footnote{94}{Ch. 670, § 4, [1970] Acts of Mass.}

Contribution among no-fault insurers of cars involved in an accident, similar to that provided by the Conard-Skillern proposal,\footnote{95}{C-S Act, § 4.5.} seems to be the more efficient and desirable method of compensation. Under this plan each insurer is required to pay a pro rata share of the total medical costs of everyone injured in the accident who is covered by no-fault insurance. Without such contribution, the premiums on no-fault insurance for large heavy vehicles such as trucks would be unfairly low, and premiums on small cars unfairly high, because the injuries to occupants of small cars are likely to be more serious and require proportionally greater medical expenditures. Reimbursement by no-fault insurers based on negligence, as in the Massachusetts Act,\footnote{96}{Ch. 670, § 4, [1970] Acts of Mass.} would be a much less desirable way to allocate cost than equal contribution. First, it would shift the loss from the victim’s insurer only in cases involving negligence and no contributory negligence on the victim’s part, whereas equal contribution would always evenly divide the cost between both parties’ insurers. Second, fault-based reimbursement would again instill the tort system into medical expenses recovery, and, to that extent, thwart the goal of compulsory no-fault medical insurance. Subrogation of a no-fault insurer to its beneficiary’s tort rights against a negligent out-of-state driver for the amount of no-fault payments would seem less objectionable since the out-of-state insurer would otherwise be subsidized by the residents and insurers of the state with a no-fault system.

Collateral source recovery (i.e., recovery in tort for losses
already recovered) should not be allowed within the structure of no-fault insurance which is designed to avoid the tort system of recovery for auto-accident injuries. However, additional recovery from a general health and accident insurer for losses compensated by no-fault insurance, as provided in the Massachusetts’s Act,\(^9\) does not appear to be as objectionable. Having paid the premiums for both the general health and accident policy and the no-fault auto policy, an injured beneficiary should reasonably expect to receive the appropriate benefits in the event he is injured. Moreover, it is arguably unfair for the general health and accident insurer to accept premiums for such coverage and not be obligated to make disbursements. In any event, such additional insurance benefits could aid rehabilitation by serving as a living allowance for the accident victim. In cases where the victim could not otherwise afford to take the time off from work required for extended care, a living allowance may be necessary for proper rehabilitation. Yet the extra recovery from a general health and accident insurer would be a haphazard way to provide such an allowance since it would benefit only those with overlapping insurance coverage and not necessarily those who need the money. Indeed, those victims with the least resources, and consequently the most need for a living allowance, are the least likely to have extra insurance coverage. To provide a living allowance for every victim needing it, however, would necessitate a specific provision for a living allowance in the no-fault insurance policy. The possibility that the increased cost of such a provision and the resulting increase in premiums would endanger the feasibility of the entire proposal must be balanced against the yet-undetermined need for a living allowance in order to achieve complete medical care.

Placing primary liability upon the no-fault insurer for all medical expenses resulting from auto accidents, as does the Conard-Skillern proposal,\(^9\) would have the advantage of distributing the entire medical cost of automobile transportation to that enterprise.\(^9\) If the primary legal responsibility for certain auto-accident expenses rested with insurers other than those providing no-fault coverage, several potential problems might result. For example, if the general health and accident insurer were primarily liable for the medical costs of its insured’s auto accident, coverage might be exhausted when the insured subsequently suffered a non-auto caused injury. As a consequence, he would not be compensated

\(^9\) Id.

\(^9\) C-S Act, §§ 4.1, 4.3.

\(^9\) See note 92 supra.
for his medical expenses resulting from the second, non-auto caused, accident even though he had two medical insurance policies. The Massachusetts Act suggests one possible solution to this problem through its treatment of lost wages recovery, where the same difficulty arises because the victim's wage continuation plan, rather than his no-fault insurer, is primarily liable for wage loss resulting from an auto accident. If the victim's wage continuation plan has been depleted to pay for his wage loss from an auto accident, and as a result he suffers a loss in benefits from the wage continuation plan for a non-auto caused injury occurring within a year after the auto accident, the personal injury insurer pays him lost wage benefits for the non-auto caused injury to the extent of that loss. A similar method could be used to protect a victim from loss of benefits that would result from the primary liability of a general health and accident insurer for medical expenses resulting from a non-auto caused injury; but it would be much simpler to avoid the loss in the first place by making the no-fault insurer primarily liable for the medical expenses of auto-caused injuries.

The Massachusetts Act and the Conard-Skillern proposal offer different advantages in their methods of underwriting. The Massachusetts method of combining liability and no-fault insurance in a single policy would seem to be easier to administer in that an accident victim would have to deal with only one insurer instead of separate liability and no-fault insurers. The Conard-Skillern method, on the other hand, has the advantage of allowing an auto owner to use his present partial coverage (e.g., his general health and accident insurance) and supplement it with sufficient additional insurance to meet the requirements of the plan. He is not required to buy a full policy which overlaps with medical coverage he already has.

Massachusetts' denial of no-fault benefits to a driver injured while under the influence of alcohol or narcotics, or while committing a felony or fleeing arrest, or who intended to cause injury or damage to himself or others, is of questionable value in a no-fault insurance plan. It is unnecessary for deterrence, since, under a plan restricted to medical payments, drivers will still be liable in tort for the wage loss, property damage, and pain and suffering they cause. Under either plan, possible prosecution under relevant criminal statutes would seem to serve the deterrence

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101 Id. § 4.
102 C-S Act, § 2.3.
function. In any event, the denial of medical care would be a most inhumane punishment for misconduct and is clearly contrary to the underlying purposes which a no-fault act is designed to serve.

V. CONCLUSION

Many state legislatures may consider following Massachusetts’ lead in introducing piecemeal reform of the auto accident compensation system limited enough in scope to be enacted without completely disrupting the existing system. Those drafting such an act should consider the magnified economic and humanitarian benefits of no-fault insurance which covers all medical and rehabilitation expenses, rather than severely limited parts of several elements of damages. Because the deficiencies of the tort system do the most harm in the area of medical expenses recovery, a plan which provides prompt, full payment for medical expenses would seem to produce more benefits than any other kind of limited reform.

—William L. Schlosser
APPENDIX I

AUTOMOBILE ACCIDENT MEDICAL PAYMENTS PROTECTION ACT
(Revised August 15, 1969)

AN ACT providing for medical payments insurance on all motor vehicles registered in the State of Michigan.

Article 1. Title; definitions.

Sec. 1.1 This act shall be known and may be cited as the “Automobile Accident Medical Payments Protection Act.”

Sec. 1.2 As used in this act:

(a) “Accident” means any collision or impact involving a motor vehicle which causes any personal injury.

(b) “Beneficiary” means, with respect to any motor vehicle, every person who would be entitled to receive the benefit of medical payments under the provisions of extended medical payments insurance, if carried as required by this act.

(c) “Certifying insurer” means the insurance carrier or other person which issues a certificate that extended medical payments insurance fulfilling the requirements of this act has been issued for a specified motor vehicle, pursuant to which certificate the motor vehicle is registered.

(d) “Extended medical payments insurance” means any policy of insurance, or any contractual arrangement, which is approved by the commissioner of insurance for compliance with this act, and which provides for the payment of medical expenses arising from an accident involving the insured motor vehicle.

(e) “Insured motor vehicle” means any motor vehicle covered by extended medical payments insurance.

(f) “Medical expenses” means all reasonable expenses for treatment of personal injuries sustained by any beneficiary in an accident involving the insured vehicle incurred, for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing, and general services, and necessary rehabilitative and therapeutic treatment.

(g) “Motor vehicle” means any vehicle which is self-propelled and is operated on the public highways.

(h) “Personal injury” means any bodily harm, sickness, or disease arising from an accident.

(i) “Trailer” means any container towed or carried by a motor vehicle.
Article 2. Registration; proof of medical payments insurance; type of medical payments insurance.

Sec. 2.1 The secretary of state shall not register or issue registration plates for any motor vehicle unless the application for registration of the motor vehicle is accompanied by proof of extended medical payments insurance covering the motor vehicle, effective until a date which is at least three months after the date of the application.

Sec. 2.2 Proof of extended medical payments insurance, with respect to any motor vehicle, shall be accomplished by filing with the application for registration of the motor vehicle a certificate of insurance, in a form and manner prescribed by the secretary of state. The certificate must be issued by an insurer or insurers, or other persons issuing the medical payments insurance who have been approved for such issuance by the commissioner of insurance. The certificate must state that the motor vehicle is covered by extended medical payments insurance in compliance with the requirements of this act, effective until a specified date.

Sec. 2.3 The extended medical payments insurance may be effectuated by (without limitation) group health or accident plans, employee benefit plans, health or accident insurance, automobile medical payments insurance, or any combination of the foregoing pursuant to a contractual arrangement which has been approved by the commissioner of insurance in compliance with the terms of this act.

Article 3. Terms and conditions of medical payments insurance; additional provisions approved by the commissioner of insurance.

Sec. 3.1 The extended medical payments insurance required by this act shall be evidenced by a policy containing appropriate provisions, which must include the following:

(a) The persons whose medical expenses will be paid under extended medical payments insurance must include the owner, operator, and occupants of the insured vehicle, the occupants of any other vehicle or trailer involved in an accident with the insured vehicle, and any other person involved in an accident with the insured vehicle.

(b) The certifying insurer shall pay the medical expenses of any beneficiary for any personal injury, if (1) the injury arose from an accident which involved the insured vehicle; (2) the accident occurred within the State of Michigan during the period for which the medical payments insurance is in effect; and (3) the medical services or commodities were rendered within one year from the date of the accident.

(c) The medical payments insurance shall pay medical expenses incurred by a beneficiary without regard to fault of any person, including the beneficiary himself.

(d) Medical expenses shall be paid directly to the doctor, hospital, or other facility providing treatment or services to the beneficiary as the medical expenses accrue and are billed, except that payments
shall be made to the beneficiary if he presents (1) a receipt from the person who provided the treatment or service creating the medical expense showing its payment by beneficiary, and (2) a statement signed by the beneficiary identifying any other medical payments or health insurance which is or might be liable for the medical expenses and stating that the payment for which he claims reimbursement has not been reimbursed by any other person.

(c) The extended medical payments insurance cannot be cancelled for any reason during the period for which it is certified in effect by the certifying insurer. If not renewed, it shall nevertheless remain in effect until thirty days after a notice of expiration has been given to the secretary of state.

(f) The liability of a certifying insurer under extended medical payments insurance shall be no less than $2,000.00 per person per accident; the total liability of a certifying insurer for a single accident shall not be limited.

Sec. 3.2 The medical payments insurance required by this act may contain any additional provisions which are consistent with the provisions of this act and which have been approved by the commission of insurance.

Article 4. Payments under extended medical payments insurance; certifying insurer's liability; reimbursement; contribution; collection by certifying insurer from a beneficiary; claims of a beneficiary.

Sec. 4.1 Primary responsibility of certifying insurer—

The certifying insurer shall pay the medical expenses of a beneficiary under extended medical payments insurance without regard to actual or possible liability of any other insurance carriers or persons for the same medical expenses.

Sec. 4.2 Reduction, release, or waiver of a certifying insurer's liability—

The liability of the certifying insurer under section 4.1 shall not be reduced, released, or waived by any agreement or otherwise between the certifying insurer and the named insured or between the certifying insurer and any beneficiary; any attempt by the certifying insurer, or the certifying insurer and the named insured, or any beneficiary, to reduce, release, or waive part or all of the liability of the certifying insurer under this act shall be void and have no effect.

Sec. 4.3 Reimbursement by a certifying insurer to health, accident, or other non-liability insurers—

Any person, other than a certifying insurer, who, pursuant to a health, accident, or other non-liability insurance policy or benefits contract, pays any medical expenses to a beneficiary for which a certifying insurer would have been liable if the payment had not been made, shall be reimbursed by the certifying insurer for the full amount of such payments, except as otherwise provided in this section.
Sec. 4.4 Reimbursement by and to persons liable for an accident—
If one or more motor vehicles involved in an accident are not covered by extended medical payments insurance in accordance with this act, and if an owner or operator of any such vehicle is directly or vicariously liable for medical expenses resulting from the accident by virtue of tortious conduct, the certifying insurer shall be entitled to reimbursement from each such owner or operator for medical expenses paid under the terms of this act. If any such owner or operator has already paid such expenses, he shall not be entitled to reimbursement from the extended medical payments insurer.

Sec. 4.5 Contribution between certifying insurers, regardless of fault or liability—
If an accident involves two or more motor vehicles which are covered by extended medical payments insurance as required by this act, then each of the certifying insurers shall contribute to the medical expenses in equal shares (up to its policy limit) regardless of which certifying insurer initially paid the medical expenses, and regardless of whether negligent owners or operators of one or more of the vehicles caused the accident.

Sec. 4.6 Contribution between certifying insurers and other automobile medical payments insurers—
If an accident involves two or more motor vehicles, one or more of which is covered by extended medical payments insurance, and one or more of which is covered by other automobile medical payments insurance, not under this act, then a certifying insurer shall be entitled to equal contribution from the other automobile medical payments insurer or insurers unless otherwise provided by valid terms of the policies issued by that insurer or insurers.

Sec. 4.7 Direct settlement of claims for reimbursement and contribution—
Any person who is liable under this act for reimbursement or contribution of medical expenses paid by a certified insurer, and the liability insurer of any such person, may settle his liability by direct payment to the certifying insurer which has paid or is liable for the medical expenses. Any such payment shall discharge to the extent of the amount paid such person's liability to the beneficiary without regard to the consent or dissent of the beneficiary.

Sec. 4.8 Insurer's rights to enforce reimbursement—
When any certifying insurer is entitled to reimbursement of medical expenses as provided in section 4.4, it shall succeed to the rights of the beneficiary against any person liable for reimbursement. In order to enforce its right of reimbursement, it may bring a separate suit against a person so liable, or may intervene in any suit brought by the beneficiary against such a person.

Sec. 4.9 Rights of a beneficiary—
This act shall have no effect on the rights of a beneficiary to make claims arising out of motor vehicle accidents against any person other than the certifying insurer, except that the beneficiary shall not make
any claim against any other person for any amounts which the certifying insurer has paid, or which it is liable or will become liable to pay.

Article 5. Administration—secretary of state; commissioner of insurance; illegal operation of a motor vehicle without medical payments insurance.

Sec. 5.1 The secretary of state acting through his duly authorized agents, shall administer and enforce the provisions of this act and may make rules and regulations necessary for its administration.

Sec. 5.2 The commissioner of insurance acting through his authorized agents is authorized to review, prescribe, and approve medical payments insurance policies or plans which shall be presented or used to satisfy the requirements of this act.

Sec. 5.3 Any person who knowingly operates a motor vehicle which is registered or required to be registered in the State of Michigan, and which is not covered by extended medical payments insurance in accordance with this act shall be guilty of a misdemeanor, and shall be punished by suspension of his chauffeur's or operator's license for a period of ninety (90) days, or a fine of five hundred dollars ($500.00), or both; the secretary of state is authorized to and shall revoke the registration and withdraw the registration plates for a period of ninety (90) days of any vehicle operated in violation of this section.