

**REPORT OF THE JOINT  
SUBCOMMITTEE STUDYING**

**MINIMUM LEVELS OF MOTOR  
VEHICLE LIABILITY AND  
PROPERTY INSURANCE**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**HOUSE DOCUMENT NO. 60**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1996**



## **MEMBERS OF SUBCOMMITTEE**

Gladys S. Keating  
William S. Moore, Jr.  
William W. Bennett, Jr.  
Vincent F. Callahan, Jr.  
Charles J. Colgan  
L. Louise Lucas  
Thomas K. Norment, Jr.

## **STAFF**

### **DIVISION OF LEGISLATIVE SERVICES**

Arlen K. Bolstad, Senior Attorney  
Mark C. Pratt, Research Associate  
Cynthia G. Liddy, Senior Operations Staff Assistant

### **HOUSE OF DELEGATES - Clerk's Office**

Committee Operations  
Chad A. Hudson, Committee Clerk



## Table of Contents

	Page
I. INTRODUCTION.....	1
A. HJR-601's Scope and Background.....	1
B. Overview of Virginia's Automobile Insurance Program .....	2
C. Minimum Coverages in Other Eastern States .....	2
II. WORK OF THE JOINT SUBCOMMITTEE .....	3
A. Meeting Agendas .....	3
B. Department of Motor Vehicles Report .....	3
C. "Choice" Legislative Proposal.....	4
D. Insurance Industry Perspective.....	5
III. SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS.....	5
Appendices	
A. House Joint Resolution 601 .....	A-1
B. Va. Code §§ 46.2-705 and 46-2-706 .....	A-2
C. Va. Code § 46.2-472 .....	A-4
D. Va. Code § 38.2-2206A-5	
E. DMV Insurance Monitoring Processes & Detection Rates chart.....	A-9
F. Briefing summary by Professor Jeffrey O'Connell .....	A-10
G. Rand Research Brief .....	A-12
H. "Choice" legislative model .....	A-15
I. House Joint Resolution to study "Choice" model .....	A-46
J. Proposed legislation eliminating mandatory uninsured motorist property damage coverage .....	A-50



**Report of the  
Joint Subcommittee Studying  
Minimum Levels of Motor Vehicle Liability  
and Property Insurance**

TO: The Honorable George F. Allen, Governor  
and  
The General Assembly of Virginia

**I. INTRODUCTION**

**A. HJR-601'S SCOPE AND BACKGROUND.**

HJR-601 approved by the 1995 Session of the Virginia General Assembly established a joint subcommittee to “study the appropriate minimum levels of motor vehicle liability and property insurance coverage” (*Appendix A*). The subcommittee considered “(i) whether the required minimum levels of motor vehicle liability and property insurance coverage should be increased or decreased; (ii) whether comprehensive coverage should be required; and (iii) whether exemptions from the required minimum levels of motor vehicle liability and property insurance coverage should be permitted.”

As introduced, HJR-601 called for a study of the appropriate minimum level of uninsured motorist coverage for property damage. The introduced resolution's language stated that “the current level of required minimum coverage may exceed the amount of [uninsured motorist property damage] coverage many insureds can reasonably expect to need.” The resolution ultimately passed by the General Assembly, however, broadened the study to include an examination of all minimum coverage levels above.

HJR-601 was patroned by Delegate Gladys B. Keating of Franconia who also served as the subcommittee's chairperson. Additional General Assembly members appointed to the joint subcommittee were as follows: Delegates William W. Bennett, Jr. of Halifax, Vincent F. Callahan, Jr. of McLean, and William S. Moore, Jr., of Portsmouth, together with Senators Charles J. Colgan of Manassas, Thomas K. Norment, Jr. of Williamsburg, and Louise L. Lucas of Portsmouth, elected vice-chair of the joint subcommittee.

The Joint Subcommittee met twice at the General Assembly Building in Richmond, first on October 6 and then on December 6. Final subcommittee action

included (i) recommending a 1996 study of model legislation establishing a “choice” auto insurance program which combines fault and no-fault insurance, and (ii) opposing a plan by the Department of Motor Vehicles to eliminate its current paper-based insurance audit program in favor of an electronic cancellation-based model.

## **B. OVERVIEW OF VIRGINIA’S AUTOMOBILE INSURANCE PROGRAM**

Automobile insurance in Virginia is not mandatory. Drivers who wish to drive without insurance may do so by paying an annual \$400 uninsured motorist fee upon registration of a motor vehicle at the Department of Motor Vehicles (DMV) (Va. Code §§ 46.2-705, 46.2-706, *Appendix B*) for its insurance monitoring program. The remainder is distributed by the State Corporation Commission (SCC) to liability insurers, offsetting their costs in providing mandatory uninsured motorist coverage.

Virginians who choose to purchase motor vehicle insurance must purchase a minimum of \$25,000 coverage for personal injury liability with a \$50,000 limit, and \$20,000 for property damage liability (Va. Code § 46.2-472, *Appendix C*) They must also purchase uninsured motorist coverage with identical minimum coverages (Va. Code § 38.2-2206, *Appendix D*). Uninsured motorist coverage provides insurance coverage for bodily injury and property damage incurred by insured individuals who are injured by drivers who have no insurance coverage, or coverage that is insufficient to cover the insured’s damages. The difference between an at-fault driver’s available liability coverage and the uninsured coverage limits of an injured individual’s own auto insurance is called “underinsurance” coverage.

Virginia’s minimum liability levels have increased slowly over the years since 1950 when they were at 5/10/1 [numbers are in thousands]. By 1972 they had been increased to 20/40/5. And the most recent change to Va. Code § 46.2-472 occurred in 1989 when the minimum liability coverage for property damage was increased from \$10,000 to \$ 20,000 culminating in the current 25/50/20 levels.

## **C. MINIMUM COVERAGES IN OTHER EASTERN STATES.**

Three states adjoining Virginia have minimum liability requirements within the range of those in our Commonwealth. North Carolina has compulsory liability insurance requirements of 25/50/15. Maryland and West Virginia require 20/40/10. All three states require uninsured motorist coverage at levels at least equal to their minimum liability levels.

Tennessee, while not requiring insurance, establishes minimum liability coverages for those purchasing insurance at 25/50/10. Pennsylvania sets its minimums at 15/30/5. New York requirements are 10/20/5. None of these states require uninsured motorist property damage coverage.



## **II. WORK OF THE JOINT SUBCOMMITTEE**

### **A. MEETING AGENDAS.**

The joint subcommittee used its first meeting to determine the study's focus. It received testimony from the Department of Motor Vehicles about Virginia's insured and uninsured motorist population, and how the Department verifies auto insurance coverage through random audits and other means. Jeffrey O'Connell, a University of Virginia law professor, testified about legal, economic and policy issues generated by Virginia's current statutory scheme. He advocated permitting Virginia's motor vehicle owners to go uninsured, with the penalty of denying them "pain and suffering" damages. And, he advocated Virginia's adoption of a "choice" plan for automobile insurance which would permit Virginians to select fault or no-fault insurance. Finally, representatives of motor vehicle insurers stated that the current minimum automobile insurance levels in Virginia are appropriate and should not be increased.

The second and final meeting provided a further opportunity to examine Professor O'Connell proposals for automobile insurance reform. Additionally, the joint subcommittee reviewed but did not act on a proposal to permit Virginians to opt out of uninsured motorist property damage insurance coverage. The joint subcommittee also discussed the Department of Motor Vehicle's plan to eliminate its paper-based insurance coverage audit system in favor of an electronic system keyed to insurance cancellation notices.

### **B. DEPARTMENT OF MOTOR VEHICLES REPORT.**

Department of Motor Vehicles (DMV) representatives reiterated that drivers who wish to drive without insurance may do so by paying an annual \$400 uninsured motorist fee upon registration of a motor vehicle at the Department of Motor Vehicles. Part of the fee is used by the Department to defray the expense of its \$3.9 million insurance audit program. The remainder (currently \$5 million) is distributed by the State Corporation Commission (SCC) to liability insurers, offsetting their costs in providing mandatory uninsured motorist coverage.

DMV estimates that approximately 200-300 thousand Virginia-registered motor vehicles are uninsured--exclusive of those vehicles for which uninsured motorist fees have been paid. In 1994, the Department issued 231,000 insurance audit notices and determined that 6 percent of that sample was without insurance. Its uninsured vehicle calculation is extrapolated from that sample. The Department also monitors motor vehicle insurance coverage through information gathered from traffic law-related convictions; accident report data; vehicle stops by

law enforcement officers; and information from insurance agents. A chart summarizing all sources of insurance verification is attached as *Appendix E*.

DMV representatives told the Joint Subcommittee that DMV proposes to replace its current uninsured motorist monitoring process with a more automated method linked to automobile insurance cancellation notices issued by insurers. Any individual receiving a notice of insurance cancellation would be required to proffer evidence of continuing coverage to the Department.

### C. "CHOICE" LEGISLATIVE PROPOSAL.

Professor Jeffrey O'Connell of the University of Virginia Law School urged the joint subcommittee to endorse legislation eliminating the choice between the uninsured motorist fee and liability insurance (*Appendix F*). Noting that even the \$400 uninsured motorist fee may be beyond the means of many of Virginia's poor, he proposed that Virginians be permitted to drive uninsured. Under his plan, uninsured drivers would give up claims for noneconomic loss (principally "pain and suffering") in connection with injuries resulting from collisions with at-fault, insured drivers. Uninsured motorist coverage would be optional. Insured drivers, he noted, could elect to purchase uninsured motorist coverage or take their premium savings and purchase additional medical expense, disability, or life insurance coverage.

O'Connell's proposal is one component of a broader auto insurance system he advocates known as "choice". Under a "choice" system, drivers may choose either a traditional auto insurance plan (using the tort system to apportion fault and recovery) or a no-fault plan. Those choosing no-fault neither recover (nor are they liable to others for) noneconomic losses resulting from less serious injuries incurred in auto accidents. According to a Rand research report O'Connell authored (*Appendix G*), Virginians would save nearly 35% percent in auto insurance premiums under a "choice" plan if 50 percent of insured motorists chose no-fault coverage. The subcommittee examined a "choice" legislative model developed by Professor O'Connell (*Appendix H*) as part of its deliberations.

Virginia Trial Lawyers' Association representative Mark Rubin, told the Subcommittee that the "choice" proposal is no panacea. He cited the "medical payments" coverages under current Virginia motor vehicle insurance policies (covering medical expenses up to a certain level under one's own policy) as an example of litigious issues that can arise between an insured and his insurer. Moreover, "pain and suffering" damages--eliminated under no-fault--are legitimate means of compensating for automobile-related personal injuries, he said.

#### **D. INSURANCE INDUSTRY PERSPECTIVE.**

Several representatives of Virginia's auto insurance industry told the subcommittee that the industry might support a proposal to make uninsured motorist property damage coverage optional. This proposal was the study's focus in the HJR-601 resolution as introduced. Its proponents believe that such coverage (currently at \$20,000 minimum) is excessive since many insured vehicles are worth substantially less than the minimum amount. However, insurers' representatives pointed out, the premium savings would be modest for most insureds. The insurance industry opposes any increases in the insurance minimum levels, suggesting that the uninsured population would probably increase if this occurred. Insofar as the "choice" proposal was concerned, the industry took no unified position.

### **III. SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS**

The Joint Subcommittee concluded that the "choice" legislative model merited further consideration, but that it presented numerous collateral issues (e.g., recoveries permitted when driver with fault-based policy is injured by driver with no-fault policy) precluding comprehensive subcommittee action in 1995. Accordingly, a majority of the joint subcommittee recommended a 1996 legislative study devoted exclusively to the "choice" model. A joint resolution to that effect is attached as *Appendix I*.

A proposal to make optional uninsured motorist property damage coverage was not recommended by the subcommittee. While the subcommittee learned that some Virginians oppose paying for insurance they do not need (many have vehicles worth substantially less than the mandatory \$20,000 minimum uninsured property damage coverage), projected premium savings associated with this initiative were very modest. A copy of proposed legislation is attached as *Appendix J*.

Finally, the subcommittee expressed opposition to the Department of Motor Vehicles' proposal to discontinue its random audit process of monitoring motor vehicle coverage. The subcommittee concluded that the current random audit process is more proactive and may provide a more dynamic indicator of automobile insurance coverage trends.

Respectfully submitted,

Gladys S. Keating, Chairman  
L. Louise Lucas, Vice Chairman  
William S. Moore, Jr.  
William W. Bennett, Jr.

Vincent F. Callahan, Jr.  
Charles J. Colgan  
Thomas K. Norment, Jr.

## HOUSE JOINT RESOLUTION NO. 601

*Establishing a joint subcommittee to study the appropriate minimum levels of motor vehicle liability and property insurance coverage.*

Agreed to by the House of Delegates, February 23, 1995

Agreed to by the Senate, February 21, 1995

WHEREAS, Virginia law requires that motor vehicle insurance policies include coverage to pay an insured all sums he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle; and

WHEREAS, concerns have been expressed about the adequacy of the current minimum levels of motor vehicle liability insurance coverage, including such minimum levels for bodily injury and property damage resulting from motor vehicle accidents involving uninsured and underinsured motorists; and

WHEREAS, insurers in Virginia are required to offer medical expense coverage, although such coverage is not required to be purchased; and

WHEREAS, comprehensive coverage provides protection for the insured in the event of damage to his motor vehicle other than by collision, such as for fire or theft; and

WHEREAS, the costs associated with property damage and bodily injury resulting from motor vehicle accidents and other damage to motor vehicles may exceed the required minimum levels of motor vehicle insurance coverage, presenting a financial dilemma for the owner or operator of a motor vehicle; and

WHEREAS, the minimum amount of uninsured motorist coverage prescribed by law for damage or destruction of the property of the insured in any one accident is \$20,000, and a portion of an insured's premium is used to cover such \$20,000 minimum coverage; and

WHEREAS, the current level of required minimum coverage may exceed the amount of coverage many insureds can reasonably expect to need; and

WHEREAS, nevertheless, many of Virginia's insured and underinsured drivers may not need or desire to have a minimum of \$20,000 in property damage and \$25,000/\$50,000 bodily injury coverage; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the appropriate minimum levels of motor vehicle liability and property insurance coverage. The joint subcommittee shall consist of seven members to be appointed as follows: four members of the House of Delegates to be appointed by the Speaker of the House; and three members of the Senate to be appointed by the Senate Committee on Privileges and Elections. The joint subcommittee is requested to consider (i) whether the required minimum levels of motor vehicle liability and property insurance coverage should be increased or decreased; (ii) whether comprehensive coverage should be required; and (iii) whether exemptions from the required minimum levels of motor vehicle liability and property insurance coverage should be permitted.

The direct costs of this study shall not exceed \$3,150.

The Division of Legislative Services shall provide staff support for the study. Technical assistance shall be provided by the Department of Motor Vehicles and the Bureau of Insurance of the State Corporation Commission. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1996 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

### **§ 46.2-705. Definitions.**

For the purposes of this article, the following terms shall have the meanings respectively ascribed to them in this section:

*"Motor vehicle"* means a vehicle capable of self-propulsion which is either (i) required to be titled and licensed and for which a license fee is required to be paid by its owner, or (ii) owned by or assigned to a motor vehicle manufacturer, distributor, or dealer licensed in the Commonwealth.

*"Insured motor vehicle"* means a motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, both in the amounts specified in § 46.2-472, issued by an insurance carrier authorized to do business in the Commonwealth, or as to which a bond has been given or cash or securities delivered in lieu of the insurance; or as to which the owner has qualified as a self-insurer in accordance with the provisions of § 46.2-368.

*"Uninsured motor vehicle"* means a motor vehicle as to which there is no such bodily injury liability insurance and property damage liability insurance, or no such bond has been given or cash or securities delivered in lieu thereof, or the owner of which has not so qualified as a self-insurer.

(1958, c. 407, § 46.1-167.2; 1960, c. 188; 1982, c. 638; 1988, c. 865; 1989, c. 727.)

### **§ 46.2-706. Additional fee; certificates required of applicants for registration of insured motor vehicles; verification of certificates; suspension of driver's license, registration certificates, and license plates for certain violations.**

In addition to any other fees prescribed by law, every person registering an uninsured motor vehicle, as defined in § 46.2-705, at the time of registering or reregistering the uninsured vehicle, shall pay a fee of \$400; however, if the uninsured motor vehicle is a motor vehicle or semitrailer registered or reregistered as provided in subsection B of § 46.2-646, the fee shall be one-twelfth of the annual uninsured motor vehicle fee for each month of the registration period. If the vehicle is a motor vehicle being registered or reregistered as provided in subsection B of § 46.2-697, the fee shall be one-fourth of the annual uninsured motor vehicle fee for each quarter for which the vehicle is registered.

If the owner of a motor vehicle registered under this article as an uninsured motor vehicle, during the period for which such vehicle is registered, obtains insurance coverage adequate to permit such vehicle's registration as an insured motor vehicle and presents evidence satisfactory to the Commissioner of the existence of such insurance coverage, the Commissioner shall amend the Department's records to show such vehicle to be registered as an insured motor vehicle and shall refund to the owner a prorated portion of the additional fee required by this section for registration of an uninsured motor vehicle. Such proration shall be on a monthly basis, except that no such refund shall be made (i) as to any registration during the last three months of its validity or (ii) on any portion of any such fee required to be paid resulting from a determination by the Department or any court that a vehicle was uninsured and no fee had been paid.

Every person applying for registration of a motor vehicle and declaring it to be an insured motor vehicle shall, under the penalties set forth in § 46.2-707, execute and furnish to the Commissioner his certificate that the motor vehicle is an insured motor vehicle as defined in § 46.2-705, or that the Commissioner has issued to its owner, in accordance with § 46.2-368, a certificate of self-insurance applicable to the vehicle sought to be registered. The Commissioner, or his duly authorized agent, may require any registered owner of a motor vehicle declared to be insured or any applicant for registration of a motor vehicle to be an insured motor vehicle to submit a certificate of insurance on a form prescribed by the Commissioner. The Commissioner shall forward the certificate of insurance or bond to the insurance company or surety company, whichever is applicable, for verification as to whether the policy or bond named in the certificate is currently in force. At that time and not later than thirty days following receipt of the certificate of insurance, the insurance company or surety company shall cause to be filed with the Commissioner a written notice if the policy or bond was not applicable as to the named insured. The Commissioner shall prescribe the manner in which the written notice shall be made.

The refusal or neglect of any owner within thirty days to submit the certificate of insurance when required by the Commissioner or his duly authorized agent or the notification by the insurance company or surety company that the policy or bond named in the certificate of insurance is not in effect, shall require the Commissioner to suspend any driver's license and all registration certificates and license plates issued to the owner of the motor vehicle until the person (i) has paid to the Commissioner a fee of \$400 to be disposed of as provided for in § 46.2-710 with respect to the motor vehicle determined to be uninsured and (ii) furnishes proof of financial responsibility for the future in the manner prescribed in Article 15 (§ 46.2-435 et seq.) of Chapter 3 of this title. No order of suspension required by this section shall become effective until the Commissioner has offered the person an opportunity for an administrative hearing to show cause why the order should not be enforced. Notice of the opportunity for an administrative hearing may be included in the order of suspension. When three years have elapsed from the effective date of the suspension required in this section, the Commissioner may relieve the person of the requirement of furnishing proof of future financial responsibility.

If the Commissioner determines that the fee applicable to the registration of an uninsured motor vehicle has been paid on the vehicle in question on or before the date that the insurance certificate was requested, no suspension action shall be taken.

The Commissioner shall suspend the driver's license and all registration certificates and license plates of any person on receiving a record of his conviction of a violation of any provisions of § 46.2-707, but the Commissioner shall dispense with the suspension when the person is convicted for a violation of § 46.2-707 and the Department's records show conclusively that the motor vehicle was insured or that the fee applicable to the registration of an uninsured motor vehicle has been paid by the owner prior to the date and time of the alleged offense.

(1958, c. 407, § 46.1-167.1; 1960, c. 188; 1966, c. 181; 1972, cc. 552, 609, 638; 1973, c. 25; 1974, c. 170; 1975, c. 16; 1976, c. 27; 1978, c. 563; 1981, c. 193; 1984, c. 399; 1986, c. 527; 1988, c. 470; 1989, c. 727; 1993, c. 127.)

**§ 46.2-472. Coverage of owner's policy.**

Every motor vehicle owner's policy shall:

1. Designate by explicit description or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted.
2. Insure as insured the person named and any other person using or responsible for the use of the motor vehicle or motor vehicles with the permission of the named insured.
3. Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person, and injury to or destruction of property caused by accident and arising out of the ownership, use, or operation of such motor vehicle or motor vehicles within the Commonwealth, any other state in the United States, or Canada, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of \$25,000 because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, to a limit of \$50,000 because of bodily injury to or death of two or more persons in any one accident, and to a limit of \$20,000 because of injury to or destruction of property of others in any one accident.

(Code 1950, § 46-492; 1954, c. 378; 1958, cc. 501, 541, § 46.1-504; 1968, c. 685; 1972, c. 433; 1975, c. 382; 1978, c. 550; 1989, cc. 621, 727.)



**§ 38.2-2206. Uninsured motorist insurance coverage.**

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least \$20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first \$200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, or (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368. A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

*"Available for payment"* means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have

the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

(Code 1950, § 38-238; 1952, c. 317, § 38.1-381; 1958, c. 282; 1959, Ex. Sess., cc. 42, 70; 1960, c. 462; 1962, c. 457; 1964, c. 477; 1966, cc. 182, 459; 1968, cc. 199, 721; 1970, c. 494; 1971, Ex. Sess., c. 216; 1973, cc. 225, 390; 1974, c. 87; 1976, cc. 121, 122; 1977, c. 78; 1979, c. 113; 1980, cc. 326, 331; 1981, Sp. Sess., c. 6; 1982, cc. 638, 642; 1984, c. 541; 1985, cc. 39, 325; 1986, c. 562; 1987, c. 519; 1988, cc. 565, 578, 585, 586, 594; 1989, c. 621; 1993, c. 381; 1995, cc. 189, 267, 476.)

**Department of Motor Vehicles  
Insurance Monitoring Processes & Detection Rates**

<b>Sampling Method</b>	<b>Notices</b>	<b>Suspension</b>	<b>Net Detection Rate</b>	<b>Comments</b>
Conviction	159	49	31%	monitors persons under driver improvement control
Vehicle registration	231,000	12,843	5.55%	random verification of insurance.
Accident-related insurance verification	1,185	1,183	62%	DMV assists motorists obtain insurance information re: parties to an accident.
Law enforcement notification via FR-422 form.	6,180	2,783	45%	insurance info. requested in connection with motorist's moving violation. FR-422 issued to motorists unable to verify insurance at the scene.
Citizen information re: individuals driving uninsured	2,000	1,200	60%	Furnished by variety of sources, including insurance agents.

Source: Department of Motor Vehicles

E:\DLSDATA\BUSJURIS\STUDIES\HJR560\DMV.DOC

## ALLOWING MOTORISTS A CHOICE TO BE LEGALLY UNINSURED BY SURRENDERING TORT CLAIMS FOR NONECONOMIC LOSS

by: Jeffrey O'Connell, Professor of Law  
University of Virginia

Unfortunately, uninsured motorists whose drivers licenses or car registrations are suspended or revoked continue to drive with relatively little possibility of detection or apprehension -- or even punishment upon apprehension. As Professor Jennifer Arlen has written, criminal laws regulating the misconduct of motorists are simply not adequately enforced. "[D]espite stringent drunk driving laws," she tells us, "Georgia has tens of thousands of repeat offenders, and ... judges do not take away drivers' licenses even when a driver has 15 drunk driving convictions." If those charged with law enforcement ignore egregious conduct such as chronic drunk driving, they certainly will not -- and do not -- punish the relatively innocuous offense of driving without insurance.

When one thinks about it, the decision of poor people, with few or no assets to protect, to drive uninsured for tort liability makes eminently good economic sense. Facing large unmet needs for essentials for themselves and their families, why should they annually spend many hundreds of dollars to buy an arcane piece of paper providing a highly contingent, long-delayed transfer payment to strangers probably far more affluent than themselves?

This sad tale should point us to taking another look at the phenomenon of uninsured motorists. What can be done?

Motorists should be allowed to go uninsured with the only penalty that one's uninsured status disallows one -- and also one's dependent family members -- from tort claims for noneconomic losses (principally pain and suffering), unless one is tortiously injured by a motorist guilty of illegally driving under the influence of alcohol or drugs or of intentionally inflicting injury. In other words, let those who cannot (or will not) pay cash for automobile insurance pay for it, in effect, with their uncompensated pain and suffering. But because payment for pain and suffering is that component of damages normally tapped to pay plaintiffs' lawyers' fees, uninsured motorists should also be entitled to reasonable attorneys' expenses in addition to payment for their economic losses.

Under this plan, those who remain insured for bodily injury will be rewarded by lowering the costs of their liability insurance because they will now no longer be exposed to claims for noneconomic loss from the uninsured. This equation ought to assuage the outrage of insured motorists who are liable for full common law damages to the uninsured motorists but unable as a practical matter to recover any losses, economic or noneconomic, from such motorists. The reason the proposal allows the uninsured to still recover economic losses is that it would seem to be inequitable in the extreme to allow, say, a very affluent motorist with huge assets to negligently damage an impecunious motorist or pedestrian and escape scot-free without paying any losses. Professor Stephen D. Sugarman of the Berkeley law faculty has written as follows:

This proposed restriction on recovery is analogous to the norm now applied to auto accident victims whose own negligence contributes to their injuries. For

example, if there is a crash between someone who runs a stop sign and a speeder and the speeder is hurt, then his fault [in Virginia bars the speeder's claim] .... Under O'Connell's reform the motorist who is at fault for not carrying insurance would have his legal award cut down -- by losing the pain and suffering damages he might otherwise have obtained.

Another appeal of this proposed scheme is that it is self-executing. There is no need for cumbersome means of identifying motorists who are or become uninsured; no need for diverting vital police and judicial efforts to the mundane -- and often futile task -- of enforcing penalties for being uninsured. (Our experience with Prohibition should have taught us the dangers of unenforceable laws.) Rather, when an uninsured motorist is in an accident and makes a tort claim, the defending insurer has an incentive to establish routinely and inexpensively the claimant's uninsured status at that time -- and to assess the penalty of refusing to honor any claim for noneconomic damages.

All of the above discussion pertains only to liability for personal injury. As to liability for property damage, the law could retain compulsory property damage liability insurance. Second, as an alternative, a motorist not carrying property damage liability insurance could not claim property damage against third persons.

# Research Brief

RAND

Institute for Civil Justice

July 1995

15<sup>th</sup> Anniversary Year

## Choosing an Alternative to Tort

Escalating auto insurance premiums have been a major public policy issue at the state level for the last three decades. No-fault auto insurance, spawned in the 1970s, was one response, offering cost savings to motorists and speedier compensation to auto accident victims. But because it required claimants to give up rights to seek compensation through the courts unless their losses exceeded a specified threshold, many states found it an unappealing alternative.

Choice auto insurance was proposed to address this concern. Under a choice auto insurance system, drivers may choose either a traditional auto insurance plan (tort) or a no-fault plan. Those who choose tort retain traditional tort rights and liabilities. Those who choose no-fault neither recover, nor are liable to others for, noneconomic losses (typically, pain and suffering) for less-serious injuries incurred in auto accidents.

Giving motorists a choice of coverage has strong appeal. But how does the choice alternative affect the premiums motorists pay? In a series of analyses, Stephen Carroll and Allan Abrahamse estimated how a choice auto insurance plan would affect insurance premiums in

each state. Their basic finding: Overall, choice auto insurance could reduce the price tag for auto insurance by about 30 percent.

### APPROACH

To understand the cost effects of choice auto insurance, the researchers estimated how a plan that offers a choice between tort and no-fault would affect the costs of auto insurance in each state that now relies on the traditional tort system. The plan they analyzed is *absolute no-fault*, the most extreme version of choice: Motorists may never sue, or be sued, for noneconomic loss. Thus, these estimates suggest the upper bound on the savings that can be accomplished in each tort state via the choice approach.

The researchers also estimated the cost effects of a choice plan in each state that already has some form of no-fault auto insurance. These estimates suggest the upper bound on the savings that can be accomplished in current no-fault states by extending the no-fault concept to its limit.

---

RAND research briefs summarize research that has been more fully documented elsewhere. This research brief describes work done in the Institute for Civil Justice and published as follows: S. J. Carroll, S. Kukalik, N. M. Pace, and J. L. Adams, No-Fault Approaches to Compensating People Injured in Automobile Accidents, R-019-IC, 1991, 239 pp., \$20.00, ISBN: 0-8330-1182-0; S. J. Carroll and J. S. Kukalik, "No-Fault Approaches to Compensating Auto Accident Victims," *The Journal of Risk and Insurance*, Vol. 60, No. 2, 1993, reprinted as RP-279, 1993 (no charge); J. O'Connell, S. J. Carroll, M. Horowitz, and A. Abrahamse, "Consumer Choice in the Auto Insurance Market," *Maryland Law Review*, Vol. 52, 1993, reprinted as RP-254, 1994 (no charge); A. Abrahamse and S. J. Carroll, The Effects of a Choice Auto Insurance Plan on Insurance Costs, MR-540-IC, 1995, 77 pp., \$13.00, ISBN: 0-8330-1641-5; J. O'Connell, S. J. Carroll, M. Horowitz, A. Abrahamse, and D. Kaiser, "The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance," *Maryland Law Review*, Vol. 54, No. 2, 1995; J. O'Connell, S. Carroll, M. Horowitz, A. Abrahamse, and P. Jamieson, "The Comparative Costs of Consumer Choice for Auto Insurance in All Fifty States," *Maryland Law Review*, forthcoming.

The RAND publications cited in this research brief are available from RAND Distribution Services (Telephone: 310-451-7002; FAX: 310-451-4915; or Internet: [order@rand.org](mailto:order@rand.org)). RAND is a nonprofit institution that helps improve public policy through research and analysis; its publications do not necessarily reflect the opinions or policies of its research sponsors.



## RESULTS FOR EACH STATE

*In the tort states*, the costs of compensating accident victims on behalf of drivers who elect no-fault would be at least 60 percent less than they would have been if those drivers had been insured under the traditional tort system. These savings include both the compensation paid to accident victims and the transactions costs incurred in providing that compensation.

If these savings are passed on to consumers, drivers in tort states who select choice could buy personal injury coverages for about 60 percent less than they pay for those coverages under the tort system. Because coverages for personal injury and property damage each account for roughly half of total auto insurance compensation costs, this 60 percent reduction translates roughly into a 30 percent reduction in a driver's total auto insurance premium. Premiums are unchanged for motorists who choose to remain in the traditional tort system.

*In most no-fault states*, a choice plan would have a similar effect on the costs of compensating accident victims and, again assuming that insurer savings are passed on to consumers, would result in similarly lower insurance premiums. And in most no-fault states, drivers who preferred to retain their current no-fault plan would pay no more for personal injury coverage than under the current system.

The savings an individual driver will realize from a choice system do not depend on the proportion of uninsured drivers in a state's current system, the proportion of previously insured who switch to absolute no-fault, or the proportion of the previously uninsured who switch to absolute no-fault. The effects of the plan on the total costs of auto insurance do depend on how many drivers choose to switch to the absolute no-fault option.

Nationwide, the reductions in personal injury premiums resulting from choice could be enormous. For example, if every currently insured driver in the country were to choose absolute no-fault, total auto insurance premiums in 1993—the last year for which data are available—would have been \$26 billion lower. The table shows the relative savings for motorists in each state.

In addition to the savings in premiums, choice has another important cost effect. Because the no-fault premium is much lower than the premium for mandatory coverage under a tort system, some motorists who chose to drive without insurance under tort will choose no-fault. These uninsured drivers who switch to no-fault could contribute \$1 billion to \$4 billion to the compensation system nationwide.

Automobile Insurance Savings in Each State Under Choice<sup>1</sup>

State	% Premium Savings for All Motorists (assumes 50% of insured motorists choose absolute no-fault)	% Premium Savings for Low-Income Motorists (assumes 50% of insured motorists choose absolute no-fault)	Total savings, \$ millions (assumes all insured motorists choose absolute no-fault)
Alabama	19	38	176
Alaska	17	28	24
Arizona	37	53	533
Arkansas	28	47	195
California	35	53	3622
Colorado	31	47	462
Connecticut	41	57	678
Delaware	34	47	93
Florida	32	44	1395
Georgia*	24	42	484
Hawaii	43	55	229
Idaho	28	46	75
Illinois	25	45	772
Indiana	27	44	450
Iowa	27	48	187
Kansas	12	23	53
Kentucky	14	21	40
Louisiana	45	64	592
Maine	31	51	114
Maryland	38	56	661
Massachusetts*	41	57	1154
Michigan	15	28	647
Minnesota	32	49	483
Mississippi	25	44	137
Missouri	26	44	405
Montana	33	57	79
Nebraska	25	45	113
Nevada	37	55	196
New Hampshire	26	42	92
New Jersey*	36	53	1496
New Mexico	33	52	173
New York	35	53	2334
North Carolina	32	47	658
North Dakota	2	3	-3
Ohio	29	47	840
Oklahoma	29	49	278
Oregon	29	43	272
Pennsylvania*	32	47	1300
Rhode Island	28	41	103
South Carolina	36	53	398
South Dakota	34	59	61
Tennessee	22	39	261
Texas	36	54	1688
Utah	29	46	145
Vermont	11	38	31
Virginia	34	50	612
Washington	37	53	621
West Virginia	37	58	222
Wisconsin	31	53	443
Wyoming	24	46	31
All states	31	49	26100

<sup>1</sup>The choice plan examined here is described in J. O'Connell, S. J. Carroll, M. Horowitz, and A. Abrahamse, "Consumer Choice in the Auto Insurance Market," *Maryland Law Review*, Vol. 52, 1993. Reprinted as RAND RP-254, 1994.

\*Insurance system changed since January 1, 1988.

APPENDIX B: MODEL LEGISLATION FOR CREATION OF A CONSUMER  
CHOICE IN MOTOR VEHICLE INSURANCE ACT\*

AN ACT relating to insurance; creating a system of motor vehicle insurance that offers a choice of methods of protection against losses from personal injury arising out of the maintenance or use of motor vehicles; abolishing tort liability in certain cases; and providing other matters properly relating thereto:

CONSUMER CHOICE IN MOTOR VEHICLE INSURANCE ACT

Section 1.	Title.....	322
Section 2.	Statement of Purpose.....	322
Section 3.	Definitions .....	326
Section 4.	Insurance Requirements .....	333
Section 5.	Required Limits of Liability Coverage.....	335
Section 6.	Election of Personal Injury Protection Option or Tort Maintenance Coverage Option .....	335
Section 7.	Application of Coverage .....	335
Section 8.	Geographic Application of Personal Injury Protection Policies.....	336
Section 9.	Persons Not Entitled to Personal Protection .....	337
Section 10.	Payment of Personal Injury Protection Benefits ...	338
Section 11.	Multiple Coverages .....	338
Section 12.	Priority of Benefits .....	338
Section 13.	Coordination of Benefits .....	339
Section 14.	Tort Rights and Legal Liability Under this Act....	340
Section 15.	Insurer's Right of Subrogation.....	341
Section 16.	Personal Injury Protection Benefits and Causes of Action for Injury .....	342
Section 17.	Personal Injury Protection Benefits Payable Periodically.....	343
Section 18.	Assignment or Garnishment of Personal Injury Protection Benefits .....	344
Section 19.	No Penalty for Claims for Personal Injury Protection Benefits .....	344
Section 20.	Limitation of Actions .....	344
Section 21.	Mental and Physical Examinations .....	345
Section 22.	Verification of Entitlement to Benefits.....	345
Section 23.	Assigned Claims Plan .....	346
Section 24.	Fraudulent Claims.....	347

---

\* This Model Legislation is authored by Jeffrey O'Connell alone. It does not necessarily reflect the views of the co-authors of the Article's main text and Appendix A.

Section 25.	Non-Discrimination in Fees for Medical Services ..	347
Section 26.	Managed Care .....	347
Section 27.	Safety Equipment .....	348
Section 28.	Regulations .....	348
Section 29.	Limitation of Liability for Advising on Options ...	349
Section 30.	Cost of Living Adjustment .....	349
Section 31.	Arbitration .....	349
Section 32.	Out-of-State Vehicles .....	349
Section 33.	Terms, Conditions and Exclusions .....	350
Section 34.	Applicable Provisions to Tort Maintenance Coverage .....	350
Section 35.	Severability and Constitutionality .....	350
Section 36.	Declaratory Judgment .....	351
Section 37.	Effective Date .....	351

THE PEOPLE OF THE STATE OF [NAME], REPRESENTED IN THEIR  
LEGISLATURE, DO ENACT AS FOLLOWS:

SECTION 1. TITLE. This Act may be cited as the Consumer Choice in Motor Vehicle Insurance Act.<sup>1</sup>

SECTION 2. STATEMENT OF PURPOSE.

a. Controlling Provisions. To the extent the provisions of section 2 differ from the provisions of section 3 and thereafter, the provisions of the subsequent sections control.

b. Existing Law. Under existing law, the ability of a person to recover losses incurred as a result of a motor vehicle accident is limited by factors over which the accident victim has no control. The recovery is dependent on, among other things, the conduct of the other driver, the amount of liability insurance (if any) carried by the other driver, and the financial resources (if any) of the other driver. Under the current system, two individuals who have received identical injuries may recover markedly different amounts. Therefore, many

---

1. These footnotes are adapted from Jeffrey O'Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable With and Without Regard to Fault*, 51 OHIO ST. L.J. 947 (1990). That article set forth a bill based on the first variation of a choice plan discussed *infra* note 2 to Appendix B. As a result of the change to the second approach in O'Connell *supra*, the terminology of the footnotes has been changed where appropriate. Furthermore, in order to limit the length of this Appendix, some identifying footnotes either cross refer to O'Connell *supra*, or have not been reproduced here. Any reader desiring to have the benefit of those eliminated footnotes can, with relative ease, track them by the section letters in the Table of Contents in O'Connell *supra*, bearing identical, or at least similar, section titles in the draft bill presented herein.

individuals, particularly the large number of motorists involved in one-car accidents, receive no compensation for their losses at all.

c. **The Right to Choose.** This bill gives motorists (1) the right to choose the kinds of personal injury protection which will be available to themselves and their family members in case of an automobile accident, and (2) the right to choose the amount of financial protection they deem appropriate and affordable for themselves and their families. Instead of being forced to buy traditional tort liability insurance to protect strangers, motorists will have the opportunity to buy a new Personal Injury Protection coverage to protect themselves and their family members in the event of a motor vehicle accident. As an alternative, they will have the right to elect traditional Tort Liability Insurance which will include an inverse liability coverage (entitled "Tort Maintenance Coverage") to provide protection in the event of injury caused by someone who has elected the Personal Injury Protection Option.<sup>2</sup>

---

2. A pivotal requirement of any law allowing motorists to choose between coverages payable with and without regard to fault is the proper allocation of benefits from the surrender of tort rights.

To illustrate the problem, consider the impact of the possible combinations of insurance coverages in a two-car collision. (1) both vehicles could be covered by insurance payable without regard to fault; (2) both vehicles could be covered by insurance payable with regard to fault; or (3) one vehicle could be covered by insurance payable without regard to fault and the other by insurance payable with regard to fault.

Resolving claims and transferring accident losses is easy for the first two coverage combinations. If two motorists with insurance payable without regard to fault collide, they would recover under their respective Personal Injury Protection policies without bringing a common law claim based on fault against each other. The term "Personal Injury Protection" is used in preference to "no-fault" throughout this bill because the latter term has come to connote, based on statutes passed under that rubric, laws that include both benefits paid without reference to fault and the preservation of full tort rights at least above a defined threshold. For a discussion of the (sometimes confusing) terminology applicable to various forms of automobile insurance reform whereby benefits are payable without reference to fault, see U.S. DEP'T OF TRANSP., *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES* 15-18, 21-22 (1985) [hereinafter *DOT REPORT*]; see also Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 *VA. L. REV.* 61, 63-64 (1986). If two motorists insured under traditional insurance payable with regard to fault collide, they could claim against each other based on fault as they do under common law rules. But resolving claims and transferring losses is problematic for the third combination, a collision between motorists insured with and without regard to fault. The motorist insured without regard to fault would recover under his or her Personal Injury Protection policy, but the traditional insured who was not at fault in causing the accident could not recover unless he or she was permitted to sue the other motorist based on fault. But requiring the motorist insured without regard to fault to insure based on fault for a claim by a fault-insured while surrendering his or her own right to claim based on fault would obviously be unfairly prejudicial—and expensive—for the motorist insured without regard to fault.

One solution would never take away tort rights in an accident involving those insuring both with and without regard to fault. Under this system, those who choose Personal In-

d. Tort Liability Insurance versus Personal Injury Protection coverage.

(1) Motorists who choose the Tort Liability Insurance and who are involved in an accident with another motorist will retain the tort liability system, except that, based on fault, (a) they can be sued by those who choose personal injury protection but only for damages in excess of the limits of the Personal Injury Protection policy and (b) they cannot claim against those who choose Personal Injury Protection coverage except for uncompensated economic loss in excess of the limits of their own first party Tort Maintenance Coverage.

jury Protection insurance must buy tort liability coverage for claims against them by those insured based on fault. However, because insurance without regard to fault can be expected to cost substantially less than tort liability coverage, exposure to tort liability for personal injury protection insureds will not be all that great.

The disadvantage of this approach is that insurers cannot be sure in advance of the percentages of drivers who will insure for traditional tort liability and those who will insure without regard to fault. As a result, reductions in premiums could conceivably be significantly less than would occur under a device in which insurers could confidently know that no motorist insured regardless of fault will be exposed to normal liability in tort to those electing traditional tort liability insurance.

The latter assurance can be gained by the device proposed herein for a regime allowing choice between insurance regarding and regardless of fault. Under a scheme of "inverse liability" (termed "Tort Maintenance Coverage"), in a collision between a motorist covered by traditional tort liability and another insured regardless of fault, no normal tort claims between the motorists would be allowed, but the driver with traditional tort liability insurance coverage would be allowed to sue his or her own company for full tort damages as if his or her company covered the driver insured regardless of fault. Such a regime mirrors "uninsured motorist" coverage, extant today, which allows victims to claim damages against their own companies if the motorist with whom they collide is uninsured. Under the proposed regime the costs of "uninsured motorist" coverage would increase, but that increase would be offset by fewer claims against the traditional insured's tort liability coverage because all those insured regardless of fault would be impeded in liability claims.

A third method of dealing with the reallocation problem has been employed in N.J. STAT. ANN. §§ 39:6A-21 to -22 (West 1990). It entails a "risk exchange" to reallocate the money saved by the motorist insured under traditional tort liability back to the motorist insured regardless of fault. Thus, under a risk exchange, as under "inverse liability," those insuring regardless of fault need not carry liability insurance to cover full common law liability for those insured under traditional tort liability. But the administrability of such a risk exchange device is subject to dispute among insurers. O'Connell, *supra* note 1 to Appendix B, at 949-50 & n.8.

The fourth and worst possible solution to the reallocation problem was adopted in Pennsylvania's bastardized choice bill, which simply ignored the need for reallocation. Act of Feb. 7, 1990, §§ 8, 17, 1990 Pa. Laws 11 (adding 75 PA. CONS. STAT. ANN. § 1705(a)(1) and amending § 1791.1(b) (Supp. 1994-95)). "As a result, the cost savings of surrendering tort rights do not accrue to the motorist surrendering the same. Instead, they accrue to the person who was at fault in injuring him or her. That is, surrender of tort rights simply reduces the chances of recovering in tort against the person at fault, which saves money for the latter's insurer but not for the insurer of the motorist surrendering his or her tort rights." O'Connell, *supra* note 1 to Appendix B, at 951.

(2) Motorists who choose Personal Injury Protection coverage established by this Act and who are involved in an accident with a motorist who has chosen traditional Tort Liability Insurance will be promptly compensated for their own losses, without regard to fault, and can also claim against the other motorist based on fault for uncompensated economic loss in excess of the limits of the Personal Injury Protection policy.

(3) Two motorists who each choose Personal Injury Protection coverage and who are involved in an accident with each other will be promptly compensated under their own policies for their own losses without regard to fault. In this situation, the two motorists who have chosen the Personal Injury Protection coverage lose the right to claim and sue for "pain and suffering" and other noneconomic loss, but if either suffers economic loss in excess of his/her policy's benefit levels, that person retains the right to claim and sue for unreimbursed economic loss based on fault.

(4) When two motorists who each choose Tort Liability Insurance are involved in an accident with each other, their rights against each other are unaffected by this Act.

(5) If a motorist who has chosen Tort Liability Insurance is involved in an accident with an uninsured motorist, the policyholder will be compensated for losses under the uninsured motorist provisions of his/her own policy based on fault and has the right to sue for damages. The uninsured motorist forfeits the right to claim for noneconomic loss against the motorist who has chosen Tort Liability Insurance unless the tort liability insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct.

(6) If a motorist who has chosen the Personal Injury Protection policy is involved in an accident with an uninsured motorist, the policyholder will be promptly compensated for losses without regard to fault under his/her Personal Injury Protection policy, and has the right to claim and sue the uninsured motorist for damages based on fault. The uninsured motorist forfeits the right to claim for noneconomic loss against the motorist who has chosen the Personal Injury Protection policy except when the Personal Injury Protection Insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct.

e. Property Damage. A motorist who purchased a Personal Injury Protection policy will thereby procure [\$10,000] of property damage liability insurance as part of his/her mandatory coverage. In order to keep the cost of property damage liability insurance as low as

possible, persons who have chosen Personal Injury Protection policies have no cause of action for damage to a motor vehicle to the extent such vehicle is insured against collision damage in accidents involving other Personal Injury Protection Insureds.<sup>3</sup>

SECTION 3. DEFINITIONS. As used in this Act, unless the context requires otherwise, the following terms have the meaning ascribed to them in this section:

a. "Accidental bodily injury" means bodily injury, sickness or disease, including death resulting therefrom, arising out of the operation or use of a motor vehicle, or while occupying such vehicle, which is accidental as to the person injured.<sup>4</sup>

b. "Added Personal Injury Protection" means coverage for additional Personal Injury Protection. Added Personal Injury Protection coverage includes benefits with an aggregate limit of [\$100,000] per person (including [\$30,000] of Basic Personal Injury Protection benefits), to consist of medical expenses, up to [\$1,000] per week of loss of income from work, up to [\$300] per week of replacement services loss, and if death is proximately and directly caused by a motor vehicle and occurs within one year of the date of the accident, a death benefit

---

3. Note that under this bill, motorists electing Personal Injury Protection insurance are not required to carry tort liability insurance for personal injury. Thus, a poorer person with no or few assets to protect can buy only Personal Injury Protection insurance protecting himself and his family for their medical bills and wage loss. This does not overly disadvantage those injured by the poor since the poor are so likely to be either un- or under-insured anyway. See *supra* main text accompanying note 43.

Note also that because insured motorists remain liable for uncompensated economic losses in excess of their own first party insurance or other coverages applicable to injury, poorer persons buying only the minimum amounts of insurance will more often be able to claim for higher losses against insureds who have purchased higher amounts of coverage than vice versa. This can arguably be justified by considerations of income redistribution. Cf. Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payments of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 356-58. But even without reference to the bill being discussed here, under traditional tort liability insurance, the poor—carrying either no or low liability insurance—can similarly draw more from the pool of liability insurance than they pay into it. (Though in fact, they may not do so. The poor are often reluctant to invoke the tort process; in addition, the poor suffer no or less wage loss and lower medical bills compared to those more affluent. See *supra* main text accompanying note 53.) The proposed plan preserves at least this theoretical advantage for the poor. But it also advantages the more affluent (1) by guaranteeing that those who buy Personal Injury Protection insurance will be covered up to whatever high limits they buy irrespective of fault, and (2) by limiting their tort exposure (including to uninsureds) to uncompensated economic loss payable periodically. This means that the temptation of those claiming against Personal Injury Protection insureds to pad claims will not be nearly so great as under tort liability. See *supra* note 7 to main text.

4. The last phrase in subsection 3a incorporates a common concept in insurance such that a victim of an intentional act (which is not accidental as to the intentional actor) is nonetheless accidental as to the victim of the actor's intentional act.



of [\$25,000] payable to the dependents, if any, or, if none, to the heirs or estate of the decedent. Nothing contained in this section prevents a Personal Injury Protection Insurer from also making available other additional compensation benefits in coverages and amounts other than those prescribed in this section. No applicant or insured may be required to purchase a lesser amount than those prescribed in this subsection.

c. "Basic Personal Injury Protection" means coverage, for Personal Injury Protection which provides benefits for loss resulting from accidental bodily injury. Basic Personal Injury Protection benefits consist of the following elements with an aggregate limit of [\$15,000] per person:

(1) Medical expenses, subject to a deductible of [\$250] applicable only to the named insured and to resident relatives of the named insured;

(2) Loss of income from work, not to exceed [\$200] per week;

(3) Replacement services loss, not to exceed [\$100] per week; and

(4) A death benefit of [\$10,000], payable to the dependents, if any or, if none, to the heirs or estate of the decedent, if the death of an injured person is directly and proximately caused by an accidental bodily injury and occurs within one year of the date of such injury.

d. "Cause of action for injury" means a claim for accidental bodily injury for economic or noneconomic loss, or both, caused by the negligent conduct or intentional misconduct of another person (whether directly or vicariously), and includes a claim by any person other than a person suffering accidental bodily injury based on such injury, including, but not limited to, loss of consortium, companionship, or any other derivative claim.

e. "Collateral sources" means all benefits one receives or is entitled to receive as reimbursement of loss because of an injury from sources other than Personal Injury Protection benefits. In such calculation, no subtraction is made for amounts one receives or is entitled to receive:

(1) in discharge of familial obligations or support;

(2) by reason of another's death, except that there is subtracted from loss in calculating net loss those amounts received from social security or workers' compensation; or

(3) as gratuities. In no event is any payment made by an employer to his employee or an employee's survivors to be regarded as a gratuity.<sup>5</sup>

f. "Commissioner" means the Commissioner of Insurance.<sup>6</sup>

g. "Coverage" means a policy or plan for insurance benefits.

h. "Dependent" means all persons related to another person by blood, marriage, adoption or otherwise who reside in the same household as such person at the time of the accidental bodily injury, and receive financial or services support from him or her.

i. "Driving under the influence of alcohol or illegal drugs" refers to such conduct when it causes or substantially contributes to the harm claimed for. A driver is deemed to be driving under the influence of alcohol for the purposes of this Act only if a test of blood, breath or urine as called for under the laws of this State shows an illegal blood or breath alcohol content as defined by State law,<sup>7</sup> or if a driver refuses to undergo such tests as called for under the laws of this State.<sup>8</sup>

j. "Economic loss" means medical expenses, loss of income from work, and replacement services loss incurred by or on behalf of an injured person as the result of an accidental bodily injury to such injured person.<sup>9</sup>

k. "Fault" is encompassed by the definition of "Tort liability."

l. "Injured person" means a person who sustains accidental bodily injury when eligible for benefits under a policy providing Personal Injury Protection or under the assigned claims plan under section 23. The term also includes where appropriate the personal representative of an estate.

m. "Intentional misconduct" means conduct whereby harm is intentionally caused or attempted to be caused by one who acts or fails to act for the purpose of causing harm or with knowledge that harm is

5. Under subsection 3e, as to payment of both Personal Injury Protection benefits and uncompensated economic loss, they are payable as excess (not primary) to other coverages such as the victim's own health and disability insurance. To define these terms, primary insurance covers from the first dollar (often after a deductible) as distinguished from excess coverage which pays only after primary coverage has been exhausted.

Subsection 3e is adapted from ROBERT KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM § 1.10, at 306 (1965).

6. O'Connell, *supra* note 1 to Appendix B, at 959 & n.39.

7. *Id.* at 959 & n.40.

8. *Id.* at nn. 41, 42.

9. The term "economic loss" (definition j) means pecuniary loss and monetary expenses incurred by or on behalf of an injured person. The categories of economic loss are medical expenses (definition o), replacement services loss (definition z), and loss of income from work (definition n).

substantially certain to follow when such conduct caused or substantially contributed to the harm claimed for. A person does not intentionally cause or attempt to cause harm (i) merely because his act or failure to act is intentional or done with the realization that it creates a grave risk of causing harm or (ii) if the act or omission causing bodily harm is for the purpose of averting bodily harm to oneself or another person.<sup>10</sup>

n. "Loss of income from work" means [80%] of loss of income an injured person would have earned through work during the period of disability, reduced by any income from substitute work actually performed by the injured person, or by any income the injured person would have earned in available appropriate substitute work which such person was capable of performing but unreasonably failed to undertake.<sup>11</sup> Loss of income from work does not include any loss after the death of an injured person and payment for the period of disability is not to exceed two years from the date of the accident.

o. "Medical expenses" means reasonable expenses incurred by an injured person for necessary medical, surgical, X-ray, dental, ambulance, hospital, medical rehabilitation, and professional nursing services and includes expenses for eyeglasses, hearing aids, and prosthetic devices. The words "incurred by" include medical expenses incurred on behalf of an injured person by a parent or guardian if the injured person is a minor or incompetent, or by a surviving spouse if the injured person be deceased. Personal Injury Protection Insurers are authorized to review medical expenses prior to, during, and after the course of treatment of an injured person, to assure that they are both reasonable and necessary. Under Basic Personal Injury Protection and under Added Personal Injury Protection, medical expenses are payable for services provided to the injured person within two years of the date of accidental bodily injury. "Medical expenses" does not include:

---

10. O'Connell, *supra* note 1 to Appendix B, at 960 & n.46.

11. In subsection 3n,

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."

UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 1(a)(5)(ii) cmt., 14 U.L.A. 46 (1972) [hereinafter *UMVARA*].

(1) that portion of the charge for a room in any hospital, clinic, convalescent or nursing home, extended care facility or any similar facility in excess of the reasonable and customary charge for semi-private accommodations unless medically required; or

(2) treatment, services, products or procedures that are experimental in nature, for research or not primarily designed to serve a medical purpose, or not commonly and customarily recognized throughout the medical profession and within the United States as appropriate for treatment of accidental bodily injury.

p. "Medical rehabilitation" means rehabilitation services reasonably necessary and designed to reduce the disability and dependence of an injured person and to restore such person, to the extent reasonably possible, to his or her pre-accident level of physical functioning.

q. "Motor vehicle" means:

(1) a vehicle of a kind required to be registered under the laws of this State relating to motor vehicles, or

(2) a vehicle with four or more load bearing wheels, including a trailer,<sup>12</sup> 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.<sup>13</sup>

r. "Noneconomic loss" means any loss other than economic loss and includes, but is not necessarily limited to, pain, suffering, inconvenience, mental anguish, and all other noneconomic damage whether otherwise recoverable under the law of this State or not. Noneconomic loss does not include economic loss caused by pain and suffering or by physical impairment.<sup>14</sup>

s. "Occupying" means to be in or upon a motor vehicle or engaged in the immediate act of entering into or alighting from the motor vehicle.

12. Under subsection 3q(2), those on a motorcycle are not insured under Personal Injury Protection. The tremendous exposure of a motorcyclist to personal injury would mean that switching to first-party coverage whereby the motorcyclist insured himself for his injuries, whether based on fault or not, would cause an exponential rise in motorcyclists' personal injury premiums. The solution adopted under this bill is simply to exempt motorcyclists from the choice system, such that motorcyclists can sue and be sued in tort after collision with those insured for Personal Injury Protection benefits as well as with those insured under Tort Liability Insurance.

13. Under subsection 3q(2), the definition of a "public roadway" excludes trails open to the public but designed solely for off-road vehicles. UMVARA, *supra* note 11 to Appendix B, § 1(7)(ii), commentary at 273-74.

14. O'Connell, *supra* note 1 to Appendix B, at 962 & n.52.

t. "Operation or use" means operation or use of a motor vehicle as a motor vehicle. Operation or use does not include manufacturing, sale or maintenance of a motor vehicle, including repairing, servicing, washing, loading or unloading, unless the conduct occurs while occupying it.<sup>15</sup>

u. "Owner" means the person or persons in whose name the motor vehicle has been registered. If no registration is in effect at the time of an accident involving the motor vehicle, "owner" means the person or persons holding legal title thereto, or in the event the motor vehicle is the subject of a security agreement or lease with option to purchase with the debtor or lessee having the right of possession, "owner" means the debtor or lessee. Owner does not include the United States of America or any agency thereof except with respect to motor vehicles for which it has elected to provide insurance.

v. "Person" includes an organization, public or private.

w. "Personal Injury Protection" means coverage providing Basic (and, if purchased, Added) benefits, regardless of fault, for loss resulting from accidental bodily injury.

x. "Personal Injury Protection Insured" means, the first person identified by name as an insured under a policy providing Personal Injury Protection benefits, the spouse of such person if a resident of household, and any other resident relative of the same household, and, with respect to accidents within this State, any person who sustains accidental bodily injury while occupying or through being struck

15. As to subsection 3t.

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 . . . benefits [without reference to fault] 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.

UMVARA, *supra* note 11 to Appendix B, § 1(a)(6) cmt., 14 U.L.A. 47.

Also in subsection 3t.

The indefiniteness of the defined term ["as a vehicle"] 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.

*Id.* § 1(a)(6) cmt., 14 U.L.A. 47.

by a motor vehicle insured for Personal Injury Protection, unless such person is insured pursuant to the Tort Liability Insurance option provided under section 4 or is an uninsured motorist.<sup>16</sup>

y. "Personal Injury Protection Insurer" means an insurer or qualified self-insurer providing Personal Injury Protection benefits.

z. "Replacement services loss" means expenses reasonably incurred in obtaining ordinary and necessary services from others, not members of the injured person's household, in lieu of the services the injured person would have performed for the benefit of the household. Replacement services loss are not due if the injured person is entitled to receive Personal Injury Protection benefits for loss of income from work for the same time period. Replacement services loss does not include any loss after the death of an injured person, and payment for the period of disability under Basic Personal Injury Protection is not to exceed two years from the date of accidental bodily injury.

aa. "Resident relative" means a person related to the owner of a motor vehicle by blood, marriage, adoption, or otherwise, and residing in the same household. A person resides in the same household if he or she usually makes his or her home in the same family unit, even though temporarily living elsewhere.

bb. "Tort liability" means the legal obligation for payment of damages caused by one adjudged to have committed a tort.

cc. "Tort Maintenance Coverage" means coverage under which a person who has chosen Tort Liability Insurance coverage when involved in an accident with a Personal Injury Protection insured, claims for tort liability against his/her own insurer to the extent of such coverage.

dd. "Uncompensated economic loss" means that portion of economic loss arising out of an accidental bodily injury of an injured person which exceeds the benefits provided by (i) Personal Injury Protection coverage (except for loss on account of the application of a deductible under such a policy), or (ii) Tort Maintenance Coverage, and (iii) collateral sources. Such loss is recoverable under the same terms and limitations as under Added Personal Injury Protection, but

---

16. The term "Personal Injury Protection Insured" (definition x) describes the people who are "insureds" under a Personal Injury Protection policy, which allows them benefits payable without regard to fault in case of a motor vehicle accident. The term means a person identified by name as an insured in a Personal Injury Protection policy and his or her spouse who lives in the same household. The term also includes any other relative of a named insured who usually lives in the same household.

shall not be subject to the aggregate limit of liability of such coverage.<sup>17</sup>

ee. "Uninsured motorist" means the owner, or a dependent thereof, of a motor vehicle uninsured for either Basic Personal Injury Protection or Tort Liability Insurance at the limits prescribed by this State's financial responsibility law, or higher while such person is operating, using or occupying the owned but uninsured motor vehicle.

SECTION 4. INSURANCE REQUIREMENTS.<sup>18</sup> Every motor vehicle required to be registered in this State can be insured:

---

17. As to subsection 3dd, for the circumstances under which a claim for uncompensated economic loss is recovered, see *supra* main text accompanying note 11. Added Personal Injury Protection can be purchased to provide payment for economic loss in excess of Basic Personal Injury Protection. Basic Personal Injury Protection limits are designed to equal the amounts required under the enacting state's financial responsibility law for personal injury liability. These levels are generally in the range of \$10-20,000. For a listing of each state's financial responsibility requirement, see DOT REPORT, *supra* note 2 to Appendix B, at 51-64. Although compensation for uncompensated economic loss is payable without any limit, as a practical matter rarely will amounts be collectible beyond liability insurance carried by the motorist against whom a claim is made.

18. This section, which is called "Insurance Requirements," is the core of the bill. The first sentence is key. The section also provides that the purchase of Basic Personal Injury Protection "meets the requirement's of this state's mandatory motor vehicle insurance law." The section requires each insurance company to make available Added Personal Injury Protection coverage and additional coverages if it sells Basic Personal Injury Protection insurance in the state.

A bill closely modeled on Appendix B was introduced in Hawaii in January 1995, as H.B. 2286. A further wrinkle in the Hawaii version added by the author of Appendix B would allow motorists a third option of going uninsured for either PIP or tort liability coverage. H.B. 2286 read in part as follows:

§ 431-2. Insurance Requirements. (a) Every motor vehicle required to be registered in this State [may] be insured:

- (1) For basic personal injury protection and the property damage liability mandated under motor vehicle financial responsibility laws; or
- (2) For bodily injury and property damage liability as described in the motor vehicle financial responsibility laws; or
- (3) For none of the above.

The point of including this provision was to recognize that even with the drastic reduction in the cost of auto insurance achieved by this proposed "choice" reform, many among the poor will still be unable to afford it. Rather than continuing to force large numbers of people into an illegal status, it seems feasible to allow them to go legally uninsured, 'paying' for that status by voluntarily waiving (by virtue of going uninsured) that portion of their tort claims for pain and suffering. (This feature could also be enacted in states without no-fault insurance or no-fault without a choice feature.) For more on this uninsured motorist feature, see O'Connell's forthcoming article *Granting Uninsured Motorists a Legal Status by Waiver of Their Tort Claims for Economic Loss* (Mar. 10, 1995) (unpublished manuscript, on file with author). Admittedly such a provision will be controversial. Indeed, it will in all likelihood be dropped from H.B. 2286 in Hawaii. William Kresnak, *Insurance Bill Due a Rewrite in House: Rep. Menor [Chairman of the House Consumer Protection Committee] Doesn't Like the No-Coverage Option*, HONOLULU ADVERTISER, Feb. 19, 1995, at A3.

a. for Basic Personal Injury Protection and the property damage liability mandated under this State's financial responsibility law, or

b. for bodily injury and property damage liability as described in this State's financial responsibility law.

c. An insurance policy written by a Personal Injury Protection Insurer pursuant to this Act to provide Basic Personal Injury Protection is deemed to include all Basic Personal Injury Protection coverage required by this Act. Coverage under Basic Personal Injury Protection meets the requirements of this State's financial responsibility law even though such policy does not provide protection against bodily injury liability claims arising out of accidents within this State.<sup>19</sup>

d. A Personal Injury Protection Insurer shall make available, at the option of a named insured, Added Personal Injury Protection on a policy providing Basic Personal Injury Protection. The exercise of the option not to purchase Added Personal Injury Protection by a named insured or an applicant shall be binding on all Personal Injury Protection insureds covered under the policy.

e. A Personal Injury Protection insurer is authorized to write Personal Injury Protection without any deductible or subject to reasonable deductibles pursuant to section 28 of this Act.

f. A Personal Injury Protection Insurer shall also make available a pain and suffering coverage, pursuant to regulations issued under section 28 of this Act, with a limit of [\$50,000], payable if the injured person sustains an accidental bodily injury resulting in death or dismemberment or significant and permanent loss of important bodily function or significant and permanent scarring or disfigurement. Nothing contained herein shall preclude any insurer from offering higher limits of pain and suffering coverage or providing broader coverage.

g. In addition to Added Personal Injury Protection coverages, a Personal Injury Protection insurer shall make available other insurance coverages with the approval of the Commissioner. Such coverages shall include, but are not limited to, bodily injury liability insurance, collision coverage, and comprehensive physical damage coverage.

h. An insurance policy written by a motor vehicle liability insurer pursuant to this Act to provide coverage under the Tort Liability In-

---

19. As to subsection 4c, a Personal Injury Protection Insured is not required to carry bodily injury liability insurance. People owning their own homes or other substantial assets will want to buy residual liability insurance, but as the main text indicates it will be quite inexpensive.



insurance option shall include Tort Maintenance Coverage for accidental bodily injury of an insured under the Tort Liability Insurance option, caused by the negligence, in whole or in part, of a Personal Injury Protection insured. Such insurance will pay such damages as might have been recovered against a Personal Injury Protection insured but for the exemption from tort liability provided by section 14 up to the liability limits of the Tort Maintenance Coverage.

SECTION 5. REQUIRED LIMITS OF LIABILITY COVERAGE. Every owner who chooses the Tort Liability Insurance Option must carry liability insurance in an amount equal to the minimum liability limits for accidental bodily injury and property damage as specified by this State's financial responsibility law. Insurers providing coverage for such persons shall include Tort Maintenance Coverage required in section 4 in all policies providing primary coverage for legal liability for motor vehicles at limits equal to the bodily injury liability coverage carried by the Tort Maintenance Coverage insured.

SECTION 6. ELECTION OF PERSONAL INJURY PROTECTION OPTION OR TORT MAINTENANCE COVERAGE OPTION.<sup>20</sup> Upon the earliest and first renewal of any applicable motor vehicle liability insurance policy on or after the effective date of this Act, or before the issuance of a policy required by this Act, a choice must be made of either the Tort Maintenance Coverage option or the Personal Injury Protection option. In order to minimize conflict between the two options, all motor vehicle insurers are authorized to maintain underwriting rules which encourage uniformity within a household. A choice made pursuant to this Act is binding with respect to any continuation, renewal, or reinstatement of an applicable motor vehicle insurance policy, and continues with respect to any policy which extends, supersedes, or replaces the policy unless the named insured subsequently makes a different choice in writing.

SECTION 7. APPLICATION OF COVERAGE.

a. If there is only one vehicle owned by the named insured or any member of the household of the named insured, the choice made by the named insured is applicable to his or her spouse and to any resi-

---

<sup>20</sup>. This section requires motorists to elect between the Personal Injury Protection system and the tort system. It establishes procedures for such elections and for establishing their effective date. It also provides that a motor vehicle insurer may encourage that all the motor vehicle insurance policies within the same household be of the same type. Without this provision an insurer might find it administratively burdensome to have different options made by individual family members.

dent relatives of the household. That choice also applies to all persons insured under the policy while occupying other motor vehicles or if struck by another motor vehicle.

b. If there is more than one motor vehicle in the household, and the named insured chooses different options for different vehicles, the choice applicable to the vehicle in use governs not only the named insured, but also all other persons insured under the policy whose injury arises out of the use of that motor vehicle unless the named insured has specifically identified family members who shall be Personal Injury Protection insureds. If the named insured is injured while occupying or through being struck by another motor vehicle, the Tort Maintenance Coverage option shall be deemed applicable and Personal Injury Protection benefits shall not be provided. If any other person insured under two or more policies covering different options is injured while occupying or through being struck by another motor vehicle, and that insured has not been specifically identified by the named insured as being a Personal Injury Protection insured at all times, the Tort Maintenance Coverage option shall be deemed applicable and personal benefits shall not be provided.

c. If there are two or more vehicles in the household, each owned by different persons, each such person shall have the right to choose either the Personal Injury Protection option or the Tort Maintenance Option coverage for himself or herself. That person's choice shall determine that person's rights no matter which vehicle he or she is occupying or which vehicle he or she might be struck by. The rights of all members of the household who are not motor vehicle owners shall be governed by the choice applicable to the motor vehicle which they were occupying at the time of the injury, if that vehicle was owned by a member of the household.

d. In the event of a bodily injury occurring prior to the effective date of a required choice, if there are conflicting choices within the household creating questions as to the applicability of the Personal Injury Protection option or the Tort Maintenance Coverage option, or if there is a failure to make a choice as required by this Act, Tort Maintenance insurance will be applicable, and Personal Injury Protection benefits will not be payable.

SECTION 8. GEOGRAPHIC APPLICATION OF PERSONAL INJURY PROTECTION POLICIES.<sup>21</sup> A Personal Injury Protection Insurer shall pay

---

21. This section provides that Personal Injury Protection benefits shall be paid to a Personal Injury Protection Insured injured anywhere in the United States and Canada. A Personal Injury Protection policy must contain provisions that satisfy the financial responsi-

Personal Injury Protection benefits for accidental bodily injury of a Personal Injury Protection Insured sustained within the United States of America, its territories or possessions, or Canada. Any Personal Injury Protection insurance policy issued to satisfy the financial responsibility law of this State shall be conformed to satisfy the financial responsibility law of any jurisdiction mentioned above in which the insured motor vehicle is being operated with respect to an accident occurring in that jurisdiction.

SECTION 9. PERSONS NOT ENTITLED TO PERSONAL INJURY PROTECTION BENEFITS.<sup>22</sup> A Personal Injury Protection Insurer has no obligation to provide Personal Injury Protection benefits to or on behalf of any injured person who:

- a. was involved in a motor vehicle accident while committing a felony or while voluntarily occupying a motor vehicle known by him or her to be stolen;
- b. was driving under the influence of alcohol or illegal drugs;
- c. is injured while occupying a motor vehicle owned by, or furnished or available for the regular use of the injured person, or the injured person's resident spouse or relative, if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy;
- d. was operating or occupying a motor vehicle with three or fewer load bearing wheels;
- e. was guilty of intentional misconduct.<sup>23</sup> (If a person dies as a result of intentional misconduct aimed at himself or herself, his or her survivors are not entitled to Personal Injury Protection for loss arising from the decedent's injury or death.);

---

bility law of any state or Canadian province in which the insured motor vehicle can be expected to be operated.

Financial responsibility laws, referred to in section 8, require motorists (or place penalties on them for failing) to carry minimum limits of automobile insurance.

<sup>22</sup>. This section provides that no Personal Injury Protection benefits will be paid to individuals who fall into one or more of the following categories:

- \* persons driving under the influence of alcohol or illegal drugs;
- \* persons occupying an uninsured motor vehicle which they themselves do not own;
- \* persons operating or occupying a motorcycle;
- \* persons occupying a motor vehicle known to be stolen or in the course of committing a felony; and
- \* persons guilty of intentional misconduct (i.e. a person who intended to commit homicide, assault, or suicide by automobile).

<sup>23</sup>. See *supra* text accompanying note 10 to Appendix B.

f. is insured pursuant to the Tort Maintenance Coverage option described in section 4h, or

g. is an uninsured motorist, or a dependent of an uninsured motorist who is not otherwise insured for Personal Injury Protection.

Nothing contained herein prevents a Personal Injury Protection Insurer from including in Personal Injury Protection coverage persons mentioned in this section, but only if such is done by language clearly manifesting an intent to provide such coverage.

SECTION 10. PAYMENT OF PERSONAL INJURY PROTECTION BENEFITS. Personal Injury Protection benefits when due are payable at the option of the Personal Injury Protection Insurer to any of the following:

- a. the injured person;
- b. the parent or guardian of the injured person, if the injured person is a minor or incompetent;
- c. a dependent survivor, executor or administrator of the of the injured person; or
- d. any other person or organization rendering the services for which payment is due.

SECTION 11. MULTIPLE COVERAGES.<sup>24</sup> Regardless of the number of motor vehicles involved, persons covered, claims made, motor vehicles or premiums shown on the policy or premiums paid, in no event shall the coverage limits under a motor vehicle insurance policy for any one coverage be added to, combined with, or otherwise stacked upon any other coverage limit to determine the maximum limit of coverage available to an injured person for any one accident. Unless the contract clearly provides otherwise, policies or plans may also provide that if two or more policies, plans, or coverages apply equally to the same accident, the highest limit of liability applicable shall be the maximum amount available to an insured person under any one of such policies. Each such policy, plan, or coverage shall bear its proportionate share of the loss.

SECTION 12. PRIORITY OF BENEFITS.<sup>25</sup>

a. Persons entitled to Basic Personal Injury Protection benefits required or provided pursuant to this Act are entitled to at least the

---

24. O'Connell, *supra* note 1 to Appendix B, at 966 & n.69.

25. This section determines which Personal Injury Protection coverage will provide compensation to a person qualified to receive such benefits. The underlying principle set forth in subsection 12a is that a person suffering loss should make his claim for benefits

Personal Injury Protection coverage under the policy insuring them and shall claim such benefits from insurers in the following order of priority up to the limits of Personal Injury Protection in the listed category:

First: The Personal Injury Protection covering a motor vehicle involved in the accident, if the person injured was an occupant of or was struck by such motor vehicle at the time of the accident.

Second: The Personal Injury Protection under which the injured person is or was an insured.

Third: If no Personal Injury Protection is available under the above priorities, a person injured as a result of a motor vehicle accident may claim benefits under the Assigned Claims Plan pursuant to section 23 of this Act, unless unqualified for benefits under section 6.

b. If two or more insurers are obligated to pay Personal Injury Protection benefits in accordance with the priorities set out in this section, the insurer against whom the claim is first made shall pay the claim as if wholly responsible, and may thereafter recover contribution pro rata from any other insurer at the same priority level for the cost of the payments and the processing of the claim. For purposes of this section, an unoccupied parked motor vehicle is not a motor vehicle involved in an accident unless it was parked in such a way as to cause unreasonable risk of injury.

SECTION 13. COORDINATION OF BENEFITS.<sup>26</sup> A Basic Personal Injury Protection Insurer has the primary obligation to indemnify an

---

against the insurer of the car which he was occupying or was struck by. In effect then, the insurance follows the car, not the driver and his family. Concerning this distinction, see DOT REPORT, *supra* note 2 to Appendix B, at 137-38; see also KEETON & O'CONNELL, *supra* note 5 to Appendix B, at 370-79.

Under subsection 12b, if two or more insurers of the same priority level are obligated to pay Personal Injury Protection benefits, the insurer against whom the claim is first made shall pay benefits, and may thereafter recover a pro rata contribution from every other insurer at the same priority level. The section also provides that an unoccupied parked motor vehicle is not a motor vehicle involved in an accident, such that it would not become the source of payment, even if damaged in the accident, "unless parked in such a way as to cause unreasonable risk of injury."

26. See *supra* text accompanying note 5 to Appendix B. Section 13 concerns the effect of collateral sources of benefits (such as health and disability coverages) on the right to receive Personal Injury Protection benefits.

Section 13 provides in effect that benefits from collateral sources received by a person injured in a motor vehicle accident shall be subtracted from Personal Injury Protection benefits payable to that person.

As a corollary to Personal Injury Protection as excess insurance over all other collectible coverage, the Personal Injury Protection Insurer has no right of subrogation except as provided in section 15.

injured person except to the extent of collateral sources paid or payable to such person.

SECTION 14. TORT RIGHTS AND LEGAL LIABILITY UNDER THIS ACT.<sup>27</sup>

a. No Personal Injury Protection Insured has a cause of action for injury against, nor is liable to, any other person on account of an accident occurring within this State, except as provided in subsections b, c, d, and e and except for injury caused other than by the ownership, operation, or use of a motor vehicle.

b. An injured person has a cause of action for accidental bodily injury against any party driving under the influence of alcohol or illegal drugs or guilty of intentional misconduct. Any party providing Personal Injury Protection or Tort Maintenance Coverage benefits to such injured person has a right of subrogation under this subsection b.

27. This section defines the extent to which an insured who is injured in a motor vehicle accident is prohibited from bringing a lawsuit in tort.

Subsection 14a provides that no insured has a cause of action for injury against any other person except as provided in the next four subsections of this section.

Under the last clause of subsection 14a, a railroad covering the motor vehicles it owns under Personal Injury Protection remains liable for accidents in which its train negligently collides with a motor vehicle.

As to subsection 14e, because payment is made only for a claimant's economic losses, unless a claimant's attorney's fee were paid in addition to his damages, he would have to pay attorney's fees, if any, be out-of-pocket. See *supra* note 15 to main text.

As to subsection 14e, for a definition of collision insurance, see *supra* note 28 to main text. This provision too (along with those described in the main text at notes 45-52) enables special cost savings for the poor—a group especially hard hit by the high costs of compulsory auto insurance. Although states require only low limits of tort liability for personal injury—say, \$15,000 or \$20,000—around 15-20% of motorists either will not or cannot pay the premium, and thereby remain uninsured. The percentage of uninsured motorists can vastly exceed 50% in the inner cities of many major metropolitan areas. See Vlai Kersinner, *Some See No End to Battle over No-Fault*, S.F. CHRON., Oct. 4, 1989, at A9; Kenneth Reich, *Relief From High Auto Insurance Not in Sight: Although State Drivers are Fuming, Powerful Lobbies Stymie Attempts at Legislative Reform*, L.A. TIMES, Nov. 23, 1986, at 1.

Because the poor ordinarily drive older cars not covered by collision insurance (many motorists are probably well advised not to insure a car for collision coverage if it is more than, say, five years old), poorer motorists buying Personal Injury Protection insurance will save substantially on property damage liability costs by virtue of their exemption from property damage claims to the extent other Personal Injury Protection insureds they collide with carry collision insurance. Such a provision can also be justified in that once loss is covered by efficient first party insurance payable without reference to fault—such as collision insurance—it no longer makes much economic sense to redistribute the loss under a second insurance scheme, especially a cumbersome one necessitating establishing fault with all its transaction costs. John G. Fleming, *The Collateral Source Rule and loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1536-37 (1966); see generally Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537 (1952).

c. A Personal Injury Protection Insured has a cause of action for accidental bodily injury for uncompensated economic loss against, and is liable for same, to, any person insured under Personal Injury Protection or Tort Maintenance Coverage.

d. Benefits under subsection c include reasonable expenses incurred by the party in collecting such benefits, including a reasonable attorney's fee for advising and representing a claimant for such benefits. No part of the fee for representing such party in connection with such benefits is a charge against benefits otherwise due the claimant, and no additional fee may be charged by an attorney to any party in collecting such benefits. All or part of the fee may be deducted from the benefits otherwise due the claimant if any significant part of the claim for such benefits was fraudulent or so excessive as to have no reasonable foundation. In any action brought against an injured person by a Personal Injury Protection Insurer, the court may award the injured person's attorney a reasonable attorney's fee for defending the action if the injured person was the prevailing party.<sup>28</sup>

e. A Personal Injury Protection Insured whose motor vehicle is damaged by the fault of another Personal Injury Protection Insured has a cause of action for damage to such motor vehicle only to the extent such motor vehicle is not covered by collision insurance.<sup>29</sup>

f. A person covered by Tort Maintenance Coverage has a cause of action for injury against another person so covered.

g. An uninsured motorist has no cause of action against a Personal Injury Protection Insured for (1) injury other than for uncompensated economic loss and (2) damage to property except damage in excess of the property damage liability limits mandated under this State's financial responsibility law unless the Personal Injury Protection Insured was driving under the influence of alcohol or illegal drugs or was guilty of intentional misconduct. An uninsured motorist remains liable in tort to a person insured for Personal Injury Protection benefits for noneconomic loss, economic loss, and property damage.<sup>30</sup>

SECTION 15. INSURER'S RIGHT OF SUBROGATION.<sup>31</sup> There is no right of subrogation or contribution by a Personal Injury Protection

---

28. O'Connell, *supra* note 1 to Appendix B, at 970 & n.87.

29. *Id.* at 957 n.32.

30. *Id.* at 970 & n.89.

31. Under subsection 15a, to the extent that the Personal Injury Protection Insurer is obligated to pay any Personal Injury Protection benefits, it has a right to be reimbursed for those payments against an uninsured motorist. "This right to claim against the uninsured

Insurer except under sections 14, 16, 23, and except that a Personal Injury Protection Insurer is subrogated, to the extent of its obligations, to all of the rights of its Personal Injury Protection Insured with respect to an accident caused in whole or in part by

- a. the negligence of an uninsured motorist;
- b. the negligence of the owner or operator of a motor vehicle having a gross weight of 7000 pounds or more;<sup>32</sup>
- c. driving under the influence of alcohol or illegal drugs;<sup>33</sup>
- d. intentional misconduct; or
- e. any person who is not affected by the limitations on tort rights and liabilities pursuant to section 14.

SECTION 16. PERSONAL INJURY PROTECTION BENEFITS AND CAUSES OF ACTION FOR INJURY.<sup>34</sup> No subtraction is made against Personal Injury Protection benefits due because of the value of a cause of action for injury preserved under this Act, except that after recovery is realized under such cause of action, a subtraction is made to the extent of the net recovery, exclusive of reasonable attorneys' fees and other reasonable expenses incurred in effecting the recovery. If Personal Injury Protection benefits have already been received, the recipient thereof shall repay to the insurer paying Personal Injury Protection benefits out of such recovery a sum equal to the Personal Injury Protection benefits received but not more than the realized net recovery, and the insurer shall have a lien on the recovery to this extent. Any remainder of the net recovery from such a cause of action applies

---

motorist. extant at common law, is unchanged by the bill. Such a right is very often only a theoretical one, given the lack of assets held by most uninsured motorists." *Id.* at 956 n.28.

As to subsection 15b, given their greater weight, large trucks in truck-car collisions disproportionately effect damage on private passenger vehicles and their occupants rather than vice versa. Lacking the above provision there would be a windfall to owners of such trucks and other large commercial vehicles following truck-car collisions because the insurer of each vehicle would simply pay the occupants of its own vehicle. Thus as a simple solution to this problem, the bill allows subrogation, based on fault, by private passenger car Personal Injury Protection payers against trucks and other vehicles having a weight of 7000 pounds or more.

Under subsection 15c, every motorist remains liable for driving under the influence of alcohol or illegal drugs (as well as for intentional misconduct under d).

Under subsection 15e, persons who retain tort rights and liabilities include an out-of-state motorist.

32. *Id.* at 968 n.74.

33. *Id.* at 968 n.75.

34. This section coordinates common law claims based on fault and claims for personal injury protection benefits. For its origins, see KEETON & O'CONNELL, *supra* note 5 to Appendix B, § 1.10(c)(2), at 307, 402-04.



periodically against loss as it accrues, until an amount equal to the net recovery under such a cause of action has been subtracted.

SECTION 17. PERSONAL INJURY PROTECTION BENEFITS PAYABLE PERIODICALLY.<sup>35</sup>

a. Personal Injury Protection benefits are payable monthly as loss accrues. Such benefits are overdue if not paid within 30 days after the Personal Injury Protection insurer receives reasonable proof of the fact and the amount of loss sustained, except that a Personal Injury Protection Insurer may accumulate claims for periods not exceeding one month, and benefits are not overdue if paid within 20 days after the period of accumulation. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after such proof is received by the insurer, subject to the right of review specified in section 30. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after such proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment is treated as made on the date a draft or other valid instrument is placed in the United States mail in a properly addressed postpaid envelope, or, if not so posted, on the date of delivery. Personal Injury Protection benefits may be paid by the Personal Injury Protection insurer directly to persons supplying necessary products, services, or accommodations to the injured person. If overdue benefits are recovered against a Personal Injury Protection Insurer or are paid by a Personal Injury Protection Insurer, the provisions of subsection 14e pertaining to expenses and an attorney's fee apply. In addition, the insurer is obligated to pay interest on the overdue payment at [150]% of the prime rate in effect at the time the payment became overdue.

---

35. This section provides that Personal Injury Protection benefits are payable monthly, as the losses accrue. If they are not paid to the victim or the provider of service within 30 days after the insurer receives reasonable proof of the fact and amount of loss sustained, the benefits are overdue. (Alternatively, benefits are overdue if they are accumulated for up to one month if they are not paid within 20 days after the period of accumulation.)

The section further provides that "all overdue payments bear interest at the rate of 150% of the prime rate in effect at the time the payments became overdue." If overdue benefits are recovered from an insurer or paid by an insurer, the insurer shall also pay reasonable attorney's fees.

SECTION 18. ASSIGNMENT OR GARNISHMENT OF PERSONAL INJURY PROTECTION BENEFITS.<sup>36</sup>

a. Personal Injury Protection benefits, other than those for medical expenses, 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.

b. An agreement for assignment of any right to Personal Injury Protection benefits payable in the future other than medical expenses is unenforceable except to the extent that such benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee or that benefits for loss of income from work or replacement services are assigned to secure payment of alimony, maintenance, or child support. Pain and suffering coverage benefits may also be assigned.

SECTION 19. NO PENALTY FOR CLAIMS FOR PERSONAL INJURY PROTECTION BENEFITS.<sup>37</sup> An Insurer shall not cancel, fail to renew, or increase the premium of its Insured solely on account of the Insured or any other injured person making a claim for Personal Injury Protection benefits or for collision damage to the insured vehicle. Violation of this section is punishable by a fine of [\$1000] per offense, such punishment to be exclusive of all other remedies permitted by law.

SECTION 20. LIMITATION OF ACTIONS.<sup>38</sup> Subject to the arbitration provisions which follow, if no Personal Injury Protection benefits have been paid, an action therefore may be commenced against the Personal Injury Protection Insurer not later than two years after the injured person suffers accidental bodily injury. If Personal Injury Protection benefits have been paid, an action for recovery of further benefits by either the injured person or another claimant may be commenced not later than two years after the last payment of benefits.

---

36. O'Connell, *supra* note 1 to Appendix B, at 973-74 & n.101.

37. This section provides that an insurer may not cancel or fail to renew a policy nor may it increase the premium of an insured, solely because he or she filed a claim for Personal Injury Protection benefits or for collision damage to the insured vehicle.

38. This section provides a two year statute of limitations for claims for Personal Injury Protection benefits. Such an action must be brought against a Personal Injury Protection Insurer within two years after the accident or not later than two years after the last payment of benefits.

SECTION 21. MENTAL AND PHYSICAL EXAMINATIONS.<sup>39</sup>

a. Whenever the mental or physical condition of an injured person is material to any claim that has been made or may be made for past or future Personal Injury Protection benefits, the insured person shall submit to reasonable mental or physical examinations by a physician or physicians designated by the insurer at a reasonably convenient time and location, subject to regulations, if any, promulgated by the Commissioner. Personal Injury Protection Insurers are authorized to include provisions of this nature in policies providing Personal Injury Protection benefits.

b. Where an insurer has requested of a person receiving Personal Injury Protection benefits that such person undergo medical or rehabilitation services, and such person unreasonably refuses to comply with such request, the insurer may, upon written notice, suspend all future such benefits until such person complies with that request.

SECTION 22. VERIFICATION OF ENTITLEMENT TO BENEFITS.<sup>40</sup>

a. Every employer shall furnish pertinent information on a form approved by the Commissioner regarding an employee who has filed a claim for Personal Injury Protection benefits if a request is made by an insurer providing such benefits under this section.

b. Every physician, hospital, clinic, or other medical institution providing, before or after an injury resulting from a motor vehicle accident upon which a claim for Personal Injury Protection benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury shall, if requested to do so by the Personal Injury Protection Insurer against whom the claim has been made, furnish a written report of the history, condition, and treatment, and the dates and costs of such treatment, of the injured person. Such information shall be provided together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the injury sustained and identifying which portion of the expenses for such treatment or services were incurred as a result of such injury. Every such physician, hospital, clinic, or other medical institution shall also promptly produce and permit the inspection and copying of its records regarding such history, condition, and treatment, and the dates and costs of treatment. The sworn statement required under this section reads as follows:

---

39. O'Connell, *supra* note 1 to Appendix B, at 974-75 & n.104.

40. *Id.* at 975 & n.105.

"Under penalty of perjury I declare that I have read the foregoing and the facts alleged are true, to the best of my knowledge and belief."

No cause of action for violation of a physician-patient privilege or invasion of the right of privacy is allowed against any physician, hospital, clinic, or other medical institution complying with the provisions of this section. The person requesting records and a sworn statement under this subsection shall pay all reasonable costs connected therewith.

c. In the event of any dispute regarding the Personal Injury Protection Insurer's right to discovery of facts about an injured person, if the dispute is not referred to arbitration under section 31, a court of record may enter an order for such discovery as justice requires.

SECTION 23. ASSIGNED CLAIMS PLAN.<sup>41</sup> Insurers and qualified self-insurers authorized to provide Personal Injury Protection insurance under this Act shall organize, participate in, and maintain an assigned claims plan to provide Basic Personal Injury Protection benefits to any person who is injured as a result of a motor vehicle accident if:

a. Basic Personal Injury Protection benefits are payable but not applicable to the injury for some reason other than those specified in section 9 of this Act; provided such person shall have the right to reject Personal Injury Protection benefits and to seek damages in tort. The election must be made within ninety days after the accident or ninety days after receiving written notice of the right of election.

b. Basic Personal Injury Protection benefits are unavailable, in whole or in part, because of financial inability of an insurer to fulfill its obligations. Payments made by the Assigned Claims Plan pursuant to this subsection b constitute covered claims of the Insurance Guaranty Association under the laws of this State.

c. The Assigned Claims Plan shall provide such rules and agreements for the operation of the Plan and for the equitable distribution of costs as approved by the Commissioner. Any claim brought through the Assigned Claims Plan is assigned to an insurer in accordance with such rules and agreements, and that insurer, after such assignment, has the rights and obligations it would have had if, prior to such assignment, it had issued a policy providing Personal Injury Protection applicable to the loss. Any person accepting Personal Injury Protection benefits under the Assigned Claims Plan has such rights

---

41. *Id.* at 975-76 & n.106.

and obligations as he or she would have had under a policy issued to him or her providing Personal Injury Protection benefits.

d. If a claim qualifies for assignment under this section, the Assigned Claims Plan and any insurer to whom the claim is assigned is subrogated to all of the rights of the claimant against any person liable for such loss and against any insurer, its successor in interest, or any other person or organization legally obligated to provide Personal Injury Protection benefits to the insured person for benefits provided by the assignment.

SECTION 24. FRAUDULENT CLAIMS.<sup>42</sup> Any person, including an insurer, who, with intent to defraud, or deceive any other person in connection with a claim for payment or other benefit pursuant to an insurance policy providing benefits under this Act, does or attempts to do either of the following, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim

a. presents or causes to be presented, or conspires to present or cause to be presented, any written or oral statements in connection with a claim for payment or other benefit; or

b. prepares or makes any written or oral statement that is intended to be presented to any person in connection with or in support of any claim for payment or other benefit, shall be guilty of a felony punishable by a fine of not more than [\$10,000].

SECTION 25. NON-DISCRIMINATION IN FEES FOR MEDICAL SERVICES.<sup>43</sup> A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person, and a person or institution providing medical rehabilitation services following an injury to an injured person, may charge only a reasonable amount for the products, services, and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services, and accommodations in cases not involving insurance.

SECTION 26. MANAGED CARE.<sup>44</sup> A Personal Injury Protection Insurer, with the approval of the Commissioner, may utilize, for the payment of medical expenses provided under Personal Injury Protection, managed care systems, including but not limited to, health mainte-

---

42. *Id.* at 976 & n.107.

43. *Id.* at 977 & n.108.

44. *Id.* at 977 & n.109.

nance<sup>45</sup> and preferred provider organizations,<sup>46</sup> and may require an injured person to obtain health care through a managed care system designated by the Personal Injury Protection Insurer if such injured person has opted to be subject to such a managed care system at the time of purchase of Personal Injury Protection coverage at an appropriately reduced premium.

SECTION 27. SAFETY EQUIPMENT.<sup>47</sup> Each Personal Injury Protection Insurer shall adopt an actuarially sound program which provides incentives, in the form of increased benefits, reduced premiums, or other means, for Personal Injury Protection Insureds to install, maintain, and make use of injury reducing devices such as, but not necessarily limited to, seat and harness belts, air bags, and child restraint systems.<sup>48</sup>

SECTION 28. REGULATIONS.<sup>49</sup>

a. The Commissioner may adopt additional regulations to provide effective administration of this Act that are consistent with its purposes and are fair and equitable, including regulations which authorize Personal Injury Protection Insurers to write Personal Injury Protection insurance with reasonable deductibles higher or lower in amount than that provided in section 3c, and regulations to permit the offering of pain and suffering coverage.

b. The Commissioner shall develop an informational brochure which must be provided by each insurer or agent to each policyholder or applicant for motor vehicle insurance explaining the Personal Injury Protection option and the Tort Liability Insurance option as well as the consequence of selection of one option over the other.

The Commissioner shall establish, within the Department of Insurance, a compliance unit which shall monitor all complaints against insurers, health care providers, and attorneys arising out of the provision of Personal Injury Protection benefits. The Commissioner shall report to the legislature, at least annually, on the nature of the complaints, the penalties levied against insurers, and the final disposition of complaints. The report, which will identify parties by name, will be a public record available on request by any member of the public.

---

45. *Id.* at 977 & n.110.

46. *Id.* at 977 & n.111.

47. *Id.* at 977 & n.113.

48. *Id.* at 977 & n.114; *see also supra* main text accompanying note 36.

49. O'Connell, *supra* note 1 to Appendix B, at 978 & n.115.

SECTION 29. LIMITATION OF LIABILITY FOR ADVISING ON OPTIONS.<sup>50</sup> No insurer or any agent or employee of such insurer, no insurance producer representing a motor vehicle insurer or any automobile residual market plan, and no attorney licensed to practice law within this State shall be liable in an action for damages on account of an election of the Tort Liability Insurance option, an election of the Personal Injury Protection option, or a failure to make a required election, unless such person has wilfully misrepresented the available choices or has fraudulently induced the election of one system over the other.

SECTION 30. COST OF LIVING ADJUSTMENT.<sup>51</sup> Every two years, on the anniversary of the effective date of this Act, the Commissioner shall report in writing to the legislature on the effect of changes in the relevant components of the cost of living on levels of benefits, limits of liability, and deductibles mentioned in this Act.

SECTION 31. ARBITRATION.<sup>52</sup> Any dispute with respect to Personal Injury Protection coverage between a Personal Injury Protection Insurer and an injured person, or the dependents of such person, shall be submitted to arbitration. Such dispute either shall be submitted to the American Arbitration Association, or be submitted for determination in the following manner: Upon the request for arbitration being made by either party, each party to the dispute shall select an arbitrator and the two arbitrators so named shall select a third arbitrator. The written decision of any two arbitrators is binding on each party. If arbitrators are not selected within 45 days from such request, either party may require that such arbitration be submitted to the American Arbitration Association.

SECTION 32. OUT-OF-STATE VEHICLES.<sup>53</sup> Each insurer authorized to transact or transacting business in this State shall file with the Commissioner, as a condition of its continued transaction of business within this State, a form approved by the Commissioner declaring that any contract of motor vehicle liability insurance, wherever issued, covering the maintenance or use of a motor vehicle while the motor vehicle is in this State, is deemed to provide the insurance required by section 5 of this Act unless the named insured, prior to a motor vehicle accident within this State, has elected the Personal Injury Protec-

---

50. See *id.* at 972 & n.96.

51. *Id.* at 978 & n.116.

52. *Id.* at 978 & n.117.

53. *Id.* at 978-79 & n.118.

tion option pursuant to section 4. Any nonadmitted insurer may also file such form. In the event a person is entitled to Personal Injury Protection benefits or their equivalent under the requirements of more than one state, such person shall elect to recover under the laws of any one such state and such election shall represent the exclusive source of recovery of all Personal Injury Protection benefits, or their equivalent, paid or payable under the financial responsibility requirements of that or any other state.

SECTION 33. TERMS, CONDITIONS, AND EXCLUSIONS.<sup>54</sup> All insurance coverages provided pursuant to this Act are subject to such terms, conditions, and exclusions as have been approved by the Commissioner.

SECTION 34. APPLICABLE PROVISIONS TO TORT MAINTENANCE COVERAGE. As to matters covered in, sections 12, 15, 16, 18, 21, 22, 23, 26, 27, 29, 32, and other related matters, where appropriate laws and regulations of this State applicable to uninsured motorist coverage are applicable to Tort Maintenance Coverage, except that the Commissioner may by regulation apply pertinent provisions applicable to Personal Injury Protection to Tort Maintenance Coverage.<sup>55</sup>

SECTION 35. SEVERABILITY AND CONSTITUTIONALITY.<sup>56</sup> If any provision of this Act or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid, the remainder of this Act and the application of such provision to other persons or circumstances are not affected thereby, and it is to be conclusively presumed that the legislature would have enacted the remainder of this Act without such invalid or unconstitutional provision, except that if section 14 is found to be unconstitutional or invalid, it is to be conclusively presumed that the legislature would not have enacted the remainder of this Act without such limitations, and the entire Act is invalid. If section 14 is found to be unconstitutional or invalid, Personal Injury Protection Insurers have no obligation to pay Personal Injury Protection benefits with respect to accidents occurring on or after the date of the finding of such unconstitutionality or invalidity and, in addition, are subrogated to all of the rights of Personal Injury Protection Insureds for all previous such benefits paid.

---

54. *Id.* at 979 & n.119.

55. This could be done, for example, in having Tort Maintenance Coverage track Personal Injury Protection coverage for recovery of uncompensated economic loss. *See supra* section 14.

56. O'Connell, *supra* note 1 to Appendix B, at 980 & n.123.



SECTION 36. DECLARATORY JUDGMENT.<sup>57</sup> In addition to the provisions of section 35, because the legislature finds and declares that questions of law may exist with respect to the constitutionality of some of the sections of this Act, the public welfare requires that such questions with respect to this Act be resolved with expedition prior to such time as its mandatory provisions take effect in order to avoid disruption of the orderly implementation of its provisions. Therefore, the legislature finds that the remedy of declaratory judgment to determine the constitutionality of the provisions of this Act should immediately be made available to determine those important questions, in order to avoid utter confusion by the public in the event this Act is declared unconstitutional after [its effective date]. Therefore, any resident of the State is authorized to forthwith bring an action for a declaratory judgment in the \_\_\_\_\_ court, for \_\_\_\_\_ County against the Commissioner to determine the constitutionality of this Act's provisions. Such court shall reserve the questions of law for the advice of the Supreme Court as provided by law. In the interest of expediting a decision, the Supreme Court may suspend its rules as provided therein.

SECTION 37. EFFECTIVE DATE. This Act takes effect on \_\_\_\_\_ and applies to the use or operation of motor vehicles within this State on and after such date. Sections 23, 26, 27, 28, 29, 32 and 36 of this Act shall take effect immediately in order that all actions necessary to prepare for the implementation and administration of this Act may be completed at least 90 days prior to the effective date.

---

57. *Id.* at 980-81 & n.124.

## SUMMARY

**Study; establishing joint subcommittee to examine the Choice model of automobile insurance.** Establishes a joint subcommittee to examine a legislative model for automobile insurance known as Choice. The Choice model permits individuals to choose between conventional, tort-based, automobile insurance and no-fault insurance. Those who elect no-fault coverage relinquish claims for "pain and suffering" and other noneconomic losses against at-fault, insured drivers. A legislative study of the Choice model is a recommendation of the HJR-601 (1995) joint subcommittee that studied appropriate minimum levels of motor vehicle liability and property insurance coverage.

## HOUSE JOINT RESOLUTION NO. \_\_\_\_\_

1 Establishing a Joint Subcommittee to study the Choice model of automobile  
2 insurance.

3 WHEREAS, House Joint Resolution 601 of 1995 established a joint  
4 subcommittee to study the appropriate minimum levels of motor vehicle liability and  
5 property insurance coverage; and

6 WHEREAS, the joint subcommittee considered (i) whether the required  
7 minimum levels of motor vehicle liability and property insurance coverage should  
8 be increased or decreased; (ii) whether comprehensive coverage should be  
9 required; and (iii) whether exemptions from the required minimum levels of motor  
10 vehicle liability and property insurance coverage should be permitted,  
11 recommending no changes in the minimum levels of coverage at this time; and

12 WHEREAS, in the course of its study, the joint subcommittee learned that  
13 while automobile liability insurance is not mandatory in the Commonwealth and that  
14 Virginians may elect to pay a \$400 uninsured motor vehicle fee in lieu of such  
15 insurance, Department of Motor Vehicles insurance monitoring statistics show that  
16 approximately 200,000-300,000 Virginia-registered motor vehicles are uninsured  
17 and that uninsured motor vehicle fees have not been paid for such vehicles; and

18 WHEREAS, the joint subcommittee received testimony suggesting that many  
19 who fail to comply with Virginia law requiring liability insurance or uninsured vehicle  
20 fee payments may be doing so because they cannot afford to pay either; and

21 WHEREAS, increasing numbers of uninsured motorists nationwide are  
22 reportedly causing substantial increases in the cost of uninsured motorist

1 coverage, while such uninsured motorists are nevertheless permitted to make  
2 claims against insured motorists; and

3 WHEREAS, the joint subcommittee learned of an automobile insurance  
4 model called "Choice." under which (i) motorists may legally drive without insurance  
5 or any obligation to pay uninsured vehicle fees or similar assessments, and (ii) such  
6 uninsured motorists, however, relinquish claims for noneconomic losses, such as  
7 damages for "pain and suffering," related to their injuries resulting from collisions  
8 with at-fault, insured drivers; and

9 WHEREAS, under the Choice model, drivers may also choose between a  
10 traditional automobile insurance plan using the tort system to apportion fault and  
11 recovery, and a no-fault plan, and those choosing no-fault neither recover for  
12 themselves, nor are they liable to others for, noneconomic losses incurred in  
13 automobile accidents; and

14 WHEREAS, proponents of Choice suggest that no-fault premiums under a  
15 Choice plan would be much lower than premiums for mandatory coverage under a  
16 tort-based system, and that some motorists who might otherwise choose to drive  
17 without insurance would choose no-fault coverage; and

18 WHEREAS, according to a Rand research report, Virginians, on average,  
19 would save nearly 35 percent in automobile insurance premiums under a Choice  
20 plan, and those choosing minimum coverages would save approximately fifty  
21 percent; and

22 WHEREAS, the HJR-601 joint subcommittee concluded that the Choice plan  
23 warrants comprehensive study, and formally recommended a 1996 legislative study  
24 of such plan; now therefore; be it

25 RESOLVED, by the House of Delegates, the Senate concurring, that a joint  
26 subcommittee be established to study the Choice model of automobile insurance.  
27 The joint subcommittee shall consist of seven members to be appointed as follows:

1 four members of the House of Delegates to be appointed by the Speaker of the  
2 House, and three members of the Senate to be appointed by the Senate Committee  
3 on Privileges and Elections. The joint subcommittee shall (i) examine the Choice  
4 legislative model, (ii) assess its likely cost savings to Virginians who insure their  
5 motor vehicles, and (iii) determine whether such a plan could be practically  
6 implemented within the Commonwealth.

7 The direct costs of this study shall not exceed \$3,150.

8 The Division of Legislative Services shall provide staff support for the study.  
9 Technical assistance shall be provided by the Bureau of Insurance of the State  
10 Corporation Commission and the Department of Motor Vehicles. All agencies of  
11 the Commonwealth shall provide assistance to the joint subcommittee, upon  
12 request.

13 The joint subcommittee shall complete its work in time to submit its findings  
14 and recommendations to the Governor and the 1997 Session of the General  
15 Assembly as provided in the procedures of the Division of Legislative Automated  
16 Systems for processing legislative documents.

17 Implementation of this resolution is subject to subsequent approval and  
18 certification by the Joint Rules Committee. The Committee may withhold  
19 expenditures or delay the period for the conduct of the study.

20

#

96 - 0961320

02/29/96 9:28 AM

## SUMMARY

**Motor vehicle insurance; uninsured motorist coverages.** Eliminates property damage as a mandatory uninsured motorist coverage.

SENATE BILL NO. \_\_\_\_\_ HOUSE BILL NO. \_\_\_\_\_

1 A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to motor  
2 vehicle insurance; uninsured motorist coverage.

3 **Be it enacted by the General Assembly of Virginia:**

4 **1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as**  
5 **follows:**

6 § 38.2-2206. Uninsured motorist insurance coverage.

7 A. Except as provided in subsection J of this section, no policy or contract of  
8 bodily injury or property damage liability insurance relating to the ownership,  
9 maintenance, or use of a motor vehicle shall be issued or delivered in this  
10 Commonwealth to the owner of such vehicle or shall be issued or delivered by any  
11 insurer licensed in this Commonwealth upon any motor vehicle principally garaged  
12 or used in this Commonwealth unless it contains an endorsement or provisions  
13 undertaking to pay the insured all sums that he is legally entitled to recover as  
14 damages from the owner or operator of an uninsured motor vehicle, within limits not  
15 less than the requirements of § 46.2-472 for bodily injury. Those limits shall equal  
16 but not exceed the limits of the bodily injury liability insurance provided by the  
17 policy, unless any one named insured rejects the additional uninsured motorist  
18 insurance coverage by notifying the insurer as provided in subsection B of § 38.2-  
19 2202. This rejection of the additional uninsured motorist insurance coverage by any  
20 one named insured shall be binding upon all insureds under such policy as defined  
21 in subsection B of this section. The endorsement or provisions shall also obligate  
22 the insurer to make payment for bodily injury or property damage caused by the  
23 operation or use of an underinsured motor vehicle to the extent the vehicle is

1 underinsured, as defined in subsection B of this section. ~~The endorsement or~~  
2 ~~provisions shall also provide for at least \$20,000 coverage for damage or~~  
3 ~~destruction of the property of the insured in any one accident but may provide an~~  
4 ~~exclusion of the first \$200 of the loss or damage where the loss or damage is a~~  
5 ~~result of any one accident involving an unidentifiable owner or operator of an~~  
6 ~~uninsured motor vehicle.~~

7 B. As used in this section, the term "bodily injury" includes death resulting  
8 from bodily injury.

9 "Insured" as used in subsections A, D, G, and H of this section means the  
10 named insured and, while resident of the same household, the spouse of the  
11 named insured, and relatives, wards or foster children of either, while in a motor  
12 vehicle or otherwise, and any person who uses the motor vehicle to which the  
13 policy applies, with the expressed or implied consent of the named insured, and a  
14 guest in the motor vehicle to which the policy applies or the personal representative  
15 of any of the above.

16 "Uninsured motor vehicle" means a motor vehicle for which (i) there is no  
17 bodily injury liability insurance and property damage liability insurance in the  
18 amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing  
19 the insurance denies coverage for any reason whatsoever, including failure or  
20 refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit  
21 of money or securities in lieu of such insurance, or (iv) the owner of the motor  
22 vehicle has not qualified as a self-insurer under the provisions of § 46.2-368. A  
23 motor vehicle shall be deemed uninsured if its owner or operator is unknown.

24 A motor vehicle is "underinsured" when, and to the extent that, the total  
25 amount of bodily injury and property damage coverage applicable to the operation  
26 or use of the motor vehicle and available for payment for such bodily injury or  
27 property damage, including all bonds or deposits of money or securities made



1 pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than  
2 the total amount of uninsured motorist coverage afforded any person injured as a  
3 result of the operation or use of the vehicle.

4 "Available for payment" means the amount of liability insurance coverage  
5 applicable to the claim of the injured person for bodily injury or property damage  
6 reduced by the payment of any other claims arising out of the same occurrence.

7 If an injured person is entitled to underinsured motorist coverage under more  
8 than one policy, the following order of priority of policies applies and any amount  
9 available for payment shall be credited against such policies in the following order  
10 of priority:

11 1. The policy covering a motor vehicle occupied by the injured person at the  
12 time of the accident;

13 2. The policy covering a motor vehicle not involved in the accident under  
14 which the injured person is a named insured;

15 3. The policy covering a motor vehicle not involved in the accident under  
16 which the injured person is an insured other than a named insured.

17 Where there is more than one insurer providing coverage under one of the  
18 payment priorities set forth, their liability shall be proportioned as to their respective  
19 underinsured motorist coverages.

20 Recovery under the endorsement or provisions shall be subject to the  
21 conditions set forth in this section.

22 C. There shall be a rebuttable presumption that a motor vehicle is uninsured  
23 if the Commissioner of the Department of Motor Vehicles certifies that, from the  
24 records of the Department of Motor Vehicles, it appears that: (i) there is no bodily  
25 injury liability insurance and property damage liability insurance in the amounts  
26 specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii)  
27 no bond has been given or cash or securities delivered in lieu of the insurance; or

1 (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in  
2 accordance with the provisions of § 46.2-368.

3 D. If the owner or operator of any motor vehicle that causes bodily injury or  
4 property damage to the insured is unknown, and if the damage or injury results  
5 from an accident where there has been no contact between that motor vehicle and  
6 the motor vehicle occupied by the insured, or where there has been no contact with  
7 the person of the insured if the insured was not occupying a motor vehicle, then for  
8 the insured to recover under the endorsement required by subsection A of this  
9 section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-  
10 enforcement officer having jurisdiction in the county or city in which the accident  
11 occurred. If it is not reasonably practicable to make the report promptly, the report  
12 shall be made as soon as reasonably practicable under the circumstances.

13 E. If the owner or operator of any vehicle causing injury or damages is  
14 unknown, an action may be instituted against the unknown defendant as "John  
15 Doe" and service of process may be made by delivering a copy of the motion for  
16 judgment or other pleadings to the clerk of the court in which the action is brought.  
17 Service upon the insurer issuing the policy shall be made as prescribed by law as  
18 though the insurer were a party defendant. The provisions of § 8.01-288 shall not  
19 be applicable to the service of process required in this subsection. The insurer  
20 shall have the right to file pleadings and take other action allowable by law in the  
21 name of John Doe.

22 F. If any action is instituted against the owner or operator of an uninsured or  
23 underinsured motor vehicle by any insured intending to rely on the uninsured or  
24 underinsured coverage provision or endorsement of this policy under which the  
25 insured is making a claim, then the insured shall serve a copy of the process upon  
26 this insurer in the manner prescribed by law, as though the insurer were a party  
27 defendant. The provisions of § 8.01-288 shall not be applicable to the service of

1 process required in this subsection. The insurer shall then have the right to file  
2 pleadings and take other action allowable by law in the name of the owner or  
3 operator of the uninsured or underinsured motor vehicle or in its own name.  
4 Nothing in this subsection shall prevent the owner or operator of the uninsured  
5 motor vehicle from employing counsel of his own choice and taking any action in  
6 his own interest in connection with the proceeding.

7 G. Any insurer paying a claim under the endorsement or provisions required  
8 by subsection A of this section shall be subrogated to the rights of the insured to  
9 whom the claim was paid against the person causing the injury, death, or damage  
10 and that person's insurer, although it may deny coverage for any reason, to the  
11 extent that payment was made. The bringing of an action against the unknown  
12 owner or operator as John Doe or the conclusion of such an action shall not bar the  
13 insured from bringing an action against the owner or operator proceeded against  
14 as John Doe, or against the owner's or operator's insurer denying coverage for any  
15 reason, if the identity of the owner or operator who caused the injury or damages  
16 becomes known. Any recovery against the owner or operator, or the insurer of the  
17 owner or operator shall be paid to the insurer of the injured party to the extent that  
18 the insurer paid the named insured in the action brought against the owner or  
19 operator as John Doe. However, the insurer shall pay its proportionate part of all  
20 reasonable costs and expenses incurred in connection with the action, including  
21 reasonable attorney's fees. Nothing in an endorsement or provisions made under  
22 this subsection nor any other provision of law shall prevent the joining in an action  
23 against John Doe of the owner or operator of the motor vehicle causing the injury  
24 as a party defendant, and the joinder is hereby specifically authorized.

25 H. No endorsement or provisions providing the coverage required by  
26 subsection A of this section shall require arbitration of any claim arising under the  
27 endorsement or provisions, nor may anything be required of the insured except the

1 establishment of legal liability, nor shall the insured be restricted or prevented in  
2 any manner from employing legal counsel or instituting legal proceedings.

3 I. Except as provided in § 65.2-309.1, the provisions of subsections A and B  
4 of § 38.2-2204 and the provisions of subsection A of this section shall not apply to  
5 any policy of insurance to the extent that it covers the liability of an employer under  
6 any workers' compensation law, or to the extent that it covers liability to which the  
7 Federal Tort Claims Act applies. No provision or application of this section shall  
8 limit the liability of an insurer of motor vehicles to an employee or other insured  
9 under this section who is injured by an uninsured motor vehicle; provided that in  
10 the event an employee of a self-insured employer receives a workers'  
11 compensation award for injuries resulting from an accident with an uninsured motor  
12 vehicle, such award shall be set off against any judgment for damages awarded  
13 pursuant to this section for personal injuries resulting from such accident.

14 J. Policies of insurance whose primary purpose is to provide coverage in  
15 excess of other valid and collectible insurance or qualified self-insurance may  
16 include uninsured motorist coverage as provided in subsection A of this section.  
17 Insurers issuing or providing liability policies that are of an excess or umbrella type  
18 or which provide liability coverage incidental to a policy and not related to a  
19 specifically insured motor vehicle, shall not be required to offer, provide or make  
20 available to those policies uninsured or underinsured motor vehicle coverage as  
21 defined in subsection A of this section.

22 K. A liability insurance carrier providing coverage under a policy issued or  
23 renewed on or after July 1, 1988, may pay the entire amount of its available  
24 coverage without obtaining a release of a claim if the claimant has underinsured  
25 insurance coverage in excess of the amount so paid. Any liability insurer making a  
26 payment pursuant to this section shall promptly give notice to its insured and to the

- 1 insurer which provides the underinsured coverage that it has paid the full amount of
- 2 its available coverage.
- 3 #

