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## No-Fault Insurance Legislation in Illinois

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## NO-FAULT INSURANCE LEGISLATION IN ILLINOIS

In the Law Division<sup>1</sup> of the Circuit Court of Cook County, Illinois, civil suits filed three years ago are now being called for jury trial. That period is the current delay for most personal injury suits involving automobile accidents.<sup>2</sup> At one time there was a delay of almost six years between filing and jury trial.

The intolerable delay in personal injury suits is symptomatic of all fault-based systems of tort recovery in large urban areas. However, that is not the only shortcoming in a system which compensates for economic loss based on the plaintiff's ability to prove both the defendant's negligence and his own freedom from contributing negligence.<sup>3</sup> At its best, a fault-based system is inefficient, costly and incomplete. As a result of the many defects in the old system, there has been an almost inexorable movement in the United States to adopt a no-fault system for automobile accident reparations. Thirteen states<sup>4</sup> have adopted some form of no-fault legislation and at least thirty states and the federal government are considering such legislation.<sup>5</sup>

The no-fault idea is quite simple. Under the traditional fault-based system, a party injured in an automobile accident must file suit and prove

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1. If the *ad damnum* is more than \$15,000, suit is filed in a Law Division and if it is less than \$15,000, suit is filed in the Municipal Division.

2. In the Law Division, the delay for a non-jury trial is about two years. In the Municipal Division, the delay for a non-jury trial is about one year and approximately two years for jury trials.

3. In Illinois where there is no comparative negligence, a plaintiff must plead and prove freedom from contributory negligence in order to prevail. When Massachusetts became a no-fault state, it also adopted comparative negligence. Hence, if the Massachusetts experience can be called a success, is it due to the no-fault legislation or the comparative negligence provision?

4. Connecticut, Delaware, Florida, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, South Dakota, Utah, and Virginia. See also Ghiardi & Kircher, *U.M.V.A.R.A. is Not the Answer*, 59 A.B.A.J. 483 (1973), Keeton, *No-Fault Insurance: A Status Report*, 51 NEB. L. REV. 183 (1971).

5. The no-fault idea was mentioned as early as 1953. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953). However, the real birth of no-fault can be traced directly to Professors Robert Keeton of Harvard University and Jeffrey O'Connell of the University of Illinois. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).

the other party's negligence in order to recover damages. Those damages might include both reimbursement for economic loss from medical expenses and lost wages as well as a further award for pain and suffering.<sup>6</sup> Under a pure no-fault system, an injured party would receive immediate reimbursement regardless of fault—but only for economic loss. There would never be recovery for pain and suffering, and subsequent lawsuits would not be allowed.

While the term "no-fault" has been bandied about a great deal, a pure no-fault bill has not been adopted or even seriously considered by any state. Pure no-fault bills have been rejected as grossly unfair to the public. As a result, modified no-fault bills have been adopted, which provide for first party benefits, *i.e.*, for immediate reimbursement by the insured's own insurance company for certain economic losses resulting from automobile accidents—regardless of fault. No bill has completely done away with the individual's right to sue. Instead, each bill has imposed certain conditions on a party's right to sue. Alternatively, if allowed to sue, monetary limits are imposed on recovery for pain and suffering. Provision for first party benefits is the only feature common to all present no-fault legislation and is the only reason these are called no-fault.<sup>7</sup> While the reluctance to completely abrogate the right to sue is the characteristic distinguishing no-fault as adopted from "pure" no-fault, differences in present legislation include: (1) types of losses covered; (2) the amount of losses covered; (3) the manner in which insurance companies can recover from other insurance companies—if recoupment is permitted; (4) provisions which permit or prohibit motorists' recovery both from insurance companies and collateral sources; and (5) requirements that insurance be mandatory, and methods for enforcement of such a requirement if one is imposed.

These differences make fair comparison of existing and proposed no-fault legislation very difficult.<sup>8</sup> It is beyond the scope of this note to consider all the consequences that no-fault legislation may have on tort law, contract law, insurance codes and premiums, remedies and arbitra-

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6. An understanding of the history and effect of the tort award for pain and suffering is essential to a thorough analysis of the no-fault idea. For a comprehensive treatment of the subject, see O'Connell & Simon, *Payment For Pain and Suffering: Who Wants What, When and Why?* 1972 U. ILL. L.F. 1.

7. Two commentators have grouped the no-fault plans into three categories: 1) "total self-insurance" plans; 2) "partial self-insurance" plans; and 3) "reform proposals." Ghiardi & Kircher, *Automobile Insurance Reparations Plans: An Analysis of Eight Existing Laws*, 55 MARQ. L. REV. 1 (1972).

8. It has been estimated that there are over 100 different no-fault plans and proposals. Ghiardi & Kircher, *The Uniform Motor Vehicle Accident Reparations Act: An Analysis and Critique*, 40 INS. COUNSEL J. 87 (1973).

tion. Rather, it is the purpose of this article to outline the broad changes that would have occurred if the two Illinois attempts at no-fault legislation had prevailed.

The first Illinois attempt at a no-fault insurance law came in 1971.<sup>9</sup> Basically, it provided for prompt payment of lost wages and out-of-pocket expenses<sup>10</sup> to owners and their families and pedestrians if injured by an insured vehicle, without regard to fault. It also limited the recovery of general damages to a specified percentage of medical expenses.<sup>11</sup> Finally, it provided for compulsory arbitration of automobile lawsuits involving damages of less than \$3,000.<sup>12</sup> However, before the Bill could become effective, the Illinois Supreme Court declared it unconstitutional in *Grace v. Howlett*.<sup>13</sup> The court found that all injured parties would be limited in their recovery of general damages, yet not all injured parties would receive the benefits of the law.<sup>14</sup> This was held to be impermissible special legislation.<sup>15</sup> The court also held that the compulsory arbitration provisions violated the constitutional prohibition against judicial fee officers<sup>16</sup> and the constitutional guarantee of a jury trial.<sup>17</sup>

The legislature was not to be denied, however, and on June 29, 1973, another no-fault insurance bill was sent to the Governor's desk. This bill, Senate Bill 187,<sup>18</sup> was specifically written to avoid the constitutional objections raised by *Grace v. Howlett*, and in that regard the Bill seemed to be an unqualified success.

The most notable change was the absence of any limitation or restriction on the individual's right to sue or his right to recover general damages. Thus, under the proposed legislation, an injured individual would receive immediate reimbursement for certain losses incurred be-

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9. Ill. Laws [1971] at 2542.

10. The maximum recovery that one person could receive under the law would be \$9,800 for reimbursement of medical expenses, lost wages, and essential services ordinarily performed by the injured party.

11. Fifty per cent of the first \$500 plus an amount equal to the excess over \$500.

12. The statute provided that in all appeals the reviewing court must consider both the law and the facts as if the matter had not been litigated, after full payment of all costs by the appellant.

13. 51 Ill. 2d 478, 283 N.E.2d 474 (1972); see Note, 67 Nw. U.L. Rev. 661 (1972).

14. The Bill required only "private passenger" vehicles be so insured, hence persons injured by commercial vehicles would, theoretically, not be protected.

15. ILL. CONST. art. 4, § 13 (1970).

16. ILL. CONST. art. 6, § 14 (1970) (based upon the requirement that the appellant had to pay all costs as a condition to appeal).

17. ILL. CONST. art. 1, § 13 (1970).

18. S.B. 187, 78th Ill. Gen. Assembly (1973) [hereinafter cited as S.B. 187].

cause of the accident. If the individual were dissatisfied with the amount of reimbursement, or if the individual wished to recover for pain and suffering, the Bill would not preclude a civil suit from being filed. However, any payment received under the no-fault Bill would have to be deducted from any damages granted.<sup>19</sup> Consequently, there is no arbitration to appeal from, no problem with judicial fee officers and no impairment of the right to a jury trial.<sup>20</sup>

The provision for compulsory arbitration of claims less than \$3,000 has been removed. However, the Bill does require that the insurance companies submit to binding inter-company arbitration to resolve the issue of liability for benefits paid under the Bill.<sup>21</sup> Consequently, while fault may no longer be an issue to the motorist, it may very well be an issue to the insurance company.<sup>22</sup> Interestingly, the results of any such arbitration are not admissible in any subsequent lawsuit.<sup>23</sup> Finally, although the previous no-fault bill was found objectionable because it covered only private passenger vehicles, Senate Bill 187 covered all motor vehicles registered in Illinois.<sup>24</sup>

With these three rather sweeping changes the legislature had apparently written a bill with none of the objections found to be fatal in *Grace v. Howlett*. But the result was a bill that worked just two significant changes for the Illinois motorist. First, Illinois was to become a mandatory insurance state.<sup>25</sup> The previous Bill did not require insurance, but if it were sought, it had to provide certain first-party benefits. Under Senate Bill 187, no owner of a vehicle registered in Illinois could operate that vehicle without insurance coverage of at least \$25,000 for any one accident.<sup>26</sup>

Secondly, the Bill required that all insurance policies provide for the immediate payment of the following benefits to the injured insured:<sup>27</sup>

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19. S.B. 187, § 625.

20. See ILL. CONST. art. 1, § 13 and art. 6, § 14 (1970).

21. S.B. 187, § 626(b).

22. Although the individual motorist may be relieved of liability for bodily injury, the insurance companies may still battle among themselves. If A's insurance company paid him for his own losses incurred as a result of B's negligence, A's insurance company could recover through binding arbitration from B's insurer for losses so paid. The concept of fault lives on!

23. S.B. 187, § 626(c).

24. S.B. 187, § 621. However, it does exclude vehicles which are self-insured under the Illinois Vehicle Code. ILL. REV. STAT. ch. 95½, § 7-502 (Supp. 1972).

25. Prior to 1972, only Massachusetts, North Carolina and New York had compulsory automobile insurance laws.

26. S.B. 187, § 621(a).

27. Payments were also to be made to members of the injured insured's house-

1) reasonable medical, hospital and funeral expenses subject to a limit of \$2,000;<sup>28</sup> 2) 85 percent of salary, wages or tips subject to a limit of \$150 per week for 52 weeks;<sup>29</sup> 3) expenses incurred for essential services ordinarily performed by the person, if not a wage producer, subject to a limit of \$12 per day for 365 days,<sup>30</sup> and 4) 85 percent of the average weekly income of anyone who dies within one year of the accident subject to a limit of \$150 per week for 156 weeks.<sup>31</sup>

The Bill allowed recovery of first party benefits under only one policy but allowed recovery regardless of other "collateral sources."<sup>32</sup> A curious provision in this regard was that benefits would not be reduced if the injured party received other payments under a private wage continuation program, but would be reduced if paid under a federal or state workmen's compensation act.<sup>33</sup>

While some states, such as Massachusetts, require proof of minimum coverage before license plates are issued, the Illinois Bill only provided that driving or authorizing another to operate an underinsured vehicle would be a petty offense and would result in loss of license.<sup>34</sup>

The Bill requires payment to the insured whether or not the injured party has a potential cause of action in tort.<sup>35</sup> Payment must be made within thirty days after the company has received proof of the fact of injury and the amount of expenses incurred. If the company fails to pay the benefits and a subsequent lawsuit requires it to do so, the individual also recovers attorney's fees and eight percent interest. Additionally, if the company "willfully refused" to pay the benefits, treble damages can be awarded.<sup>36</sup>

Consequently, Senate Bill 187 only provided for mandatory automobile insurance and prompt payment of certain lost wages and out-of-pocket expenses without regard to fault. As such, the legislation seemed innoc-

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hold injured in any accident, to persons injured while occupying his car and to pedestrians injured by his car in this state. S.B. 187, § 621(b). Under current Illinois law, insurance protection generally "follows" the car rather than the insured, although the wording of S.B. 187 may indicate legislative intent to change that.

28. S.B. 187, § 621(b) (1).

29. S.B. 187, § 621(b)(2).

30. S.B. 187, § 621(b)(3).

31. S.B. 187, § 621(b)(4).

32. S.B. 187, § 621(e) and (f).

33. S.B. 187, § 621(f)(2). Apparently, the theory was that such federal and state programs are often not voluntary.

34. S.B. 187, § 621(i). Pre-certification of coverage has proven to be expensive and its effectiveness has been questioned.

35. S.B. 187, § 624(a).

36. S.B. 187, § 624(b).

uous enough and certain to withstand judicial scrutiny. However, it could not withstand the Governor's objections—Governor Walker vetoed the Bill on September 5, 1973.

Ironically, the shortcomings of the Bill which the Governor cited as reasons for his veto may well have been the result of the legislative effort to draft a bill which would survive constitutional challenge. To be sure, the Governor was disappointed that the Bill did not guarantee victims full reimbursement for medical costs and lost wages. The Governor would also have preferred a provision requiring a reduction of insurance premiums within a specified period. But the Governor found the absence of any restriction on the individual's right to sue the most serious defect of the Bill. The Governor reasoned that without any limitation on the right to sue, the Bill would do nothing to cut down on the number of suits which have clogged the courts, delayed more urgent cases, and pushed up premium rates. The Governor concluded that the insurance companies would now have to pay certain benefits without regard to fault but would theoretically still be saddled with the cost of litigating all claims. This would "virtually guarantee that insurance rates would go up for every policyholder."<sup>37</sup> The result was the veto.

Not surprisingly, the question whether or not to limit the right to sue has always been the most controversial aspect of no-fault legislation. *Threshold* is the name given to such provisions. A *threshold* is a standard which must be met before a lawsuit may be initiated to recover damages for pain and suffering; or, if a lawsuit is allowed, it is a limit on the award that may be granted. It is *the* single most important feature in distinguishing the no-fault bills that have been adopted. Of the thirteen states that have no-fault legislation, seven have adopted different thresholds<sup>38</sup> while six have rejected the threshold concept.<sup>39</sup> Puerto Rico has taken a middle ground and allows lawsuits, but with an exemption for a specified amount.<sup>40</sup>

The almost even split in the jurisdictions accepting and rejecting a threshold is perhaps the most obvious indication that the controversy over

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37. Chicago Tribune, Sept. 10, 1973, at 20, col. 1.

38. Connecticut: CONN. GEN. STAT. ANN. § 38-323 (Supp. 1973) (\$400 or serious injury); Florida: FLA. STAT. ANN. § 627.737 (1972) (\$1000 or serious injury); Massachusetts: MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1973) (\$500 or serious injury); Michigan: MICH. STAT. ANN. § 500.3135 (1973) (only serious injury); New Jersey: N.J. STAT. ANN. § 39:6A-8 (1973) (\$200 or serious injury); New York: N.Y. INS. LAW § 673 (McKinney 1973) (serious injury—eff. Feb. 1, 1974); Utah: UTAH CODE ANN. § 31-41-9 (Supp. 1973) (\$500 or serious injury).

39. Delaware, Maryland, Minnesota, Oregon, South Dakota and Virginia.

40. PUERTO RICO LAWS ANN. tit. 9, § 2058 (Supp. 1973).

that provision is far from settled.<sup>41</sup> While the Governor thought that the lack of a threshold in Senate Bill 187 would cause an increase in insurance rates, the proof is far from conclusive that the presence of a threshold will reduce rates. Massachusetts is often pointed to as the model no-fault state. It was the first state to enact a no-fault law which included a threshold provision. Proponents of the bill have pointed to a cut in premiums of as much as fifty percent.<sup>42</sup> But while the rates for bodily injury liability have decreased, the total automobile premium of the average motorist has increased.<sup>43</sup> Perhaps the confusion over the effect no-fault will have on premium rates can be explained by the fact that rates are determined by factors occurring over a much longer period of time than no-fault has been in existence.<sup>44</sup> Claims, even under no-fault, may take five years to mature. But this difficulty hardly excuses the subtle manipulation of statistics by both groups at war over the no-fault issue.

The real advantage in any no-fault legislation may well lie in the speedy and uncomplicated manner in which the public is reimbursed for out-of-pocket expenses incurred because of minor automobile accidents.<sup>45</sup> It is worth noting that only five-tenths of one percent of all accident victims sustained economic loss in excess of \$10,000.<sup>46</sup> The Bill vetoed

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41. Although the threshold question is still a much debated issue, its proponents merely point to the states that have successfully adopted it. Opposition to the concept is evidently widespread, *see, e.g.,* Spangenberg, *Thresholds: The Unjust Feature of No-Fault Plans*, 59 A.B.A.J. 627 (1973). For an article analyzing thresholds in light of *Grace v. Howlett*, *see No-fault Insurance—The Constitutionality of the Threshold Approach*, 8 GONZAGA L. REV. 146 (1972). For the practical effect a threshold may have on the average motorist, *see* Brainard, *The Threshold Impact on Injury Victims' Recoveries*, 8:4 TRIAL 32 (July-Aug. 1972).

42. Fanikos, *How "No-fault" Has Worked In Massachusetts from the Point of View of the Commissioner of Insurance*, 39 INS. COUNSEL J. 466, 469 (1972).

43. Spangenberg, *No-Fault, Fiction, and Fallacy*, 44 MISS. L.J. 15, 68 (1973); Donague & Sugarman, *The Automobile Reparation System in Massachusetts*, 8 FORUM (A.B.A.) 11, 15-16 (1972).

44. Coombs, *The Massachusetts Experience Under No-Fault*, 44 MISS. L.J. 158, 169 (1973).

45. It should be noted that most no-fault plans cover only bodily injury, but exclude property damage. Massachusetts was the first state to extend no-fault coverage to include property damage. MASS. GEN. LAWS ANN. ch. 90, § 34 (Supp. 1973). Florida has become the second state to do so. FLA. STAT. ANN. § 627.738 (1972). There are indications, however, that the coverage of property damage has not been successful and may soon be abandoned in both states. Ghiardi and Kircher, *U.M.V.A.R.A. Is Not the Answer*, 59 A.B.A.J. 483, 486 (1973). S.B. 187 did not include property damage. *See* Mehr and Eldred, *Should the Automobile Property Damage Liability Insurance System be Preserved?*, 48 NOTRE DAME LAW. 811 (1973).

46. Ghiardi & Kircher, *supra* note 7.

by Governor Walker could provide reimbursement for up to \$9,800. If the average motorist would be satisfied with reimbursement for his economic loss and would decide not to file suit to recover for pain and suffering, the goal of no-fault legislation could be attained without a threshold.

It has been suggested that once a motorist has been reimbursed for his out-of-pocket expenses, he has nothing to lose and everything to gain by filing suit. But as in Senate Bill 187, it could be required that any award so granted be reduced by the benefits received through insurance.<sup>47</sup> Consequently, assuming a reasonable jury verdict based on actual injury, the average motorist could expect little more than he has already received. More importantly, the fee available to his attorney would be minimal.<sup>48</sup> With the monetary incentive largely diminished, it would not be unreasonable to expect fewer lawsuits.<sup>49</sup> Those serious automobile accidents where the injured motorist may reasonably expect a large award for pain and suffering and thus be tempted to pursue a tort claim, would meet the threshold requirement of all no-fault bills anyway.<sup>50</sup>

Perhaps it is naive to assume that the average motorist would be satisfied only with reimbursement of his economic losses. Perhaps the average motorist would file suit merely on principle. If that is the case, and the cost becomes prohibitive, a threshold could always be added by amendment. Although *Grace v. Howlett* may suggest that the Illinois Supreme Court is not willing to allow complete abrogation of the tort claimant's right to a jury, the specific objections raised in that opinion are not insurmountable.<sup>51</sup> Other state supreme courts have specifically found a threshold provision permissible.<sup>52</sup>

One should always remember that the success of no-fault legislation does not absolutely depend on the existence of a threshold. No-fault

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47. S.B. 187, § 625. All no-fault bills have a comparable provision.

48. It is assumed that the average plaintiff's attorney would receive only one third of what the plaintiff actually recovers. Although S.B. 187 received the support of the Bar Association and although lawyers today generally support no-fault legislation, the lawyer's early view of no-fault legislation is still interesting reading. See, e.g., Spangenberg, *At What Price . . .*, 3:6 TRIAL 10 (Oct.-Nov. 1967); Fuchsberg, *Lawyers View Proposed Changes*, 1967 U. ILL. L.F. 565.

49. For an analysis concluding that no-fault has reduced lawsuits, but with a possible caveat as to why, see Widiss and Bovbjerg, *No-Fault in Massachusetts: Its Impact on Courts and Lawyers*, 59 A.B.A.J. 487 (1973).

50. *Supra* note 38.

51. See Brainard, *supra* note 41.

52. *Pinnick v. Cleary*, — Mass. —, 271 N.E.2d 592 (1971); *Opinion of the Justices*, 304 A.2d 881 (N.H. 1973).

is a response to not less than six criticisms of the present automobile reparations system:<sup>53</sup>

1. The uncertainty of financial recovery and ensuing economic hardship under a system based on fault.
2. The tendency to overcompensate those with minor injuries, and undercompensate the seriously injured.
3. Delay in receiving compensation.
4. The tendency to allow injuries to worsen until fault is established and recovery is achieved.
5. Excessive costs resulting in higher premiums.
6. A temptation to falsify claims. A properly written no-fault bill, even without a threshold, may go a long way to solving all of these problems.

In any event, Illinois may shortly have no choice but to adopt its own no-fault bill or have a federal plan imposed in its place. There is every indication that the federal government will soon pass its own no-fault legislation. The National No-Fault Motor Vehicle Insurance Act<sup>54</sup> was quietly killed by being sent to committee on August 8, 1972. Interestingly, the vote of the full Senate was 49-46.<sup>55</sup> With such strong support, it is not surprising that the Senate Commerce Committee again passed the Bill in 1973.<sup>56</sup> The nation-wide Bill would only require each state to act in accordance with minimum standards. However, if no state action is taken, a federal bill would be imposed.<sup>57</sup> Clearly, if Illinois does not act, the federal government will.<sup>58</sup>

Thus, Illinois is left with little choice. The legislature may act because of the obvious deficiencies in the present reparations system, or it may act because Congress demands it. If the threshold question remains a stumbling block, it should be remembered that six states have a no-fault bill without any threshold and they seem to be working. If Governor

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53. *Grace v. Howlett*, 51 Ill. 2d 478, at 492, 283 N.E.2d 474, at 481 (1972) (Underwood, C.J. dissenting).

54. S.B. 945, 92d Cong., 2nd Sess. (1972).

55. *Magnuson, Nationwide No-Fault*, 44 Miss. L.J. 132 (1973).

56. *Chicago Tribune*, Aug. 6, 1973, at 20, col. 1.

57. *Kornblum, No-Fault Automobile Insurance*, 8 FORUM 175, 195-97 (1972). For a comprehensive analysis of the National Act, see Ghiardi & Kircher, *supra* note 8.

58. The A.B.A. recently asked for a delay in passage of the National Act but did not suggest that it was adamantly opposed to it. *President Meserve States American Bar Association Opposition to National No-Fault Insurance Act*, 59 A.B.A.J. 607 (1973). For a view by the sponsor of the Bill suggesting that a delay would not be wise see Hart, *National No-Fault Auto Insurance: The People Need it Now*, 21 CATH. U.L. REV. 259 (1972).

Walker has his way and a threshold is employed, careful drafting of the bill should be able to obviate any constitutional objections.<sup>59</sup> In any event, some form of no-fault legislation will have to be passed soon. There will be time enough to change it to make it perfect. In the meantime, the legislators should pass it; that would please the over-burdened courts, the injured motorist and most of all the insurance companies.<sup>60</sup>

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59. On October 24, 1973, the Senate failed to override Governor Walker's veto. Whereas the bill had sufficient votes in both the Senate and House to override a veto when it was initially passed, some Senators apparently changed their minds prior to the veto vote. Politics was undoubtedly a prime factor in no-fault's ultimate demise. Legislators can now go home and tell the voters that they passed a bill and it was the Governor who vetoed it. Hopefully, no one will count the votes. In any event, no-fault will surely be a major issue when the legislature meets again next session.

60. For an article suggesting that insurance companies desire to see no-fault adopted on the state level see *Strong Political Forces Move State No-Fault*, 98 TRIAL 52 (Mar.-Apr. 1973). There are indications that insurance companies might reap the largest benefits from no-fault with increased profits. See Brainard, *The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers*, 44 Miss. L.J. 174 (1973). See also Spangenberg, note 41 *supra*.