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No-Fault Auto Insurance: Back By Popular (Market) Demand?

JEFFREY O'CONNELL*

In America, there are three ways to get rich. You can work hard (but that's no fun). You can win a lottery (perfect—except for the long odds). Or you can get in a car wreck and sue. Due to the publicity that surrounds astronomical jury awards for such dubious injuries as "whiplash," it's this last path to wealth—the fender bender—that sometimes seems to offer the truest promise.

Foreigners must be mystified by those American bumper stickers that say, "GO AHEAD, HIT ME—I COULD USE THE MONEY!" This, thinks the visitor from abroad, truly is the land of opportunity, where you can acquire great wealth just by getting your Ford bashed up.

But closer inspection shows this system contains more tarnish than shine.¹

Under most forms of insurance, after one proves one is injured, one is reimbursed by one's own insurer for one's economic losses. But in the tort system, one must prove a case against someone else's insurer showing not only that one was injured, but that it was someone else's fault. One must thus be prepared to go to court, after typical delays of several years, where one's fate turns on the vagaries of (by definition) inexpert jurors, with the award (assuming there is one) cut by as much as half because of a lawyer's contingent fee and other litigation expenses. To make matters worse, tort law consistently undercompensates the more seriously injured while routinely overcompensating the less seriously injured. The key to this overcompensation is payment for "pain and suffering" which, in most cases does not track actual discomfort or agony, but rather, amounts to a routine multiple of three or four times medical expenses. Claimants are thereby encouraged to run up their medical bills, in turn creating

* John Allan Love Professor of Law, University of Virginia; B.A., 1951, Dartmouth College; J.D., 1954, Harvard University.

huge incentives for chicanery and even naked fraud. All this makes auto insurance, at even low levels of coverage, so expensive that mandatory limits are kept low (typically $10,000 to $20,000), with the further result that there is often relatively little coverage available to pay the more seriously injured. All of this in turn, adds up to a system that is dilatory, fortuitous, expensive, and inefficient. Only forty-four cents of every premium dollar actually goes to victims—and of that forty-four cents only 14.5 cents pays for what most people buy insurance for, namely, economic loss.

Faced with the seemingly ever-rising insurance costs needed to feed this legal maw, consumer activists in California (led by the redoubtable Ralph Nader) succeeded, against massive insurance industry opposition, in getting California voters in November 1988 to adopt an initiative, Proposition 103 (Prop. 103). It called for a twenty percent rollback from rates prevailing in November 1987, and a further discount of twenty percent for the more than eighty percent of motorists it defined as “good drivers.” But the initiative did nothing significant to change the underlying system of tort law arguably causing the high rates in the first place.

Flushed with success, consumer activists are pushing replicas of Prop. 103 in many other states. But the most obvious answer to the ills of auto insurance is no-fault insurance, which does purport to address the underlying causes of its malfunctioning. Under no-fault, each motorist recovers only his economic losses (not damages for pain and suffering) from his own insurance company without regard to who was at fault in the accident. That way, the two variables causing most of the problems under auto insurance—establishing who was at fault, and paying for pain and suffering—disappear.

The improvements in auto insurance under no-fault are borne out by a 1985 Department of Transportation study: approximately twice as many accident victims are compensated under no-fault; practically all no-fault payments are made within one year of injury (as opposed to only half of tort awards); and average benefits under no-fault are seventy-nine percent greater.

5. Id.
6. For a description of no-fault auto insurance, see O'Connell & Joost, supra note 2, at 63-67.
7. U.S. DEP’T OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 3, 4, 6, 113-17 (1985) [hereinafter DOT REPORT]; ALL-INDUSTRY RESEARCH COUNCIL (AIRAC),
And yet, many states have not enacted any kind of no-fault; they continue to rely on traditional tort law to compensate traffic victims. Admittedly, some states which have enacted no-fault laws nonetheless continue to suffer overly high premiums along with festering consumer discontent. But the problem is not no-fault itself; it is the type of laws state legislatures enacted during the early and mid-1970s. Spurred on by trial lawyers’ lobbies, legislatures undermined no-fault laws by allowing too many motorists to have it both ways: that is, to collect no-fault benefits and then to sue the other driver anyway.\(^8\)

Indeed, even relatively good no-fault laws (like New York’s), as we shall see,\(^9\) result in more unnecessarily high costs for tort liability insurance. Under the pure tort system, victims are often without funds to cover accruing medical expenses, lost wages, and other losses while their case is battled. So claimants often settle for relatively little rather than undergo the delay and uncertainty of final resolution of a tort claim. But, with a tort system bolstered by no-fault benefits (along with growing coverage for health care costs by private insurance as well as Medicare and Medicaid), victims are guaranteed resources which enable them to energetically pursue a tort claim (after hiring a lawyer at no initial cost on a contingent basis). This leads to even higher costs for the tort claims that are left under no-fault laws.\(^10\) That, at least, is one side of the story.

At this point, a major obstacle to reforming our auto insurance system is that the proponents of no-fault and those supporting fault-based insurance are hurling accusations at each other about the respective merits and demerits of tort liability and no-fault insurance.\(^11\) Hapless legislators and their constituents are understandably confused by the cacophony. Cutting through the confusion, California State Senator Quentin Kopp recently asked a provocative question: “[W]hy should the legislature, or the voters, be forced to choose between these two insurance alternatives? Why not offer consumers a choice in the marketplace?”\(^12\)

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9. See infra notes 15-20 and accompanying text.
Out of Senator Kopp's thoughtful question comes this proposal: Why not offer a choice? What follows here is a suggested way of implementing such a system. It is a proposal outlining an actual bill already before several state legislatures in one form or another.

Here is how it could work. Consumers would be allowed to choose between fault-based and no-fault insurance for their automobiles. If two motorists with no-fault policies collide, no problem. Each collects from his own insurer without regard to fault. Likewise, if each carries only liability insurance, no problem. The two claim against each other based on fault.

If, however, a no-fault and fault-based motorist collide, the solution embodied in the choice-based bill grows out of our current system of coverage of motorists injured by uninsured motorists. The bill would treat no-fault insureds as in effect uninsured motorists, allowing recovery of tort damages by motorists covered by tort liability insurance against their own insurer based on tort rights. Such coverage would be termed "inverse liability." On the other hand, the no-fault driver, covered by his own no-fault insurance policy for medical costs and wage losses, could neither sue nor be sued based on fault. Although liability insurance policy costs might rise for fault-based insureds as a result of the larger class of "uninsured motorists" (all those buying no-fault), liability premiums for fault-based insureds would correspondingly decrease because none of the no-fault insureds could claim against motorists carrying fault-based insurance.

This choice plan seeks to insulate the costs of no-fault coverage from those of tort liability; no-fault motorists would no longer be forced to subsidize tort litigation, as they are under present mixed systems. At the same time, other motorists will no longer be required to surrender involuntarily their rights to be paid (even for pain and suffering) based on who was at fault, as also now happens under

13. Concerning uninsured motorist coverage, see A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE (2d ed. 1987). Uninsured motorist coverage (UM) pays up to the limit specified in the policy when the insured or others in the insured vehicle are injured by an uninsured or hit-and-run driver. Thus, the insured's own insurer pays what the injured person was eligible to recover from the other uninsured, at-fault driver. Underinsured motorist coverage (UIM) similarly pays the insured and other occupants of his vehicle when the at-fault other driver is insured, but with low limits.

For a cogent criticism of some features of these coverages, see Schwartz, A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans, 48 OHIO ST. L.J. 419 (1987). But these inadequacies are in substantial measure a function of (a) the inadequacies of fault-based coverage, and (b) attempts by the courts to expansively and (expensively) provide more payouts under such coverage. At least under the reform suggested here, an alternative is provided to fault-based coverage—including to UM and UIM coverages themselves.

mixed systems.

The figures in the table below illustrate the increase in benefits per premium dollar that can be provided under no-fault insurance versus tort liability. In the first place, states having even high levels of no-fault benefits (such as New York with $50,000) save substantial amounts in total premiums applicable to bodily injury. (The table is not concerned with property damage which, except in Michigan, is not covered by no-fault insurance.) In New York, the pure premium (defined in footnote a of the table) is estimated to have been thirty percent lower in 1987 than it would have been had a no-fault law not been enacted ($198.48 - $138.12 = $60.36/$198.48 = 0.30). But, even more significant is how relatively little the high no-fault benefits cost as a percentage of the total New York pure premium despite New York's high threshold ("significant bodily impairment") banning about eighty-five percent of all tort suits for bodily injury. No-fault benefits contributed to only thirty-six percent of the total pure premium ($49.78/$138.12 = 0.36). In other words, the relatively few tort claims preserved over New York's high threshold contributed disproportionately to total costs.
### TABLE 15
A Comparison of Estimated 1987 Tort Liability Pure Premiums without A No-Fault (N-F) Law to Actual Pure Premiums in N-F States

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td></td>
<td>$10,000</td>
<td>$187.32</td>
<td>$157.45</td>
<td>$41.11</td>
<td>26.1%</td>
<td>-16%f</td>
<td>-21%</td>
</tr>
<tr>
<td>(2)</td>
<td>Michigan</td>
<td>Verbal</td>
<td>Unlimited</td>
<td>171.67</td>
<td>116.57</td>
<td>74.93</td>
<td>64.3</td>
<td>-32</td>
</tr>
<tr>
<td>(3)</td>
<td>New York</td>
<td>Verbal</td>
<td>50,000</td>
<td>198.48</td>
<td>138.12</td>
<td>49.78</td>
<td>36.0</td>
<td>-30</td>
</tr>
<tr>
<td>(4)</td>
<td>Hawaii</td>
<td>Verbal</td>
<td>$5,600^e</td>
<td>15,000</td>
<td>141.49</td>
<td>147.82</td>
<td>62.74</td>
<td>44.85</td>
</tr>
<tr>
<td>(5)</td>
<td>Minnesota</td>
<td>4,000</td>
<td>40,000</td>
<td>138.97</td>
<td>112.59</td>
<td>43.88</td>
<td>39.0</td>
<td>-19</td>
</tr>
<tr>
<td>(6)</td>
<td>Utah</td>
<td>3,000^e</td>
<td>14,100</td>
<td>82.22</td>
<td>85.00</td>
<td>22.87</td>
<td>26.9</td>
<td>3</td>
</tr>
<tr>
<td>(7)</td>
<td>Colorado</td>
<td>2,500^e</td>
<td>129,925</td>
<td>90.70</td>
<td>131.86</td>
<td>64.22</td>
<td>48.7</td>
<td>45</td>
</tr>
<tr>
<td>(8)</td>
<td>North Dakota</td>
<td>2,500^e</td>
<td>30,000</td>
<td>66.11</td>
<td>49.81</td>
<td>17.17</td>
<td>34.5</td>
<td>-25</td>
</tr>
<tr>
<td>(9)</td>
<td>Kentucky</td>
<td>1,000</td>
<td>10,000</td>
<td>93.96</td>
<td>75.06</td>
<td>28.79</td>
<td>38.4</td>
<td>-20</td>
</tr>
<tr>
<td>(10)</td>
<td>Georgia</td>
<td>500</td>
<td>5,000</td>
<td>91.32</td>
<td>107.24</td>
<td>39.97</td>
<td>36.3</td>
<td>17</td>
</tr>
<tr>
<td>(11)</td>
<td>Kansas</td>
<td>500^e</td>
<td>28,925</td>
<td>74.90</td>
<td>58.87</td>
<td>14.64</td>
<td>24.9</td>
<td>-21</td>
</tr>
<tr>
<td>(12)</td>
<td>Massachusetts</td>
<td>500</td>
<td>2,000</td>
<td>231.70</td>
<td>173.99</td>
<td>21.32</td>
<td>12.3</td>
<td>-25</td>
</tr>
<tr>
<td>(13)</td>
<td>Connecticut</td>
<td>400</td>
<td>5,000</td>
<td>162.54</td>
<td>170.92</td>
<td>24.02</td>
<td>14.1</td>
<td>5</td>
</tr>
<tr>
<td>(14)</td>
<td>New Jersey</td>
<td>200^e</td>
<td>unlimited</td>
<td>183.59</td>
<td>226.77</td>
<td>91.17</td>
<td>40.2</td>
<td>24</td>
</tr>
</tbody>
</table>

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15. This table is based on work done by Brian A. Smith, Research Manager, Alliance of American Insurers. A version of this table appeared in an article entitled Reexaming the Cost Benefit of No-Fault, CHARTERED PROP. & CASUALTY UNDERWRITERS J., Mar. 1989, at 28; see also Letter to author from Brian A. Smith (Mar. 22, 1989) (on file at the offices of San Diego Law Review).
<table>
<thead>
<tr>
<th>No-Fault Auto Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Add-On States</strong></td>
</tr>
<tr>
<td>(15) Oregon</td>
</tr>
<tr>
<td>None</td>
</tr>
<tr>
<td>18,380</td>
</tr>
<tr>
<td>110.01</td>
</tr>
<tr>
<td>25.26</td>
</tr>
<tr>
<td>23.0</td>
</tr>
<tr>
<td>- 3</td>
</tr>
<tr>
<td>- 8</td>
</tr>
<tr>
<td>(16) Delaware</td>
</tr>
<tr>
<td>None</td>
</tr>
<tr>
<td>10,000</td>
</tr>
<tr>
<td>173.13</td>
</tr>
<tr>
<td>53.53</td>
</tr>
<tr>
<td>30.9</td>
</tr>
<tr>
<td>59</td>
</tr>
<tr>
<td>17</td>
</tr>
<tr>
<td>(17) Maryland</td>
</tr>
<tr>
<td>None</td>
</tr>
<tr>
<td>2,500</td>
</tr>
<tr>
<td>170.10</td>
</tr>
<tr>
<td>38.73</td>
</tr>
<tr>
<td>22.8</td>
</tr>
<tr>
<td>26</td>
</tr>
<tr>
<td>26</td>
</tr>
<tr>
<td>(18) Pennsylvania</td>
</tr>
<tr>
<td>None(^c)</td>
</tr>
<tr>
<td>15,000</td>
</tr>
<tr>
<td>162.78</td>
</tr>
<tr>
<td>61.78</td>
</tr>
<tr>
<td>38.0</td>
</tr>
<tr>
<td>37</td>
</tr>
<tr>
<td>53</td>
</tr>
</tbody>
</table>

\(^a\) Pure Premium is that portion of premium used to pay losses, thereby excluding an insurer's expenses in marketing and administrative costs as well as legal defense costs.

\(^b\) BI means tort liability coverage for bodily injury, thereby excluding property damage.

\(^c\) UM means uninsured motorist coverage. See *supra* note 13 and accompanying text.

\(^d\) N-F means no-fault coverage

\(^e\) Threshold was raised between 1982 and 1987. Colorado raised its threshold from $500 to $2,500, effective 1/1/85. North Dakota raised its threshold from $1,000 to $2,500, effective 7/1/85. Hawaii's threshold was $1,500 in 1982. Since 1982, the state's tort threshold has been raised several times. Utah increased its threshold from $500 to $3,000, effective 7/1/86. Pennsylvania eliminated its $750 tort threshold, effective 10/1/84. New Jersey adopted an optional $1,700 tort threshold, effective 7/1/84. Kansas raised its threshold to $2,000, effective 1/1/88.

\(^f\) A negative result indicates an insurance cost savings in a no-fault state. A positive figure indicates an increase in costs in same.
As a further illustration of the comparative benefits of no-fault versus tort, the New York figures indicate that if a state without a no-fault law were to offer motorists a choice of buying regular tort liability versus no-fault coverage with $50,000 in benefits (which in New York covers over ninety percent of all motoring victims for over ninety percent of their losses), the reduction in pure premium would be in the vicinity of seventy-five percent ($49.78/$198.48 = 0.25). And that does not take into account savings stemming from the fact that the pure premium under no-fault is disproportionately higher than under tort liability since legal defense fees are far lower under no-fault, and defense fees are excluded from the calculation of pure premiums.

Admittedly, more than one-third of all motorists in New York and elsewhere carry more than $50,000 in liability insurance. Thus, it could be argued that providing only $50,000 in no-fault benefits, along with eliminating all tort claims, lessens the protection provided under current law. But there are several answers to that. New York—like most states—requires only $20,000 in tort liability limits for bodily injury because such coverage is so costly even at low limits. (To require higher limits would be deemed politically unfeasible. Even at low limits, around twenty percent of motorists in California refuse to pay the premium, remaining uninsured—and the percentage vastly exceeds fifty percent in the inner cities of many major metropolitan areas.) In addition, any payment from whatever lim-

16. It will be noted that these figures assume that no-fault replaces not only tort liability, but uninsured (and underinsured) coverage—which is arguably the case: once one insures oneself (and one's family) at limits one deems adequate, one can be seen as no longer dependent on coverage from third parties, whether insured or uninsured. In other words, only those dependent on payment from third parties need coverage for uninsured motorists.

17. See supra p. 6, table, note a.

18. DISTRIBUTION OF POLICY LIMITS

<table>
<thead>
<tr>
<th>Policy Limits (000)</th>
<th>Bodily Injury</th>
<th>Uninsured Motorist*</th>
<th>Underinsured Motorist*</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/20</td>
<td>4.7%</td>
<td>6.0</td>
<td>19.0%</td>
</tr>
<tr>
<td>15/30</td>
<td>11.2</td>
<td>25.9</td>
<td>10.1</td>
</tr>
<tr>
<td>20/40</td>
<td>4.3</td>
<td>8.0</td>
<td>4.5</td>
</tr>
<tr>
<td>25/50</td>
<td>17.8</td>
<td>23.0</td>
<td>18.5</td>
</tr>
<tr>
<td>50/100</td>
<td>17.6</td>
<td>10.2</td>
<td>13.4</td>
</tr>
<tr>
<td>100/300</td>
<td>27.6</td>
<td>13.8</td>
<td>3.2</td>
</tr>
<tr>
<td>Over 100,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per Person</td>
<td>4.5</td>
<td>1.4</td>
<td>2.5</td>
</tr>
<tr>
<td>Other Split Limits</td>
<td>3.6</td>
<td>8.2</td>
<td>4.2</td>
</tr>
<tr>
<td>Single Limit</td>
<td>8.6</td>
<td>3.5</td>
<td>4.5</td>
</tr>
<tr>
<td>100% 100% 100%</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*See supra note 13 and accompanying text. This table is taken from Table 3-13 in the AIRAC Study, supra note 7.

its the other motorist may be carrying (plus whatever limit may be carried in uninsured motorist and underinsured motorist coverages) will be fortuitous and dilatory, depending on the vicissitudes of proving a tort claim. So if one wanted more protection than $50,000, one would be better advised to buy more than $50,000 in no-fault benefits than to depend on suing in tort above a threshold. Note, for example, the figures for New Jersey—comparable in many ways to New York—where unlimited no-fault benefits result in a pure premium of only $91.17.20

The availability of devices whereby the motorist can choose—but not be compelled—to buy no-fault insurance arguably changes the terms of the whole no-fault debate. As indicated earlier, legislatures have for years been baffled and buffeted by the competing and cacophonous claims—actuarial and otherwise—of those who advocate and those who animadvert no-fault insurance. The result has been either failure to enact no-fault systems, or enactment of mixed systems allowing both no-fault and tort recoveries. But a law allowing consumers to choose between no-fault and tort liability means legislators need not bet exclusively on one or the other of the competing coverages and claims. Rather, a legislature can undertake the much less daunting task of letting the two coverages compete one with the other.21 (That will mean healthy pressure, by the way, to keep the no-fault system operating effectively—for example by guaranteeing that benefits track inflation—in order to compete with the tort system.) It is one thing, after all, for the trial bar and other opponents of no-fault to assert that no-fault is so bad that motorists ought not be forced to buy it; it is quite another to assert that it is so bad that motorists ought not be allowed to buy it even if they want to.

20. Note further that on the whole, the state of New Jersey is more urbanized and congested than New York state, much more of which (upstate) is rural. Note though, that New Jersey's no-fault benefits include only $5,200 for wage loss. One further point about New York: Perhaps nothing illustrates better the efficacy of no-fault than that it works so comparatively well in New York—a state probably more prone to social ills of all kinds than any other in the nation. If no-fault works there, it can arguably work anywhere. But even in New York, allowing motorists a choice between no-fault only versus tort liability (supplemented or not by no-fault) would further improve things for most motorists.

21. Versions of such a "choice" bill have been introduced in Arizona, California, and Maryland, and are being prepared in Massachusetts, New Jersey, and Pennsylvania, as well as in the Canadian province of Ontario. See infra note 41.

22. The tort system—being driven by jury verdicts which heavily influence settlements as well—does track inflation; workers' compensation benefits generally have not—they are statutorily defined.
Three separate but intertwined questions deserve further discussion: (1) What level of no-fault benefits should be required of those who choose no-fault and fault-based insurance? (2) What should be done (if anything) about losses suffered above the required limits—either no-fault or fault-based? (3) How should we deal with the emotional question of freeing no-fault insureds from tort liability under circumstances that might be deemed unconscionable?

Taking up the last question first, the bill embodying this proposal provides that despite the tort exemption normally accompanying the no-fault option, an accident victim retains a cause of action against anyone driving under the influence of drugs or intoxicating liquor, or anyone guilty of intentionally causing harm. Such a provision preserves the tort rights of victims of particularly egregious conduct by no-fault insureds.23

As to the first question, the level of required benefits, the bill does not change the level of tort liability limits required under prevailing state law. But, how about the level of required no-fault benefits? It would be much more feasible politically to simply eliminate all tort claims (except intentional, or alcohol or drug related torts) for those electing no-fault if no-fault limits were sufficiently high that very few no-fault insureds would suffer losses higher than their coverage.24 Data indicate that only about five percent of motorists are insured for more than $100,000.25 As a result, a level of $100,000 in no-fault benefits would leave very few motorists with less possible coverage than they could collect under the tort system. Granted that those few victims are the most seriously injured persons, but keep in mind how cruelly such victims are often treated by the tort system; relatively few motorists carry very high limits, and even if one collides with such a driver, the applicable tort liability might well be nonexistent or greatly scaled down by one's own contributory negligence.

At the other end of the spectrum, requiring even $100,000 in no-fault limits—not to speak of higher coverage—might well be counterproductive. For each increment of $10,000 in benefits, a certain number of less-affluent motorists may decline to insure them-

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23. A further provision provides that a victim of an accident caused by such guilty conduct by a no-fault insured has a right in the alternative to claim against such a guilty driver for no-fault benefits up to the amount specified in the no-fault driver’s policy, plus attorney’s fees. Furthermore, any party providing other coverage to the victim has a right of subrogation against such a guilty driver. Note that a guilty party claimed against for only economic loss would probably be inclined to settle such a claim quickly rather than risk paying full scale tort liability. This means, therefore, a victim of such a guilty party, not wanting to undergo possibly prolonged litigation, can claim for the lesser but more prompt benefits available under no-fault insurance.

24. O’Connell & Joost, supra note 2, at 74 n.42, 80 n.55; see also supra notes 18-22 and accompanying text.

25. See supra text accompanying note 15 (table).
selves at all. Indeed since, as is often indicated,\textsuperscript{26} lowering insurance costs is the prime desideratum of auto insurance reform, the bill proposed here requires only the same level of no-fault benefits as is required under tort liability insurance ($15,000 to $20,000 in most jurisdictions).\textsuperscript{27} Of course, more affluent motorists will carry more than the minimum limits, as happens under tort liability insurance.\textsuperscript{28}

That in turn raises the second question: What should be done (if anything) about losses suffered above the required limits carried by either no-fault or tort liability insureds? The proposed bill provides that a victim of any accident retains the right to bring a tort claim, despite any tort exemption of no-fault insureds, for damages in excess of any applicable inverse liability for no-fault coverage available to the victim. To the extent that a large majority of motorists elects no-fault limits of $100,000,\textsuperscript{29} this provision will not often come into play. In other words, only in the rare case that a victim’s losses exceed $100,000 would a tort claim normally be made.

On the other hand, the provision preserving the victim’s tort claim will more often come into play in dealing with members of a family whose motorists provided either no or low limits of no-fault or tort coverage. It would be hard to justify, for example, leaving without much or any remedy a small, poor child run down by the tortious conduct of an affluent no-fault insured. In such a case, if the parent of such a child had provided no or low coverage, the injustice would be manifest. But in order to control the cost of such preserved claims, the victim will be foreclosed from pursuing the claim further if the no-fault insured tenders to the victim within ninety days, after either the accident or the claim, a written offer to pay no-fault benefits\textsuperscript{30} covering economic loss in excess of any other coverage available

\begin{itemize}
\item \textsuperscript{26}N.Y. Times, Apr. 1, 1989, at 52, cols. 1-3.
\item \textsuperscript{27}DOT REPORT, supra note 7, at 22, 25-64. On the option of motorists choosing $15,000 versus $100,000 of no-fault benefits levels, see infra notes 33-36 and accompanying text.
\item \textsuperscript{28}See supra text accompanying note 15 (table).
\item \textsuperscript{29}See supra text accompanying note 28.
\item \textsuperscript{30}Note that there is no limit on the amount of benefits for economic loss which must be offered under this provision. This means that when a defendant-motorist’s liability insurance limits are relatively low compared to his victim’s net economic loss, an insurer will not be inclined to make “an early offer.” But in the great mass of cases where losses are substantially less than the defendant’s coverage, an early offer becomes feasible. Another possibility is to authorize the offer to the victim of whatever no-fault benefits the offeror carries, subject to a minimum of $100,000, to cover economic loss in excess of any other coverage applicable to the victim, thereby foreclosing pursuit of an ordinary tort claim. This coverage, being in excess of collateral sources, means that payment of
\end{itemize}
After such an offer, the victim will retain a tort claim only if he or she proves beyond a reasonable doubt (or perhaps by clear and convincing evidence) that the no-fault insured was guilty of wanton conduct. On the other hand, if no such tender is made, the victim retains his right to pursue a normal tort claim for lack of ordinary care by a preponderance of the evidence. Under this provision, a victim will always have the right to claim for losses above either inverse liability or no-fault coverage. The defendants are given an incentive, but are not compelled, to pay their victims expeditious benefits equivalent to those available under no-fault (covering only economic loss) rather than spending precious resources litigating fault and the value of pain and suffering—as well as possibly paying the latter.

Such an “early offers” approach will work better, for example, than simply allowing an injury victim to claim in tort for only economic loss (and not for pain and suffering) above his no-fault or inverse liability coverage. Under this latter approach, the defendant’s insurer will often be inclined to resist payment of the tort claim for economic loss in the realization that its exposure is thus limited to only economic loss. This seems often to happen for tort claims for property damage where insurers have no reason to fear exposure to payment for noneconomic loss. Under the early offers approach, on the other hand, an insurer is required to earn the right to pay a tort claimant for only economic loss by promptly (within ninety days) offering to do so. And yet, a defendant with either no or very doubtful tort liability—or no or low tort liability insurance—will not be induced to make an early offer because of the low probability of full-scale tort liability.

It is important to note that under the bill proposed here, motorists electing no-fault insurance are not required to carry liability insurance. This means that the poor, with no or few assets to protect, can buy only no-fault insurance protecting themselves and their families
for medical bills and any wage loss. Nor are those injured by the poor disadvantaged by this arrangement compared to what happens under tort liability insurance, since the poor are so likely to be either uninsured or underinsured. Note further that even those covered by no-fault insurance have the right to claim for losses in excess of their no-fault benefits, subject to the right of a no-fault defendant to make “early offers.”

In order to avoid compelling the poor to buy more insurance than they can readily afford (and thus perversely encouraging them to go completely uninsured), the proposed bill allows motorists to buy either $15,000 or $100,000 (or more) in no-fault coverage, thereby meeting the mandatory insurance requirement at either level.3 The bill could further provide that those buying only $15,000 limits will still be liable in tort for losses above any and all coverage applicable to those whom they tortiously injure, but they would not have the right to limit their tort liability exposure by making early offers to pay net economic loss up to $100,000. Because, however, there would be no requirement that tort liability insurance be carried, the poor, prompted to buy only $15,000 in no-fault coverage in order to save money, need not be concerned any more than they are now about carrying no or low tort liability coverage to protect often non-existent assets. On the other hand, the more affluent will be induced to buy at least $100,000 in no-fault coverage to get not only the benefit of such coverage, but of making early offers, with concomitantly lower costs for their excess liability coverage.

All this raises two additional objections to the choice-based bill. First, since no-fault insureds buying full coverage of $100,000 remain liable for losses in excess of inverse liability, no-fault, or other coverages (subject to being able to make early offers), persons buying $15,000 of either liability (including inverse liability) or no-fault coverage will more often be able to claim against no-fault insureds than will those buying fuller no-fault coverage. This can arguably be justified by considerations of income redistribution:34 it is the poorer who will buy minimum coverage (under either tort, including inverse liability, or no-fault coverage). Under liability insurance, the poor—carrying either no or low liability insurance—can similarly draw more from the pool of liability insurance dollars than they pay

33. See supra text accompanying note 27.
into it. (Though in fact, they may not do so. The poor are often reluctant to invoke the legal process; in addition the poor suffer no or less wage loss and lower medical bills than the affluent.\textsuperscript{35}) Granted, the proposed plan preserves at least the theoretical advantage of the poor. In fact, it also advantages the affluent by guaranteeing those who buy no-fault that they will be covered up to high limits irrespective of fault, and by limiting their tort exposure with the early offer provision, which allows the option of paying only for net economic loss payable periodically. This further means that the temptation of tort claimants under normal tort liability to pad claims will largely disappear.\textsuperscript{36}

A second possible objection to the choice-based bill as structured above should be discussed. Because the inverse liability device is derived from uninsured motorist coverage, victims of tortfeasors who have chosen no-fault coverage lose their right to claim against such tortfeasors. Three arguments are offered in answer to that: (1) tort recoveries are almost never paid today by tortfeasors themselves, but by liability insurers; (2) with the rise in auto insurance costs (caused by the excesses of the tort liability system) and the concomitant rise in uninsured and underinsured motorist coverage, more and more tort claims are today asserted against one's own insurer and not against tortfeasors;\textsuperscript{37} and (3) according to empirical evidence, even motorists aggrieved to the point that they make successful personal injury claims do not feel hostility against the tortious drivers who injured them, nor do they find assuagement from tort payment.\textsuperscript{38}

But, to the extent one rejects these arguments, one course to follow would be to abandon the inverse liability device and follow the Kentucky optional no-fault auto insurance law which never takes away tort rights from those electing tort liability insurance. In Kentucky, in a collision between two no-fault insureds, neither can assert tort rights. But when a tort liability insured and a no-fault motorist collide, tort liability claims remain for each against the other—as, of course, is the case with two tort liability insureds.\textsuperscript{39} Although under the Kentucky system, those who choose no-fault must buy tort liability coverage for claims against them by tort liability insureds, if in

\textsuperscript{35} O'Connell, \textit{supra} note 3, at 518.
\textsuperscript{36} AIRAC, \textit{supra} note 7. For further discussion of "claims padding," see O'Connell, \textit{supra} note 34, at 334-40.
\textsuperscript{37} As legal philosopher Jules Coleman has suggested, the purposes of tort damages do not require that they be paid by tortfeasors. Coleman, Book Review, 97 \textit{Yale L.J.} 1233 \textit{passim} (1988) (reviewing W. Landes & R. Posner, \textit{The Economic Structure of Tort Law} (1987)).
\textsuperscript{39} Ky. REV. STAT. ANN. §§ 304.39-010 to 304.39-340 (Baldwin 1989).
fact no-fault coverage costs substantially less than tort liability coverage—which is very likely to be the case—exposure to tort liability may not be all that great. Ninety-nine percent of Kentucky motorists elect no-fault coverage. (That high percentage may be influenced, however, by the fact that there is a state mandated rate differential advantageous to those electing no-fault, along with the fact that motorists first must affirmatively reject no-fault in order to avoid such coverage.)

On the other hand, given the fact that insurers will not be sure in advance of the potential mix between tort liability and no-fault insureds, initial reductions in premiums may be significantly less compared to those which would occur by use of the inverse liability device, under which insurers can confidently know that no no-fault insureds are exposed to liability in tort to those electing no-fault insurance. Still, the Kentucky device may be a prudent course in states like Arizona with arguable constitutional barriers to the abolition or limitation of tort rights for personal injury victims. The Kentucky solution also has the psychological and political advantage that those electing tort coverage never lose their tort rights.

In closing, it might be noted that even allowing motorists to choose between no-fault and fault-based liability insurance will seem to some a big step. A more modest way of experimenting with the choice idea would be to limit the choice to coverage under uninsured and underinsured motorist coverage. That change would be relatively modest in that all claims for such coverages are already universally made against one's own insurer. Thus, a motorist would simply be asked to decide whether, after accidents with uninsured or underinsured motorists, he wishes to be paid by his own insurer on a fault or no-fault basis. Note too that many jurisdictions give motorists a choice whether to purchase uninsured motorist coverage at all. Thus, a motorist would now be given three choices: no uninsured motorist coverage; uninsured motorist coverage with inverse liability; or uninsured motorist on a no-fault basis. The attractiveness

40. See supra notes 15-20 and accompanying text.
41. A bill embodying this concept has been drafted by the author working in collaboration with Project New Start, a coalition of consumer advocates, community organizers, insurers, and others, and has been introduced in Arizona. But, for a discussion indicating that the constitutional barriers in states like Arizona may not be as great as first appears, see J. O'CONNELL, ENDING INSULT TO INJURY 223-27 (1975).
42. See supra note 21 and accompanying text.
43. See supra note 13.
44. See supra note 13.
45. A. WIDISS, supra note 13, § 2.5.
and feasibility of allowing uninsured motorist coverage to be offered on a no-fault basis is enhanced by the history of such coverage. When voluntary uninsured motorist coverage was first offered in the 1950s by certain stock companies in New York, a number of mutual companies offered an endorsement providing benefits for the policyholder and members of his family injured in an accident with an uninsured car, regardless of the legal liability of the uninsured driver.\footnote{46} Data derived from experience under such choices would be invaluable in deciding whether or not to extend choice beyond uninsured motorist and underinsured motorist coverages. Under such an experiment, the insurer would pay its insureds buying no-fault coverage up to whatever limits the insured had bought under uninsured or underinsured motorist coverages, with a right of subrogation (which would be especially valuable as to the liability coverage of the underinsured motorist).

\textbf{Surrebuttals}

Time and space restraints prevent extensive answers to the thoughtful pieces of my fellow contributors. But let me make a few points.

Professor Carr’s piece is, I fear, typical of so many economists’ dealing with the law; he allows his rigid premises to drive him to shaky conclusions. Thus, he asserts: “The real question is the desirability of fault versus the desirability of no-fault. A system which frees economic agents from liability for the harm they impose on others results in a reduction in the driving standard of care.”\footnote{47} By that token, of course, workers’ compensation and compulsory no-fault auto insurance are condemned. But is Professor Carr really advocating repeal of workers’ compensation? Certainly it is hard to make a convincing case that freeing employers from tort liability under workers’ compensation has increased the number and severity of workplace injuries. Even under no-fault auto insurance, where, unlike workers’ compensation, the tortfeasor does not have to pay his victim no-fault benefits (rather, he simply insures his own and his family’s injuries), there is as much or more research showing no adverse effect on the number and severity of motoring injuries as showing the contrary.\footnote{48}

As for Professor Gaudry’s research on the Quebec experience, cited by Professor Carr, his data did show that the Quebec no-fault

48. O’Connell & Joost, supra note 2, at 87 n.72.
act was followed by increases in injuries and deaths. But the effect of no-fault on such increases "is very small, if it exists at all." Rather, the increase was due to (1) the moral hazard from more people being insured because the act made insurance compulsory, and (2) the adverse selection stemming from flat-premium pricing that greatly reduces auto insurance costs for high risk drivers (such as young males)—thereby encouraging them to drive, whereas previously they had tended to be priced off the road.

Pursuing Gaudry's first point and probing even deeper into Professor Carr's ukeses, liability insurance itself violates Professor Carr's premise in that it too is a "system which frees economic agents from liability for the harm they impose on others." Is Professor Carr thereby advocating abolition of liability insurance itself?

Professor Carr is especially concerned about drunk drivers: "One cannot allow negligent drivers to decide whether or not they will be liable for the harm they cause to others. One cannot allow drunk drivers the option of being relieved of the responsibility for the harm they cause to others." But of course, under tort liability insurance, drunk drivers do not pay for the harm they cause; their insurers—and all insureds, drunk and sober—do. Here too, holding Professor Carr to his consistent conclusions from his premises, does he advocate that injuries from drunk driving should thereby be uninsurable? But regardless of his stance in that regard, a choice-based no-fault system can readily be adjusted to incorporate liability for driving under the influence of alcohol or drugs.

According to Professor Carr, "It should be noted that under our current system of negligence laws, traditional fault systems do offer consumers choices . . . . Automobile drivers can purchase accident and disability insurance to protect themselves against loss of income in the case of accidents in which they are the negligent party." But

50. M. GAUDRY, RESPONSIBILITY FOR ACCIDENTS: RELEVANT RESULTS FROM THE DRAG MODEL (Publication No. 544, Centre de Recherche sur les Transports, Université de Montréal, 1987).
51. See supra note 47 and accompanying text.
52. Carr, supra note 47, at 1093.
53. Id. at 1074.
that is precisely the point of no-fault reform: Why should two drivers adequately insured against auto accidents by first party coverage be, in effect, required to insure each other all over again with third party tort liability coverage for those same auto accidents? One can understand why lawyers—and insurance companies—love all that unnecessary insurance, leading to large premiums and contingent fees, but why should it appeal to an economist supposedly concerned with eliminating waste, not praising it?

As to Professor Carr's confident prediction that bad drivers will elect no-fault insurance and good drivers fault-based insurance, that seems by no means as inevitable as he would have us think. Bob Joost and I have written:

No a priori reason . . . indicates that disproportionate numbers of safe or unsafe drivers will prefer one form of insurance over the other. Economic analysis might suggest that unsafe drivers, knowing their lesser likelihood of recovering in tort, will opt for [no-fault] insurance, and conversely, safer drivers, knowing their greater likelihood of recovering in tort, will opt for

54. In a 1968 speech Bradford Smith, then president of the Insurance Company of North America, spoke as follows:

What alternatives are offered to a motorist under the present law? If he distrusts his chances of recovery under [the fault] . . . system and wants to be positively assured of recovery, he can buy [accident and health (a & h)] . . . insurance which is readily available and will compensate him promptly and equitably without regard to legal liability. The difficulty is that the customer cannot substitute such a direct benefits [a & h] contract for the [fault] . . . contract. For complete protection he must purchase both the [a & h] . . . policy and the [fault] . . . policy.

Thus, [a & h] . . . insurance, as a solution, is impractical unless the law is changed to eliminate liability under the [fault] . . . system. To the public, purchasing [a & h insurance] . . . policies and being required to also purchase a [fault] policy for the benefit of others and having others required to purchase [fault] policies for his benefit in the event of legal liability is illogical, inconvenient, and unnecessarily expensive.

But, up until now, that is the only alternative we have offered to simple reliance on the [fault] . . . system for recovery of loss due to automobile accidents; and our only explanation has been that it is true that our system involves a duplication of expenses, but there is also a duplication of benefits. If a claimant is successful in his [fault claim], . . . he will recover this judgment in addition to whatever he recovers from his [a & h] benefits contract. The public might well charge that the industry has developed a system requiring a motorist to buy twice as much insurance as he needs, so that in the event he is injured he may recover twice as many benefits as he needs.

Yes, that sounds preposterous, but that is, in effect, the present position.

So long as the premium for this duplicate coverage is a matter of a dollar or two, a policyholder might accept this proposition and look upon it like the football pool, ignoring insofar as possible the fact that he is the football. But when the premiums are substantial and grow larger in response to rising hospital costs, medical costs, automobile repair costs, and legal costs, he rejects the proposition. He can hardly be expected to be interested in paying double insurance premiums. Given the choice, it seems clear that he would prefer to pay the single premium and forego any double recovery in return for the elimination of duplication of cost.

Address by Bradford Smith, Jr., Mid-Winter Meeting of the Federation of Insurance Counsel, Miami, Florida (Feb. 1, 1968).
traditional [tort] insurance. But one can just as persuasively argue that safer drivers are more likely to be risk averse and therefore will opt for the more certain, no-fault insurance payments, even if they are lesser in amount. Conversely, unsafe drivers, being risk-preferred, will arguably opt for higher (if less sure) traditional tort insurance payments.58

Finally, even if it turns out that, disproportionately, unsafe drivers elect no-fault and safe drivers elect fault-based insurance, there is nothing to prevent implementation of a scheme of surcharges on unsafe drivers to correct the imbalance. But we need not inevitably assume that such will be the case any more than we must agree with any other of the rigid assumptions and conclusions of Professor Carr. Anyone who comes down on the side of preferring the tort system for auto accidents would seem to be an unrealistic guide through the thickets of automobile insurance.

Which brings us to Professor Little. Professor Little believes so deeply in the tort system, one is inclined to forgive his (uncharacteristically) churlish tone. His basic problem is he is an old-fashioned torts scholar who resents the disruption of pure tort principles by liability insurance and the focus on compensation for injuries that insurance has brought with it.56 That, in turn, as with Professor Carr, causes a certain myopia. Professor Little, like Professor Carr, pontificates as follows (Who’s getting churlish now? Must be catching!): “[P]rincipledly, I think any plan that allows people to opt out of personal accountability for wrongful acts is wrong. Indeed one person’s opting out of liability is a denial of another person’s rights under the law of torts.”57 Unmentioned by Professor Little are the huge numbers of poor—in Florida as well as in jurisdictions where motor vehicle tort liability insurance is compulsory—who find tort liability so expensive they go uninsured. As a practical matter, they too are opting “out of personal accountability for wrongful acts . . . [and denying] another person’s rights under the law of torts.”58 All this leads, of course, to very expensive uninsured motorist coverage imposed on those remaining in the insurance pool.

Professor Little goes on to bemoan “the hidden zinger in the

55. O’Connell & Joost, supra note 2, at 88 n.74.
56. See Little, Up With Torts, 24 SAN DIEGO L. REV. 861 (1987). In an elegant piece, Professor Little (rather wistfully) pines for old-fashioned tort law—more extant in England—focusing on morally culpable behavior, and not on redistribution of losses underwritten by insurance. (Nostalgia is okay in its place, but one must not get carried away.)
58. Id.
[choice-based] plan as to the poorest among us, [in that] in choosing the [no-fault] option . . . the poor people would also be choosing to give up all the rights to both noneconomic and economic damages that they have under existing tort law." But note, now many of those same poor are unwilling (or unable—it does not make much difference which) to redeem others' "rights to both noneconomic and economic damages . . . under existing tort law." So what Professor Little does not address is the basic injustice of the present system, whereby the uninsured (and underinsured), operating "dangerous instrumentalities," capable of inflicting huge losses on others, pay into the insurance mechanism for those they injure either not at all or at very low levels, while retaining the right to claim for huge amounts against those who injure them. Note that in most motorized countries, without the excesses of America's tort system, everyone, rich and poor and neither, can be expected to carry tort insurance coverage capable of meeting high and even unlimited losses.

As to Professor Little's solution, he wants a lot of no-fault coverage ($50,000) plus tort liability for bigger cases. But the figures for New York and other states indicate how very expensive that combination can be—disproportionately so for the tort liability portion.

Professor Little's solution of generous no-fault benefits coupled with a right to claim in tort above a high threshold raises another problem—namely, that the huge expense involved in unrestricted tort claims above a no-fault threshold is not limited to claims against motorists. One can note, for example, the phenomenon of the huge rise in so-called "third party" suits by recipients of workers' compensation—suits not against employers (who are exempt from tort liability) but against, for example, suppliers of equipment, such as punch press machines, to the employer. It now turns out that about half (forty-two percent) of all product liability payments are made for injuries already covered by workers' compensation.

Going beyond workers' compensation, increased social and private loss insurance benefits generally subsidize aggressive tort litigation by the insured parties, who are thereby insulated from dire need by that very same loss coverage. When one combines this with the

59. Id. at 1022.
60. Id.
61. Automobiles were so designated by the Florida courts as long ago as 1920. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 446-47, 86 So. 629, 631 (1920).
62. See supra notes 13-17 and accompanying text.
availability of a lawyer at a no-risk, contingent fee, along with the “American rule” by which the loser need not pay the winner’s counsel fees, the result is that loss insurance beneficiaries increasingly are encouraged to file a tort claim and resist any relatively quick but low settlement offer. This is not to say that lawsuits offer what loss insurance rarely does—payment for “pain and suffering” and similar intangible losses.64

This means that benefits paid by no-fault auto insurance can be expected to excite more aggressive tort claims against, among others, (1) car makers and suppliers of automobile parts and (2) the government and other parties who build and maintain roads. Arguably, society does not want to choke off wasteful, inefficient tort litigation in one area (against motorists) in order to expand litigation in allied areas (against car makers and the government). There may be a way to avoid that result, and at the same time encourage prompt, periodic payment of actual economic losses above the amount of auto insurance benefits: the choice-based no-fault bill could provide that when a motorist who is eligible for no-fault benefits makes a third-party claim, the defendant will also have the right to make an “early offer.”65 Thus, defendants are provided incentives to offer, within ninety days, to pay periodically the victim’s medical expenses, wage loss, and other monetary losses not covered by auto no-fault or other loss insurance applicable to the victim, plus an hourly fee for the victim’s lawyer. As a further feature, the law could provide that a third party defendant not making such a prompt offer would lose legal defenses based on the victim’s own fault.66 On the other hand, a defendant making such an offer would foreclose further pursuit of a tort claim in a normal situation. A claimant refusing such an offer could only prevail in court if he could show by a higher than normal standard of proof (such as beyond a reasonable doubt or by clear and convincing evidence, rather than by a mere preponderance) that the defendant had been guilty of a higher degree of fault (gross or wanton conduct, rather than merely negligent conduct or the mere

64. On the general point of loss insurance subsidizing liability insurance claims, see O'Connell, supra note 10.
65. See supra notes 30-33 and accompanying text.
66. On the justification for loss of the defense of the claimant’s contributory fault, see O'Connell, supra note 32, at 606-09. This feature might also be made a part of the “early offers” proposal as applied to motorists. Or it might be limited to third party defendants as an extra cost to them alone for the privilege of providing coverage excess to auto insurance and limited to economic loss.
presence of a defect in the product).\textsuperscript{67}

Turning to Craig Brown's piece,\textsuperscript{68} it carefully emphasizes that he is only suggesting a further alternative in case some difficulties (he fairly identifies) under the choice scheme are seen as barriers to its enactment. But, as he is quick to acknowledge, his proposal raises some problems of its own. Let me raise a few which may or may not be persuasive. If the central political problem of auto insurance at the moment is its high cost, a proposal such as his can be seen as threatening, raising, as it does, the specter of adverse selection and therefore, at the least, considerable actuarial uncertainty. Professor Brown acknowledges that both the plaintiff’s own lawyer and his own (no-fault) insurer will be under a strong incentive to encourage him to sue in tort (the lawyer to get his tort contingent fee, the first party no-fault insurer to fob off the claim on the other driver’s third party liability insurer). He argues that, nevertheless, even the seriously injured with relatively good tort claims would be inclined to accept the prompt certainty of no-fault benefits, coupled with some additional safeguards he tries to build in, and abandon their relatively uncertain (and sure to be delayed) torts claims. Since he builds on proposals structured by me for athletic injuries, I might well be inclined to agree with him.\textsuperscript{69} But my schemes are not faced with the incentive of the no-fault insurer totally avoiding payment if the no-fault benefits are turned down. (At that point only the liability insurer faces possible payment.)

When you stop and think about it though, once you postulate a plan that commits insurers to make preaccident commitments to offer no-fault benefits to injury victims who are then given a postaccident option of rejecting those benefits to sue in tort, one does not need a statute, nor does one need to make the cumbersome switch from third party liability insurance to third party loss insurance. Any third party liability insurer is free today to make such a preaccident commitment for victims seriously injured by the insurer’s insureds (“seriously injured” defined in Brown’s or any other way) above a threshold (also defined in Brown’s or any other way), subject to the victim’s right to reject and sue in tort.\textsuperscript{70} Granted, that would

\textsuperscript{67} Note that pending universal enactment of such no-fault laws with this “third party early offers” feature, the temptation will be to sue car makers or other third parties doing business across the country in a state without such a “third party early offer” provision. Arguably, however, such suits should be dismissed on the basis of forum non conveniens. \textit{Cf.} Piper Aircraft v. Reyno, 454 U.S. 235 (1981); R. Weintraub, \textit{Commentary on the Conflicts of Laws} § 6.29, at 352 n.5 (3d ed. 1986).


\textsuperscript{70} See O’Connell, \textit{Neo No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives}, Law & Contemp. Probs., Spring 1986, at 125
not change their exposure to tort claims under the threshold, nor would Professor Brown's proposal.

But with the exception for athletic injuries mentioned above, insurers have not done so. Why not? Well, fear of adverse selection is one reason. They could be wrong but, after all, it is their money they are refusing to bet on such a scheme, so maybe they know something Professor Brown and I do not. Another reason admittedly is the free rider problem. An insurer experimenting with such a scheme will face start up costs as well the actuarial uncertainty accompanying any insurance innovation. If the scheme is successful, competitors can copy it without facing the same start up costs or uncertainty. A statute like Professor Brown's compelling all insurers to start to play the game at the same time does address the free rider problem, but compelling insurers to try new and untried programs they do not want to try voluntarily is bound to meet their resistance. That means such a proposal will excite the opposition of both the trial bar and the insurance industry—which surely dims its prospects. On the other hand, his proposal is a welcome addition to the literature.

CONCLUSION

To return to where this article began, allowing motorists to buy no-fault insurance as a way out of the morass of the tort law would not only make sense to those foreigners mystified by our litigious ways, but to many Americans as well.

(discussion of the difference between a plan whereby the insurer is under a pre-accident obligation to tender no-fault benefits, while the injured party has a postaccident choice between accepting the tender or pursuing the tort action, as opposed to a plan whereby the injurer has a postaccident choice between tendering no-fault benefits or risking a tort suit, while the injured party is under a postaccident obligation to accept the tender of no-fault benefits if it is made).

71. For an answer to the reverse phenomenon of adverse selection by insurers against claimants under my offers scheme, see Moore & O'Connell, Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss, 44 LA. L. REV. 1268, 1283-84 (1984); J. O'CONNELL & C. KELLY, supra note 2, at 133-34.