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Reducing Noneconomic Damages by Trick

JOSEPH W. LITTLE*

PART I—DOOMED TRICKS

The magician's trick is to divert the eye of the audience away from the action. I always fall for it when someone is pulling a rabbit out of a hat, but I have not been tricked by the latest O'Connell-Joost "freedom to choose" no-fault plan.¹ (I will hereafter refer to this as the OJ plan.)

I could spend a number of pages uncovering the lurking legislative, administrative, and constitutional pitfalls in the proposal, but I am not going to do that. Instead, I will briefly demonstrate why I think presenting this plan in the guise of freedom of choice is something of a charlatan's trick that would not fool most lawyers and judges. I will then present some different approaches for solving the problem O'Connell and Joost want solved.

What O'Connell and Joost want to do and how they want to do it are plain enough. Their goal is to reduce automobile insurance rates and the method is to eliminate noneconomic damages. They doubtless anticipate that direct attempts to take away or cap noneconomic damages, to the extent needed to achieve their goal, would be doomed to political or constitutional failure.² They are keenly aware that few standard "threshold" no-fault³ states have adopted high enough levels of no-fault personal injury protection (PIP) benefits

* Professor of Law, University of Florida College of Law. B.S. 1957, Duke University; M.S. 1961, Worcester Polytechnic Institute; J.D. 1963, University of Michigan.
2. See, e.g., Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987).
3. By this I mean a noneconomic damage threshold based upon the original Kenton-O'Connell plan such as the one now in effect in Florida. See FLA. STAT. ANN. § 627.730-.7405 (West 1984 & Supp. 1989).
and tort suit thresholds to achieve their purposes. Stymied by those realities, they have made a bold attempt to borrow from the modish freedom of choice ideology in an attempt to lure the populace "to choose" to give up the right to sue for noneconomic losses (and maybe a lot of economic losses, too). Like the magician, they attempt to focus the readers' attention on what they are "getting" while diverting it from what they are giving up.

Here is the OJ plan. Everyone must choose to purchase either no-fault (NF) or tort (Tort) insurance. (Incidentally, you, sub silentio, are deprived of the choice of buying no insurance.) If you purchase NF, your NF policy sets the limit of your entitlement and you may bring no action in tort. To be definite, you retain no tort rights, not for economic losses in excess of your policy coverage, and not for noneconomic damages under any circumstances. Hence, if you buy, say, $20,000 in no-fault benefits and a negligent driver injures you to the extent of $100,000, you get your $20,000 policy limit and have no right to sue the tortfeasor. By the same token, the NF purchaser acquires immunity against negligence actions brought by others. Hence, if the tortfeasor in my first example was also a NF insured, he would enjoy total immunity for the harm done, including the amount exceeding the injured person’s NF benefits.

If, instead, you purchase tort insurance, you get no NF benefits and your right to sue remains unimpaired as to other Tort purchasers. Similarly, as to them, you have no immunity for your own negligence, but would be indemnified by your Tort insurer. (The description of the plan breaks down as to whether the immunity applies to losses that exceed the limits of the Tort coverage.) By contrast, when a Tort purchaser collides with a NF purchaser, mutual immunities prevent either party from maintaining a tort action against the other. Nevertheless, as a reward for the choosing to purchase Tort insurance, the Tort purchaser is permitted to bring an “inverse liability” tort action against his inverse liability insurer as an ersatz for the real tortfeasor. In effect, the injured party sues himself. In what may be a mildly disquieting revelation, the Tort purchaser will soon discover he also paid the inverse liability carrier to defend the action. What the Tort purchaser gets as his choice, then, is immunity against actions brought by NF purchasers and the right to buy as much uninsured motorist coverage as he pleases, which coverage treats a NF purchaser as an uninsured motorist. He also gets to sue other negligent Tort purchasers and likewise has no immunity against them (subject to the authors’ vagueness as to whether in-

5. See generally O'Connell & Joost, supra note 1, at 77-82.
6. The authors are vague on this, but to make sense the plan should supply immunity for damages in excess of the limits of the liability coverage purchased. If the plain-
sureds, NF or Tort, are immune as to damages exceeding the respective liability and inverse liability limits).

The first trick outcome here is the abolition of noneconomic damages *simpliciter* as to NF purchasers and the severe capping of noneconomic damages as to Tort purchasers. In fact, the actual limit on Tort purchasers' rights to recover noneconomic damages would be unpredictable in advance of a crash. If the Tort purchaser were to be injured by a NF purchaser (or were to suffer a single vehicle collision), the amount of recoverable noneconomic damages would be set by the policy limit of inverse liability insurance coverage reduced by the amount of economic damages suffered. If the Tort purchaser were to be injured by another Tort purchaser, the limit would be the higher of the defendant's liability coverage or the plaintiff's inverse liability coverage (also reduced by the amount of economic damages).

The second trick outcome is the abolition of economic damages as to NF purchasers to the extent they exceed the plaintiff's NF coverage, and the abolition of economic damages as to Tort purchasers to the extent they exceed the higher of the liability coverage (if any) of a defendant or the inverse liability coverage of a plaintiff. In sum, the freedom of choice plan not only does away with noneconomic damages for all intents and purposes, but it caps economic damages as well.

The purpose behind all this is to lower automobile liability insurance prices, and I do not doubt it would do so, at least in the short run. I also believe that the true costs of uncovered economic losses would be reintroduced into the insurance system in the long run, but I will not speculate where. What I will speculate about is the true nature of the choices the OJ freedom to choose plan offers. I will take current Florida law as the base line. The Florida no-fault statute requires all motorists (with exceptions that need not concern us) to purchase no-fault PIP benefits in the amount of $10,000, gives immunity as to PIP benefits payable under any policy, and gives immunity to no-fault purchasers as to noneconomic damages so long as a prescribed threshold is not exceeded. Otherwise, Florida law does not cover noneconomic damages. The purpose of this article is to show that the freedom of choice plan does exactly that, and that it is not a viable alternative to the current system.

7. The noneconomic threshold in the Florida plan is prescribed as follows:

(2) In any action of tort brought against the owner, registrant, operator, or...
not limit the common law actions to recover all economic and noneconomic damages caused by a negligent tortfeasor.

How would the OJ plan affect people in Florida? O’Connell and Joost figure that well-off folks, such as I, would buy Tort inverse liability coverage up to the limit satisfying our perceived needs to be secure against a catastrophe. Hence, I would buy coverage limits of between one and five million dollars. In doing so, I would likewise be buying liability coverage in the same amount as to all the rest of the world. In addition, to cover myself, the occupants of my car, and my family in other cars, against my own negligence (and the like), I would buy at least as much first party insurance as my PIP and other first party coverages now afford. In short, I would not tolerate a reduction in the total amount of automobile insurance coverages that are now in place from all sources (i.e., my own PIP, other first party and uninsured motorist’s coverages, plus other people’s liability and self-insurance coverages) to protect me and my family. Nevertheless, the authors of the OJ plan figure that this entire package will come cheaper than my present package of coverages, because they are betting that most people will choose to purchase NF coverage which, concomitantly, makes me immune to any potential liability as to them. If they are correct, my rates may indeed go down and the only thing I will have lost is the potential of a huge recovery (i.e., more than my one to five million dollars inverse liability coverage) against a very deep pocket. The risk of that is minuscule, but because I would worry about it, I would probably buy more inverse liability coverage, say, up to ten million dollars. In any event, the OJ plan may actually reduce my insurance rates to some degree while I


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remain as well covered as I now am for both first party benefits and third party entitlements, including both economic and noneconomic damages.

But what of the NF purchasers? O’Connell and Joost figure that most poor people and many of the vast middle class who get by, but only by pinching pennies, will opt for NF coverage. Under the OJ plan this coverage must have “a high established limit on benefits.”

I presume that this means something substantially higher than the $10,000 in PIP benefits Florida now requires (perhaps the New York limit of $50,000); hence, the vast crowd of NF purchasers will see their no-fault premiums rise, perhaps dramatically. O’Connell and Joost would respond to this revelation in two ways. First, the NF purchasers would be getting substantially more no-fault coverage, which is true and to the good. And, second, they would be choosing to be immune to tort liability and, consequently, might drop any liability insurance they had been purchasing.

To the latter point, I have two serious rejoinders. Florida does not presently require liability coverage except for those folks who run afoul of the financial responsibility law. Probably it should, but it does not. In the meantime, poor people have little reason to purchase liability insurance because they have little to lose. If they have something worth protecting, it is most likely their homes, which the Florida law already zealously guards against creditors. In short, the

8. O’Connell & Joost, supra note 1, at 81.
10. The Florida financial responsibility statute requires covered motorists to purchase liability insurance with limits of $10,000 for the bodily injury or death of a person; of $20,000 for two or more persons; and of $5000 for property damage. FLA. STAT. ANN. § 324.021 (West Supp. 1989).
11. The Florida Constitution provides an impenetrable barrier against tort claims as follows:
   (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by the head of a family:
      (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;
      (2) personal property to the value of one thousand dollars.

FLA. CONST. art. X, § 4.
poorest class of NF purchasers under the OJ plan (which probably extends well into the bottom tiers of the middle class) would see a net rise in the amounts they pay for motor vehicle insurance. Finally, and this is the hidden zinger in the OJ plan as to the poorest among us, in choosing the NF option at an elevated price, 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. In other words, the vaunted choices in the OJ plan omit two valuable choices, either of which would be preferable to people in this class: retain the present system and purchase more no-fault benefits, or retain the present system and spend their money exactly as they now are spending it. In short, this fabulous freedom of choice plan limits rather than creates choices, and the ones it takes away are preferable to the ones it offers.

Things could come out even worse for the poorer classes. If, for example, the minimum tort coverage were set low enough, the price of that coverage might prove to be less than the price of the augmented NF coverage. If so, the poorest people, and maybe others too, could be lured into buying into that plan to save money. In doing so, they would be abandoning all no-fault coverage, which they ought to have, and buying liability coverage which they don't need at all. And on top of it, the amount of liability coverage they buy would simultaneously cap their tort rights (except as against a Tort insured, such as myself, with higher limits). Hence, the OJ plan might well drive many of the poorest people into making a perverse choice indeed.

By a similar analysis I can demonstrate that the OJ plan would put the people in the middle in a quandary. People in this class may have some nonhomestead assets (or prospects of acquiring them) they want protected, and carry some liability insurance in addition to the required PIP coverages. Moreover, many are aware of the risk of catastrophic injuries in a highway crash and some carry modest amounts of uninsured motorist coverage to guard against the consequences. What would they do under the OJ plan? It is all a speculative matter, of course, but I would guess the less well off of this group would opt for NF and suffer the same losses as the poorest. Perhaps most of these would see a net reduction in total insurance payments (i.e., they would drop liability and uninsured motorist coverages but increase NF coverages), but others would see a net increase (particularly those presently with no or low limit liability coverage and with no uninsured motorist coverage). I would guess that most of these folks would just as soon choose the present system.

The OJ plan might offer the people in the higher tiers of the mid-

12. See generally supra note 11.
dle bracket a genuine opportunity to lower their motor vehicle insurance bills. If they opt for NF, the net price might truly be less than the sum of their current PIP, liability, and uninsured motorist coverages. Nevertheless, giving up tort recoveries in the event of a catastrophic automobile injury would nag at them, and some might purchase additional coverages. If so, their gains would be offset. All the NF purchasers would, of course, give up the right to recover in tort from those who are able and otherwise potentially liable to pay.

The people in the group just below me—say those now buying liability and uninsured motorist coverages in the amount of $300,000 per person—would have a hard choice. They could probably save money on insurance premiums by taking the NF option (at least if they did not add on additional coverages) but many would want to keep their tort rights intact. Perhaps they could still save money by buying $300,000 Tort coverage under the OJ plan (because of their immunity to the NF insureds) but this would not be a satisfactory replacement. For one thing, this option would give them no PIP benefits, so they would add first party coverage, thus reducing their savings. In addition, their tort entitlement would now be capped at $300,000 except against other Tort insureds (like myself) who have purchased higher liability limits. Hence, those choosing this option might raise their liability limits (say to $500,000 or even one million dollars), thereby further reducing their savings.

In sum, the OJ freedom to choose plan would cost the poorest people more money (albeit providing them more no-fault benefits) and would deprive them of the preferable choices they now have open to them. It might also perversely coerce the poorest people to opt into the emasculated (for them) tort system, eliminating their current no-fault coverages and drastically reducing their tort rights. By contrast, the most well-to-do people could reap a real savings in insurance premiums because of the immunity against suits brought by the NF insureds which the OJ plan forces the NF insureds to "choose.” These savings would be diminished, of course, if the well-to-do people prefer to buy back the tort rights (as I would) that the OJ plan would otherwise take away from them. Finally, the people in the middle would have the hardest choices, balancing the prospect of some immediate reduction in insurance rates and the loss of tort rights against buying back some part of existing rights at a higher price.

What I have said should reveal that I am no fan of the OJ plan. Although it might well take most noneconomic damages out of the
insurance system, it would do so at great expense to the poorer strata of the population. But these criticisms are merely economic. More principledly, 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. Although I will not examine the matter here, I suspect any statute having such an effect would be unconstitutional in the many states, such as Florida, where attempts to place caps on noneconomic damages (much less abolish them and cap economic damages as the OJ plan would do) have been thwarted on constitutional grounds. The so-called freedom of choice aspect of the plan is but a too clever gambit and will be seen as such. What may not be done directly, may not be done indirectly, so the plan will (and should) fail.

**PART II—SEMIWORKABLE IDEAS**

In this part I will set forth a few semiworkable ideas that might work. I call the ideas “semiworkable” because the most aggressive is probably unattainable, the next most aggressive has its own objectionable aspects, and the least objectionable (which is, so far as I know, a novel wrinkle to well-known ideas) will not produce deep enough cuts in costs to satisfy OJ proponents. The first of these is merely a counter no-fault proposal that O'Connell and Joost would probably endorse if they thought it would get accepted. The latter two proposals grew out of the work of a 1986-88 Florida Academic Task Force for Review of the Insurance and Tort Systems (Academic Task Force) which I participated in as a member of the academic research group.

**A. More Aggressive No-Fault**

I accept the OJ economic premise that shifting claims away from the tort system into a first party system can reduce the cost of insurance. To that I add this premise: If the legislature perceives a public benefit in limiting tort liability that is great enough to offset the concomitant losses in individual responsibility and common law remedies, then it should apply the new rule to all. Any idea of permitting some people to choose to opt out is repugnant and should be

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13. See Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987).
14. This mimics the well-settled rule that what a constitution prohibits being done directly cannot be done indirectly. See, e.g., Department of Revenue v. Leadership Hous., Inc., 343 So. 2d 611, 617 (Fla.) (Roberts, J., dissenting), cert. denied, 434 U.S. 805 (1977).
abandoned.

With these premises in mind, I propose this system.

1. All motorists would be required to purchase NF coverage for PIP benefits up to a high limit, say, $50,000. A NF insured tortfeasor would be immune as to PIP losses payable from this source.

2. A no-fault noneconomic damages threshold, like the one in Florida, would be retained or instituted.

3. A new tort threshold of $50,000 (or whatever the NF limit is) as to all tort bodily injury damages, both economic and noneconomic, would be instituted.

4. Liability and uninsured motorist coverages would be offered for liabilities in excess of the $50,000 floor up to any limit a purchaser chooses to buy.

The third proposal is new. It is a barrier to recovery and not to suit. Thus, a plaintiff who brought a suit, satisfied a noneconomic damages threshold, and obtained a verdict of $100,000, of which $30,000 was economic and $70,000 noneconomic, would recover a judgment of $50,000. Indeed, it would not matter how the verdict was divided between economic and noneconomic losses, as long as the verdict was $100,000, the judgment would be $50,000 in every case. I predict this plan would squeeze a mass of noneconomic losses out of the insurance system (to be internalized by the victims) and should reduce the amount of litigation and concurrent expenses. It would not offer any trick choices and it would not benefit the rich at the expense of the poor.

As to the poorest population, the required NF coverage would raise their insurance costs, as does the OJ plan, but it would not tempt any of them to opt into a liability plan that would offer them nothing. Indeed, persons in this category would be best off not to buy liability insurance. At the same time, they would retain all the common law rights in tort except for the $50,000 threshold.

The middle and upper classes would probably save some money. The lower middle class should also opt solely for NF, thereby offsetting the cost of the added NF coverage by dropping liability coverage. People in the middle and higher categories would retain liability and uninsured motorist coverages, but their entire insurance packages should cost somewhat less because of the noneconomic losses squeezed out of the entire system by the uniform $50,000 threshold operating on top of the typical noneconomic damages NF threshold.

This plan I offer as a direct alternative, free of tricks. Two barri-
ers stand in the way of enactment: political acceptability and constitutional prohibitions against infringing common law rights. I offer no "freedom to choose" smoke screen on the former point; the plan will have to stand on its merits. Moreover, I believe the plan would pass constitutional muster under the analysis courts have applied to workers' compensation and the initial round of no-fault plans, but I will not examine the issue here.

B. Prompt Resolution of Meritorious Claims

What to do about skyrocketing medical malpractice insurance rates was a major item on the agenda of the Academic Task Force. Preliminary studies showed increasing payments and increasing costs of defending claims were major factors driving the perceived crisis. (Another was the driving force of the so-called insurance cycle.)

17. I confess that Kluger v. White, 281 So. 2d 1 (Fla. 1973), poses an obstacle to this plan, but if the public need is great enough, it could be surmounted.
19. The Academic Task Force provided the following description of the underwriting cycle:

The phenomenon known as the "underwriting cycle" is unique to the insurance industry and is a major cause of the periodic malpractice insurance crises. An entire cycle is defined by the period of years in which insurer underwriting profits cycle from above average to below average. Such cycles have always been a feature of the insurance industry and this is especially true for medical malpractice liability insurance, which generates large loss reserves for investment.

1. Causes of Underwriting Cycles. Economic cycles usually result from changes in demand but, since the demand for insurance is rather constant, the insurance underwriting cycle results from changes in supply.

The cycle may begin when insurance is very profitable and, as a result, capital flows into the industry as new insurance companies are formed. To attract business, the new companies cut rates forcing the existing companies to cut rates in order to protect their market share. The rate cutting continues until the underwriting losses exceed the amount that insurers are willing to bear. At that point, some insurers will withdraw from the marketplace, some because of insolvency and others voluntarily. This shrinkage in supply permits the remaining insurers to raise rates to more profitable levels. The rate increases come quickly, and usually are accompanied by tighter underwriting standards, which result in more frequent refusals by insurers to provide insurance. The higher rates restore profitability, which attracts new capital into the marketplace, and a new cycle begins.

Effect of Interest Rates on Underwriting Cycle

Underwriting cycles are frequently, but not always, driven by changes in interest rates. In addition, interest rates may prolong an underwriting cycle. The most recent cycle (the longest in history) was probably influenced by both types of effect.

The historically high interest rates which peaked in 1981 permitted substantial rate deductions or, at least, a delay in rate increases as insurers competed for premium dollars to invest. As interest rates declined, premium increases became necessary to offset the effect of reduced investment income.

Id. at 89-90.
Although the doctors were pushing hard for it, the Academic Task Force refused to recommend any form of immunity or direct noneconomic damage limitation.\textsuperscript{20} Instead, the Academic Task Force was persuaded the litigation process itself was out of control and could be tamed to provide major overall savings.\textsuperscript{21} The evidence showed defendants seldom get serious about negotiating with plaintiffs until a trial date is set. Moreover, plaintiffs too often file malpractice lawsuits before obtaining careful expert review of whether malpractice was the probable cause of the harm.

What emerged was a “Prompt Resolution of Meritorious Medical Negligence Claims Plan” (PR Plan) of two parts.\textsuperscript{22} The first part requires the intending plaintiff, as a condition of bringing suit, to inform an intended malpractice defendant of an intention to file suit prior to bringing the action\textsuperscript{23} and to include with the notice a written opinion of an expert “corroborating” the claim of negligent injury.\textsuperscript{24} Similarly, as a condition of denying the claim, the PR plan requires defendants to submit to the plaintiff an expert opinion refuting medical negligence.\textsuperscript{25} These preliminaries are intended to force both parties to evaluate the claim earlier rather than later.

The second stage of the plan is intended to offer the parties economic inducements to enter into voluntary, but binding arbitration. The financial gain to the insurance system would come from limitations on noneconomic damages and from a cheaper resolution process.

Here is how the arbitration plan works. Either party can demand binding arbitration with the following possible outcomes:

1. The Parties Arbitrate: The defendant pays the plaintiff full economic damages, noneconomic damages up to a maximum of $250,000, and reasonable attorneys fees. A three-member arbitration panel makes the nonreviewable (absent fraud, for instance) findings.

2. Neither Party Demands Arbitration: The parties proceed to trial under the existing law of torts.

\textsuperscript{20} Id. at 2.

\textsuperscript{21} Except for the limited but important instance of catastrophic injuries to infants suffered in the birthing process. See Fla. Stat. Ann. § 766.303 (West Supp. 1989) (providing a no-fault plan for tightly defined neonatal injuries).

\textsuperscript{22} Academic Task Force for Review of the Insurance and Tort Systems, \textit{Medical Malpractice Recommendations} (1987) [hereinafter \textit{Malpractice Recommendations}].

\textsuperscript{23} Id. at 16.

\textsuperscript{24} Notice of intent to sue, but without the expert opinion, was already required in Florida. Fla. Stat. Ann. § 768.57(2) (West 1986).

\textsuperscript{25} \textit{Malpractice Recommendations}, supra note 22, at 18-19.
3. The Plaintiff Demands Arbitration and the Defendant Declines: The parties proceed to trial under the existing law of torts, modified to award a successful plaintiff prejudgment interest on the recovery and a reasonable attorney's fee.

4. The Defendant Demands Arbitration and the Plaintiff Declines: The parties proceed to trial under the existing law of torts, modified to cap noneconomic damage recoveries to $350,000.26

The Florida legislature enacted a slightly modified version of the plan into law and it now regulates medical malpractice actions.27 Obviously, should the plan prove effective, it could be extended to the general run of tort actions, including automobile negligence cases.

I personally do not much like the induced arbitration part of the plan and doubt if it will deliver enough benefits to give it transferability. To begin with, the PR plan is infected with a perversity that is reminiscent of the OJ plan. To my way of thinking, it plainly favors defendants. As I see it, defendants should always demand arbitration in cases of strong liability and severe damages and should always refuse to arbitrate in cases of iffy liability and moderate or small damages. Hence, strong plaintiffs would usually see their noneconomic damages capped ($250,000 if they arbitrate and $350,000 if they do not), and weak plaintiffs would usually be forced to trial. If I am correct in my perception of the imbalance here, the Florida Supreme Court will give a very hard look at the constitutionality of the scheme under existing tort limitation jurisprudence.28

I am also doubtful that the induced arbitration scheme, if constitutional, will achieve the intended economic benefits. Of the four possible outcomes only number one (arbitration) and number four (plaintiff declines arbitration) offer any prospect of savings. Outcome number two (neither party demands arbitration) is neutral and number three (defendant refuses arbitration) could actually add costs in cases won by plaintiffs. Nevertheless, time will tell. If my earlier prediction that defendants regularly demand arbitration in bad (for them) cases is correct, the PR plan may squeeze some real money out of the medical malpractice insurance system.

C. Mandated Demand for Judgment Plan

I invented the Mandated Demand for Judgment Plan (MD Plan) as an alternative to the PR plan, which I didn't like. This is the way it works. First, in the medical malpractice setting the same prerequisites to filing and denying suits that were described under the PR

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26. Id. at 15-27.
28. See, e.g., Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987).
plan could be adopted. Thereafter, the MD plan would force the parties into early settlement negotiations as follows:

1. After filing suit, the plaintiff must make a demand for judgment against each defendant within ninety days of the date the action began.
   
   (a) The demand must be filed with the court and becomes a part of the record of the suit.
   
   (b) If the plaintiff does not file the demand, the defendant may file a motion to dismiss and the action shall be dismissed with a right of the plaintiff to replead if and only if the action is not otherwise banned by operation of law. A second dismissal for failure to make a demand shall be a dismissal with prejudice.29
   
   (c) No case in which the demand is not made will be permitted to go to trial.30

2. If the demand is not accepted and the litigation continues to the point that the plaintiff has obtained a final and binding verdict:
   
   (a) If the amount of the verdict exceeds the amount of the plaintiff’s unaccepted demand, the defendant shall be required to pay the amount of the verdict plus interest computed at the rate of eighteen percent per annum compounded on the amount of the plaintiff’s demand for judgment beginning at the date the demand was made as determined by the court record;
   
   (b) But if the amount of the verdict is less than the amount of the plaintiff’s unaccepted demand, the defendant shall pay the verdict, less all the reasonable fees, costs, and expenses accrued by the defendant in defending the case after the date the demand was made. These reductions shall be made before any computation or payment of a fee for plaintiff’s lawyer is made.

3. At any time within ninety days of the date of plaintiff’s demand, the defendant may make a counteroffer and file it in the record of the litigation. If the counteroffer is not accepted and the litigation continues to the point that the plaintiff has obtained a verdict and if the amount of the verdict exceeds the amount of the plaintiff’s unaccepted demand, the sum on which the plaintiff shall be entitled to receive interest shall be the amount of the plaintiff’s demand minus the amount of the defendant’s offer, beginning at the date the demand was made as determined by the court record. If the action is

29. This sentence is new. It is intended to deny plaintiffs the discretion to indefinitely put off making a demand.

30. This part is new. It is intended to prevent plaintiffs and defendants from agreeing sub silentio to ignore the demand process.
against joint and several tortfeasors, the amount of the offer shall be the sum of valid independent and separate offers and the liability for interests on the difference between the demand and the offer shall be a joint and several liability. No defendant shall be required to make a settlement counteroffer.\textsuperscript{31}

4. (a) The plaintiff may make a series of demands within the 180-day period succeeding the date of the first demand with each new demand revoking its predecessor. After the expiration of the 180-day period, the plaintiff may make no new demands for the purpose of invoking the operation of the plan, except that the plaintiff may make one additional demand in the ten-day period immediately following the 180th day if the defendant makes a counteroffer on the 180th day or the plaintiff first learns of such a counteroffer on the 180th day.

(b) The defendant may make a series of counteroffers during the 180-day period succeeding the date of the plaintiff's initial demand with each new demand revoking its predecessors. After the expiration of the 180-day period, the defendant may make no new counter-offer for the purpose of invoking the operation of the plan.\textsuperscript{32}

This plan is intended to induce an early and sincere dialogue about settlement. Plaintiffs must open the negotiations and do so knowing that unrealistically high demands will cost them money. (The majority of the Academic Task Force research group thought that the threatened cost to plaintiffs was too small.\textsuperscript{33}) Defendants can choose to sit on their hands, but would do so at the risk of substantial additional costs.\textsuperscript{34} Because most actions have some legitimate settlement value (especially with the filing prerequisites described above), defendants should ordinarily respond with a counteroffer. Once this occurs, the process will have begun and might often lead to a settlement.

If these inducements work, cases which can be settled should be settled earlier than they now are, thereby saving costs. I have a hunch the settlement amounts would tend to be less than courthouse door settlements and jury awards. The downside risk, so far as costs is concerned, is that some cases plaintiffs would otherwise lose at trial might settle and, if defendants systematically offered too little,

\textsuperscript{31} This sentence is new and is added merely to make explicit what was implicitly intended. \textit{Academic Task Force for Review of the Insurance and Tort Systems, Medical Malpractice Recommendations of Research Staff} 16 (1987) [hereinafter Medical Malpractice Recommendations of Research Staff].

\textsuperscript{32} This subpart has been rewritten to provide greater flexibility.

\textsuperscript{33} \textit{Medical Malpractice Recommendations of Research Staff, supra} note 31, at 16. The majority also criticized the MD plan as not providing "sufficient predictability for those who evaluate expected loss payments." \textit{Id.}

\textsuperscript{34} If the 18\% interest from the date of demand were thought too little to be an incentive, it could be substantially helped by making it run from the date of the injury.
the interest surcharge would actually drive up costs.

The MP plan is transferable to all tort litigation. I believe it would lower insurance costs enough to make a difference. But beyond that, if properly attended to by the judges and defense concerns, it could help bring the unruly litigation process under control. It would not and should not make defendants settle worthless cases or give in to unrealistic demands, but it should make them undertake determined settlement efforts early. The one thing it lacks is an element for penalizing plaintiffs (or their lawyers) who prosecute worthless cases to losses before juries. Maybe someone else can think of how to do that, but I doubt there are enough of these cases to make much difference in the cost of insurance.

**Summary**

The OJ plan is a trick. The so-called freedom to choose is illusory and benefits the rich at the expense of the poor. A beefed up no-fault plan with an added level of immunity for all would be preferable on several counts. Beyond renewed no-fault efforts, various plans that would induce early settlement attempts could be beneficial both in bringing tort litigation under control and in reducing costs.