Whither No-Fault in California: Is There Salvation after Proposition 103

William C. George
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Regardless of what we call it—accident, damages, or injury to person or property—it all comes down to this: Someone will either pay or sustain a loss. Most perils are latent financial risks. For example, a motorcycle rider who refuses to wear a helmet gambles on a head injury—and society risks bearing the cost of that injury if the rider has no insurance. In an earthquake prone area, the possibility of earthquake loss is an insurance risk and a chronic financial risk for both the inhabitants and those lenders holding security interests in real and personal property in the area. One of the most common human activities involving hazards and financial risk is owning and driving an automobile—especially in dense urban areas. Is there a better way than the one we now have to apportion the financial risk for destruction caused by automobiles?

I. WHO IS SUPPOSED TO PAY FOR THE DAMAGES?

Courts and legislatures operate by assigning risk, and sometimes income, among the parties affected by a legal decision or a new statute. Before assigning the risk or the income, courts and legislatures try to find out which parties have, or had, control of the thing causing damages or increasing the risk of failure. In tort, the liable party is the one setting in motion the forces causing the foreseeable inju-

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ries to person or property. In contract, it is the draftsman or designer of the terms or the person who fails to act. In many instances, this is a shared responsibility, as in cases of contributory negligence or estoppel. In financial activities, this principle is “risk and return.” We have all kinds of little homilies to say it in other ways: “no guts, no glory;” “nothing ventured, nothing gained;” “no pain, no gain.” But the idea is if you want to go after the goodies you have to think about the downside.

The concept of no-fault auto insurance goes against this policy grain. Under no-fault laws, regardless of culpability, the financial risk is pinned on the injured party. The bad actor is freed of risk, up to the limits of the injured person’s no-fault coverage. However, after all of the horror stories about uninsured motorists, it is easy to conclude that “it’s a jungle out there” and the only way to survive is to protect yourself. No-fault does just that, and does it even better than uninsured or underinsured motorist coverage since there are fewer steps the insured must complete to get his or her money.

Although there is probably more bang for the buck under no-fault, it is harder to sell since, aside from running against our traditional policy for assigning financial risk, it insults our basic belief that wrongdoers should pay for the cost of repairs to persons and property they injure. Making people pay damages satisfies our need to punish the bad guy. Our financial responsibility laws assume everyone who should pay can pay; although we know these laws do not work, we are frustrated when we cannot make the wrongdoer pay.

There are many suggested schemes to force all drivers to buy insurance. Several examples are requiring proof of insurance for car registration;\(^1\) permitting police to ask for proof of insurance if they stop you for some other violation;\(^2\) or requiring proof of insurance to get a driver’s license.\(^3\) Yet, uninsured drivers still exist in states where some of these remedies have been tried. Though we may not realize it, this predicament starts us on the path to no-fault. In order to protect ourselves and our property, we purchase first party coverage such as collision, comprehensive, and medical payments insurance. Then legislatures require insurers to offer coverage for uninsured and underinsured motorists and most of us buy it.

The result of these efforts is that we pay to protect ourselves. That is the no-fault seed. But the seed never seems to germinate and the


\(^{2}\) CAL. VEH. CODE § 16028 (West 1989).

\(^{3}\) See King v. Meese, 43 Cal. 3d 1217, 1225, 743 P.2d 889, 891, 240 Cal. Rptr. 829, 833 (1987) (referring to a Michigan case, Shavers v. Kelly, 402 Mich. 554, 267 N.W.2d 72 (1978)) (“the Michigan Supreme Court reviewed a legislatively enacted no fault insurance law, which required all drivers to establish their financial responsibility in order to register or operate a motor vehicle”).
question is why.

II. HOW DOES THE GOLDEN STATE FEEL ABOUT NO-FAULT?

On its face, the evidence indicates Californians do not like no-fault. But have the people ever had an opportunity to express their opinion on a well-drafted, equitable, no-fault proposal? Based on the defeat of Proposition 104 in November 1988, the trial bar wants us to conclude that the people have knowingly rejected the idea.4 But remember that the no-fault initiative failed in the same election in which the people rejected the trial bar's initiative, Proposition 100.5 These most recent rejections appear to reflect popular feelings of "a pox on both your houses"—dismissing anything associated with either the insurance industry or attorneys, rather than reflecting condemnation of the no-fault insurance concept.

III. NO-FAULT'S RECENT LEGISLATIVE HISTORY IN CALIFORNIA

Since 1970, beginning with Senator Anthony Beilenson's personal protection insurance bill (SB 797), about thirty-five no-fault type bills, some called personal injury protection (PIP), have been introduced in the California Legislature.6 Of that number, only six got

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4. During the session's policy committee and fiscal committee hearings for AB 354 (Johnston), the California Trial Lawyers Association's witnesses alluded several times to the defeat of Proposition 104 as the people's rejection of no-fault.
5. Both propositions were on the November 8, 1988 ballot. Proposition 100 lost by 3,849,572 yes votes to 5,562,483 no votes, or 40.9% to 59.1% respectively. Proposition 104 lost by 2,391,287 yes votes to 7,015,325 no votes, or 25.4% to 74.6%. March Fong Eu, Statement of Vote 39-40 (Nov. 8, 1988).
out of the house of origin and none reached the Governor. These bills are the subject of the immediately following discussion. During the same period there were at least two attempts to enact no-fault through initiatives. These are discussed in a later section.

On April 2, 1971, Assemblyman Jack R. Fenton (D. Los Angeles) launched AB 1505, his “Motor Vehicle Basic Loss Insurance Act.” As introduced, the bill provided for unlimited medical benefits; up to $5,000 for funeral, burial, work loss, and other expenses; and required proof of insurance before an automobile could be registered. Cancellation of the insurance resulted in forfeiture of both license plates and registration. Between its introduction and September 30, 1971, the bill was amended three times in the Assembly and twice in the Senate. In the final version, medical and all other benefits had been reduced to a maximum of $10,000 and, although proof of insurance was required for registration, cancellation no longer resulted in forfeiture of license plates and registration. On September 29, 1971, the Senate Judiciary Committee sent the bill to the Rules Committee for assignment to a committee for “interim study,” a euphemism for a mortally wounded proposal which cushions its demise for close friends and supporters. Thus ended no-fault in the 1971 session.

Early the following year, on January 18, 1972, Assemblyman Fenton introduced AB 125, the “Motor Vehicle Basic Loss Insurance Act,” similar in content to the final version of AB 1505. Between its introduction and November 22, 1972, the Assembly and Senate each amended AB 125 five times and changed its title to the “Fenton-Song Motor Vehicle Reparations Act.” The Legislature limited PIP benefits to a total of $5,000. It also provided that after the $5,000 was exhausted, medical costs would still be allowed if total PIP ben-

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8. “Interim” refers to the interim between sessions but is used to mean the time between the two years of the session or the time between the end of one session and the beginning of the next. Policy committees, by rule, are constituted as investigating or study committees. As study committees, they look at the subject matter of the bills. If a bill’s subject actually is to be studied, there is a procedure which must be followed to set that hearing. If being sent to interim is only a nice way of killing a bill, nothing is done following the session. See Assembly Standing Rule 11.5, ASSEM. DAILY J., Dec. 5, 1988, at 13; Rule 19, ASSEM. DAILY J., Dec. 5, 1988, at 18; Rule 59, ASSEM. DAILY J., Dec. 5, 1988, at 32; see also Senate and Assembly Joint Rule 36, S. Res. 2, 1989-90 Sess. (Cal. 1989).
benefits would have reached $50,000. For automobile accident cases, the bill established comparative fault and abolished the defenses of contributory negligence, assumption of risk, and last clear chance. General damages were available only for serious injuries and only after exhaustion of first party benefits. In November 1972, AB 125 was laid to rest in the Senate Finance Committee—which taught its proponents a lesson. If possible, draft a bill so it will be deemed “nonfiscal” to avoid giving opponents on fiscal committees extra opportunities to kill it.

On May 23, 1972, Senator Lawrence D. Walsh (D. Los Angeles) introduced SB 1493, prohibiting hitchhiking on freeway ramps. The Assembly amended SB 1493 to require the State Department of Public Works to put up signs and mark freeway off-ramps having histories of accidents. On November 28, 1972, the Assembly further amended the bill by cutting off its head, sliding a new body under it, and changing the author to Senator Alfred H. Song (D. Los Angeles). Installed was the “Fenton-Song Motor Vehicle Reparations Act,” similar to the final version of AB 125. This is an example of how proponents resuscitate moribund bills in the waning days of a legislative session: AB 125 was killed November 22, 1972 in the Senate Finance Committee, and on November 28, 1972, SB 1493 was hijacked to carry the message. SB 1493 sustained minor amendments on November 30, 1972, but remained substantially the same as the November 28, 1972 version. The Assembly passed SB 1493 on December 1, 1972 by a vote of forty-three to twenty-three. However, one good turn deserves another, and when SB 1493 returned to the Senate for concurrence on the Assembly amendments, opponents challenged the germaneness of the no-fault amendments. Under Senate Standing Rule 38.5 (a rule selectively invoked when other killing methods are too cumbersome), the amendments were not relevant to the bill in its prior form. Since the amendments were not germane,
without their removal, the bill could go no further. That was the last of no-fault in the 1972 session.

At this point, something should be said about one-year versus two-year sessions of the Legislature. In November of 1972, California amended its Constitution to provide for two-year instead of one-year sessions. Thus, the life cycle of the above mentioned bills lasted one year. After the 1972 Session, bills' life cycles may run into a second year since, under the new rules, any bill out of the house of origin on or before January 30 of the second year of a session can continue through the entire second part of the session. Now on to the bills arising during the two-year sessions.

Undaunted by his reverses in previous years, on January 10, 1973, Assemblyman Fenton and his supporting co-authors introduced AB 50, the "Fenton-Song Motor Vehicle Reparations Act," a bill very similar to the final version of the prior session's SB 1493. The Assembly amended AB 50 once and the Senate amended it five times. In its final version, AB 50 allowed a maximum of $50,000 for medical treatment expenses and a combined maximum of $5,000 for wage loss, services loss, survivor benefits, and funeral expenses. The bill also prohibited duplication of recovery, provided for subrogation, established comparative fault, and abolished the doctrines of contributory negligence, last clear chance, and assumption of risk in auto accidents. AB 50 died on August 31, 1974 when the Assembly failed to concur in Senate amendments and no subsequent conference report was agreed upon.

On March 15, 1973, while AB 50 was winding its way through the legislative process, Assemblyman John F. Foran (D. San Francisco) and eight others introduced AB 801. The bill required mandatory first party coverage of at least $10,000 per person and $20,000 per accident, with a maximum $2,000 funeral expense benefit. In addition, the bill repealed the guest statute, established comparative fault, and abolished the doctrines of contributory negligence, last clear chance, and assumption of risk. To assure compliance with the law, the bill prohibited registering and operating a vehicle unless the required insurance was in effect throughout the registration pe-

12. On November 7, 1972 the people of the state of California approved a proposed amendment of California Constitution article IV, section 3(a) providing for each session to commence on the first Monday of December of each even-numbered year and adjourn at midnight on November 30 of the following even-numbered year. CAL. CONST., art. IV, § 3(a) (1879, amended 1972). The former subdivision (a) provided for annual sessions beginning at noon on the first Monday after January 1. CAL. CONST. of 1879, art. IV, § 3(a).

and the Department of Motor Vehicles was required to revoke registration if the insurance was terminated.

From its introduction in March 1973 to August 22, 1974, AB 801 was amended three times in each house. The final version was similar, in general, to the original version but it did not establish comparative fault or abolish the defenses of contributory negligence, last clear chance, and assumption of risk. In the final amended version, the Judicial Council, Department of Insurance, and insurers were given responsibilities to assure the legislation’s goals were accomplished. For example, the bill required the Judicial Council to report to the Speaker and President Pro Tempore on whether the legislative intent was being achieved. Although the Assembly had originally passed AB 801 by a fifty to ten vote, the Assembly refused to concur in the Senate amendments and it, like AB 50, died awaiting conference. So much for no-fault during the 1973-74 session.

AB 801’s competition with AB 50 managed to divide no-fault proponents. AB 801, in general, appeared to provide greater benefits, at least according to the consultants that analyzed both bills. Assemblyman Alister McAlister (D. Santa Clara), who would later author his own no-fault bills, made one of the more damaging statements against AB 50. According to Assemblyman McAlister:

Elimination of most cases of recovery for pain and suffering and attorneys’ contingent fees will make it difficult for injured persons to obtain 1st-class legal representation in disputes with insurance companies. And even under no-fault, there will still be many disputes. For example, regarding whether medical treatment was both necessary and reasonable in cost and whether the injury in fact was caused by the accident. The tendency will be for people to accept whatever they are offered by the insurance company, if the offer is not totally unreasonable, because it simply will not be worthwhile to take legal action to enforce all of one’s legal rights. Thus under no-fault, the injured person will be increasingly at the mercy of his own insurance company.

Assemblyman McAlister also described the perspective of the insurance companies:

Insurance companies’ greatest profits are made from their investments, the money from which comes the “cash flow” of their insurance premiums. Would the insurance industry spend millions of dollars to promote no-fault if no-fault honestly promised a substantial savings in premiums to the consumer, thereby reducing the industry’s “cash flow” that finances their lucrative investment operations?

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15. Id. at 10 (emphasis added).
16. Id. at 13.
On April 3, 1975, Assemblyman McAlister introduced AB 1458, the "California Motor Vehicle Reparations Act," which the author portrayed as "the most comprehensive automobile insurance reform legislation in California history." As described by Assemblyman McAlister:

[T]he bill would require every motor vehicle owner and operator, unless specifically exempted, to purchase a policy of personal injury protection insurance providing $50,000 medical care benefits plus additional compensation for wage loss, loss of services, survivor benefits and funeral expenses. Payments would be made regardless of the fault of the beneficiary.

Calling AB 1458 a product of many months of study and research, the author said, "We have taken the best aspects of the many no-fault bills which have been introduced in prior years and have added a few new reforms." Unlike other no-fault bills, it did not restrict an injured person's right to sue for pain and suffering. The bill prohibited uninsured motorists "from suing for any damages which they could have received had they purchased the required insurance." This, it was believed, would discourage the filing of "any but the more substantial 'pain and suffering' law suits."

An interesting feature of AB 1458 was its provision that disability insurers and nonprofit hospital plans could sell PIP insurance. Even though health insurers would not write the PIP coverage, they could still reduce their benefits to the extent those benefits were covered by PIP insurance—providing they mirrored that benefit decrease with a premium reduction. Between its introduction on April 23, 1975 and June 30, 1975, AB 1458 was amended once in the Assembly and twice in Senate. The bill died in the Senate Judiciary Committee on August 5, 1976 when, after a hearing, it was held in committee without further action. Usually this is a euphemism for a bill that does not get a "do pass" motion. So ended no-fault in the 1975-76 session.

AB 1458 was the last significant no-fault bill to get into the second house, although another effort was made in the 1987-88 session.

18. Id. at 1.
19. Id.
20. Id. at 1-2.

When a bill fails to get the necessary votes to pass it out of committee or upon failure to receive reconsideration, it shall be returned to the Chief Clerk of the Assembly or the Secretary of the Senate of the house of the committee and may not be considered further during the session.

Id. Some authors attach significance to the information in the legislative histories. It is thought better to have it said that a bill was "held in committee" rather than it "failed passage," even though held in committee might mean the bill could not get a motion, let alone a vote.
SB 912 (Sen. Alan Robbins, D. Los Angeles), which dealt with the assigned risk plan when the bill left the Senate, was amended three times while in the Assembly Finance and Insurance Committee to add provisions similar to those of New York no-fault law. The amendments also included much regulatory matter. The proposed law, known as the "Automobile Insurance Rate Reduction Act of 1988," died in the Finance and Insurance Committee. Since SB 912 lived only three weeks and in one committee as a no-fault bill, it lacks much significance.

IV. NO-FAULT INITIATIVES

In 1980, a no-fault initiative failed to qualify for the ballot. Later, a motor vehicle liability insurance initiative, filed in 1986, and two insurance regulation initiatives, filed in 1987, also failed to qualify for the ballot.

In 1988, it fairly rained auto or other insurance initiatives—four qualified for the ballot and of these one, Proposition 103, was approved by the voters. Much has been written about Proposition 103. Allegedly a great "consumer victory," it is better relegated to the "code of illusory benefits." The proposition affected all commercial and personal lines of property and casualty insurance; however, most people treat it only as an automobile insurance law. It called for rolling insurance rates back to their November 1987 level and then reducing them by another twenty percent. On top of this, "good drivers" were to get an additional twenty percent reduction. According to one commentator, the proposition was a mathematical impossibility. Although the California Supreme Court held that the

22. See id. (describing procedure applied to bills which are never heard in committee). As the deadlines for bill action pass, the bill is retained in committee until it is required to be returned to the Clerk of the Assembly or the Secretary of the Senate. The result is described as "dying in committee."


24. Id. at 42, 44.

25. CAL. INS. CODE § 1861.01(a) (Deering 1989). Section 1861.01(a) states: For any coverage for a policy of automobile and any other form of insurance subject to this chapter issued or renewed on or after November 8, 1988, every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987.

26. See id. § 1861.02(b).

27. Referring to Proposition 103, Professor Robert Harris (University of California at Berkeley, Department of Business and Public Policy) said, "[t]his is a punitive mea-
proposition is facially constitutional, it also held that insurers are entitled to a fair rate of return—which means a rate which will attract capital. Other than a decrease in premiums for automobile owners in Los Angeles because of the abolition of territorial rating, most automobile insureds will never see any of the decreases called for by the proposition. In fact, people outside of Los Angeles will see increases in their rates to the extent that Los Angeles drivers benefit from the change in territorial rating. In this writer’s opinion, the proposition created more problems than it resolved. It was poorly drafted by persons who did not understand insurance, given credibility by Ralph Nader, and will result in continuing administrative and judicial challenges with no offsetting benefits to society.

Proposition 104 was the insurance industry’s no-fault proposal. Although the industry spent millions in advertising Proposition 104, the initiative was rejected by voters. Even the most superficial examination of the proposal exposed the industry’s attempted overreaching. First party benefits were penurious and difficult to come by. Medical expenses were limited to $10,000, wage losses to $15,000, and funeral benefits to $5,000. Basic benefits (medical expenses, work losses, and funeral benefits) were available only to the extent that they were not paid by workers’ compensation or disability payments. Proposition 104 limited attorney’s fees and noneconomic damages, thus narrowing the risk or exposure of the industry. It required claimants and insurers to go through an offer and acceptance of possible arbitration. By following this procedure, the insurer would be able to immunize itself from exemplary dam-

28. See Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (relating to Proposition 103). That proposition allowed rate increases between November 8, 1988 and November 8, 1989 only if the insurer was “substantially threatened with insolvency.” CAL. INS. CODE § 1861.01(b) (Deering 1989). The California Supreme Court discussed this limitation. “By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.” Calfarm, 48 Cal. 3d at 818 n.9, 771 P.2d at 1253 n.9, 258 Cal. Rptr. at 168 n.9 (quoting Federal Power Comm’n v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944)).

29. See CAL. INS. CODE § 1861.01(a) (Deering 1989).

30. Think of California as a giant water bed with a bubble in the Los Angeles area. If you push down on the bubble the rest of the bed (state) goes up. In other words, if there are no other economies (that is, costs remain the same), all the proposition does is move dollars around among insurance purchasers.


32. March Fong Eu, Statement of Vote 40 (Nov. 8, 1988): Yes votes: 2,391,287 (25.4%) to No votes: 7,015,325 (74.6%).
ages for bad faith, further reducing its financial exposure.

Like other legislative proposals from “interested parties,” Proposition 104 suffered from the defect of not starting with a clean sheet. Prior to offering any legislation, most interested parties design it with the underlying assumption that their interests are inviolate and, at a minimum, they should not share in any income decrease or any risk increase. Instead, they hope the drafted legislation will transfer risk to someone else or increase their own income. In this case, of California’s fifty-eight counties, only Modoc County voted for Proposition 104; overall it was rejected by a vote of 74.6% to 25.4%.\(^{33}\)

The money spent advertising Proposition 104 could have bought more goodwill (support for it) if used as rebates of premium dollars. Was Proposition 104 really a test of no-fault?

Proposition 106, also on the November 1988 ballot, was a limitation on attorney contingency fees. That proposition prevailed in thirty-seven of the fifty-eight counties, but lost overall by a vote of 53.1% to 46.9%.\(^ {34} \) Although the trial bar argued that the vote was evidence of support for trial attorneys, it appeared to reflect a perception of inequity, since opponents argued the limitation affected only fees paid to the “little” plaintiff’s lawyers, and not those paid to the “big” corporations’ or insurers’ lawyers.\(^ {35} \)

Not to be eclipsed in the public eye, the trial bar had its own initiative, Proposition 100, which was better drafted and generally more equitable than the other insurance ballot measures. It won only in Los Angeles County, losing overall by a no vote of 59.1% to 40.9%. Although Attorney General John Van de Kamp claimed authorship, the opponents’ advertising tied it to the trial bar. The no vote appears to be more a rejection of attorneys than a negation of the ideas in the initiative. The state would have experienced far less chaos from Proposition 100 than it has with Proposition 103, if the concern is legislating insurance issues by popular ballot.\(^ {36} \) At least

\(^{33} \) Id.

\(^{34} \) Id. at 41.

\(^{35} \) The insurance industry wants caps on legal fees. But whose fees? NOT the fees paid to lawyers who work for insurance companies, NOT manufacturers’ lawyers, NOT large corporation lawyers, NOT criminals’ lawyers. The ONLY lawyer whose fees would be limited would be YOURS—the lawyer YOU HIRE to help you recover damages from a drunk driver, an insurance company that won’t pay you what it owes you, or a shoddy manufacturer.

\(^{36} \) After Proposition 103 was adopted by the people, it was immediately chal-
Proposition 100 had within it the means to allow competing parties to air their contentions.

As far as no-fault, Proposition 100 stated in part: "It is the will of the People that persons who wrongfully cause damages to others in the ownership or operations of a motor vehicle should be held legally responsible for the full extent of the injuries they cause."37

The initiative also contained a preemptive strike against other initiatives on the ballot:

It is the intent of the People that the provisions of this act be construed to be in conflict with the provisions of any other initiative statute passed at the same election dealing with compensation for motor vehicle accidents. Accordingly, it is the will of the People that any other provision of any other measure passed at the same election as this act and dealing with compensation for motor vehicle accidents, shall be of no force or effect unless the other measure receives a higher number of affirmative votes.38

The Legislative Analyst interpreted these preemptive provisions "to affirm the current system of at-fault motor vehicle liability, thereby restricting other systems such as 'no-fault' insurance."39

V. THE CURRENT LEGISLATIVE SESSION (1989-90)

Interest in no-fault appeared to be greater at the beginning of this session than it is at the midpoint. Four bills were introduced: AB 354 by Patrick Johnston (D. San Joaquin); AB 744 by Charles M. Calderon (D. Los Angeles); AB 2429 by Frank Hill (R. Los Angeles); and SB 1232 by Quentin Kopp (I. San Francisco). Of the four bills introduced, none currently is moving and only one, AB 354 (Johnston), was heard in a policy committee. Technically, all four bills are dead since none got to the second house by January 30, 1990.40 AB 354's fate41 seemed to improve when the Governor vetoed Speaker

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Willie L. Brown’s AB 2315, the low price automobile policy designed to make insurance available for lower income drivers. However, as we will see later, the Governor’s veto message contained within it the ammunition to shoot down AB 354’s form of no-fault.

In the beginning, the battle between no-fault and fault was staged by two bills, both purporting to offer low cost insurance: AB 354 (Johnston) and AB 2315 (Brown). The Johnston bill began as a no-fault measure based on New York no-fault law but was changed to a “no frills” no-fault policy which was to be available to “good drivers” for about $180 per year. There was no income test and anyone could purchase the policy with the caveat that, even though the driver may have satisfied the financial responsibility law, his or her assets were at risk for liability exceeding the no-fault threshold. The bill was significant because it brought odd bedfellows together, including insurers, insurance trade organizations, and interest groups such as: Consumers Union; Center for Public Interest Law; Insurance Agents and Brokers Council; Latino Issues Forum; Mexican American Political Association; and Rainbow Coalition.

Soon after the low cost version of AB 354 was announced, Speaker Brown brought out his low cost liability policy for persons meeting an income test. AB 2315 also was backed by numerous...
groups, including: Retired Public Employees Association; Black American Political Association of California; Mexican American Community Association; and Professional Insurance Agents. AB 2315 was subsequently amended to include some no-fault provisions. A major distinction between the bills was the treatment of bad faith or unfair claims practices. AB 2315 would have restored third party claimants' rights as they were under Royal Globe before it was overturned by Moradi-Shalal.\footnote{Royal Globe Ins. Co. v. Superior Ct. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979) (overruled by Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988)).} On the other hand, according to some analysts, AB 354 would have eliminated first party bad faith sanctions growing out of the implied covenant of good faith and fair dealing which was specifically mentioned in Moradi-Shalal.\footnote{Moradi-Shalal, 46 Cal. 3d at 304-05, 758 P.2d at 68-69, 250 Cal. Rptr. at 127.} AB 2315 reached the Governor who vetoed it and gave the AB 354 opponents more ammunition against its passage.\footnote{See infra note 61.}

VI. IS THE ISSUE FAULT VERSUS NO-FAULT, OR COST?

Both authors, Willie L. Brown (AB 2315) and Patrick Johnston (AB 354), were trying to resolve a continuing problem: the unavailability of affordable automobile insurance for drivers in the dense urban areas of the state, especially Los Angeles and San Francisco.\footnote{See infra note 61.} Because of recent legislation allowing police officers to ask for proof of insurance when stopping a motorist for a traffic violation,\footnote{King v. Meese, 43 Cal. 3d 1217, 1225, 749 P.2d 889, 891, 240 Cal. Rptr. 829, 833 (1987).} many low income people in Los Angeles and other congested areas are caught in the dilemma of either not driving or facing fines and the loss of driving privileges. They are not able to avoid these consequences because insurance is unaffordable. In effect, the state has delegated the authority to determine who is authorized to drive.

All the ballot arguments for the insurance propositions on the November 1988 ballot promised some cost relief, as shown by the following quotes from campaign literature: Proposition 100: “Guarantees ‘good drivers’ an immediate 20% reduction and future 20% discounts in insurance rates;” Proposition 101: “[M]andates a 50% cut in bodily injury and uninsured motorist liability insurance premiums. This means that you will receive a reduction in your premium

\footnote{CAL. VEH. CODE § 16028 (West 1989).}
between 22% and 45%;”53 Proposition 103: “[R]educes all of your automobile, home and business insurance premiums to November, 1987 prices. Then, it alone cuts them another 20%;”54 Proposition 104: “No-fault is fundamental reform that will: REDUCE PREMIUMS by requiring all California auto insurers to cut rates for basic personal injury coverage by an average of 20%. This will result in an immediate overall average premium reduction of 7% to 17%.”55 As we shall see, this is not quite what some insurers had said earlier.

Although Proposition 103 was not promoted as low cost insurance, implicit in the appeal to the voters was the promise that they were going to get their insurance for less. First, the rates for all lines of property casualty insurance, both personal and commercial, were to be reduced twenty percent from their November 8, 1987 level, and second, “good drivers” were to get an additional twenty percent reduction beginning November 8, 1989. Although the initiative affected all lines of personal and commercial property casualty insurance, the voters considered it an automobile insurance proposal.56

Additionally, four of the six no-fault bills discussed above contained language stating the legislative objective was to lower insurance costs. However, during an interim hearing in San Francisco on December 14, 1977, insurance witness Michael McCabe said:

[N]owhere has no-fault automobile insurance proven to be an effective cost saver. Now we at Allstate have long maintained that no-fault should not be sold to the public on the promise that it would reduce their insurance premiums. We disagreed with many of our brethren in the industry in the early days when they were touting no-fault as a cost saver. We feel that our position has been vindicated, since the results to date simply reveal that no-fault is not an effective way of reducing costs.57

In his previous explanation of the rationale for no-fault Mr. McCabe had said:

[T]he aim of no-fault designers was to reduce the number of automobile accident cases in the tort liability system, to accumulate the dollar savings resulting from this reduction in tort litigation and, of course, the cost associated with it including attorney’s fees, and to use the money so saved to pay new and obviously generous first-party benefits which for the first time would be available to all rather than those just free of negligence in the

53. Id. at 92.
54. Id. at 100.
55. Id. at 104 (emphasis in original).
56. Many press stories about Proposition 103 support this as does the fact that “drivers” have yet to see the required reductions in rates.
It seems pretty obvious that cost is the issue. As Professor J. David Cummins stated:

Auto insurance is being treated more and more like social insurance. In most parts of the country it is necessary to have a car in order to get to work, and driving uninsured is not an acceptable alternative to most workers. Thus, the auto-insurance system has come under increasing pressure to operate according to social insurance principles. This underlies the demand for universal entitlement, flattening of price differentials across territories and driver classes, and reduction of rates below costs. 

It is increasingly difficult to reconcile the social role of auto insurance with its provision through the private-insurance industry.

I believe that, whether or not we want to recognize it, cost is the real issue facing insurance reform.

VII. WILL THE GOVERNOR GET A NO-FAULT BILL?

The Governor will get a no-fault bill when legislative leaders want the Governor to get a no-fault bill. Looking at the experience of the 1970s, when the leadership of a house backed no-fault, it got out of that house. When the second house leadership did not want no-fault, the bill died. If, by chance, the bill returned to the first house for concurrence, it died because leadership really did not want the bill to go to the Governor. If the leadership perceives that people want no-fault, a no-fault bill will get out of both the houses and to the Governor.

58. Id. at 2.
60. From 1970 through June of 1974, Democrat Bob Moretti was Speaker of the Assembly and supported some of the no-fault bills. On March 4, 1973, Speaker Moretti issued a press release supporting AB 50 (Fenton). In its last paragraph, the release stated: "Moretti pointed out that a similar bill passed the Assembly in 1972 and expressed confidence the legislation would again clear the lower house this year." Speaker Moretti was a co-author on some no-fault bills. Leadership plays a substantial role in the passage or failure of bills affecting major competitors, for example, trial lawyers versus consumer interests, insurers or doctors, and so forth. Speaker Moretti, Press Release (Mar. 4, 1973) (emphasis added) (on file with author).
61. During the debate on AB 354 in Assembly Ways and Means on January 17, 1990, there were assertions that the bill could not get a "do pass" recommendation because leadership didn't want it to get out of committee. According to an article in the January 18, 1990 edition of The Los Angeles Times:

To hear Republican Assemblyman Pat Nolan of Glendale tell it, Wednesday's session was a textbook example of the Alice in Wonderland qualities of Sacramento, where things are not always as they seem. As if with some sort of invisible hand, Nolan alleged, Brown can wield his power without leaving a trace. . . . "There should be no mistake about it," Nolan said, "This bill has been Speaker-ized."


Ironically it was Republican Governor Deukmejian who gave AB 354 opponents their most usable argument when, in his Veto Message for AB 2315, he said:
VIII. WHAT SHOULD BE IN A NO-FAULT LAW?

If the no-fault law permits suits in tort, the threshold should be sufficiently high to handle the majority of automobile accident claims and to discourage use of the courts. Also to discourage litigation, benefits should be generous (at a level similar to Michigan's but, at a minimum, no less than New York's). There should be medical cost control to keep both providers and patients honest.

Most importantly, there should be incentives for all parties to adhere to the implied convent of good faith and fair dealing. Much has been written about the need for sanctions to prevent bad faith dealings between insurers and claimants. The California legislature and courts should develop a strong policy requiring both insurers and claimants to act in good faith and to deal fairly, complete with administrative and judicial sanctions.

If California reported decisions are any indication of how insurers will treat their claimants, both first party and third party, any insur-

[I] It is more appropriate to develop cost control measures and policy limitations that will actually produce a low-income policy, without setting an arbitrary cap on premiums. . . During the subsequent months, my administration will be exploring alternatives for long-term relief for automobile insurance premiums.

I look forward to working with the author to develop a fair and workable solution to this problem.

Veto Message for A.B. 2315 (Oct. 2, 1989) (emphasis added). Opponents said there was no reason to have AB 354 when the Governor said that he was going to work with the author of AB 2315. During the January 17, 1990 Assembly Ways and Means Committee Hearing on AB 354, Assemblyman Johnston said the best way to keep talks going was to let AB 354 keep moving through the Legislature since, at that time, there was no other low-cost auto insurance bill extant. P. Johnston, Remarks at the Assembly Ways and Means Committee Hearing (Jan. 17, 1990).

62. Michigan: "Unlimited medical and hospital benefits. Funeral benefits up to $1,000. Lost wages up to $1,475 per month, adjusted annually to keep up with cost of living, and, substitute services of $20 a day payable to victim or survivor." PUBLIC RELATIONS DEP'T, STATE FARM INS. COS. NO FAULT PRESS REFERENCE MANUAL E-102 (1989). The threshold for torts case is stated as follows: "Cannot recover unless injuries result in death, serious impairment of body function, or permanent serious disfigurement." Id.

63. New York: "Aggregate limit of $50,000 for medical, wage loss, and substitute service benefits. Wage loss: 80% of actual loss with benefit limited to $1,000 per month. Substitute services benefits: $25 a day for one year. In fatal cases, estate gets $2,000 in addition to above benefits." Id.

Tort Threshold:

Cannot recover unless disabled for 90 of the 180 days after the accident, or injury causes dismemberment; significant disfigurement; fracture; loss of fetus; permanent loss of use of body organ, member, function, or system; permanent consequential limitation of use of body organ or member; significant loss of use of body function or system; or death.

Id.
ance legislation, whether liability or no-fault, will have to include an element for bad faith sanctions against insurers.

In numerous cases insurers demonstrate their insensitivity to the expectations of their insureds. For example, in *Comunale v. Traders & General Insurance Co.*, the insurer wrongfully declined to defend its insured and refused to accept a reasonable settlement within policy limits. Other instances are *Crisci v. Security Insurance Co.* and *Neal v. Farmers Insurance Exchange*, where the insurers virtually drove their insureds to poverty.

The necessity for enforcing good faith would be even greater in a no-fault system. Some reasons attracting people to no-fault would be to seek “protection against calamity” and to provide “peace of mind and security.” How can this be achieved if the parties do not act in good faith? As Assemblyman McAlister said in his opposition to a no-fault bill, “under no-fault the injured person will increasingly be at the mercy of his own insurance company.”

Adherence to standards of good faith and fair dealing might be helped by administrative and judicial sanctions. For example, the insurer should have to pay interest on the amount it owes to the insured if a given time passes after the insurer’s obligation to pay becomes reasonably clear. The interest rate could be indexed a few points above market driven interest or the cost of funds rate to create a disincentive for slow payments.

Administrative sanctions could be bolstered with bad faith sanctions similar to those permitted under *Royal Globe.* If the administrative deterrence works, there will not be much need to punish the insurers for bad faith—it is also cheaper and faster to solve the problem before it occurs.

Since good faith and fair dealing cuts both ways, no-fault laws must deal with the claimants who, in many situations, demonstrate as much greed as the insurers. But it is more difficult to specify claimant sanctions. Perhaps, the law should require a return of the wrongfully paid money with interest at a rate higher than any available in the market. The obvious problem with claimant sanctions is

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64. 50 Cal. 2d 654, 328 P.2d 198 (1959).
67. See McAlister, Statement Regarding No-Fault Insurance 10 (undated but issued during the 1973-74 session) (on file with author).
68. In Professor Jeffrey O'Connell's *A Draft Bill to Allow Choice Between No-Fault and Fault-based Auto Insurance*, p. 21, l. 142 (May 6, 1988 version), overdue payments bear interest at the rate of 18% per annum. However, I would suggest an indexed rate to assure that under most circumstances there would be disincentives against holding funds for any period.
“turnip blood.” However, this difficulty should not be a reason to not sanction claimants who act in bad faith.

Assuming all parties act in good faith, the best solution appears to be a “choice” system modeled after that proposed by Professor Jeffrey O'Connell of the University of Virginia School of Law. If Professor O'Connell's proposal were adopted, I would recommend making the benefits equivalent to Michigan's and adding the bad faith sanctions described above. Since we cannot assume all parties will act in good faith, there will be those who decide after an accident they should have opted for no-fault. They will claim their insurance agent made a mistake in designating their type of insurance. Therefore, choice will mean we must get ready for insurance agent malpractice suits.

IX. CONCLUSION

Why are we here? To make some suggestions for the solution of the automobile insurance problem. What is the problem? Judging from the public outcry, cost is the problem.

One way of reducing cost would be to repeal the financial responsibility laws. People concerned with protecting themselves and their assets would purchase first party and third party coverages. The irresponsible would be left to their own devices and subject to legal sanctions for failure to pay for damage they cause. This solution appears more harmful than helpful.

If financial responsibility laws are retained, we will continue to need insurance. There are at least two times when we are interested in insurance: (1) at the time we purchase it; and (2) when we make a claim. We want the lowest cost when we buy insurance and the most comprehensive benefits when we make a claim. Our desires are polar because the amount paid in premiums is strongly related to the amount of benefits or, conversely, the amount of benefits available depends on revenues from premiums. We can reduce insurance rates to the extent we reduce our exposure. Our exposure is our financial risk, which is based on the probable number of accidents resulting in claims and the severity of those accidents. This exposure is what we hand over to the insurer with our premium dollars.

We can reduce claims costs and, ultimately, rates by altering the conditions under which claims dollars are paid. For example, we can try to ruin the market for stolen auto parts by requiring vehicle identification numbers on commonly fenced parts. Another alternative might be to better package vehicle occupants to reduce injuries. We can also implement medical and legal cost containment requirements and sanctions for fraudulent claims. And, we can try to establish true market competition so insurance companies have incentives to operate more efficiently.

Efforts to reduce costs are also important because financial responsibility or equivalent laws make having insurance a practical condition of operating an automobile. Through those laws, we have, in effect, given insurers the power to determine who drives. Instead of buying insurance, the motorist is really buying the right to drive, so cost becomes paramount. Apparently, for most drivers, the method of compensating injuries is not an issue. But, the method of compensation would be an issue if insurers offered their product on the basis of what drivers get for the dollars they will have to spend in any event. The law, however, would have to be changed to allow insurers to offer different products. No-fault insurance, theoretically at least, should be more efficient than liability insurance since it does away with many costs not spent directly on repair or injuries.

What should be the options? For starters, we can look closely at the "choice" proposal suggested by Professor Jeffrey O'Connell. It would require changes in the law, under certain circumstances, to abolish tort causes of actions by those electing the no-fault option. They would also need to be immunized against tort suits arising

72. In King v. Meese, 43 Cal. 3d 1217, 749 P.2d 889, 240 Cal. Rptr. 829 (1987), plaintiffs raised the issue of insurers being delegated the power to determine who is authorized to drive. That case was a challenge to the California Insurance Code section 16028 which permits a police officer to ask a motorist for proof of automobile insurance when that motorist is stopped for another violation.

Although the law was upheld, Justice Broussard in a concurring opinion said:

When we granted review, we saw this case as raising two significant constitutional issues: (1) whether the state, having effectively made automobile liability insurance compulsory, had a duty to assure that such insurance was available to all its drivers at reasonable and nondiscriminatory rates; and (2) if so, whether the state's statutory and administrative scheme fulfilled the duty. But a funny thing happened on the way to this forum. The state did not dispute its duty to assure that insurance was available to all on a fair and reasonable basis. Instead, it maintained that the California Automobile Assigned Risk Plan (CAARP) fulfilled that obligation. And plaintiffs, on their part, made no attempt to show that insurance was not available under CAARP on a fair and reasonable basis, and in response to our questions disclaimed any notion that affordability was something to be considered in assessing the reasonableness of insurance rates.

Id. at 1235-36, 749 P.2d at 901, 240 Cal. Rptr. at 841.

from injuries they inflict on others. At the same time, those opting for liability insurance would have to take their chances with the risk that other drivers may not have liability coverage. In an accident, if the other driver is no-fault insured, the person opting for liability insurance would be limited to recovery under his or her own uninsured motorist coverage. If "choice" is offered, the effect on insurance agents' errors and omissions on insurance must be considered if, after an accident, insureds claim they opted for more beneficial coverage.

No-fault insurance should ideally offer benefits similar to Michigan's level of benefits, but under no circumstances should benefits be less than New York's. You cannot ask people to trade their right to sue in tort unless full compensation of out-of-pocket expenses is assured.

Also, no-fault is not the solution if insurers fail to act in good faith. Evidence shows a tendency to overreach by both insurers and claimants. Administrative and judicial sanctions must be in place to assure all parties comply with the implied covenant of good faith and fair dealing. No-fault is probably more cost effective and economically efficient than our present system of paying for injuries caused by automobiles, but all parties will have to cooperate to achieve that effectiveness and those efficiencies.

Finally, at least in California, before we can do too much, we are going to have to unscramble the mess remaining after Proposition 103.