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James D. Ghiardi

Marquette University Law School, james.ghiardi@marquette.edu

John J. Kircher

Marquette University Law School, john.kircher@marquette.edu

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AUTO INSURANCE IN NEW YORK STATE

JAMES D. GHIARDI
JOHN J. KIRCHER

The subject of automobile insurance occupied a great deal of the time and energy of the Bar, the insurance industry, the news media, and politicians in New York during 1970. The question under consideration was whether the present automobile accident reparation system should be changed. 1970 was not a year of decision, but merely the initial skirmish for the battle ahead.

The purpose of this article is to examine the status of the automobile insurance controversy in New York and also the factors within and without the state which may have an important bearing upon its ultimate resolution.

THE ROCKEFELLER-STEWART PLAN

On February 16, 1970, an approach toward automobile accident reparations was announced which provoked much discussion and debate in New York.¹ The Rockefeller-Stewart Plan was the work-product of less than five month's study by the state's insurance department under a mandate from the Governor.² The report of the department contains a condemnation of the present automobile insurance and accident reparation systems and suggests that a "new" approach would improve the lot of the state's motorists and accident victims.

While the approach suggested by the department and promoted by the Governor may be "new" as far as New York is concerned, it is actually based upon other plans and proposals which preceded its announcement.³

James D. Ghiardi is Professor of Law at Marquette University Law School, Member and President of the Wisconsin Bar, and Research Director of the Defense Research Institute.

John J. Kircher is a Member of the Wisconsin Bar and Research Director of the Defense Research Institute.

1. The plan is outlined in a report, Woodward & Fondiller, *Review and Summary Report, New York Insurance Department, Automobile Insurance . . . For Whose Benefit?* (Feb. 12, 1970), [hereinafter cited as STEWART REPORT] which was prepared by the New York State Insurance Department staff. Enabling legislation was also drafted and introduced into the New York Legislature as Senate Bill 8922 (Mar. 16, 1970); for a detailed analysis of the plan, see Ghiardi & Kircher, *Automobile Insurance: The Rockefeller-Stewart Plan*, 37 INS. COUNSEL J. 324 (1970).

2. STEWART REPORT, *supra* note 1, at iii-iv.

3. The plan contains basic features of both the Keeton-O'Connell and American Insurance Association plans. See *Basic Protection—Diminished Justice At High Cost*, 8 FOR THE DEFENSE 73 (Dec. 1967); *Keeton Plan—Analysis of Major Elements*, 8 FOR THE DEFENSE 75 (Dec. 1967); *The*

Basic Provisions.—Under the proposed plan, tort liability for automobile accident damages in New York would be eliminated.⁴ In its place, a system of insurance would be created under which each vehicle owner would be required to carry first party insurance which would pay benefits to persons injured while passengers in or when struck by his vehicle. Benefits would be paid regardless of the fault of the vehicle's operator or of the person seeking them. There would, likewise, be no tort liability for damage caused to motor vehicles.⁵ Each vehicle owner would be required to bear the costs resulting from damage to his own vehicle or to seek collision and comprehensive coverage. The only exception to the elimination of tort liability would apply to cases of wrongful death caused in an automobile accident. Believing that the exemption of a tortfeasor from such liability would be unconstitutional, the insurance department and the Governor determined not to tamper with this type of action.⁶

The Plan's Benefits.—In return for giving up the right to full and complete compensation from a negligent tortfeasor, the innocent accident victim would be entitled to the benefits provided by the Rockefeller-Stewart Plan. These are limited to medical and hospital expenses, wage loss and rehabilitation expenses "*not compensated from other sources.*"⁷ The "other sources" referred to would include accident and health insurance, accumulated sick leave, wage continuation benefits, union health and welfare benefits, workmen's compensation and any other source of benefits not funded "from general public revenues." While the report of the insurance department and the enabling legislation are silent as to the definition of sources funded "from general public revenues," it is presumed that these would include Medicare, Medicaid, Social Security and other public welfare programs. Other than the fact that 1970 was an election year, the reason why one person recovering medical expenses under his personal accident and health policy, for example, should not also be allowed to recover benefits under the Rockefeller-Stewart Plan, while another person could recover under both Medicare and the plan is not explained.

It can thus be seen that the Rockefeller-Stewart Plan is nothing

Keeton-O'Connell Plan—Some Questions And Answers, 9 FOR THE DEFENSE 25 (Apr. 1968); DRI SPECIAL REPORT, *An Analysis and Critique of an Automobile Insurance Proposal Prepared for Study and Comment by the American Insurance Association* (Feb. 1969).

4. STEWART REPORT, *supra* note 1, at 83-4.

5. *Id.* at 89.

6. *Id.* at 86 n.139.

7. N.Y. Senate Bill 8922, *supra* note 1, at § 673.

more than excess accident and health insurance for motorists. No benefits would be paid until the claimant had exhausted his other collateral benefit plans' coverages. It is important to note that the insurance department's own report states that 91 percent of the workers in New York are covered by health insurance and that most are also covered by income continuation plans.⁸

Special Provisions.—In addition to the basic coverage and tort immunity provisions of the Rockefeller-Stewart Plan, there are a number of special provisions which should be noted.

While vehicle owners are responsible for the damage to their vehicles under the plan, owners of any other property are granted the right to hold a vehicle owner absolutely liable for the damage caused to that property.⁹ Thus, for example, if a motorist had an unexpected blowout and ran off the road into a building, he would be absolutely liable for the damage caused to the building owner. The question of whether the vehicle operator was at fault for the damage to the non-vehicular property would not be an issue.

Owners of commercial vehicles are singled out for special treatment by the plan. They would be absolutely liable to reimburse the insurers of noncommercial vehicles for all benefits which have been paid as the result of an accident involving a commercial vehicle.¹⁰ The owners of commercial vehicles would also be absolutely liable for property damage to "any other kind of motor vehicle."¹¹ Thus, for example, if a truck is stopped at an intersection waiting for a traffic light to change and is rear-ended by a private passenger vehicle, the owner of the commercial vehicle or his insurer would have to reimburse the insurer of the private passenger vehicle for all the Rockefeller-Stewart benefits it paid to the passengers in the private passenger vehicle. In addition, the cost of repairing the private passenger vehicle would have to be paid by the commercial vehicle owner or his insurer. The plan, however, specifically excludes the owners of "a motor coach for carrying passengers" from this absolute liability.¹²

Provisions for absolute liability identical to those which are applicable against commercial vehicle owners are also provided against the drunken driver, the escaping criminal, the driver operating under the

8. STEWART REPORT, *supra* note 1, at 30.

9. *Id.* at 109 n.187.

10. N.Y. Senate Bill 8922, *supra* note 1, at § 671(3).

11. *Id.* at § 671(3)(b).

12. *Id.* at § 671(3).

influence of drugs, or the person operating a vehicle with the specific intent to injure himself, others or their property.¹³ Again, this absolute liability is imposed without regard to the question of whether a person so liable was at fault for the accident.

The Plan's Cost.—Proponents of the Rockefeller-Stewart Plan have claimed that it could be sold at a cost “as much as” 44 percent lower than present automobile insurance coverage.¹⁴ This, quite naturally, caused immediate interest in the proposal. However, actuaries not connected with the insurance department studied the plan and found that the cost predictions were overly optimistic,¹⁵ despite the limited benefits that would be paid.

Regardless of whether the Rockefeller-Stewart Plan would actually cost less than present automobile insurance, it should be noted that cost predictions refer only to the basic coverage of the plan.¹⁶ Additional coverages, purchased for additional premium dollars, would have to be procured to provide a motorist with full and adequate protection. These would include coverage for absolute liability imposed on some classes of motorists, collision and comprehensive protection, liability coverage for out-of-state driving, and uninsured motorist protection for out-of-state driving.

It should also be noted that the lower costs predicted for the Rockefeller-Stewart Plan are predicated upon the fact that it would be secondary coverage and other collateral coverages would bear the primary burden of automobile accident compensation. Yet, there is nothing to prevent the suppliers of those collateral sources from turning the tables on the Rockefeller-Stewart Plan, as it were, by rewriting their contracts to exclude coverage for loss caused by auto accidents or by making their coverage secondary to any automobile insurance carried by their insureds. If this would happen, the cost of automobile accident compensation would be shifted back to the Rockefeller-Stewart Plan and its price would sky-rocket.

13. *Id.* at § 671(4).

14. Press release by Governor Nelson Rockefeller, February 16, 1970.

15. Woodward & Fondiller, Review and Summary Report, New York Insurance Department, *Automobile Insurance . . . For Whose Benefit?* (Apr. 28, 1970); Haugh, *Actuarial Analysis of Stewart Bill*, 12 N.Y. STATE BAR ASS'N NEWSLETTER No. 6 (Sept. 1970).

16. STEWART REPORT, *supra* note 1, at 109 n.187.

THE HUGHES-CRAWFORD PLAN

Also presented to the New York Legislature during 1970 was a bill sponsored by the New York State Bar Association.¹⁷ The Hughes-Crawford Bill would not abrogate tort liability for automobile accidents. Rather, it would mandate that compulsory, first party benefits coverage be added to any private passenger auto liability policy issued or delivered in the state.

The benefits would be available to any passenger in the insured vehicle and to pedestrians who were struck by that vehicle. Benefits would be for medical and hospital expenses and wage loss up to a maximum limit of \$1,500. A \$1,500 death benefit would also be provided, but it would be reduced by the amount of other first party benefits paid. A \$500 funeral benefit is also provided.

As to medical and hospital benefits, the insurer would not be liable to make payment under the first party coverage of the auto policy if similar benefits were paid or payable by workmen's compensation, disability benefit programs, or by any governmental plan or program.

The injured person collecting benefits under the Hughes-Crawford Plan would retain his right to maintain a tort action for full compensation. However, insurers paying the first party benefits would be entitled to a lien against any settlement or judgment the claimant would receive from a tortfeasor, subject to a pro rata deduction for attorney's fees occasioned by the collection of the amount recovered. In addition, if the person receiving the benefits is a guest passenger and he brought suit against the insured of the insurer making the payment, the insurer would be entitled to deduct the amount of benefits paid from any settlement or judgment on the tort claim.

OTHER LEGISLATIVE PROPOSALS

The 1970 sessions of the New York Legislature also saw the introduction of other automobile accident legislation. Both the Keeton-O'Connell and American Insurance Association plans were introduced.¹⁸ Since these no-fault proposals have been analyzed in great detail over the years, their provisions need not be examined here.¹⁹

17. N.Y. Senate Bill 8537 (Feb. 17, 1970).

18. The Keeton-O'Connell Plan was embodied in Senate Bill 2803, and the American Insurance Association Plan was proposed in Senate Bill 8849.

19. See critiques referred to in note 3, *supra*.

ACTIVITY OUTSIDE NEW YORK STATE

Activity outside of New York State in relation to automobile insurance and automobile accident reparations is worth noting since it may have an important bearing on how the New York situation may be finally resolved.

The Massachusetts Plan.—If proponents of no-fault auto insurance in New York were seeking a “first” by their new scheme, their hopes were dashed when, on August 13, 1970, the Governor of Massachusetts signed Senate Bill 1580 into law. Thus, Massachusetts, which was also the first state to have no-fault legislation introduced, became the first state to enact no-fault.²⁰

Actually, the Massachusetts Plan should be referred to as a limited no-fault scheme since it does not completely eliminate tort liability.²¹ The new law amends the state’s compulsory automobile liability insurance law by providing that policies issued and delivered in the state must also provide first party coverage which pays benefits for medical, hospital and related expenses, and wage loss without regard to fault. There is a \$2,000 limit on the first party coverage, and, within that limit, wage loss payments may not exceed 75 percent of the injured person’s average weekly wage. Tort immunity is provided to the extent that benefits are paid or payable under the first party coverage. However, the insurer making payments is subrogated to the injured person’s rights against the insurer of the person responsible for the accident—not against the tortfeasor himself.

The Massachusetts Plan also has an impact, in addition to the first party tort exemption, upon the operation of the present tort system. The new bill provides that an injured person may not recover for general damages (pain, suffering, etc.) unless his medical, hospital and related expenses exceed \$500 or unless he sustains permanent and serious disfigurement, loss of a body member, permanent loss of sight or hearing, a fracture or death.

The Massachusetts Plan is somewhat similar to the Hughes-Crawford Bill in that both provide for limited, compulsory first party coverage. While the Massachusetts Plan grants tort immunity to insured motorists to the extent that first party benefits are paid or payable, it

20. Puerto Rico passed a limited no-fault plan on June 28, 1968, which became effective on January 1, 1970. See Aponte and Denenberg, *Puerto Rico’s Social Protection Plan*, UNIVERSITY OF PUERTO RICO MONOGRAPH (1969).

21. For a detailed analysis of the Massachusetts Plan, see Ghiardi & Kircher, *Automobile Insurance: An analysis of the Massachusetts Plan*, 21 SYRACUSE L. REV. 1135 (1970).

accomplishes the same result as the Hughes-Crawford Bill by allowing the insurer paying these benefits to seek reimbursement from the insurer of the person responsible for the accident. Hughes-Crawford accomplishes the same result by preserving tort recovery, but also gives the insurer making the first party payments a lien against the amount recovered from the tortfeasor. However, the big difference between the two plans is the limitation on recoveries for general damages found in the Massachusetts Plan. Hughes-Crawford has no such restriction.

The Massachusetts Plan is scheduled to become law on January 1, 1971. However, it has been attacked in the courts. The bill contains a provision which requires all insurers writing auto policies in the state to cut auto insurance premiums by 15 percent. This rate cut would not only apply to the bodily injury coverages which the no-fault provisions are expected to affect, but would also apply to collision and property damage coverages which could not be affected by the new no-fault provisions. This, coupled with the fact that auto insurance rates have been frozen in the state at their 1967 levels, caused a number of insurers to announce that they would cease to write auto business in the state. The Supreme Judicial Court of Massachusetts has held the property damage liability rate reduction provision of the bill unconstitutional as a result of the insurers' suit.²² The provision of the bill which would mandate a rate cut for physical damage coverages (collision, comprehensive, fire, theft, etc.) has also been challenged by the insurance industry. It has been reported that the court has also held this provision unconstitutional.²³ The outcome of other litigation and its impact on the implementation of the Massachusetts law is uncertain.

The experience in Massachusetts makes clear one important aspect of the no-fault situation. When proponents of no-fault claim fantastic rate reductions through the implementation of no-fault, these rate reductions, if they actually do materialize, can only apply to bodily injury coverages. These coverages make up only one part of the entire auto insurance premium bill. No-fault cannot affect the cost of repairing automobiles. Physical damage coverages typically make up as much as 60 to 70 percent of the auto insurance premium.²⁴ The only way that no-fault could reduce the cost of property damage coverage would be to

22. *Aetna Cas. and Sur. Co. v. Comm'r of Ins.*, ___ Mass. ___, 263 N.E.2d 698 (1970), CCH AUTO L. REP. INS. ¶ 6761 (1970).

23. *See Massachusetts Court Won't Rule on No-fault; Says "No" to Rate Cuts*, BUS. INS. (Nov. 23, 1970).

24. J. AM. INS. (Nov.-Dec. 1969).

make each vehicle owner a self-insurer for some portion of his property damage.

THE FEDERAL SCENE

While various states have been struggling with the automobile insurance question, activity has been taking place at the federal level which may have a profound impact upon the ultimate resolution of the problem.

The Hart Plan.—On September 14, 1970, Senator Philip A. Hart (D. Mich.) introduced Senate Bill 4339, the Uniform Motor Vehicle Insurance Act.²⁵ Hart, long a vocal critic of the present automobile insurance and automobile accident reparation system, is chairman of the Senate Antitrust and Monopoly Subcommittee.

What Hart has proposed is a national no-fault system which, if enacted, would make state action on the subject unnecessary.

His bill provides that no person shall register or operate a motor vehicle in any of the 50 states or United States' possessions unless the vehicle is insured in accordance with the provisions of the Act. The Act provides that each policy carry "net economic loss benefits" coverage. The first party benefits payable under this coverage would include medical, hospital and related expenses, physical and occupational therapy benefits, all without limits, and wage loss payments of up to \$1,000 a month for up to 30 months after the accident. Tort liability would be eliminated to the extent that benefits are paid or payable under the Act. However, the Act specifically provides that there would be tort liability for "catastrophic harm." That term is defined to include bodily injury which results in permanent, partial, or total loss of, or loss of use of, a bodily member or a bodily function, including permanent disfigurement.

The Hart bill was referred to the Commerce Committee but it will not be acted upon at this session. It will have to be reintroduced in 1971, at which time hearings will have to be scheduled.

Department of Transportation.—The action by Senator Hart must be viewed in light of the fact that the Department of Transportation is in the process of completing its two-year, \$1.6 million study of automobile insurance and the automobile accident reparation system under a congressional mandate.²⁶

25. S. 4339, 91st Cong., 2d Sess. (1970).

26. Pub. L. No. 90-313 (May 22, 1968).

Although the final report and recommendations of DOT to the President and Congress are not expected until the early part of 1971, it is possible to predict at this time that the present system will not be given a good bill of health by DOT. In the process of carrying out its study, DOT has issued a series of 21 preliminary reports, totaling 4,333 pages, which deal with a wide variety of aspects of the operation of the present system.²⁷ From the public pronouncements of high ranking DOT officials and persons connected with the study, it is clear that the DOT recommendations will call for a drastic overhaul of the present insurance and liability systems.²⁸

It is expected that DOT will propose some form of no-fault system. However, it does not appear that it will recommend the same type of federal program proposed by Senator Hart. Rather, it is expected that DOT will suggest federal auto insurance guidelines which will be implemented at the state level. The incentive for state action will probably come in the form of grants of federal money to states that comply with the guidelines.²⁹

LOOKING INTO THE FUTURE

Trying to accurately predict what action will be taken by New York or any other state with regard to auto insurance is impractical and impossible. In New York, it is clear that the Rockefeller-Stewart and Hughes-Crawford Bills will be reintroduced in 1971. They may be joined in the legislative hopper by other proposals. Clearly, the activity at the federal level will have an impact on the deliberations of state lawmakers. The Massachusetts experience may also have a sobering effect upon state legislators. If nothing else, it should cause them to take a long, hard look at fantastic cost saving predictions made by no-fault proponents.

Those who ultimately decide the no-fault question, whether they be state legislators or members of Congress, are faced with clear alternatives. When all the rhetoric is dispensed with, two basic and simple issues are presented. On the one hand, the solution may be found in no-fault plans similar to the Rockefeller-Stewart proposal. However, in making this choice, one becomes committed to the philosophy that innocent traffic victims should be forced to insure themselves against the

27. Copies of the reports are available from the U.S. Government Printing Office, Washington, D.C.

28. Testimony of Department of Transportation Secretary, John A. Volpe, before the Senate Commerce Committee (Oct. 7, 1970).

29. *Id.*

carelessness and recklessness of others. It puts a state (or the nation) on record as endorsing the principle that motorists should be given a license to kill and maim without being held personally responsible for their actions. It says that personal accountability is out of tune with the times. It refuses to face up to the fact that such plans will not increase highway safety and reduce accidents, but may increase the death and carnage on our highways.³⁰

On the other hand, there are proposals to improve the present system, such as the Hughes-Crawford Plan, which do not seek to destroy the tort liability system and the principles upon which it is based.³¹ Those who advance proposals such as these do not claim that the operation of the present system is perfect, but seek to correct those imperfections within the basic framework of individual responsibility. These plans meet the challenge of cost and delay without sacrificing justice for expediency.

30. See Lawton, *Psychological Aspects of the Fault System As Compared With the No-Fault System of Automobile Insurance*, DRI SPECIAL REPORT, vol. 1969 No. 11 (Dec. 1969).

31. See also DRI SPECIAL REPORT, *Responsible Reform—A Program To Improve The Liability Reparation System*, vol. 1969, No. 8 (Oct. 1969); REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS (June 1969).