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Report of the Defense Research Institute

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Report Of The Defense Research Institute

PROF. JAMES D. GHIARDI
DRI Research Director

MAXIMUM effort by all defense attorneys is needed in the next few months to prevent the erosion of the private enterprise automobile insurance and the tort system it was created to fund. If change favors "no fault" reparations, it will be to the accompaniment of chaos, an increased number of highway accidents, and a staggering increase in claims and lawsuits which evolve from the ill-defined and conflicting system which will spring up.

A call to action was issued previously by the DRI Chairman of the Board:

The legislative halls, both federal and state, the ivory towers of the law schools and study commissions throughout the land are proposing change and even revolution in the legal arena. Yet the average lawyer remains aloof. What will it take to awaken the legal profession to the problems which may spread and gradually engulf a large segment of the practice of law? The time for action is now—not after the fact.¹

The threat and required action also have been well stated by the President of DRI:

Federal incursion and possible take-over of the liability insurance industry, as well as the total abolition of the civil jury system in personal injury and death actions is the predictable result of the continued distortion of the present system and the failure to improve and modernize it.²

State, Federal Picture

Defense attorneys cannot afford to ignore the interaction between federal and state considerations of "no fault" proposals.

The next Congress may have its choice of at least two possible approaches to the automobile accident reparation and insur-

ance problem. First, it could choose the approach provided by Senator Phillip A. Hart (D-Mich)—a federal mandate that all motorists in every state purchase a specified first party, "no fault" coverage. Second, dependent upon the final version of the Department of Transportation recommendations, it could decide to use the power of the federal dollar to prod states to enact laws outlined in federal auto compensation insurance guidelines.

Senator Hart

Under the "Uniform Motor Vehicle Insurance Act" (S.4339) of Senator Hart, which was referred September 14 to the Senate Commerce Committee of Senator Warren G. Magnuson (D-Wash), a national compulsory auto insurance law would be enacted which would eliminate tort liability to the extent that benefits are paid or payable under required first party insurance. At a hearing of that Committee, the intent of Senator Hart is indicated by one of his statements:

I have a feeling that we may be kidding ourselves that there is any way effectively to cure the court clogging until we go to first party coverage, no-fault. I wonder whether the tort concept makes any sense any longer when you have 90 million privately-owned automobiles, and you throw 16 million trucks on the road. You can talk about appointing referees, pre trial, liability being admitted, when you are in the right, you have to prove it. Philadelphia tried, among others, a combination of referee arbitration things and their court docket is in just as bad shape as anybody elses. Even if you cured this aspect of it, which I tentatively suggest we can't, that doesn't do anything for the fellow that is denied insurance to begin with, or who is arbitrarily cancelled after he gets it. There is another area where I think we may be teasing ourselves into the notion that we can avoid an ultimate confrontation with the states, this notion that we can guide,

¹Moelmann, Act To Prevent Erosion of The Adversary System, 11 For The Defense 73 (Sept 1970).

²Ford, Expanded Federal Incursion A Reality, 11 For The Defense 85 (Oct 1970).

persuade, outline, and so on. As my legislation proposals indicate, tentatively, I think we have to be much more direct, much more preemptive.³

Secretary Volpe

The precise direction of the Department of Transportation is most difficult to predict at this writing, although it seems clear that DOT will propose some form of first party, "no fault" system. Whether the proposal will provide for complete or only partial elimination of tort liability cannot be learned from examining the transcript of the Commerce Committee before whom DOT Secretary John Volpe also appeared on October 7. But it seems clear that the proposal offered by DOT will be tied to reform on the state and not the federal level. In his statement, Secretary Volpe said:

Similarly, I am strongly persuaded that in the long run reform offers its best opportunities at the State level. This may require greater cooperation with the state governments, though without direct Federal intervention. Conceivably the National Conference of Uniform State Law Commissioners, with suitable Federal financial assistance, could play a role in moving toward reform.

In another of his statements before the Commerce Committee, Secretary Volpe shows personal caution in approaching the complex problems:

While the present system has its obvious faults, we should not hastily move to a system merely because it is new. Caution, common sense, and consideration of sound public policy demand that we carefully assess the full range of alternatives and move gradually in the direction of reform, checking actual experience as we proceed. . . . The overriding goal should be a compensation system that is efficient, offers greater flexibility and choice, is fair, gives maximum incentives to loss reduction and that in the final analysis does a better job of reparing victims' losses than the one we have today.

Senator John O. Pastore of Rhode Island, commenting at the meeting of the

³Statement by Senator Hart before hearing of Senate Commerce Committee, October 7, 1970.

Commerce Committee, underlines popular arguments which have been made in the past, which will be made in the future and which cannot be ignored by attorneys concerned with the future of the tort system:

What good is it to talk about rehabilitation of a person if he can't get any recovery at all? What difference does it make if a person is maimed or injured on the road and he is in the right and he has to wait five years before he can get a hearing before the courts? Isn't that really the crux of the whole problem? The only trouble is that the insurance company likes to wait. Naturally, they have the money in the bank, they are getting . . . dividends on their investment and they are not ready to pay, so they wait until you get to court. They know you won't get there for four or five years. So finally when you get to court, you impanel a jury, the judge will say, "Will the two parties come into my office," and say "how far apart are you," and many, many times the cases are settled. Why should a plaintiff wait five years to have that process? I don't know why a bar association hasn't come up with a solution to their problem. I think this depends on the bar associations and the courts to reach some kind of a decision to expedite these cases.

Massachusetts Experiment

The problem is compounded by experiments in such states as Massachusetts where a modified "no fault" bill is scheduled to take effect on January 1, 1971. The Massachusetts experience will be watched in other important states such as New York where a committee has been named to study its provisions. It will be recalled that Governor Francis W. Sargent, outlined by television lights and flanked by lesser dignitaries, publicly signed a "no fault" bill on August 13, 1970 which provided that injured motorists would be able to collect medical and hospital benefits regardless of fault, as well as 75 per cent of actual lost wages up to \$2000. Despite the fact that insurers had not had an increase in bodily injury liability rates since 1967 and property damage liability rates had risen only 3 percent since 1965, the Governor also dictated an across-the-board 15 percent reduction in insurance rates.

The original rationale of the Massachusetts plan, since amended, would have

made it impossible for insurance companies to non-renew for any reason other than non-payment of premiums. Under these conditions and in keeping with their promises prior to the signing of legislation, insurers indicated their intent to forsake Massachusetts as an insurance market and challenged the constitutionality of the governor's actions in the court. At this writing, the property liability reduction has been ruled "confiscatory" by the Massachusetts Supreme Judicial Court. Subject to court direction, the Insurance Commissioner has allowed insurers the right to raise property liability rates 38.4 per cent. The issues of the mandatory rate reduction for other physical damage coverages (collision, comprehensive, etc.) and the "no-fault" principle have not been ruled upon by the court as yet, but would appear to be unconstitutional as well. Bodily injury coverage rate reductions have not been challenged.

Danger in States

It should be noted carefully that the issue of automobile insurance has become a major political theme, not only in Massachusetts but in other states and the federal government as well. The aim is to gain massive newspaper headline display and little, if any, distinction is made between the problems of insurance and the problems of the tort system—the tarring brushes sweep wide. All states except Kentucky, Louisiana and Virginia will have

legislative sessions in 1971 which could consider the question of "no fault." Such plans could spring up in any of 47 states.

Careful attention must be given to the fact that the "no fault" concept has been mentioned in relation to the fields of medicine, aviation, product and professional liability. A consumer protection bill has been favorably reported out of the Senate Commerce Committee which provides for class actions in the federal courts by consumers who have claims in excess of \$10. Senator Magnuson has lauded the report of the National Commission on Product Safety and has promised action on its proposal for a Consumer Product Safety Act. The National Commission has announced that it will release a series of supplemental research papers.

This brief report cries out for positive action by defense attorneys to implement the proposals of "Responsible Reform—A Program To Improve The Liability Reparation System" on the state level. It indicates that individual attorneys must make their thoughts known to their Congressmen. It shows that attorneys must communicate their thoughts to others who value the present system so that organized strength is forthcoming. Without such actions, the odds are high that the tort system, as we know it, will undergo severe surgery. The dangers are many, demanding thought and positive contributions from all with the goal being reform in the public interest.