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1-1-1974

# Federal "No-Fault" Insurance-S354

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Publication Information
John J. Kircher, Federal "No-Fault" Insurance-S354, 41 Ins. Counsel J. 602 (1974) (originally published in the Insurance Counsel Journal, published by the International Association of Defense Counsel)

Repository Citation
Kircher, John J., "Federal "No-Fault" Insurance-S354" (1974). *Faculty Publications.* Paper 227.
http://scholarship.law.marquette.edu/facpub/227

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# FEDERAL "NO-FAULT" INSURANCE–S354

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## INTRODUCTION

At the present time we are one step closer to having federal incursion into the area of automobile accident reparations reform than we were when this Association last met. You will recall that at the last mid-winter meeting of the International in Palm Beach, Florida, Darrell Coover of the Washington office of the National Association of Independent Insurers discussed the possibility of Senate action in this area. Ironically, on "Law Day," May 1, 1974, the United States Senate, by a vote of 53-42, passed the "National No-Fault Motor Vehicle Insurance Act" (S354).

The steps remaining before S354 becomes the law of the land are consideration by a House Subcommittee; consideration by the full committee; a vote in the House itself; possible conference committee action if the House version differs from the bill passed in the Senate; and, ultimately, action by the President. Of course, if the House does not act on S354 by the end of this year when Congress adjourns, new legislation would have to be introduced when the 94th Congress convenes in January 1975.

I have been asked to take a few minutes of your time today to present an analysis (possibly a critique) of this federal no-fault bill that was passed by the Senate. Hopefully, the information I am able to provide will assist you in making up your own mind as to the merits of this bill so that you can express your views to your own Representative in the House.

Basically, S354 is a two-tiered bill calling for certain action on the part of the states to enact "no-fault" legislation and providing for a stricter form of "no-fault" for those states that do not choose to act.

## REQUIRED STATE ACTION

S354 provides [§201] that by the completion of the first general session of a state legislature which commences after S354 is enacted, each state [defined in § 103 (29)

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to include the United States, District of Columbia, Guam and the Virgin Islands] must enact an auto reparation plan which meets or exceeds the requirments of Title II of the bill. The one-year time limit for state action is extended to four years for any state found to be a "no-fault" state as defined in §201 (g). There, "no-fault state" is defined to mean:

> A State which has enacted into law and put into affect a motor vehicle insurance law not later than September 1, 1975, which provides, at a minimum, for compulsory motor vehicle insurance; payment of benefits without regard to fault on a first-party basis where the value of such available benefits is not less than $2,000; and restrictions on the bringing of lawsuits in tort by victims for non economic detriment, in the form of a prohibition of such suits unless the victim suffers a certain quantum of loss or in the form of a relevant change in the evidentiary rules of practice and proof with respect to such lawsuits.

At the present time twenty-one states have enacted laws which modify their tort-based auto reparation systems. Of those, twelve (Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York and Utah) would, in all probability, qualify as "no-fault states" under the S354 definition. They all provide for

compulsory insurance, at least $2,000 in first party benefits; and some restriction, generally through a threshold, on tort actions. Seven states (Arkansas, Delaware, Maryland, Oregon, South Dakota, Texas and Viriginia) have enacted laws providing for first party benefits without limitation on tort liability. Of these, only Delaware would probably qualify as a "no-fault state" under S354's definition since, in addition to its provision for compulsory insurance and first party benefits, it provides for a change in the state's evidentiary rules to preclude evidence in a tort suit with regard to losses for which first party benefits have been paid. Whether this would be considered a "relevant change" under the S354 definition is, at this time, speculative. How the law recently enacted in Kentucky would be evaluated under the definition is hard to judge. The Kentucky law does establish a system of compulsory insurance, first party benefits and has tort exemptions similar to the law in Florida. However, the Kentucky law provides that insureds may elect to remain under the tort liability system.

Regardless of the "no-fault state" exemption in S354, all states will eventually have to meet or exceed the standards for auto reparation established in Title II of S354. All that the "no-fault state" exemption does is to extend the time for compliance with the provisions of Title II for an additional three years.

Under S354 a state is considered to have met the requirements of Title II if the substance of the provisions of its law are the same as or the equivalent of Title II; it "exceeds" the requirements if the provisions of its law are more favorable or beneficial to an insured or more restrictive of tort liability than those of Title II [§ 202 (B)]. The Secretary of Transportation is to examine, and periodically re-examine, state legislation to determine its compliance with Title II. If a state does not enact a plan which complies with Title II within the time specified (one year after enactment of S354 for a "non-no-fault state" and four years for a "no-fault state"), Title III of S354 will become applicable in that state.

With this background in mind we may now consider the requirements for an auto reparation law which a state must meet or exceed to comply with S354.

## TITLE II — STATE STANDARDS

### *Required Insurance*

To comply with Title II, the state law must provide [§ 104] that every owner of a motor vehicle which is registered in the state, or operated in the state with the owner's permission, must continuously maintain insurance coverage for first party benefits and, at the option of the state establishing the plan, against tort liability. Motor vehicle is defined [§ 103 (17)] as a vehicle of a kind required to be registered in this state. However, states are given the option to provide special treatment as to vehicles having less than four wheels as respects the insurance requirements and the first party benefits which must be made available under the state plan. The purpose of this provision, added as an amendment during Senate debate on the bill, is to allow a state to exclude vehicles such as motorcycles from the requirement to purchase first party coverage. It seems generally agreed that a high-limit first party insurance plan would be extremely expensive for motorcycle operators. The reason is that a minor collision, which would produce little if any injury to an automobile occupant, can result in very severe injuries to motorcycle operators.

Self-insurance would be allowed under a state plan complying with S354 if the self-insurance program is approved by the state's Insurance Commissioner or Department of Motor Vehicles.

To comply with S354 the state plan must also provide for an assigned risk mechanism. Section 105 of the bill provides that the state must "establish and implement or approve and supervise a plan assuring that any required no-fault benefits and tort liability coverages for motor vehicles will be conveniently and expeditiously available, . . . to each individual who cannot conveniently obtain insurance through ordinary methods at rates not in excess of those applicable to similarly situated individuals under the plan." If I were an insurance executive the words "cannot conveniently obtain," in § 105 would scare me to death.

Also of interest to insurers are the provisions of § 105 of the bill which require the state plan to limit the insurers right to cancel, refuse to renew, or otherwise terminate the required coverages.

*Interstate Coverage*

The proponents of S354 have claimed that its enactment is necessary to avoid the problems which would arise and affect interstate commerce as the result of 50 or more different state auto reparations plans. In this regard, two provisions of the bill are important to consider. Section 110 provides that the state laws to comply with the provisions of Title II, must provide that the owner of a vehicle who has fulfilled the insurance requirements of his state of registration shall be deemed to have complied with the insurance requirements of any state in which the vehicle is operated. Thus, the insurance policy issued by an insurer to such a vehicle owner will be construed to contain a provision which provides such conforming coverage and, in addition, to provide $50,000 of liability coverage to protect the insured against tort exposure which he may have while driving in a state other than his own.

This section of the bill goes on to provide that an accident victim's entitlement to benefits under first party coverage will always be determined by the law of the state of his domcile on the date of the accident. If the victim is not domiciled in a state or his state has not enacted a "no-fault" law as of the date of the accident, the law of the state of the acident governs. Likewise, with respect to the right of the accident victim to a tort recovery—the law of the state of domicile governs and, if the victim is not domiciled in a state, the law of the state of the acident governs. My interpretation of these provisions can best be shown through an example. Let us suppose that S354 has been enacted and all fifty states have passed varying laws (as to first party benefits and retained tort) in compliance with its provisions. Let us suppose also that during the course of this convention the International has arranged a bus trip for the attendees to tour the West Virginia mountains. Let us suppose further that one of the busses has an occupant from each state in the Union and, unfortunately, is involved in an accident. As I would interpret § 110, each accident victim would be entitled to first party benefits in accordance with the law of his home state. Any IAIC member from Canada would recover under the West Virginia law. The same breakdown, by state, would appear to hold true with respect to the accident victims' rights to pursue a tort remedy —to the extent that tort liability is retained by their home state, or again in he case of our friends from Canada, the state of West Virginia. While each accident victim would claim benefits from his own insurer, the insurer of the bus company would be faced with the possibility of at least 50 tort actions under 50 different state plans. In each the question would be not only what each state has done with respect to the tort actions that are retained, but also wheher S354 means what it says as to the victim's rights being "determined by the law of the state of domicile." Would some of these claims be determined under the rule of comparative negligence, guest statutes and the like while others would not? Or, does this provision of S354 merely mean that the accident victim's state law is looked to only for the purpose of determining the extent to which the law restricts his right of tort recovery. As far as I am concerned this provision of the bill, in this application, would make some automobile crash cases so complex that the Santa Barbara Oil Spill case will look like a mine-run slip and fall accident.

*Minimum First Party Coverages*

For a state to comply with the requirements of Title II of S354 the first party insurance coverage which it must mandate for its state's motorists must provide certain minimum first party benefits.

The coverage must provide benefits unlimited as to dollar amount or duration of payment, for professional medical treatment and care, emergency health services and medical and vocational rehabilitation. To comply with Title II, expense directly related to funeral and burial must be provided up to at least $1,000. Certain limitations are provided with regard to expense for rehabilitation benefits.

Under § 204 of the bill a state has two choices with respect to the limits it will set for work loss benefit coverage. It may set the monthly limit for such benefits at $1,000 multiplied by a fraction whose numerator is the average per capita income in the state and whose denominator is the average per capita income in the United States (according to latest Department of Commerce statistics)—or, the monthly limit may be what the bill refers to as a "disclosed amount" which would require the insured, prior to the accident resulting

in injury, to voluntarily disclose his actual monthly earned income to his insurer so that the insurer could agree in writing that such sum would be the measure of the monthly payment. It should be noted that if the state chose the fractional approach to determining the monthly limit, persons earning a high income, in states having a low average per capita income, would be limited in the amount they could recover under the basic first party coverage.

Section 204(b) also gives the state the option to determine the total dollar limit that will be paid for wage loss benefits. The state may choose to set the limit at $25,000 multiplied by the same per capita income fraction referred to previously or, at some other sum, but not less than $15,000.

S354 would also require the states, in order to comply with Title II, to mandate first party benefit coverage for substituted services (e.g., hiring a housekeeper while a housewife is recovering from injury) and for survivor's loss. However, the bill [§ 204(c)] allows each enacting state to establish its own "reasonable" limits on the benefits that would be payable in these two categories.

### *Deductibles and Waiting Periods*

S354 [§ 204(e)] would allow states, in complying with Title II, to make provisions in their auto reparation laws for a deductible from first party benefits (but not more than $100 per person) and for waiting periods prior to the entitlement to first party benefits (but not to exceed one week). Deductibles and waiting periods may only apply to claims by insureds and, in the case of death of an insured, to claims by his survivors. Quite obviously coverages with deductibles and waiting periods should be sold at a reduced premium. It is certain that many persons of limited means will take the maximum deductible and waiting period available. Considering that DOT statistics show over 80% of accident victims sustain economic loss under $500, a $100 deductible will have a substantial impact upon the amount of benefits paid to accident victims. Even more of an impact is bound to result as to those accident victims who have elected to eliminate coverage for the medical expenses and wage loss resulting during the first week after an accident.

### *Collateral Sources*

One of the areas of heated debate, almost since the inception of the no-fault controversy, has been whether first party benefits available under a no-fault system should be reduced by the amount of benefits the accident victim receives from sources other than automobile insurance. A state bill complying with Title II of S354 needs only to provide for such a reduction as to benefits received under:

a. the social security law (not Title XIX);
b. workmen's compensation;
c. state-required temporary, non-occupational disability insurance; and
d. benefits received from any government (unless the law providing them makes them secondary to first party auto insurance).

The reduction of the "no-fault" benefits by benefits received under the Social Security Law will have a significant impact upon retired persons. As a general rule, retirees will receive medical care under Medicare and will sustain no wage loss as a result of an automobile accident. Therefore, as respects first party benefits, S354 would appear to give them nothing.

It should be noted, in reference to collateral sources, that as a result of debate on S354 on the senate floor, an amendment [§ 208(c)] was added to the bill allowing for a deduction from first party benefits of benefits received by the accident victim for medical, hospital and related services under coverage such as group health insurance. Such a deduction would be required for a state to comply with Title II unless it, according to the language of the Act:

> finds and reasonably determines, in the course of establishing such plan . . ., that the inclusion of such provisions in the plan would affect adversely or discriminate against the interests of persons required to provide security covering motor vehicles in such state.

In other words a state would be required to make group accident and health coverage primary to first party auto coverage unless it determined that doing so would not be in the best interest of its motorists.

### *Exclusions*

In order to comply with Title II, a state plan may allow an insurer to exclude per-

sons from first party coverage in only two instances [§ 210]. First, a person who converts (steals) a motor vehicle is not entitled to benefits under the insurance coverage of the converted vehicle. Nevertheless, he may recover from his own insurer. Second, a person who intentionally injures himself or another (including his survivor should he die as a result of the accident) is denied any coverage.

### *Optional Coverages*

To comply with Title II, the state plans *may* require the insurers writing in that state to offer certain first party coverages:

1. first party benefits in excess of the minmums established in the state;
2. benefits for damage to property;
3. benefits for loss of use of a motor vehicle; and
4. benefits for expenses for remedial religious treatment and care.

However, in order to comply, the state plan *must* require insurers to offer certain other optional coverages:

1. collision and upset coverage for the insured motor vehicle subject to an optional $100 deductible;
2. liability coverage if the state determines that this coverage is not compulsory;
3. coverage for work loss in excess of that provided by the required first party coverage; and
4. coverage for first party benefits for vehicles having less than four wheels—if the state determines that it will not compel the owners of those vehicles to purchase this coverage.

### *Assigned Claims Plan*

In addition to establishing the basic auto reparations plan required by Title II each state, in order to comply with S354's provision, must also establish an assigned claims plan so that injured accident victims who do not have an insurer from which to claim first party benefits may receive those benefits as if, in fact, they had been insured. This plan would protect, for example, a pedestrian, not himself an insured or a member of a car-owning family who is injured by a hit-and-run automobile. Even those persons who would violate the state law which requires them to insure their motor vehicles could seek benefits under the assigned claims plan. However, the amount of benefits recovered would be reduced by a penalty of $500 for each year the person violated the required insurance law. Also, the claimant would be subject to all permissible deductibles and waiting periods. [§ 108(a)(4)]

### *Source of Benefits*

In order to comply with S354, the state auto reparations law would have to establish guidelines to determine the insurer from which an accident victim would recover benefits. Except in a few limited instances, coverage would not follow the vehicle but would follow the person insured. That is, the accident victim would look to his own insurer for benefits, rather than the insurer of the vehicle he occupied.

### *Impact on Tort Liability*

To comply with the requirements of Title II of S354 a state would have to place certain minimum restrictions on tort liability. Just as a state would comply with Title II by enacting a law providing broader first party benefits than the minimums of Title II, it would also comply if the restrictions it places on tort liability are more severe than those required by Title II.

To comply with the requirements of Title II [§ 206(a)], a state enacting an auto reparation law may only *preserve* tort liability as a result of motor vehicle accidents in the following situations:

1. As to the owner of a motor vehicle involved in the accident who failed to comply with the state's compulsory insurance requirements;
2. As to a person in the business of designing, manufacturing, servicing or otherwise maintaining motor vehicles with respect to a defect in such a vehicle caused or not corrected by any act or omission in the course of such business; other than a defect in a vehicle operated by such business;
3. As to a person who intentionally injures himself or another;
4. As to economic loss which is not compensated under the state's required first party insurance plan [however, tort liability may not be preserved as to economic loss damages resulting from the differences between the amount of actual monthly wage loss sustained and the monthly wage loss benefit paid under the plan. In addi-

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tion, tort liability would not be preserved with regard to those damages resulting from deductibles or waiting periods. Thus, if the state established a plan with a monthly wage loss benefit limit of $1,000 and the accident victim sustained $1500 actual monthly loss, the $500 per month difference would be uncompensated and would not be recoverable in tort. Only after the aggregate total limit payable for wage loss is exceeded could the accident victim bring an action to recover for future uncompensated economic loss.];

5. tort liability could only be preserved for what the bill refers to as "noneconomic detriment" (pain, suffering, etc.) if the accident results in death; serious and permanent disfigurement; other serious and permanent injuries; or more than 90 continuous days of total disability; and

6. tort liability is preserved if an injury was caused or not corrected by an act or omission not connected with the maintenance or use of a motor vehicle.

## TITLE III

If a state fails to enact a plan complying with the requirements of Title II within the time limits previously discussed, the plan as set forth in Title III of the bill would be imposed upon that state.

Basically, the plan set forth in Title III is similar to the one established by Title II with certain exceptions. Under the Title III plan, wage loss would be determined for the state by the fraction previously referred to (a numerator of the average per capita income of the state and a denominator of the average per capita income in the United States multiplied by $1,000). However, unlike the Title II plan, there would be no cap or ceiling on the total amount of wage loss benefits which would be paid subject to the monthly maximum. Therefore, under Title III an accident victim could recover wage loss benefits for the remainder of his life.

Under Title III the retained tort liability is more limited than that required of the states under Title II. Under Title III there would be no tort liability with respect to uncompensated economic loss. General damages (pain, suffering, and the like) would be completely eliminated.

Title III also modifies, to a certain extent, several other features of the plan set forth in Title II, especially with regard to the required optional coverages.

### *Title II in a Nutshell*

With this basic overview of S354 we can see that it would require all states to enact a "no-fault" plan which would provide unlimited medical, hospital and related expenses; wage loss benefits at the rate of approximately $1,000 per month to a total aggregate of between $15,000 and $25,000; and to provide "reasonable" benefits for substituted services and survivor's loss. To comply with Title II the state would also have to severely limit tort liability for personal injuries arising out of a motor vehicle accident. Tort liability for property damage resulting from a motor vehicle accident would be unaffected by the provisions of Title II.

Even with all of the states that have enacted laws modifying their auto reparations system, only the laws in the states of Michigan and Minnesota come close to meeting the "standards" of Title II. Therefore, all other states would have to severely modify their existing plans in order to comply. They would have to do this within one to four years after the enactment of S354, depending upon the plan existing in that state at the time of enactment, or face imposition of Title III.

### *Why We Oppose It?*

In April of this year Rudy Janata and Ed Seitzinger of DRI, Bill Steele or IAIC, Phil Knight of FIC and Paul Gibbs of the Association of Insurance Attorneys appeared before the Senate Judiciary Committee and expressed opposition to S354. You have all probably received a copy of our reprint of Rudy's statement entitled "Federal 'No-Fault' Insurance—An Analysis and Critique."

There are many reasons why the four defense groups are opposed to S354. Basically, we have always favored improvement of the auto reparations system but we believe that this improvement should take place at the state level so that the plan enacted meets the needs of the citizens of a given state. We do not believe that the auto reparation needs of Illinois are the same as those of Utah. We certainly do not believe that the banks of the Potomac River provide the ultimate vantage point from which to judge the needs of each and every state.

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We believe that S354 has many constitutional infirmities. These are fully explained in Rudy's statement and I need not go into them now. There are those who disagree with us as to S354's constitutional problems, noteably Erwin N. Griswold, former U.S. Solicitor General and late of the Harvard Law School. He was retained by proponents of S354 to present a brief to the Senate Judiciary Committee supporting the constitutionality of the bill. Dean Griswold claimed that S354 presented no constitutional problems.

In addition to the states' rights problems and constitutional issues, there are other reasons why we oppose S354 or similar federal legislation. We believe that this type of bill will be another step down the road to federal regulation of insurance. While we favor first party insurance for automobile accident victims, we believe that the cost of those benefits should ultimately be shifted to the persons responsible for causing accidents. In most instances, S354 would allow the loss to lie where it falls. We believe that S354's requirements for elimination of tort recoveries go much too far—certainly further than the plans enacted in most states to date.

The proponents of S354, and similar legislation, have claimed that lawyer opposition to the bill is founded principally on the economic interests of the Bar in preserving the tort liability system. Having studied S354, I am not convinced that it would have a serious impact upon the Defense Bar. In fact, it is filled with enough ambiguities to result in a good deal of insurance coverage questions which will ultimately lead to litigation. When one considers that states statutes would have to be enacted in compliance with S354 and that insurance policies would have to be drafted to comply with both S354 and varying state laws, the possibility for compounding the ambiguities increases geometrically.

Having been involved with the subject of "no-fault" since the early days of Keeton and O'Connell, I recall that the original need for auto reparations reform was predicated upon the claim that the system should be improved for the benefit of accident victims and insurance policyholders. Somehow that concept seems to have been forgotten during the years that this subject has been debated. One only has to read the Senate debate on S354 in the Congressional Record of May 1, 1974 to come away with the idea that the proponents of this bill were more interested in uniformity of the laws among the states and in downright "getting the lawyers" than in whether the plan under debate would improve the lot of those that the auto reparations system was intended to serve.

I believe that the auto reparation system can be improved, but I also believe that it will only be improved for the benefit of accident victims and policyholders if it is tailored to meet the needs of the citizens of each individual state. Although the proponents of S354 refer to the bill as establishing "minimum state standards," the requirements of that bill are far from being minimums and would give state legislatures little if any opportunity to mold auto reparations reform to individual state needs. I personally believe that S354 should not be enacted.

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