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Mark V. Holden

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## THE 1985 AMENDMENTS TO THE DISTRICT OF COLUMBIA'S NO-FAULT MOTOR VEHICLE INSURANCE ACT OF 1982: THE FUTURE OF NO-FAULT INSURANCE IN THE DISTRICT

No-fault automobile insurance, in theory, compensates automobile accident victims for their losses without regard to tort liability.<sup>1</sup> It was designed to remedy the weaknesses of the traditional automobile liability insurance system which critics claimed cost too much to maintain and yet inadequately compensated victims.<sup>2</sup> Under the traditional liability insurance system, automobile accident victims first must establish fault and degree of injury before compensation can be awarded. In attempting to meet these requirements, victims often face expensive and time-consuming litigation. In contrast, the "no-fault solution" provides that accident victims receive compensation from their insurance companies for out-of-pocket losses, regardless of fault.<sup>3</sup> However, along with the certainty of no-fault benefits comes the requirement that the victim surrender any claim based on the fault of another that may have arisen from the accident, unless certain exceptions are met.<sup>4</sup>

The opponents of no-fault insurance plans,<sup>5</sup> refute the claims made by its

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1. See IV R. LONG, *THE LAW OF LIABILITY INSURANCE*, § 27.02 (1984); R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE ACCIDENT VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE*, 5 (1965) [hereinafter R. KEETON & J. O'CONNELL, *BASIC PROTECTION*]; R. KEETON, *INSURANCE LAW-BASIC TEXT* § 4.10 (1971); O'Connell, *Operation of No-Fault Auto Laws: A Survey of the Surveys*, 56 NEB. L. REV. 23, 24 (1977).

2. The adequacy of traditional liability insurance as a tool for compensating those who are injured in automobile accidents has been questioned for over 65 years. See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION*, *supra* note 1; Carmen, *Is a Motor Vehicle Compensation Act Advisable?*, 4 MINN. L. REV. 1 (1919); Ellsbree & Roberts, *Compulsory Insurance Against Motor Vehicle Accidents*, 76 U. PA. L. REV. 640 (1928); James & Law, *Compensation for Automobile Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B. J. 70 (1952); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

3. R. KEETON & J. O'CONNELL, *BASIC PROTECTION*, *supra* note 1, at 5. This is one of no-fault insurance's most appealing characteristics. The idea of an expedited payment schedule appeals to those who have grown tired of the delays that are often a part of traditional liability insurance systems.

4. O'Connell, *supra* note 1, at 24. For example, prior to 1986 in the District of Columbia, insured victims could sue if their medical expenses exceeded \$5,000, if their damages exceeded the total amount of personal injury protection benefits received, or if their injuries met a specified level of severity. D.C. CODE ANN. § 35-2105 (Supp. 1983).

5. This group includes many plaintiffs' attorneys. See, e.g., O'Connell, *supra* note 1, at 23; O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72

proponents that no-fault increases victims' benefits, reduces delays in the payment of claims by insurance carriers, diminishes litigation, and keeps insurance costs lower than traditional liability insurance.<sup>6</sup> One commentator has argued that no-fault's statutory requirements unfairly burden the poor, the aged, and others with limited economic resources.<sup>7</sup> Other critics have argued that no-fault's promises of reduced cost and litigation are unfulfilled<sup>8</sup> and that its guarantee of benefits is misleading.<sup>9</sup>

Some critics have focused their attacks on the provisions contained in no-fault statutes that require a victim to meet a certain level of either pecuniary loss from medical expenses or injury severity before he or she brings a suit in tort or recovers no-fault benefits.<sup>10</sup> These provisions, which are known as thresholds, have been said to invite fraud and abuse by the unscrupulous automobile accident victim who will falsify or "pad" his or her medical ex-

VA. L. REV. 61, 75 (1986). For an example of what some trial lawyers have proposed as an alternative to no-fault insurance plans, see M. WOODRUFF, J. FONESCA & A. SQUILLANTE, *AUTOMOBILE INSURANCE AND NO-FAULT LAWS* § 12.13 (1974).

6. See R. LONG, *supra* note 1, § 27.03; Green, *Basic Protection and Court Congestion*, 52 A.B.A. J. 926, 931 (1966); Morrow, *Fault Without Responsibility—An Anachronism*, 36 INS. COUNS. J. 202, 205 (1969); Ring, *The Fault With "No-Fault,"* 49 NOTRE DAME LAW. 796, 803-09 (1974); Ross, *DRI Studies Refute Court Delay Claims of Critics*, 36 INS. COUNS. J. 46, 46-47 (1969).

7. See, e.g., Schwartz, *Faulty No-Fault: Let the Consumer Beware*, 22 CATH. U.L. REV. 746 (1973). The author argues that no-fault insurance hurts senior citizens whose retirement years become filled with "grief, pain and unhappiness." *Id.* at 759. Accident victims in lower economic brackets, according to the author, typically incur substantially lower medical expenses than wealthy victims for the same accident because of medical expense formulas which allow the wealthy to recover for that injury while denying recovery to the poor. *Id.* at 759-60. See also *infra* note 46.

8. Green, *supra* note 6, at 931. Professor Green, in a reply to the no-fault insurance plan put forth by Robert Keeton and Jeffrey O'Connell, argued that since most statutes provide for the retention of tort suits, plus the no-fault benefits, the claimant takes no risk of losing his basic protection by bringing the tort suit. Furthermore, the claimant's counsel would probably encourage him to do so.

Thus, Green argued that instead of reducing cost and litigation, no-fault insurance has the opposite effect because the traditional tort suit, which is retained as a part of every statutory no-fault insurance act, would continue to occupy a substantial amount of the courts' time. The problem would be made worse by the vagueness and ambiguity of many no-fault statutes. Green further argued that the courts in no-fault jurisdictions would be turned into "administrative tribunals, charged with the responsibility of investigating, policing and enforcing the myriad details of the plan." *Id.* Therefore, Green felt that no-fault would increase congestion and delay in the courts and fail to "serve the ends of justice." *Id.*

9. Ring, *supra* note 6, at 797, 803-09. Ring argued that the thresholds in no-fault statutes preclude many deserving victims from bringing tort suits. While victims are compensated for losses that are incidental to the mishap, such as property damage and out-of-pocket losses, they are woefully undercompensated in comparison with those who are able to bring tort actions. *Id.*

10. *Id.* at 805-06.

penses in order to meet the statutory standard.<sup>11</sup>

Despite the criticism of no-fault insurance, twenty-eight jurisdictions have adopted, in one form or another, a no-fault automobile insurance plan.<sup>12</sup> Following this trend, the District of Columbia City Council enacted the "District of Columbia/No-Fault Motor Vehicle Insurance Act of 1982."<sup>13</sup> While many responded to the city council's action with praise for what was seen as the solution to the city's automobile insurance problems, others felt that the plan would prove to be too costly.<sup>14</sup> In 1985, the District of Columbia City Council amended the no-fault insurance statute in response to widespread criticism and challenges concerning its validity.<sup>15</sup>

This Note will examine the history of no-fault automobile insurance in the District of Columbia by evaluating the factors that led to its enactment. Next, the Note will examine the motivation behind the 1985 amendments. Finally, this Note will analyze the impact these amendments will have on the local automobile insurance industry.

## I. THE ADOPTION OF NO-FAULT INSURANCE IN THE DISTRICT OF COLUMBIA: A MARRIAGE OF CONVENIENCE

The District of Columbia's adoption of a no-fault automobile insurance plan resulted from the failure of many District motorists to purchase traditional liability insurance and the acknowledgement by the city's lawmakers that there was a need to implement a more efficient method of compensating accident victims.<sup>16</sup> Proponents argued that no-fault insurance would lead to

11. *Id.* at 806.

12. ARK. STAT. ANN. §§ 66-4014 to -4021 (1985); COLO. REV. STAT. §§ 10-4-701 to -723 (1973); CONN. GEN. STAT. ANN. §§ 38-319 to -351 (West Supp. 1986); DEL. CODE ANN. tit. 21, § 2118 (1985); D.C. CODE ANN. §§ 35-2101 to -2114 (Supp. 1986); FLA. STAT. §§ 627.730 to .741 (1985); GA. CODE ANN. §§ 33-34-1 to -13 (Supp. 1986); HAW. REV. STAT. §§ 294-1 to -41 (1985); KAN. STAT. ANN. §§ 40-3101 to -3121 (1985); KY. REV. STAT. ANN. §§ 304.39-010 to -340 (Michie/Bobbs-Merrill 1981); MASS. GEN. LAWS ANN. ch. 90, §§ 34A-340 (West 1986); MICH. COMP. LAWS §§ 500.3101 to .3179 (1983); MINN. STAT. ANN. §§ 65B.41 to .71 (1986); NEV. REV. STAT. §§ 679A.010-.130 (1975) (repealed 1979); N.H. REV. STAT. ANN. § 412 (Supp. 1986); N.J. REV. STAT. §§ 39:6A-1 to -20 (1983) (Supp. 1986); N.Y. INS. LAW §§ 5101-5108 (1985); N.D. CENT. CODE §§ 26-41-01 to -19 (1975) (repealed 1985); OR. REV. STAT. §§ 743.800 to .835 (1985); PA. STAT. ANN. tit. 40, §§ 1009.101 to .701 (Purdon Supp. 1983) (repealed 1984); P.R. LAWS ANN. tit. 9, §§ 2050-2065 (1982); S.C. CODE ANN. §§ 56-11-110 to -250 (Law. Co-op. 1986); S.D. CODIFIED LAWS ANN. §§ 58-23-5 to -8 (Supp. 1986); TEX. INS. CODE ANN. §§ 5.06-3 to 5.12-1 (Vernon 1986); UTAH CODE ANN. §§ 31-41-1 to -13 (1982) (repealed 1985); VA. CODE ANN. §§ 380.2-100 to -136 (1986); WIS. STAT. ANN. §§ 632.32 to 636.36 (Supp. 1986).

13. D.C. CODE ANN. §§ 35-2101 to -2113 (Supp. 1983).

14. *See infra* notes 18-21 and accompanying text.

15. D.C. CODE ANN. §§ 35-2101 to -2114 (Supp. 1986).

16. D.C. CODE ANN. § 35-2101 (Supp. 1983). This section states that:

faster and larger recoveries to accident victims at less cost, because no-fault would not require a showing of fault.<sup>17</sup>

In 1981, the no-fault insurance controversy sparked great excitement and a popular outcry in favor of its enactment in the District of Columbia.<sup>18</sup> Local insurance companies sent letters to policyholders advocating the no-fault concept and urging that policyholders let their views be known to the city council.<sup>19</sup> Representatives of the District's trial bar pressured the city council as well to adopt the bar's position that no-fault insurance was unnecessary and unfair.<sup>20</sup> *The Washington Post* favored the adoption of a no-fault system, characterizing its enactment as "urgent business" and attacking the position of the area's trial bar.<sup>21</sup> The American Bar Association, insurance

(a) Findings.—The Council of the District of Columbia finds that:

(1) Motorists, motor vehicle passengers, and pedestrians in the District are not adequately protected, by current law and practice, from the consequences of motor vehicle accidents.

(2) If a person suffers personal injuries because of an accident involving a motor vehicle in the District, he or she is unlikely to recover the amount of his or her actual losses because:

(A) Approximately 50% of the victims do not satisfy the prerequisites to compensation under the present law;

(B) Approximately 40% of the operators in the District do not maintain any motor vehicle insurance or have other financial resources sufficient to pay losses;

(C) The average motor vehicle insurance policy in the District will pay only up to \$10,000 for the personal injuries of any 1 victim, a sum that is insufficient to compensate adequately a victim with serious injuries; and

(D) Satisfaction of the prerequisites to compensation under the present law is time-consuming and expensive to policyholders because a victim must establish that the accident was the fault of another person; that the person injured was free from contributory fault; and that the injuries suffered were the natural and probable consequences of the accident.

(3) Far greater protection to victims of motor vehicle accidents is available at a lower price than that afforded for coverage currently available.

(4) The purchase of this better insurance protection should be compulsory because of the great potential of a motor vehicle to cause personal injury.

(b) *Purpose*.—It is the purpose of this chapter to provide adequate protection for victims who are injured in the District or who are injured while riding in motor vehicles registered or operated in the District.

*Id.*

17. See Stein, *Gee, Today Was a Bad Day . . . But It's Nobody's Fault: D.C.'s New No-Fault Insurance Law*, 8 DISTRICT LAW. 40, 41 (Mar./Apr. 1984).

18. *Id.* at 41.

19. *Id.* In addition to private citizens, representatives of the American Bar Association, the local trial bar, and the insurance industry all attended. For the most part, the citizens were in favor of no-fault insurance as it seemed to offer them a hope that the insurance situation in the city would change. *Id.*

20. *Id.*

21. Wash. Post, May 11, 1982 at A18, col. 1. An editorial stated that:

[t]his evening, Washingtonians will find out which D.C. Council members are serious about making the city's streets safer and providing auto accident victims with swift,

industry representatives, and private citizens all expressed their views on the subject to the city council.<sup>22</sup>

After conducting extensive hearings on the subject, the city council enacted the no-fault automobile insurance act.<sup>23</sup> The District's no-fault act required all residents of the city who owned motor vehicles to purchase insurance coverage consisting of personal injury protection, property damage liability protection, uninsured motorist protection, and third party liability coverage for accidents occurring outside the District.<sup>24</sup>

A victim who preferred to bring a tort action to recover "noneconomic loss"<sup>25</sup> had to meet at least one of six statutory exceptions.<sup>26</sup> One of the exceptions required that a victim's medical expenses must meet or exceed \$5,000,<sup>27</sup> which was at the time of the statute's enactment, the highest express monetary threshold of any no-fault jurisdiction.<sup>28</sup> The statute immediately became the target of criticism by lawyers and others who claimed that it was one of the most severe of any no-fault statute in the country and that the \$5,000 requirement eliminated the right to sue in all but the most cata-

fair insurance compensation. . . . It would make auto insurance mandatory and end the costly process of suits, countersuits, haggling and settling that lines the pockets of a few trial attorneys before compensating the injured.

*Id.*

22. Stein, *supra* note 17, at 41-42. One council member described the hearings as "latent with emotions" as the various lobbyists "marched through in a traveling road show" trying to convince the council members to embrace their particular position on the issue. *Id.* at 41 (quoting *Thirty-Ninth Legislative Session, Proceedings*, May 25, 1982 (statement of Councilman Clarke)).

23. District of Columbia/No-Fault Motor Vehicle Insurance Act of 1982, D.C. CODE ANN. §§ 35-2101 to -2113 (Supp. 1983).

24. *Id.* § 35-2103.

25. Noneconomic loss was defined as "pain, suffering, inconvenience, physical or mental impairment, and other nonpecuniary damage recoverable under the tort law applicable to injury arising out of the maintenance or use of a motor vehicle." *Id.* § 35-2102(19).

26. *Id.* § 35-2105. This section stated that a suit based on the liability of another could not be maintained unless (1) the victim's medical expenses exceeded the personal injury protection benefits available to him or her; (2) a death resulted from another's maintenance or use of a motor vehicle; (3) the injury resulted from another party's use of a motor vehicle with the intent to harm himself or any other person; (4) the victim's injuries resulted in substantial permanent scarring or disfigurement; (5) the other party's vehicle was not insured; or (6) the victim's medical expenses equalled or exceeded \$5,000. *Id.* §§ 35-2105(1)-(6) (amended and partially repealed 1985).

27. *Id.* § 35-2105(b)(6).

28. See, e.g., COLO. REV. STAT. § 10-4-714(e) (1973); CONN. GEN. STAT. ANN. § 38-323(a)(7) (Supp. 1986); GA. CODE ANN. § 33-34-2(13) (1982); KAN. STAT. ANN. § 40-3117 (1981); KY. REV. STAT. ANN. § 304.39-060(2)(b) (Michie/Bobbs-Merrill 1981); MASS. GEN. LAWS ANN. ch. 90 § 34M (Supp. 1986); MINN. STAT. § 65B.51(3)(a) (1986); N.J. REV. STAT. § 39:6A-8 (1973); PA. STAT. ANN. tit. 40, § 1009.301 (Purdon. Supp. 1986) (repealed 1984); UTAH CODE ANN. § 31-41-9(e) (1982) (repealed 1985).

strophic cases.<sup>29</sup>

Amid the high hopes of some people and the criticism of others, no-fault automobile insurance began what would prove to be an unsteady existence. The act was expected to be a cure for all the District's automobile insurance problems. The citizenry had great expectations of no-fault insurance;<sup>30</sup> proponents believed the new system would provide adequate and inexpensive coverage.<sup>31</sup> The heightened expectations of the public added an additional burden to the fledgling system because no-fault insurance had to work well quickly to satisfy everyone.<sup>32</sup>

## II. THE COMPULSORY/NO-FAULT MOTOR VEHICLE INSURANCE ACT OF 1982 AMENDMENTS ACT OF 1985

### A. *The Reasons Behind the Amendments*

The District of Columbia City Council amended the no-fault insurance statute in 1985.<sup>33</sup> A number of developments, including: (1) a federal district court ruling concerning the act, (2) an investigation by the city government into the act's effectiveness, and (3) the public's general dissatisfaction with the act's failure to perform as its proponents had promised, led to enactment of the amendments.<sup>34</sup>

Until recently, the District of Columbia courts had not ruled on or interpreted the no-fault statute in terms of its constitutional validity.<sup>35</sup> Although accident victims brought claims under the act's exceptions in the lower courts, the constitutionality of the no-fault insurance act was not litigated until 1985. The United States Court of Appeals for the District of Colum-

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29. Winter, *D.C. Adopts a No-Fault Insurance Plan*, 68 A.B.A. J. 1360 (1982). Critics likened the act to a form of an experiment with the District's motorists as guinea pigs. *Id.* at 1360.

30. See Stein, *supra* note 17, at 41.

31. See *supra* note 21.

32. See *supra* notes 18-22 and accompanying text; see also *infra* notes 46, 60-63 and accompanying text.

33. The Compulsory/No-Fault Motor Vehicle Insurance Act of 1982 Amendments Act of 1985, D.C. CODE ANN. §§ 35-2101 to -2114 (Supp. 1986).

34. See *infra* notes 46, 50-62 and accompanying text.

35. The United States District Court for the District of Columbia has decided at least three cases dealing with the no-fault statute's applicability to taxicab drivers. In *Nasaka v. Data Access Sys.*, 602 F. Supp. 761 (D.D.C. 1985), the court held that the exemption of taxicabs from the city's no-fault law applied only to the law's mandatory insurance provision. The exemption did not prevent a taxicab owner or driver from claiming benefits under the no-fault law, nor did it entitle the owner or the driver from avoiding the limitations on civil liability set forth in the act. *Id.* at 765.

Both *Arthur v. Avis Rent-a-Car Sys., Inc.*, 613 F. Supp. 82 (D.D.C. 1985) and *Adinyede v. National Children's Center, Inc.*, No. 84-1515 (D.D.C. Apr. 4, 1985) (order granting summary judgment) reinforced the *Nasaka* ruling that taxicab drivers are not exempt.

bia, in *Dimond v. District of Columbia*,<sup>36</sup> held the \$5,000 requirement of section 35-2105(b)(6) to be constitutional.<sup>37</sup> In doing so, the court reversed the decision of the federal district court, which had held that the \$5,000 amount was unreasonable and a violation of the equal protection clause of the United States Constitution.<sup>38</sup>

In *Dimond*, a plaintiff who failed to meet any of the section 35-2105 exceptions claimed that the act was unreasonable.<sup>39</sup> Specifically, the plaintiff argued that the \$5,000 threshold established an arbitrary and irrational classification between accident victims whose medical expenses exceeded \$5,000 and those victims whose expenses fell short of that amount.<sup>40</sup> The United States District Court for the District of Columbia agreed and invalidated the subsection containing the monetary provision because it unreasonably barred motor vehicle accident victims from recovering their losses.<sup>41</sup> The court based its holding on its determination that the \$5,000 floor was not rationally related to the no-fault act's professed purpose of providing adequate protection to District of Columbia motorists.<sup>42</sup>

Although the decision was reversed by the United States Court of Appeals for the District of Columbia Circuit, which held that the threshold and its

36. 792 F.2d 179 (D.C. Cir. 1986). This case involved a challenge to the statute by plaintiffs from the District of Columbia, Virginia, and Maryland. *Dimond v. District of Columbia*, 618 F. Supp. 519, 523 (D.D.C. 1984).

37. *Dimond*, 792 F.2d at 182. In addition to the attack on the reasonableness of the \$5,000 requirement, the plaintiffs argued that the entire statute was null and void because the District of Columbia City Council failed to observe certain procedural requirements of the District of Columbia Self-Government and Governmental Reorganization Act. D.C. CODE ANN. §§ 1-201 to -299.7 (Supp. 1986). *Dimond*, 792 F.2d at 184. While the district court ruled that the plaintiffs lacked standing to challenge the act on this ground because their claim was "nothing more than a generalized grievance alleging abstract injury," *Dimond*, 618 F. Supp. at 524, the court of appeals allowed the plaintiffs to argue the issue. *Dimond*, 792 F.2d at 191. The appellate court, however, ruled against the plaintiffs on the issue, stating that, although there may have been procedural improprieties in the enactment of the statute, the causal connection between that and any injury suffered by the plaintiffs was too attenuated and speculative to warrant the invalidation of the entire statute. *Id.*

The third attack by the plaintiffs dealt with another alleged violation of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. CODE ANN. § 1-233(a)(4) (1981 & Supp. 1985). The plaintiffs claimed that the \$5,000 threshold impermissibly altered the jurisdiction of both federal and local courts. This was forbidden by the section of the act in question which prohibited the city council from enacting any provision relating to the District's courts. Although the federal district court did not reach this issue, the appeals court did address it, *Dimond*, 792 F.2d at 184, ruling that the city council had not altered the local and federal courts' jurisdiction. *Id.* at 189, 190.

38. *Id.* at 182.

39. *Id.* at 184.

40. *Id.*

41. *Dimond*, 618 F. Supp. at 526.

42. *Id.*

resulting classification were constitutional,<sup>43</sup> the importance of the court's decision was greatly diminished by the amendment of the no-fault statute while the case was in the midst of appeal.<sup>44</sup> The court of appeals' reversal could not cure the damage done to the statute's credibility and strength by the district court's ruling.

Prior to the judiciary's review of the act, the District of Columbia government had begun to evaluate and assess the effectiveness of no-fault insurance in the city.<sup>45</sup> Spurred on by complaints of area motorists<sup>46</sup> and the finding of inconsistencies in two of the original act's major premises,<sup>47</sup> the District's Department of Consumer and Regulatory Affairs (DCRA) urged that the no-fault insurance statute be amended.<sup>48</sup> The district court's ruling in *Dimond* expedited the amendment process because the city government did not want the citizenry to be in doubt about the effectiveness of the insurance system while the case was being resolved.<sup>49</sup>

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43. *Dimond*, 792 F.2d at 182.

44. *See id.* at 184-85.

45. In August of 1984, Washington, D.C. Mayor Marion Barry approached the District of Columbia's Department of Consumer and Regulatory Affairs and requested that the department conduct a study to assess the effectiveness of the no-fault act. Mayor Barry requested such action even before *Dimond* was heard in district court because he felt that this was a matter for the legislature to address and solve, not the judiciary. *The Compulsory/No-Fault Motor Vehicle Insurance Act of 1982 Amendments Act of 1985: Hearings on Bill 6-249 Before the Committee on Consumer and Regulatory Affairs Council of the District of Columbia*, July 3, 1985, Attachment B, at 1-2 [hereinafter *Hearings*] (statement of Carol B. Thompson, Director of The Department of Consumer and Regulatory Affairs) (available from the District of Columbia Legislative Services Office).

46. *Id.* at 3. At the July 3, 1985 hearings, several private citizens voiced their complaints about the no-fault statute. The Reverend Jerry Moore stated that no-fault insurance was a burden on the city's poor. He argued that no-fault insurance had failed to deliver the promised lower premiums and faster settlement of claims and that the accident victim was still in court "su[ing] his own insurance company to collect rightful compensation." *Id.* at 8.

Other citizens voiced similar complaints about no-fault insurance. The Reverend Douglas Moore, a former member of the city council, stated that the no-fault system benefited the wealthy at the expense of the poor. He argued that:

[w]ealthy people can buy the best medical care and can pay for the best lawyers, so they can usually find some way to obtain compensation, even under a no-fault system. . . . But the poor man can't. And that's what I find so terribly unfair and wrong about this law. It punishes the poor, leaves the wealthy relatively untouched, and rewards an already prospering industry.

*Id.* at 10.

Another citizen told of her experiences after an automobile accident left her seriously injured. Under the no-fault insurance system she received no money. She stated, "I've been without money, food and my rent since the accident. . . . Now I feel like a burden on myself. I guess I would have been better off dead. Then at least, I might receive some justice." *Id.* (statement of Brina Banks).

47. *See infra* notes 50-53 and accompanying text.

48. *Id.*

49. *Hearings, supra* note 45, Attachment B, at 3 (statement of Carol B. Thompson).

The DCRA discovered that two of the major premises upon which the act was based were erroneous. The first of the errors was a seventeen percent overstatement of the estimated number of uninsured motorists in the District of Columbia at the time of the enactment of the original no-fault act in 1982. At that time the percentage of uninsured motorists was placed at forty percent,<sup>50</sup> however, the DCRA stated that the figure was actually less than twenty-three percent.<sup>51</sup> The DCRA also found that the claim made by the insurance industry and other proponents of the act that no-fault insurance in the District would lead to lower insurance premiums was false.<sup>52</sup> The DCRA revealed that there had not been any substantial rate reductions and, in fact, many insurance companies had requested rate increases.<sup>53</sup> Thus, the federal district court's ruling in *Dimond* that a significant portion of the act was unconstitutional along with the DCRA's discovery of the erroneous premises prompted the city council to make substantial adjustments to the no-fault insurance act.

As part of its decision making process, the DCRA held a public hearing that strengthened its position that change was needed.<sup>54</sup> It heard testimony from government officials, community organizations, private citizens, representatives of the local bar, and the insurance industry.<sup>55</sup> Except for the insurance industry and a handful of community organizations that opposed any changes to the existing law,<sup>56</sup> the overriding opinion of those in attend-

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50. D.C. CODE ANN. § 35-2101(a)(2)(B) (Supp. 1983).

51. *Hearings, supra* note 45, Attachment B, at 2 (statement of Carol B. Thompson). The DCRA based this conclusion on insurance records that were investigated by that department. The records dated back to the time of the statute's enactment in 1982. *Id.*

52. *See id.*

53. *Id.* The DCRA based this conclusion on the receipt of recent insurance records and reports. *Id.*

54. *Id.* at 4.

55. *Id.* at 4-10.

56. *Id.* at 5-9. Representatives of the insurance industry argued that the amendments were premature because the no-fault law had not been in effect long enough to assess its impact. August P. Alegi, vice-president and deputy general counsel of GEICO Insurance Company, asserted that making personal injury protection (PIP) coverage optional would hurt the poor who would probably choose not to purchase the coverage despite their lack of any other source of compensation. In addition, Alegi asserted that the optional coverage would cause health insurance to become the primary source of benefits, unfairly shifting the cost of auto accidents to those who did not drive, particularly the aged and the poor. *Id.* at 6.

Grover Czech, regional vice-president of the American Insurance Association, voiced similar objections to the amendments. He also stated that the solution was not to repeal no-fault but rather to remove all compulsory coverages except the no-fault PIP component. This alteration would result, he asserted, in an effective law that would be inexpensive, protect everyone, and allow for the voluntary purchase of additional coverage. *Id.*

Spokesmen for the Federation of Civic Associations, The District of Columbia Legislative Committee of the American Association of Retired Persons, and The Chevy Chase Advisory

ance was that no-fault insurance in the District had failed to live up to its original promises.<sup>57</sup> While their reasons for the amendments differed, all agreed that a change in the present law was necessary.<sup>58</sup>

A great number of those testifying at the hearing were private citizens. Their dissatisfaction with the act stemmed from the high hopes that had accompanied the enactment of no-fault insurance in the District.<sup>59</sup> The promises that were made by no-fault insurance's proponents of lower insurance costs and greater certainty of benefits to the injured, had led the public to believe that no-fault would eliminate much of what was wrong with automobile insurance in the city. However, the tensions that ran throughout the community during the enactment of the original act prevented a calm consideration of the utility of the no-fault insurance statute.<sup>60</sup> But shortly after its passage, the public viewed the act as abrogating their choice of what type of insurance to buy and eliminating their right to bring suit if they so chose.<sup>61</sup> When the system failed to live up to the public's expectations, to severe criticism of the no-fault insurance system resulted.<sup>62</sup> These concerns were carefully considered by the District's lawmakers as they began work on the new no-fault bill. The lawmakers also may have been concerned with not making the same mistakes twice.

The 1985 amendments, the DCRA claimed, would provide policyholders with an opportunity to control the cost of automobile insurance by allowing them to select an insurance plan that best fit their needs.<sup>63</sup> The amendments

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Neighborhood Commission also opposed the amendments. These groups voiced complaints similar to those of the insurance industry representatives. *Id.* at 9.

57. *Id.* at 4, 6-10.

58. *Id.* Private citizens and civic organizations supported the amendments because they felt that the present no-fault statute was not an adequate source of compensation for the injured and because they felt exploited under the present act. *See supra* note 46.

Representatives of the local trial bar promoted the amendment because it would lead to more tort suits and, thus, more business for them. The attorneys also argued that the rate of increase of insurance premiums was greater in no-fault jurisdictions than in those jurisdictions utilizing traditional liability insurance. *Hearings, supra* note 45, Attachment B, at 1 (statement of Edward L. Norward, president of the Association of Plaintiffs' Trial Attorneys of Metropolitan Washington).

These findings are supported by a study conducted by the National Association of Independent Insurers (NAII). According to the NAII study, no-fault insurance has failed to deliver rate reductions and has increased costs to the insured public. By September of 1975, the NAII study concluded that the cost of no-fault insurance was higher than the cost of insurance under traditional liability systems. R. LONG, *supra* note 1, § 27.03. *See also* Knepper, *Review of 1976 Tort Trends*, 26 DEF. L.J. 1, 23 (1977).

59. *See supra* notes 18-23 and accompanying text.

60. *See Hearings, supra* note 45, Attachment B, at 1 (statement of Carol B. Thompson).

61. *See supra* note 46.

62. *Id.*

63. *Hearings, supra* note 45, Attachment B, at 3 (statement of Carol B. Thompson).

brought about many changes. Among other things, the amendments abolished the mandatory nature of personal injury protection (PIP) benefits,<sup>64</sup> increased the amount of benefits available to those who are seriously injured in an accident<sup>65</sup> and eliminated the \$5,000 requirement.<sup>66</sup> As a result, the District now has an insurance statute that is a hybrid between no-fault and traditional liability systems. It remains to be seen whether the new act will accomplish the benefits that were not realized in the 1982 no-fault act.

### B. Substantive Changes in the No-Fault Statute

The District of Columbia's no-fault insurance act has undergone an enormous transformation in its text and effect. The major changes deal with the types of insurance coverage that must be purchased by motorists,<sup>67</sup> the procedures to institute a tort suit,<sup>68</sup> methods of dispute resolution<sup>69</sup> and statutory coverage.<sup>70</sup> The DCRA stated that the act was amended in order to offer city motorists an opportunity to take control of the way their insurance dollars are spent and to allow motorists to select the coverage best suited for their needs.<sup>71</sup> Thus, the success or failure of the amendments must be judged according to this standard.

The amendments' greatest impact is upon the type of insurance required to be purchased and the requirements that one must meet in order to bring a tort suit. The purchase of PIP coverage, which was the mainstay of the 1982

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64. D.C. CODE ANN. § 35-2104(a)(1) (Supp. 1986). The newly amended section states that "[i]n addition to insurance required to be provided by an insurer under § 35-2106, each insurer shall offer to each person required to have insurance under this chapter optional personal injury protection insurance . . ." *Id.*

65. *Id.* § 35-2106(f)(2). Under the amended section, a person is to receive coverage up to \$25,000 for injuries from any one accident. *Id.* This amount was only \$10,000 before the amendments. D.C. CODE ANN. § 35-2106(f)(2) (Supp. 1983). In addition, the total amount of coverage for all accident victims in any one accident has been increased to \$50,000. D.C. CODE ANN. § 35-2106(f)(2) (Supp. 1986). This is an increase of \$30,000 over the original no-fault insurance act. D.C. CODE ANN. § 35-2106(f)(2) (Supp. 1983).

66. See Official Comments to D.C. CODE ANN. § 35-2105(b) (Supp. 1986).

67. *Id.* § 35-2106(a)(1)(D). The amended statute states that each insurer shall provide property damage liability coverage, third party personal liability protection and uninsured motorist protection. *Id.*

68. *Id.* § 35-2105(b). For an insured to recover both PIP benefits and maintain a tort suit, the victim must either meet a certain level of injury severity or the victim's medical and rehabilitation expenses must exceed the \$50,000 amount of PIP benefits available. *Id.*

69. *Id.* § 35-2105(b)(2)(h). This section establishes that any person having a claim arising out of the mandatory insurance coverage or the optional insurance coverage may request that the claim be resolved by arbitration before the Board of Consumer Claims Arbitration for the District of Columbia. *Id.*

70. *Id.* § 35-2103.

71. See *Hearings, supra* note 45, Attachment B, at 3, 8-9 (statement of Carol B. Thompson).

no-fault act, is no longer mandatory.<sup>72</sup> The compulsory nature of PIP coverage has been eliminated in order to ensure that citizens will have the ability to fashion their insurance coverage to fit both their needs and budgets.<sup>73</sup> Whereas under the pre-amendment Act city motorists resented the forced purchase of certain types of insurance coverage, the amendments grant motorists a choice in deciding what is best for them. The District's motorists must now elect whether to receive PIP coverage.<sup>74</sup> If a person elects to receive the benefits, that person will be entitled to receive compensation based on the level of coverage purchased.<sup>75</sup>

For those who choose to forego the PIP coverage, their compensation for losses resulting from an automobile accident must come from another source. The source could include either a health insurance policy<sup>76</sup> or a tort action against the other party. The availability of an action in tort is open to all who opt not to purchase PIP coverage.<sup>77</sup> Although motorists may now elect to receive PIP benefits, the no-fault statute still governs the ability of motorists to bring tort claims as well as recover no-fault benefits.<sup>78</sup> However, the city council has eliminated the \$5,000 threshold requirement that created the controversy in *Dimond*.<sup>79</sup>

The city's lawmakers have replaced the monetary provision with a strict statutory requirement that must be met before a suit may be brought by the insured.<sup>80</sup> The provision is a statutory description of the types of injuries or damages that are sufficient to enable an insured to sue in tort.<sup>81</sup> This change effectuates the intent of the District government to provide the citizenry with

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72. D.C. CODE ANN. § 35-2104 (Supp. 1986).

73. See *Hearings, supra* note 45, Attachment B, at 3, 8-9 (statement of Carol B. Thompson).

74. D.C. CODE ANN. § 35-2105(a) (Supp. 1986). Victims are to notify an insurer within 60 days of an accident of their intention to receive personal injury protection benefits. *Id.*

75. *Id.* § 35-2104. One package would be worth \$100,000 in medical and rehabilitation expenses, \$24,000 for work loss and \$4,000 for funeral expenses. The second level would allow an insured to purchase coverage up to \$50,000 for medical and rehabilitation expenses, \$12,000 for work loss and \$4,000 for funeral expenses. The additional level creates an alternative for middle and lower income residents to obtain coverage to meet their needs. *Id.* See *Hearings, supra* note 45, Attachment B, at 3, 11 (statement of Carol B. Thompson).

76. See *Hearings, supra* note 45, Attachment B, at 3 (statement of Carol B. Thompson).

77. *Id.*

78. D.C. CODE ANN. § 35-2105(b) (Supp. 1986).

79. *Id.*

80. *Id.*

81. The statute's provision states that an insured may bring suit in tort if:

[t]he injury directly results in substantial permanent scarring or disfigurement, substantial and medically demonstrable permanent impairment which has significantly affected the ability of the victim to perform his or her professional activities or usual and customary daily activities, or a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and

choice and control over insurance matters. Motorists may now decide not to purchase excess or inappropriate coverage.<sup>82</sup>

The amendments also establish an innovative arbitration program that dissatisfied motorists may utilize in lieu of bringing a lawsuit.<sup>83</sup> Theoretically, the arbitration system will reduce the dockets of the city's courts, which, in the past, have been forced to handle a great deal of these cases.<sup>84</sup> If successful, the arbitration plan would bring about a court-like resolution without the costs normally associated with a formal court proceeding.<sup>85</sup>

The amended no-fault insurance statute also allows an insured to specifically exclude certain persons from coverage under the policy.<sup>86</sup> This new option furthers individual choice and control because a policyholder will now be able to bar a careless driver from coverage and thus reduce the possibility of higher insurance premiums in the future.<sup>87</sup> The goal of the amendment is to give the city's motorists a choice in how to spend their money for insurance coverage. In trying to achieve this goal, it appears that the city council and other lawmakers have tried to effectuate a low cost insurance system without the use of a strict no-fault plan.

### C. *The Future of Automobile Insurance in the District of Columbia*

The amendments to the 1982 no-fault automobile insurance statute demonstrate an attempt by the city government to answer the needs of its citizens. The hybrid insurance system created by these amendments indicates the government's desire to have the best of both no-fault and traditional insurance systems.

While the severity of injury threshold requirement now contained in section 35-2105(b)(1) is similar to those used by other no-fault jurisdictions at one time or another,<sup>88</sup> little else about the present act is typical of a no-fault

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duties that constitute his or her usual customary daily activities for more than 180 continuous days.

*Id.* § 35-2105(b)(1).

82. See *Hearings*, *supra* note 45, Attachment B, at 3, 8-9 (testimony of Carol B. Thompson).

83. D.C. CODE ANN. § 35-2105(h)(1) (Supp. 1986).

84. See *Hearings*, *supra* note 45, Attachment B, at 6-7 (testimony of Carol B. Thompson). It is interesting to note that while attorneys advocated the adoption of the amendments, the very adoption of the amendments could serve to reduce the amount of work for the city's trial bar. This would result because the new system's arbitration plan seeks to do away with the need for attorneys and courtrooms in dispute resolution.

85. *Id.*

86. D.C. CODE ANN. § 35-2102(10) (Supp. 1986).

87. See *Hearings*, *supra* note 45, Attachment B, at 7 (statement of Carol B. Thompson).

88. The provision contained in this section, *see supra* note 81, is similar to the thresholds of Michigan and New York's no-fault statutes. The Michigan statute states that: "[a] person

statute. The actions by the city council evidence both a desire to reap the benefits of a no-fault system and to avoid *Dimond*-type challenges in the future. By granting more choice and offering concessions to those who favor no-fault insurance and to those who favor traditional liability insurance systems, the city council tried to achieve a more efficient, equitable and cost effective system.

The amendments fall short of what some commentators have advocated as the resolution of the no-fault insurance versus traditional liability insurance dilemma.<sup>89</sup> However, the new statute could serve to eliminate one of the major problems in a no-fault insurance jurisdiction—double recovery or “double dipping”,<sup>90</sup> which arises in jurisdictions with no-fault insurance

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remains subject to tort liability for noneconomic loss caused by his or her . . . use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” MICH. COMP. LAWS § 500.3135(1) (1983).

The Michigan courts have construed their no-fault act strictly and have found that the statute’s purpose is to keep minor cases out of the courtrooms. *McKendrick v. Petrucci*, 71 Mich. App. 200, 211, 247 N.W.2d 349, 354 (1976). The statutory scheme permits those who are catastrophically injured to be compensated. *Workman v. Detroit Auto. Inter-Ins. Exch.*, 404 Mich. 477, 509, 274 N.W.2d 373, 386 (1979). The Michigan court’s approach is to interpret the threshold as being a bar to all recovery for noneconomic loss unless the injury involved is severe, which also relieves “the courts of the burden of litigation where injury is not serious.” *Byer v. Smith*, 419 Mich. 541, 546, 357 N.W.2d 644, 646 (1984).

New York’s no-fault insurance statute allows for recovery in tort if there has been a serious injury to the victim. N.Y. INS. LAW art. 51, § 5104 (1985). A serious injury is defined as:

[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture . . . significant limitation of use of body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

N.Y. INS. LAW art. 51 § 5102(d) (1982). The New York provision was justified at its inception because it would significantly decrease the number of litigated automobile personal injury cases. *Licari v. Elliot*, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570, 573, 441 N.E.2d 1088, 1091 (1982). Thus, the courts of New York have also interpreted their threshold strictly and sought to keep the number of personal injury cases to a reasonable level.

89. O’Connell & Joost, *supra* note 5, at 62-63. The authors suggest that to bridge the gap between the two types of insurance, motorists should be given a choice between the two when purchasing insurance. Any problems that would result because of the differences between the two systems would be resolved by an extension of uninsured motorist benefits. *Id.* at 79. Uninsured motorist benefits are provided in no-fault insurance packages to compensate traditional insured who are injured by a no-fault insured. As the authors state, “[w]ith the uninsured motorist connector in place, a traditional insured who is hurt in an accident with a no-fault insured would recover tort liability damages on the same basis as in a current tort-based system.” *Id.* The uninsured motorist connector would take the place of a tort suit. Although the traditional insured would pay more for the uninsured motorist coverage, “this additional cost would be offset by lower liability insurance premiums because of the traditional insured’s immunity from suits by no-fault insureds.” *Id.*

90. *Id.* at 70-71.

that allows motorists to recover in tort as well as receive no-fault benefits.<sup>91</sup> This phenomenon causes an increase in both the victim's total compensation as well as the cost of everyone's insurance, thus undermining one of no-fault insurance's professed benefits.<sup>92</sup>

The District's amended statute and its new verbal threshold requirement, if given a literal interpretation by the area's courts, should lead to the elimination of double recovery in most cases. If the District of Columbia courts follow what other jurisdictions have held as sufficient to meet similar statutory language, a victim will have to suffer serious injuries or damages in order to bring a tort suit.<sup>93</sup> If courts interpret the statute strictly, then double recovery will be precluded. This strict interpretation should occur because of the fact that an insured can now choose whether to purchase no-fault PIP coverage. With choice now a part of the District of Columbia automobile insurance system, motorists who once felt forced into purchasing coverage should be satisfied. The courts, noting that choice is now available, should be less receptive to allowing tort suits to be brought as a method of compensation. Thus, a victim who elects to receive PIP benefits should not be allowed to bring a tort suit unless he or she clearly falls within one of the two statutory exceptions.<sup>94</sup>

The amended version of the District of Columbia no-fault automobile insurance act offers more choice and instills fairness into a system that has been clouded with complaints of unfairness. Whether the statute will be successful depends on whether the city government and the public will show patience in allowing the system to operate. It does appear that the amendments were planned and enacted in a rational manner, free from much of the chaos and heightened expectations that surrounded the passage of the original act.<sup>95</sup>

#### IV. CONCLUSION

With the 1985 amendments, the District of Columbia government has attempted to effectuate lower insurance costs, provide more choice for consumers, and induce more universal satisfaction with insurance coverage. The 1982 no-fault act did not adequately provide benefits in the manner that its proponents had predicted it would. Whether the amended version can succeed where its predecessor failed depends on a number of factors, includ-

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91. *Id.*

92. *Id.* at 70.

93. *See supra* note 88.

94. D.C. CODE ANN. § 35-2105(b)(1), (2) (Supp. 1986).

95. *See supra* notes 18-23 and accompanying text.

ing the interpretation given to the act by the courts and the citizenry's willingness to abide by the statute's provisions.

With the District government's realization that insurance costs are unlikely to decrease in the future, the amended act appears to be a good faith attempt to give its constituency the ability to contain any increase in costs. Given the fact that there is an element of choice presented to the insured, there may be more satisfaction with the act. The satisfaction of the citizenry, combined with more reasonable expectations concerning the benefits the city can derive from an insurance system, should result in an improvement in automobile insurance in the District of Columbia.

*Mark V. Holden*