Approved Feb. 15, 1983
Date

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE.

The meeting was called to order by Chairman Rex Hoy at
Chairperson

3:30 ~~x.m.~~/p.m. on February 10, 1983 in room 521-S of the Capitol.

All members were present except:

Committee staff present:
Wayne Morris, Legislative Research
Gordon Self, Revisor's Office
Mary Sorensen, Committee Secretary

Conferees appearing before the committee:
Rep. Robert Vancrum
Mrs. Carol Sams, Lenexa, KS
Kathleen Sebelius, Executive Director, Kansas Trial Lawyers Assn.
Dan Lykins, Vice President of Legislative Program, KS Trial Lawyers Assn.
John W. Brookens, Kansas Bar Association
Dick Brock, Kansas Insurance Department

Others present:
See List (Attachment 1)

First to testify was Rep. Vancrum, sponsor of HB 2061, who briefly explained the bill and the reasons for its introduction. A copy of his testimony was provided for each committee member (Attachment 2). He then introduced Carol Sams, mother of the teen-ager mentioned in his testimony, and she spoke in favor of the bill. Kathleen Sebelius, Executive Director of the Kansas Trial Lawyers Association, passed out Attachment 3, a statistical reference of the Wrongful Death Laws of other states which was referred to in Rep. Vancrum's testimony. She introduced Dan Lykins, an attorney from Topeka, who also spoke in favor of the bill. He said that for the past five years he had limited his practice to representing people who had been injured in accidents. He has seen many cases that would relate to this bill, and gave several examples. There were some questions, and then discussion as to possibly eliminating the ceiling completely rather than raise it from $25,000 to $100,000. John W. Brookens, representing the Kansas Bar Association, then asked to speak on the bill, and present the position of the Kansas Bar Association, which he said would not take a position on this bill due to the diverse membership of the Association.

Dick Brock, of the Kansas Insurance Department, then spoke on HB 2247, which is Proposal No. 3 requested by the Insurance Department. This bill is an attempt to put into law some minimum financial requirements for Health Maintenance Organizations, to help prevent insolvency of an organization and losses to subscribers. He gave a brief explanation of the three categories of deposit requirements set out in the bill; and situations where deposit requirements could be waived. Mr. Brock suggested adding certain words on line 77 and on line 91, to make capital surplus requirements the same for all accident and health insurors. Gordon Self, of the Revisor's office, had no question about these suggested changes to the bill. There were questions and discussion about the filing of financial statements with the Insurance Department by the Health Maintenance Organizations presently licensed in the State of Kansas, and how a problem would be discovered and handled if an HMO was having difficulties. Chairman Hoy asked Mr. Brock to briefly describe, for the new members of the committee, what a Health Maintenance Organization was, and how it operated. Mr. Brock said that it was an alternative method of health care, concentrating primarily on preventive health care, providing more out-patient service and trying to avoid hospital stays (in-patient care) where possible. There was further discussion on the impact of this bill on existing and future HMO's.

MINUTES OF THE HOUSE COMMITTEE ON INSURANCE,

room 521 S, Statehouse, at 3:30 ~~a.m.~~/p.m. on February 10, 1983

Chairman Hoy announced that other matters on the agenda would be taken up at a future meeting; and that each committee member had been furnished "An evaluation of the Kansas No-Fault Law", prepared by the Insurance Department (Attachment 4), which would be discussed on Tuesday, February 15, 1983.

Rep. Littlejohn moved that the minutes of the meetings of February 2, 1983, and February 3, 1983, be approved. Rep. Cribbs seconded, The motion carried.

The meeting adjourned at 4:30 PM.

GUEST LIST Attachment 1

COMMITTEE: House Insurance DATE: Feb 10, 1983

NAME	ADDRESS	COMPANY/ORGANIZATION
Jeanette E. Livingston	7220 Mastin Dr. Lenexa	Ks. Legislative Committee AARP-ARTA
Joseph J. Turner	S-308 Windsor Pl. Topeka	KCOA
Marvin Brookens	1200 Harrison, Topeka	Kans Bar Assn
Michael Hayes	Topeka	AIA
Jim Wright	Topeka	Ks. Assn of Realtors
Rebecca Kupper	"	Ks. Hospital Assoc.
Donald Wilson	"	" " "
Carol Sams	8502 Deer Run - Lenexa	Parent
Dick Scott	Mission	State Farm
Dave Kass	O.P. Ks	F.I.A.
Ron Todd	Topeka	Ks Insurance Dept
Dick Brock	"	" " "
Jack Roberts		BCBS
Bud Cornish		Assn Prop + Cas. Cos
Kathleen Sebelius	Topeka Ks.	Executive Director Ks Trial Lawyers Assn
Dan Lykins	115 E 7th Topeka	Vice President Ks. Legislative Trial Lawyers Assn dist.

Atch. 1

Attachment 2

BOB VANCRUM
REPRESENTATIVE, TWENTY NINTH DISTRICT
OVERLAND PARK
9004 W. 104TH STREET
OVERLAND PARK, KANSAS 66212

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: FEDERAL AND STATE AFFAIRS
MEMBER: ASSESSMENT AND TAXATION
EDUCATION

To: House Insurance Committee House Bill 2061

Thank you ladies and gentlemen, for giving me the opportunity to appear before you this afternoon. I am pleased to present and support HB 2061, which would increase the $25,000 limit on wrongful death damages to $100,000.

Since I see there are some new people on this committee, let me explain briefly that although there is no limit on so-called pecuniary damages (loss of wages, medical and certain other out-of-pocket damages), Kansas has had for some years a $25,000 lid on all other damages, including punitive or exemplary. It may surprise you to find out that 21 states have no limit whatsoever and an additional 23 states have no ceiling on damages other than punitive damages. It may surprise you even more to find out that Kansas until the 1960's had a $50,000 lid covering all types of damage, meaning that for certain types of victims we have actually been moving in the opposite direction from most states. In doing so, we have done a terrible injustice to a number of Kansas citizens, and the principal reason has been an irrational fear of what would happen to jury awards.

Let me say before going further that although I am an attorney, I do not make my living trying cases and have never tried a personal injury case in my life. I have a business practice and if I have

Atch. 2

a prejudice in personal injury cases it is generally in favor of the defendant. Nevertheless, our current limit on certain types of wrongful death damages has created some outrageous injustices which demand to be corrected. Let me give two examples.

Assume for a moment that a case of clear medical malpractice has occurred. The doctor or the hospital has failed to take action in accordance with well established medical practice, and everyone agrees that inexcusable negligence killed a person. If the person is a high salaried working father, the jury will clearly take the highest estimate of lost wages and award several million dollars in damages. But if the person is a teenager, an elderly person or a woman who is a homemaker, the award in Kansas will be severely limited. Would you like to explain to the grieving parents why the negligence of the doctor or hospital results in an award of only $25,000 because the person they killed was a bright teenager with his whole life in front of him? This is exactly the situation I faced about eighteen months ago.

Another striking example of the injustice of this law is created by the common disaster cases. Let us assume that the Hyatt Regency skywalk cave-in had occurred in Wichita rather than in Kansas City, Missouri. In addition to over a hundred deaths, several hundred permanent injuries resulted from apparent negligence in the design and/or construction of the facility. The widow or children of a high salaried, working father killed in that diaster would probably recover millions of dollars. Any person regardless of age or sex who is severely injured, but not killed, would expect

to recover tens of millions of dollars. But the parents or other grieving relatives of a bright young teenager, an older retiree and maybe even a number of homemakers would in most cases receive $25,000. Someday such a disaster will occur in Kansas--I hope that this Legislature will come to its senses and correct the injustice being done to innocent victims everyday--before it's too late.

The insurance lobby continues to oppose any increase in this limit. They will try to tell you that jury awards will soar and insurance premiums will rise. You should ask them why this has not occurred in other states that have recently removed the lid. The answer is twofold: First, there aren't that many cases in which the limit comes into play. Second, rates on casualty and liability policies are generally set nationwide, which means the companies are charging approximately the same premiums to Kansas policyholders as they would if there were a higher limit, or even no limit at all. Just remember that their increased profit is at the expense of a small but ever present number of families who have been treated very unjustly.

In closing, I am sure someone on the committee wants to know why I have proposed merely increasing the dollar limit rather than removing it as most of our sister states have chosen to do. The reason is very simple: My experience has shown that the insurance industry is going to try to use this bill to "make a deal" with the trial lawyers and other groups. That is, they are going to try to win concessions on other bills as a trade-off for passing this bill. I am not a party to any of those trades and in fact have no

strong feelings about either prejudgment interest or no-fault auto insurance. I left the limit in the bill in the vain attempt to try to persuade the insurance industry that simple fairness and justice demanded an increase to at least reflect the cost of living since the $50,000 limit was set. Although of course the limit should eventually be removed, I would urge you not to do so and not to listen to those people who are urging you to do so either as a means to win concessions on another bill or as a means to eventually kill this and some other bill. This Legislative change should be passed on its own merits and the time is now.

Attachment 3

DEFENSE RESEARCH INSTITUTE: 1980

Study on Wrongful Death Laws

"Compensatory" covers pecuniary and non-pecuniary damages.

44 States: No Ceiling on Compensatory Damages -- those with * allow Punitive Damages.

Arizona*, Arkansas*, California, Connecticut, Delaware, District of Columbia*, Florida*, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky*, Louisiana, Maryland, Massachusetts*, Michigan, Minnesota, Mississippi*, Missouri*, Montana*, Nebraska, Nevada*, New Hampshire, New Jersey, New Mexico*, New York, North Dakota, Ohio, Oklahoma*, Oregon*, Pennsylvania*, Rhode Island*, South Carolina*, South Dakota, Tennessee*, Texas*, Utah, Vermont*, Virginia, Washington, West Virginia*, Wyoming*.

Other:

Kansas: $25,000 non-pecuniary lid - no punitive.
Maine: $10,000 non-pecuniary lid - no punitive.
Colorado: $45,000 total lid - no punitive.
Wisconsin: $10,000 non-pecuniary lid - no punitive.
Alaska: Only allows punitive damages.
North Carolina: Lid of $500.

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Attachment 4

AN EVALUATION OF THE KANSAS NO-FAULT LAW

Fletcher Bell, Commissioner of Insurance

January 21, 1981

Atch. 4

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I. INTRODUCTION.

It has now been over seven years since the Kansas No-Fault law was enacted by the Kansas Legislature. The No-Fault law, entitled the Kansas Automobile Injury Reparations Act (K.A.I.R.A.), was passed in the Spring of 1973 and became effective on January 1, 1974. This controversial piece of legislation made three fundamental changes in the motor vehicle liability system in Kansas. It made motor vehicle liability insurance compulsory. It required all motor vehicle liability insurance policies issued in Kansas to provide first party Personal Injury Protection (PIP) benefits which were to be paid regardless of fault. And, it placed a limitation upon an injured traffic victim's right to sue the wrongdoer in tort.

This Report has been written pursuant to a request for a review of the performance of the Kansas No-Fault Act. Such a review can only be conducted by examining the overall concept of No-Fault insurance and the legislation and No-Fault activity that has occurred and is occurring across the nation. Therefore, this Report will provide an analysis of the No-Fault motor vehicle liability insurance concept in general, the legislative activity regarding No-Fault insurance that has taken place on both the State and Federal level, the performances of the different types of No-Fault plans that have been enacted into law in the various States and an analysis of the Kansas law.

II. A BACKGROUND TO NO-FAULT.

A. THE TORT LIABILITY SYSTEM.

One cannot thoroughly discuss the concept of No-Fault automobile insurance without first discussing the system which it was designed to replace, the tort liability system.

The tort liability system is based upon negligence and is derived from the common law principle that a wrongdoer is responsible for the losses he causes to others. The system is based upon fault and to recover, an innocent victim must prove that the other person was responsible for the loss. At times, this has proven to be a difficult task.

Although the tort liability system is generally a practical and workable system, in certain areas it has proven to be lacking. Providing compensation for motor vehicle accident victims is one such area.

B. ATTACKS UPON THE TORT LIABILITY SYSTEM.

Throughout the years there have been many attacks leveled upon the tort system's inability to properly and fairly compensate persons who have been injured in motor vehicle accidents. Probably the most influential attack was set forth in a 1965 book authored by Professors Robert Keeton and Jeffrey O'Connell, entitled Basic Protection For The Traffic Victim. Professors Keeton and O'Connell carefully examined the tort system and set forth five major criticisms. They found:

(1) The tort liability system did not properly compensate traffic victims for injury. Some victims received no compensation while others received less than their actual economic losses;

(2) The tort liability system was slow and cumbersome because the significant delays that occurred in the judicial process could result in a claim taking months or even years before it was finally adjudicated or settled;

(3) The common law system was unfair because some victims got too much compensation, especially in nuisance type of cases;

(4) The operation of the tort liability system was excessively expensive because of the cost of preparing defenses in fault cases;

(5) The system was marred by dishonesty and exaggeration in claims to inflate settlements.

In essence, the Keeton-O'Connell study attacked the system as providing too little, too late; it unfairly allocated compensation at wasteful costs; and was implemented through means that promoted dishonesty and disrespect for the law.

Following the Keeton-O'Connell attack, a United States Department of Transportation report leveled even a more critical attack upon the tort system's inability to properly compensate accident victims. In 1968, the United States Congress enacted Public Law 90-313 which authorized the Department of Transportation to conduct a two year study on the automobile insurance system and compensation of the automobile accident victim. This Report, published in 1971 and entitled "Motor Vehicle Crash Losses and Their Compensation in the United States", made the following findings:

(1) Only forty-five percent (45%) of all people seriously injured or killed in automobile accidents were benefitted in any way under the common law system;

(2) When the economic losses were small (under $500) victims received over four and one-half (4½) times their economic losses. However, when the losses were large (over $25,000), even successful tort claimants recovered only one-third (1/3) of their actual losses;

(3) Final tort settlements took an average of one year longer for seriously injured victims with economic losses of $2,500 or more than for small losses;

(4) Tort liability insurance costs in the neighborhood of $1.07 in total system expenses to deliver $1.00 in net benefits to the victim;

(5) Motor vehicle accident litigation in the court system was estimated to occupy seventeen percent (17%) of the system's available resources.

The Keeton-O'Connell and Department of Transportation reports did more than just attack the tort liability system, they proposed the enactment of No-Fault legislation to resolve the problem. The Department of Transportation report concluded that the tort system should be supplemented by a system based upon first party benefits with No-Fault insurance that either eliminated or restricted tort lawsuits arising out of motor vehicle accidents. The Keeton-O'Connell report went one step further and drafted a basic injury protection plan that could be used as a model for No-Fault legislation.

C. STATE NO-FAULT ACTIVITY.

Supported by the criticisms leveled against the tort system, No-Fault proponents across the nation actively pursued the enactment of No-Fault legislation to replace the tort liability system as a means of compensating traffic victims. As a result, every State Legislature to date has considered to one degree or another the adoption of a No-Fault law, and from 1970 to 1975 there were twenty-five (25) States which enacted No-Fault laws. While these laws have differed significantly in their breadth and scope, they have all marked a change in the prior system that was based primarily upon tort liability. Currently there are twenty-three (23) States which have No-Fault laws in effect. Although Illinois enacted a No-Fault law, in 1972 their Supreme Court declared it unconstitutional and it has never been re-enacted. In 1979, the Nevada Legislature repealed the No-Fault law they had enacted in 1974 and returned to the common law tort liability system.

Although there were twenty-five (25) No-Fault laws enacted in the first half of the 1970's, since 1975 there have not been any No-Fault laws enacted. Although no one is exactly sure why No-Fault legislation has stalled, it appears that uncertainty has been the impediment to further reform. An informal poll of twenty (20) Insurance Commissioners that was conducted for a research study by the Rutgers Law Review, found that many State Legislatures questioned the effectiveness of No-Fault. Apparently, the Legislatures did not know if No-Fault was the answer to the problem or, if so, which form of No-Fault was best.

D. FEDERAL NO-FAULT ACTIVITY.

Apparently, the doubts which have stalled State legislative action have been reflected in the United States Congress inasmuch as they have yet to endorse a recommendation by the Senate Commerce Committee to enact a national No-Fault law that imposes national standards of coverage upon the States.

This change has been somewhat surprising because after the 1971 Department of Transportation report, which recommended No-Fault as the answer to the tort liability problem, there was considerable action at the Federal level regarding the enactment of a national No-Fault law.

The first Federal No-Fault bill appeared in the Senate in 1971. Similar legislation was introduced in 1973, 1974 and 1975. 1973 Senate Bill No. 354 proposed a national No-Fault plan which would have established minimum national standards which the States would have been required to satisfy. The Bill gave the States three years to meet the standards with the risk of having a more rigorous plan imposed upon them if they did not. The Bill did not propose a Federal plan to be administered by Federal employees per se. The Bill was modified and re-introduced in 1975 to require, among other things, a narrative threshold defining serious injury, unlimited medical and rehabilitation expenses and wage losses to cover a person for at least $15,000. Senate Bill No. 1381, which was proposed in 1977, was similar to the 1975 bill. However, it did not require unlimited medical expenses, it tightened the verbal threshold definition of serious injury and the Federal pre-emption plan was modified so that the requirements imposed would be equal to but not more rigorous than the national standards.

While it appears, for the time being, that the Federal No-Fault activity has quieted, it is necessary to note some criticisms and possible problems inherent in a national No-Fault plan. Many believe that the concept of Federalism in No-Fault is unworkable because of the nature of the problem. Critics of Federal No-Fault point out that States should be given the opportunity to make their own reforms because the problems of one State differ from those of another. Because of the difference in these problems, a uniform national No-Fault law would often fail to address the problems of some States, while addressing non-existent problems of others. For example, it would be difficult to devise a plan to adequately resolve the problems of an urban Connecticut-New York type society and that of a more rural type society like Kansas. Another criticism of the Federal No-Fault plan is that it is too speculative. With the many different types of No-Fault plans that have been enacted across the nation, it is difficult to determine which one is the best and the most successful. Last, if the No-Fault concept proves to be a failure in the States, a national No-Fault plan would prove to be disastrous. Therefore, significant problems exist with Federal No-Fault and it appears the citizens of this country might be better served if the States are allowed to deal with the problem and seek reform on a state by state basis.

E. THE TYPES OF NO-FAULT PLANS.

The No-Fault plans which have been devised to resolve the motor vehicle liability insurance

problem can be categorized into three types. They are: (1) add-on; (2) modified; and (3) pure No-Fault plans.

1. ADD-ON PLANS.

Add-on No-Fault plans, as they are termed, are probably a misnomer because they are not really No-Fault plans. Add-on plans merely add first party benefits to the standard motor vehicle liability insurance policy, but do nothing to limit or restrict the right to sue in tort. Their primary purpose is to provide prompt payment of benefits to more people. The add-on plans which have been enacted differ as to whether the added benefits are required. Some plans make the additional benefits optional; some plans make it mandatory that all motor vehicle liability policies provide first party benefits, but make no requirement that every owner of a vehicle have motor vehicle liability insurance; and finally, some plans make both the having of a motor vehicle liability insurance policy and the addition of the first party benefits mandatory.

There are eight States which have add-on plans. They are Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas and Virginia.

2. MODIFIED NO-FAULT PLANS.

Modified No-Fault plans are somewhat similar to add-on plans in that they provide first party benefits. However, they also make the coverage mandatory; make insurance compulsory; and most importantly, limit or restrict tort liability for pain and suffering by some type of threshold. The threshold is the key to the modified insurance plans and is designed to eliminate tort action for non-pecuniary losses, except in cases involving serious injury.

There are three types of thresholds which have been implemented. They are the verbal or narrative threshold, the specific dollar amount threshold, and the duration of disability threshold. The threshold limits liability because it prevents suits for non-economic losses, (i.e., pain and suffering, mental anguish, inconvenience, etc.) unless the threshold is met. The threshold or the limitation on liability usually applies to non-economic losses for bodily injury while the tort

system remains in effect for economic losses. The No-Fault concept itself is generally not applicable to property losses or property damage. The reason for this is that the long delays and expensive attorneys fees which generally characterize lawsuits for bodily injury are not present in cases involving property damage.

There are fifteen (15) States which have modified No-Fault plans of some kind, although they differ a great deal in regard to the type of threshold and amount of benefits available. These States are Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania and Utah. The No-Fault law which Nevada repealed was a modified No-Fault plan.

3. PURE NO-FAULT PLANS.

The final type of plan is the pure No-Fault plan. This plan completely eliminates tort liability for bodily injury arising out of a motor vehicle accident. There is no pure No-Fault plan in effect at this time, although the Michigan plan is very close. It has a strict verbal threshold and is the only State to combine unlimited medical and rehabilitation benefits with high wage loss benefits. Also, it is the only State to meet the national standards proposed by the Federal legislation.

III. EVALUATION OF THE PERFORMANCE OF NO-FAULT.

It is difficult to evaluate the performance of No-Fault motor vehicle liability insurance. Although there have been many studies conducted in an attempt to accurately gauge the strengths and weaknesses of No-Fault, the reliability of the results of these studies are somewhat questionable. A study of the subject is complicated by the fact that there are many different types of No-Fault plans in existence in many different settings with many different factors influencing their performance.

One of the most recent studies on the effects of No-Fault insurance was conducted by Daniel D. Caldwell and reported in the 1977 Rutgers Law Review. This Study, entitled "No-Fault Automobile Insurance: An Evaluative Survey", 30 Rutgers L.Rev. 909 (1977), provides

an in-depth and exhaustive survey on fault and No-Fault insurance States. The Rutgers' study is especially useful in examining No-Fault because it not only evaluates how No-Fault legislation has met the goals for which it was enacted, but attempts to statistically gauge the impact No-Fault legislation has had on automobile insurance rates, which is something that many of the other studies fail to do. Because this Study is one of the most recent and most comprehensive studies conducted on No-Fault, and because it reviews and summarizes findings of other No-Fault studies, a review of the Rutgers' findings will be used as a springboard in this evaluation of the performance of No-Fault.

The Rutgers' study starts with the premise that the tort liability system was seriously lacking as a means of compensating traffic victims. A review of many articles, books, periodicals and studies conducted by scholars and No-Fault proponents revealed that the tort liability system was deficient in four crucial areas. These areas were:

(1) Too many traffic victims were not able to receive compensation, either because they lacked a defendant (e.g. one car accident victims) or because they were unable to win a tort suit even if a defendant was found.

(2) Benefit dollars were inequitably distributed among successful tort plaintiffs, with the trivially injured often paid "general damages" many times their economic losses, while the catastrophically injured seldom recovered even out-of-pocket expenses.

(3) There was too much delay in the payment of benefits to victims.

(4) The tort liability system was unduly expensive and inefficient, returning less than one-half ($\frac{1}{2}$) of all premiums paid into the system as benefits to victims, and less than one-sixth (1/6) of all premiums as compensation for actual economic loss.

After determining these four major problems in the tort system, a plan was devised whereby the State No-Fault laws could be evaluated to determine if the No-Fault laws were more successful than the tort system in resolving the problems.

Because of the three different approaches to No-Fault (add-on, modified and pure), the

Study was also broken down to reflect the difference these approaches used to resolve the problems. The Study divided the No-Fault laws into four categories for the survey. The first category for No-Fault laws consisted of those States which employed the add-on form of No-Fault insurance (Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas and Virginia). The second group consisted of States with modified No-Fault laws which provided a relatively low amount of PIP benefits (Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, Nevada, North Dakota and Utah). For the purposes of the survey, the low benefits States were plans which provided medical and wage loss benefits not exceeding $15,000. The third category consisted of modified States which provided medical and wage benefits in excess of $15,000 (Colorado, New Jersey, New York and Pennsylvania). The final category consisted of only one State, that being Michigan with the purest form of No-Fault in existence. This division of the No-Fault laws allowed the Study to evaluate how successful the different types of No-Fault plans were meeting the problems found in the tort liability system.

To make the findings, the Study collected data from insurance companies, State Insurance Departments, and published and unpublished empirical studies. To evaluate the data, the Study set forth four propositions which they believed were generally accepted as the fundamental goals of No-Fault by the proponents of No-Fault. Inasmuch as these propositions appear to generally reflect the goals of No-Fault, this Report will focus on those propositions and the findings of the Rutgers' study, along with the results of other studies to determine how successful No-Fault has been.

A. DOES NO-FAULT PROVIDE BENEFITS TO MORE TRAFFIC VICTIMS THAN THE TORT SYSTEM.

The first proposition of the Rutgers' study reflected the contemplated goal that, "No-Fault will provide bodily injury benefits to more traffic victims than the tort liability system, including many who were formerly uncompensable."

The findings regarding this proposition were not surprising. All the No-Fault plans supported proposition one by providing more benefits to more traffic victims than did the tort liability system. This first proposition deals with the scope of the coverage rather than the adequacy of the coverage. To determine how successful the plans were meeting the proposition, the

Study posed five additional questions which were all answered affirmatively. These questions were:

(1) Has there been a shift from third party to first party claims?

(2) Have the total claims increased?

(3) Do the PIP claims that have been filed correspond to the number of accident victims?

(4) Are most PIP claims routinely paid?

(5) Are victims unable to recover in tort able to receive PIP?

It is reassuring to know that the No-Fault system provides benefits to more people than the tort system because this is one of the primary and most important reasons for the implementation of No-Fault insurance.

In a study published in "No-Fault Automobile Insurance In Action: The Experiences In Massachusetts, Delaware and Michigan" (1977), Professor Alan Widiss found that Massachusetts insurers conceded liability in ninety-seven percent (97%) of their PIP claims. He found that PIP claimants received the full payment they requested ninety percent (90%) of the time, and that there was a ten-fold increase in previously uncompensated one car accidents. Professor Widiss found in his Massachusetts study that over twenty percent (20%) of the No-Fault claims paid were the result of one car accidents. This marked a significant increase over the prior system where only 2.9% of the claims paid were for one car accident victims. This is one of the primary advantages of No-Fault insurance; that is, the compensation of one car accident victims. This has been proven to be true in studies conducted in Colorado, Connecticut and Michigan as well. A Florida study found that the benefits to registered vehicles had increased by thirty-one percent (31%) in 1973 after the enactment of their No-Fault law.

In a 1977 United States Department of Transportation study entitled, "State No-Fault Automobile Insurance Experience, From 1971 to 1977", a similar finding was made. The Department of Transportation found that a greater amount of claims were paid after the implementation of No-Fault. They found there had been a significant increase in the claims paid and that, "the huge jump in the frequency of paid claims even with the countervailing forces of the lower accident rate caused by the 1974 gas shortage, can only be explained by

the conversion from third to first party No-Fault systems." The Department of Transportation report also made a finding in regard to the Kansas No-Fault law. The Report noted that the Kansas accident rate had actually decreased in 1974 by .06% compared to the 1971 to 1973 period. However, despite this decline in the accident rate, State Farm reported a paid claim frequency increase for the year 1974 of 11.4% as compared to 6.8% in the 1971 to 1973 period.

Therefore, it appears that the No-Fault system does fulfill one of its primary goals, which is to provide more benefit payments to more accident victims than did the tort system. Such a finding also appears to be applicable to Kansas.

B. DOES NO-FAULT MATCH BENEFITS WITH ECONOMIC LOSSES BETTER THAN THE TORT SYSTEM.

The second proposition the Rutgers' study examined was whether, "No-Fault will match benefits with economic losses better than the tort liability system, reducing overcompensation of victims with small economic losses and undercompensation of victims with large economic losses."

To fulfill this goal, a No-Fault plan must eliminate nuisance claims and adequately compensate catastrophic loss victims. The findings of the Study indicated that the success in fulfilling the second proposition was directly dependent upon the threshold and PIP benefits provided in the particular law.

The figures revealed that a relatively low level of maximum benefits fully compensated the vast majority of traffic victims, yet failed to cover even one-half of the economic losses suffered. This finding was due to the disproportionate share of the total economic losses suffered by the very small minority of catastrophically injured persons.

The Department of Transportation report found that a $1,000 medical and wage loss package would fully compensate over three-fourths (3/4) of the traffic victims. It is only for the catastrophically injured that this package would not be adequate.

In the add-on No-Fault States, this proposition was not satisfactorily met, which was to be expected because there is no tort threshold to bar any of the minor nuisance claims in add-

on plans. Also, the benefits provided by the add-on plans are not adequate to compensate the catastrophically injured.

In both the high and low benefit modified States there was some reduction in suits for minor injuries, but the question of whether the modified plans adequately provided for the catastrophically injured depended upon the amount of benefits provided.

In Kansas, for example, the medical benefit level of $2,000 adequately covered ninety-six percent (96%) of the victims who suffered medical losses, but only covered fifty-five percent (55%) of the total medical expenses. The wage benefit in Kansas of $7,800 per year ($650 per month) covered 99.5% of the victims while covering only eighty-four percent (84%) of the total losses. Therefore, the vast majority of victims were fully covered for both wage and medical losses in the modified No-Fault States.

The pure system matched benefits to economic losses better than the tort system. From 1973 to 1976 there was an eighty-seven percent (87%) reduction in bodily injury claims in Michigan, while there was a one hundred sixty-one percent (161%) increase in the PIP claims frequency. This indicated that there has been a drop in insurance over-payments. In a report released by Michigan, it was noted that the real payments for economic losses during the first three years of the Michigan law was up sixty-five percent (65%). The Michigan report cited as reasons that the many previously uncompensable victims were now being compensated and that the full value of the losses were being received.

Therefore, the findings conclude that the success the No-Fault system has had over the tort system in providing traffic victims with compensation for economic losses, depends upon the type of No-Fault system enacted and the particular threshold and PIP limits.

C. WILL NO-FAULT REDUCE THE DELAY IN BODILY INJURY PAYMENTS.

The third proposition examined by the Study was whether, "No-Fault will reduce delay in bodily injury payments." As expected, all No-Fault States overwhelmingly supported proposition three by providing benefit payments more promptly than did the tort system. Providing prompt payments was one of the most important goals of all No-Fault legislation. In Kansas, this particular goal is cited at K.S.A. 40-3102 as the primary purpose of the K.A.I.R.A. Therefore, it is no surprise that No-Fault provides benefits more promptly than did the tort system.

A CLRS Massachusetts claims project demonstrated that seventy-five percent (75%) of all PIP claimants had received their first payment within thirty (30) days from the date of their loss and eighty-five percent (85%) within six months. The Department of Transportation report made a similar finding in that it was determined that PIP claimants received payments faster than claimants did under the tort system. Such findings were also reported from responses provided by Florida, Colorado, New York, Connecticut, Maryland, New Jersey, Michigan and Pennsylvania.

One of the most important findings of the Department of Transportation report was not that No-Fault merely provided compensation to accident victims more quickly than did the tort system, but that No-Fault is more advantageous than the tort system because it does not discriminate against the catastrophically injured. Generally, under the tort system, catastrophically injured persons with serious and complicated claims would have to await lengthy settlement or long court cases before they would be able to receive benefits. Under No-Fault, benefits are provided promptly to all claimants.

D. DOES NO-FAULT PROVIDE MORE BENEFITS TO MORE PEOPLE AT NO GREATER COST THAN THE TORT SYSTEM.

The final proposition which was examined in the Rutgers' study is by far the most difficult to evaluate. The proposition is whether "No-Fault will provide more bodily injury coverage to more traffic victims at no greater premium cost than non-No-Fault liability insurance."

To determine the rate impact of No-Fault is a difficult task. As stated in the 1977 Department of Transportation report, "It must be acknowledged at the outset that there are few topics so arguable or difficult to discuss with confidence and certainty as the cost and price implication of No-Fault insurance." The Report went on to state that from an empirical standpoint, "the study found no satisfactory approach to assessing relative 'cost' of No-Fault vis-a-vis the insured tort liability system."

Although this is the most difficult of comparisons to make, it is the one with which people are most concerned. Most people assume that the shift from a third to first party system, as indicated by the paid claim frequency, has led to greater cost efficiency, but there is no empirical data to support this belief. The Department of Transportation report indicated

that although there is no quantification of the administrative cost, "the major shift to first party benefits for No-Fault States has undoubtedly significantly improved the cost efficiency of the auto insurance system; the major unanswered question is the extent of this improvement." In a limited review, the Department of Transportation reported that after studying the fourteen (14) modified plans of No-Fault insurance, in constant dollars (i.e., adjusted for inflation), most premiums exhibited increases for both rural and urban, and fault and No-Fault States alike.

Although it was extremely difficult to determine the answer to proposition four, the Rutgers' study devised a system whereby it used non-No-Fault States as a control group and compared the percentage of rise in bodily injury premium changes in the control group with those in No-Fault States. The Study used State Farm statistics in an attempt to determine this increase. It is important to remember, before reviewing these results, that this study is not without problems because there may have been factors which affected the control group which did not affect the No-Fault States and vice-versa, which could make the findings somewhat inaccurate. However, the findings are by no means totally unreliable and should be considered persuasive.

The Study hoped that comparing premium changes within the various No-Fault categories with the premium changes in the non-No-Fault control group would provide a reliable indication of the No-Fault impact on the total bodily injury premiums. The Study believed that if any of the thresholds had reduced bodily injury premiums enough to off-set the added cost of PIP, and if this trade-off produced total bodily injury premium increases less than those experienced by the control group, it would appear that the thresholds were working as intended.

The findings in regard to the control group reflected a total bodily injury (liability, med pay and uninsured motorist) premium increase of twenty-two percent (22%) for the five year test period, running from 1971 to 1977. The bodily injury liability premium increased by a mean of twenty-seven percent (27%) and a median of twenty-eight percent (28%). This increase was attributed to inflation as reflected by the Consumer Price Index which indicated that medical care had risen by forty percent (40%), semi-private hospital rooms had risen by sixty-two percent (62%) and the wages for private non-supervisory non-farm workers had risen by forty-four percent (44%) since 1970.

Add-On Plans

The Study found that the premiums for the group of add-on States increased substantially more than those of the control group. This was expected because without a tort threshold there would not be a reduction in bodily injury premiums, yet there would be an increase in premiums to pay for the additional PIP benefits. The add-on group's bodily injury liability increase was a mean of thirty-eight percent (38%) and a median of 31.5%, while the total bodily injury increase (liability, med pay/PIP and uninsured motorist) was a mean of forty-eight percent (48%) and a median of 49.5%.

Low Benefit Modified Plans

The Study found that the low benefit modified No-Fault plans had kept the total bodily injury premiums at a level equal to or less than the control group's. This finding revealed that there had been a great variance in the low benefit States and that some had actually reduced total premiums while others had increased slightly above the control group's. The Study concluded that the thresholds had apparently reduced the number of trivial tort claims which had produced a savings in the nuisance over-payments and adversarial procedures which are reflected in liability premiums.

Regarding the total BI premiums, the control group increased by both a mean and median of twenty-two percent (22%). The low benefit modified plans increased by a mean of fourteen percent (14%) and a median of eighteen percent (18%). Kansas' total BI (liability, med pay/PIP and uninsured motorist) premium increase was fifteen percent (15%), or seven percent (7%) below the control group.

The total liability premium increase for the control group was a mean of twenty-seven percent (27%) and a median of twenty-eight percent (28%). For the low benefit modified plans the mean premium change in the total liability premium was a decrease of one percent (1%) and a decrease in the median of negative 2.5%. The Kansas total liability premium increase was five percent (5%).

High Benefit Modified Plans

The results regarding the high benefit modified No-Fault plans were confusing and

inconclusive. The data did not show a significant difference in the average premium changes for total BI in the low and high benefit States. Both experienced smaller increases than the control group, which seemed untenable because while the thresholds were similar, the benefits were much higher.

Upon closer examination, and from a review of other sources, the Study found that while the total BI changes of a mean increase of fifteen percent (15%) and a median increase of thirteen percent (13%) was similar to the low benefit group, the total liability was not. It had decreased a mean of ten percent (10%) and a median of twelve percent (12%). This was a greater decrease than reflected in the low benefit plans and an unusual finding because the thresholds in the two groups were similar.

The difference in the findings was explained by the fact that the liability premiums had been artifically depressed by tight State regulation. In fact, there have been reports that due to severe losses, some insurers have refused to write motor vehicle liability insurance in those States.

Therefore, although the data is admittedly somewhat inconclusive, the Study determined that while high benefit modified No-Fault plans provide better coverage than the tort system, there remain questions as to its ultimate cost.

Pure Plans

The final group examined in regard to proposition four was the No-Fault plan of Michigan. The Study found that the total bodily injury premiums in Michigan had declined by eleven percent (11%) despite inflation. This resulted in a fifty-three percent (53%) reduction in bodily injury liability premiums and appeared to be consistent with an eighty-seven percent (87%) decrease in the number of liability claims submitted. The Study noted that the reduction in premiums and third party claims was powerful evidence that Michigan's verbal threshold was successful. Further, because the fact the liability premium decreases had more than off-set the added cost of PIP, it was suggested that the cost trade-off envisioned by No-Fault proponents was not only a viable concept, but could be implemented effectively with the most generous of PIP packages.

Synopsis

From these results, it would appear that the No-Fault systems can be effectively implemented without increases in bodily injury or liability premiums over the increases that could be expected with the tort system. How accurate these figures are, is subject to debate. However, one must conclude, as did Professor Robert Henderson of the University of Nebraska College of Law in a Report to the Commissioners on Uniform State laws, that the figures from various sources will not provide clear-cut answers to the question of the impact of No-Fault on cost, but "at the very least though, the data does clearly not support the claims of those who charge that No-Fault has caused higher rates."

In summary, from the studies evaluating the performances of the various No-Fault laws across the nation, it appears that all the laws do two things better than the tort liability system. They provide the payment of benefits more promptly than did the tort system, and they make benefits available to more accident victims. The extent to which the No-Fault laws match the benefits to economic losses vary according to the benefit limits and tort thresholds of the particular law.

In the Rutgers' study, the Michigan plan proved to be the most successful in providing more PIP coverage at a minimal cost. The modified plans appear to be successful in fulfilling the goals contemplated by the enactment of No-Fault legislation. Although both the high benefit plans and the low benefit plans proved to be successful, this success was mixed. The high benefit plans, which provided the most comprehensive coverage, tended to cause rising costs and also led to a restriction of insurance markets. The low benefit plans, which were more economical, resulted in smaller premium increases, but did not compensate all accident victims adequately. The add-on plans were the least successful from a rating standpoint. They provided relatively low benefits and led to increases in the cost of premiums because of their failure to restrict tort lawsuits.

IV. AN EXAMINATION OF THE KANSAS NO-FAULT LAW.

A. A BRIEF REVIEW OF THE K.A.I.R.A.

The Kansas No-Fault law was originally enacted by the 1973 Kansas Legislature as

Substitute for House Bill No. 1129 and became effective on January 1, 1974. On January 4, 1974, three days after its effective date, a Shawnee County District Court ruled that the K.A.I.R.A. was unconstitutional. The District Court decision was stayed and an appeal was taken immediately to the Kansas Supreme Court.

Shortly after the District Court decision was rendered, the 1974 Kansas Legislature met and enacted another No-Fault law in Senate Bill No. 918 to clear up some of the alleged constitutional problems, and repealed Substitute for House Bill No. 1129. Senate Bill No. 918 became effective on February 22, 1974. Three months later on May 5, 1974, the Kansas Supreme Court ruled on the Shawnee County District Court decision. The Supreme Court carefully reviewed Substitute for House Bill No. 1129 and Senate Bill No. 918 and held that both Acts were constitutional.

Other than a few minor changes and one rather limited, but significant change by the 1977 Kansas Legislature, the Act remains intact and is set forth in its entirety at K.S.A. 1980 Supp. 40-3101 through 40-3121. As of this writing, there have been twenty-three (23) Kansas Appellate Court decisions interpreting various provision of the Act.

The K.A.I.R.A. is comprehensive in scope and controlling in the area. It controls insurers, motor vehicle owners and operators. It controls owners and operators in this State by requiring that they have insurance protection that complies with the Act, and it controls insurers by mandating minimum policy coverages and limits.

The Kansas No-Fault Act is a modified form of No-Fault insurance because it has (1) compulsory insurance requirements, (2) first party protection benefits, and (3) a limited tort threshold. The K.A.I.R.A. was not designed or implemented as a rate-saving device, but instead, was enacted to provide prompt compensation for accident victims. This is the stated purpose of the Act and has been referred to by the Kansas Supreme Court as ". . . the heart of the Act . . ." in Manzanares v. Bell, 214 Kan. 589, at 608, when they upheld the Act's constitutionality.

B. AN EVALUATION OF THE PERFORMANCE OF THE K.A.I.R.A.

The Rutgers' study attempted to evaluate whether the No-Fault plans which have been enacted across the nation had met four recognized goals of No-Fault. Because the goals

which they set forth are generally accepted goals of all No-Fault legislation and can be regarded as recognized goals of the Kansas No-Fault Act, it is proper to start the examination of the Kansas Act by assessing how well the K.A.I.R.A. reaches these objectives. However, before doing so, it should be noted that a completely accurate and statistically sound examination of the Kansas Act is not possible because the data needed to make such an examination is unavailable at this time. This does not mean that the following evaluation is necessarily unreliable, however, because the data available is felt to be sufficient to allow one to form an educated and reasonably reliable opinion as to whether the Kansas Act meets the aforementioned goals.

1. DOES THE K.A.I.R.A. PROVIDE BODILY INJURY BENEFITS TO MORE TRAFFIC VICTIMS THAN THE TORT SYSTEM.

There appears to be little question that the Kansas Act meets the goal of providing bodily injury benefits to more traffic victims than did the tort system. In K.S.A. 40-3107(f), insurers are required to provide in every policy of motor vehicle liability insurance issued in Kansas a package of first party PIP benefits to be paid regardless of fault.

These PIP benefits are available to almost everyone injured in a motor vehicle accident in the State of Kansas. K.S.A. 40-3109 sets forth who is entitled to receive the PIP benefits and under what circumstances. This statute provides that PIP benefits must be provided to all owners of motor vehicles when occupying their motor vehicle either within this State or without; or when they are not an occupant of a motor vehicle if they are injured in Kansas. Relatives residing in the same household with owners, who themselves are not owners, will be afforded PIP benefits under the same circumstances as the owner. The statute also provides that any other person who is injured in this State as the result of a motor vehicle accident, and is himself not the owner of a motor vehicle required to be registered in this State, will be entitled to PIP benefits from either the vehicle in which he was riding or the vehicle which struck him.

There are six basic exceptions to the aforementioned PIP coverage, but they are limited in scope. Therefore, in most circumstances, when a person is injured in a

motor vehicle accident in Kansas he will be able to recover PIP benefits from one of the vehicles involved, or if he is an owner, from his own vehicle.

If for some reason a person is not an owner and is unable to recover PIP benefits from one of the vehicles involved, the person would be able to receive PIP benefits from the Assigned Claims Plan, as set forth in K.S.A. 40-3116.

As is demonstrated by this review of the K.A.I.R.A., the Act liberally provides benefits to persons who were previously unable to receive benefits through the tort system. Under the Act, benefits will be paid without regard to fault to individuals who are at fault, are one car accident victims, or are for some reason unable to recover from the tortfeasor.

Therefore, an examination of the law itself provides a strong basis for arriving at the conclusion that the Kansas No-Fault Act provides benefits to more traffic victims than did the tort system.

2. WILL THE K.A.I.R.A. MATCH BENEFITS WITH ECONOMIC LOSSES BETTER THAN THE TORT SYSTEM.

In the Rutgers' study, it was reported that the Kansas Act met this goal as did all the modified No-Fault Acts. Their findings are subject to debate. In citing their reasons for finding that the Kansas Act met the proposition, the Study noted that the medical payments of $2,000 was sufficient to compensate ninety-six percent (96%) of the injured traffic victims while providing compensation for only fifty-five percent (55%) of the total losses, and that the wage losses of $7,800 per year compensated 99.5% of the traffic victims while providing compensation for eighty-four percent (85%) of the total losses.

Although these figures reflect that the PIP limits are adequate for compensating the majority of the injured traffic victims, they do not demonstrate whether they prevent overcompensation of victims with smaller economic losses or undercompensation of victims with large economic losses. Whether the Kansas Act prevents overcompensation of smaller losses can only be determined by examining whether the threshold adequately prevents tort suits in minor tort

cases. It can be surmised that the Kansas Act meets the goal for losses which do not surpass the threshold, and as such, would be an improvement over the tort system. At this time, PIP medical payment figures provided by both ISO and State Farm indicate that the average medical claim is less than $500, so it appears that overcompensation is generally being avoided. However, it should be noted that the average PIP medical payment is extremely close to the $500 threshold. For example, over the past four years, State Farm's average PIP medical payment has been $473.38, while for 1979 it was $490.62.

Whether there is undercompensation for the catastrophically injured victim, is questionable. The figures provided by the Study indicate this goal has not been met because they reflect that only a percentage of the total losses are being paid.

3. WILL THE K.A.I.R.A. REDUCE THE DELAY IN CLAIM PAYMENTS.

The Kansas Act fully supports the proposition that No-Fault reduces delay in claim payments. As was noted earlier, the expressed and stated purpose of the K.A.I.R.A., as set forth in K.S.A. 40-3102, is to provide prompt compensation for persons injured in motor vehicle accidents.

This purpose is carried out and implemented by K.S.A. 40-3110 of the Act, which provides that all PIP benefits must be paid within thirty (30) days from the filing of proof of loss. PIP disability benefits are late if they are not provided within two weeks after the insurer receives the proof of loss notice. The statute also provides that if payments are overdue, the insurer shall be required to pay a penalty of eighteen percent (18%) per annum. Finally, K.S.A. 40-3111 requires an insurer to pay an insured's attorney fees if the court finds that an insurer has unreasonably delayed in making proper PIP payments.

To further support this proposition, a review of the files handled by the Consumer Assistance Division of the Department reflects that only a small percentage of No-Fault inquiries and complaints are for delay in the payment of PIP benefits.

4. DOES THE K.A.I.R.A PROVIDE MORE BODILY INJURY BENEFITS TO MORE TRAFFIC VICTIMS AT NO GREATER PREMIUM COST THAN THE TORT SYSTEM.

As was indicated in the earlier analysis of the Rutgers' study, this is the most difficult of propositions to determine. The rate impact of the No-Fault concept in general, and of the Kansas law in particular, is difficult, if not impossible, to gauge. The problem in determining the rate impact of No-Fault in Kansas is complicated by the fact that in the same year that No-Fault became effective, the guest statute was repealed and the comparative negligence law was enacted. Whereas No-Fault would theoretically reduce liability premiums because it fosters less exposure to liability by limiting the right to sue in tort, the repeal of the guest statute and enactment of the comparative negligence law theoretically create more liability exposure.

The Rutgers' study found that low benefit modified No-Fault plans such as the Kansas plan had a smaller increase in premium than the control group of non-No-Fault (or tort) States. For Kansas specifically, they found the same result. The reliability of this finding is diminished somewhat due to the imprecise method of evaluating the factors which affected the control group, and those which affected Kansas.

Although the rate impact is difficult to scientifically evaluate, most knowledgeable people within the industry do not believe that Kansas has shown an increase in premium due to the implementation and enactment of No-Fault over what the increase would have been if it had remained under the tort system. They do not feel that there has been a decrease, but they do not feel that the enactment has led to an increase in premium either.

It would appear the premium rate for No-Fault has remained at the same level it would have been at if Kansas had retained the tort system. As such, the premium rate has remained constant while providing more benefits to more injured traffic victims. Therefore, the K.A.I.R.A. appears to be successfully meeting the goal of providing more benefits at no greater cost than the tort system.

C. A REVIEW OF POSSIBLE PROBLEM AREAS OF THE KANSAS NO-FAULT ACT.

Although the aforementioned review of the K.A.I.R.A. indicated that it is working successfully, and for the large part meeting the objectives for which it was designed, it is not without problems. The following will provide an analysis of some of the possible problem areas of the K.A.I.R.A.

1. THE TORT THRESHOLD.

One provision of the K.A.I.R.A. which needs to be carefully examined is the tort threshold found at K.S.A. 40-3117. This is the element of the Kansas law which makes it a modified No-Fault plan, rather than an add-on plan. The tort threshold was deemed to be of such major significance to the Legislature, that when they drafted the Act, they placed a provision in K.S.A. 40-3121 that stated all sections except the tort threshold could be severed and the Act could still stand. However, they specifically made the tort threshold provision non-severable and declared that the entire Act must fail if the threshold was found unconstitutional.

The Kansas tort threshold is a low threshold and very limited in scope. It is a combination of a specific dollar amount and verbal threshold, which is easy for an injured traffic victim to meet. The threshold bars only victims with the most minor of injuries from suing in tort.

The tort threshold, as set forth in K.S.A. 40-3117, prevents persons from bringing actions in tort for pain, suffering, mental anguish, inconvenience, or any other non-pecuniary loss, if the injury which they have received does not require medical treatment of the kind described as medical benefits in the Act and has a reasonable value of $500 or; unless the injury consists in whole or in part of a permanent disfigurement; a fracture to a weight-bearing bone; a compound, comminuted, displaced or compressed fracture; loss of a body member; a permanent injury within a reasonable medical probability; a permanent loss of a bodily function; or death.

The dollar threshold is relatively easy to reach in Kansas. A person is not

required to actually incur $500 in medical expenses, he need only receive treatment that has a reasonable value of $500. In K.S.A. 40-3117 it is stated that a person need not actually incur the expenses, but is able to satisfy the threshold even if he receives the medical benefits free. The key is that the treatment must be of a value equivalent to $500. Finally, the statute provides that in determining the value of the medical expenses to reach the threshold, a person may include the value of ordinary and necessary services usually performed by a nurse if they are performed by a relative or a member of the household.

The ease in which injured traffic victims are able to satisfy the threshold is of major concern in determining whether No-Fault is satisfying the goals for which it was enacted. One of the most important goals of No-Fault was to place more of the premium dollars in the hands of the injured victims through benefit payments by reducing the number of tort suits, nuisance over-payments, and administrative and litigation costs. If the threshold is too low, these cost savings will not be realized.

Across the nation and in Kansas, there has been much discussion regarding No-Fault tort thresholds. There have been many who have attacked not only low tort thresholds, but dollar thresholds of any kind, and narrative or verbal thresholds which can be too easily met.

One of the most vocal critics of low tort thresholds has been Frederick B. Karl, a former Florida Supreme Court Justice and currently General Counsel of the Florida Association of Insurance Agents. Mr. Karl contends that the only thing worse than no threshold is a dollar threshold. He believes that a dollar threshold only establishes a target for lawyers and litigants. He believes this not only encourages over-utilization of medical services, but encourages fraud. Mr. Karl advocates the enactment of a strict verbal threshold, and refers to the experiences of Florida as support for the success of such a plan. Originally, Florida had a $1,000 threshold which was not very successful. In 1977, the Florida Legislature changed the threshold requirement by eliminating the dollar amount and replaced it with a strong verbal threshold. After the change, State Farm reported litigation was down by twenty percent (20%). In 1978, the Florida

Legislature again tightened the verbal threshold so that it only allowed suits for significant and permanent injuries, scarring or disfigurement, or death.

Florida is not the only State which has increased the tort threshold. New York just recently raised their tort threshold, replacing a $500 threshold with a verbal threshold. Minnesota raised the dollar amount of their threshold and added a verbal and a duration of disability threshold as well. Georgia appears to be contemplating the enactment of a verbal threshold after hearing testimony by Mr. Karl on the problems of their $500 threshold. New Jersey, which has experienced significant problems with their automobile reparations system, is also considering modification of their threshold.

Debate regarding the tort threshold has not escaped Kansas. In the 1980 legislative session, House Bill No. 2898 was proposed with the support of the automobile insurers to amend K.S.A. 40-3117. The Bill proposed to replace the $500 threshold with a strict verbal threshold, so as to allow suits for pain and suffering only if there had been significant and permanent injury. Although this bill failed to pass, it does not mean the issue is dead. One perceived deficiency in the bill was that it did not propose to increase the PIP benefits to balance the effect of the added restriction on the ability to recover non-pecuniary damages. This is one of the key elements which must be kept in mind when establishing the tort threshold and will probably be corrected next time the issue is presented. There should be a balancing between the right an individual forfeits to sue in tort with the medical and disability benefits he would be able to receive in lieu thereof.

Upon careful examination of the Kansas tort threshold, it appears that the threshold may be too low to adequately achieve the desired purpose. The threshold is now at $500, the same as it was when the law was enacted in 1973 and became effective in 1974. In the meantime, health care costs have risen eighty-nine percent (89%) during 1974 to 1979, as reported by Blue Cross/Blue Shield. Therefore, the $500 threshold is now, for all practical purposes, a $250 threshold. And as such, it appears questionable whether the tort threshold is serving the purpose of reducing litigation and the over-payment of claims for non-pecuniary losses to the extent that was originally intended by the

Legislature. It should be noted that some believed the $500 threshold was too low when the No-Fault law was enacted. In fact, an actuarial study conducted on behalf of the Department at that time reported a $1,000 threshold was needed, which was what the Department proposed in a bill it submitted to the Legislature in 1973.

In light of the possibility that the threshold may no longer be adequate, one must consider the alternatives available to the Legislature if they were to choose to amend the threshold. Several alternatives exist. The Legislature could choose to raise the specific dollar amount of the threshold, or remove it altogether and replace it with a strict verbal threshold or a verbal threshold coupled with a duration of disability threshold. If the threshold is raised, the amount of PIP benefits available must also be raised. The Legislature would need to determine how much the PIP benefits should be raised to strike the balance between the right to sue in tort that is forfeited and the PIP benefits available.

2. ARE THE PIP BENEFITS HIGH ENOUGH.

The K.A.I.R.A. provides six PIP benefits. When an individual is injured in an automobile accident, he may recover the following first party benefits: disability benefits; medical benefits; funeral benefits; rehabilitation benefits; substitution benefits; and survivors' benefits. Each of the benefits has a statutorily stated amount. In some cases, the benefits are stated as minimums with specific time limitations placed upon them, whereas others have no time limitations. The amount of benefits available have not been changed since the original enactment of the No-Fault law. In examining the No-Fault law, one must question whether these benefits remain adequate so as to properly compensate injuries in Kansas due to inflation, if for no other reason.

a. DISABILITY BENEFITS.

Disability benefits are provided to an individual who has been injured and is unable to engage in available and appropriate gainful activity. These benefits are available to regularly employed persons, not regularly employed persons, self-employed persons and even some

unemployed persons. When an individual is unable to engage in available and appropriate gainful activity, he is able to receive $650 a month for one year, or in other words, $7,800.

In an attempt to decide if these benefits are adequate, an effort was made to determine what an average worker in Kansas is earning. The Director of Worker's Compensation Office reported that for worker's compensation purposes, an average worker in Kansas makes a weekly wage of $254.88. This amount has increased due to inflation and other factors by seventy-nine percent (79%) from the 1974 average weekly wage figure of $142.73, the year in which the K.A.I.R.A. was enacted. Therefore, according to the increase in average weekly wage from 1974 to the present, one would have to question whether the disability benefits are adequate.

In the Rutgers' study, the figures furnished by State Farm indicated that wage loss benefits as of 1977 were high enough to adequately compensate 99.5% of the victims, while they covered only eighty-four percent (84%) of the total losses. To explain these figures, one must assume that the benefits are high enough to fully compensate persons for minor injuries, but remain inadequate for the more seriously injured who lose a great deal of time off work.

b. MEDICAL BENEFITS.

As to whether the medical benefits are adequate to compensate injured traffic victims for their losses is, again, somewhat unclear. As indicated earlier, it has been estimated that health care costs have risen by eighty-nine percent (89%) since the enactment of the law in 1974. As health care costs have doubled, the value of the medical benefits has been cut in half. The most accurate figures available to demonstrate whether medical benefits are adequate, are the State Farm figures cited in the Rutgers' study. In the Study, it was found that the medical benefit level adequately covered ninety-six percent (96%) of the victims, but in so doing, only covered sixty-

five percent (65%) of the total medical expenses lost. If these figures are still accurate, it can be assumed that the benefit levels are adequate for the majority of the people. It should be noted that there is no time limitation upon the payments of these medical benefits, which theoretically broadens the medical benefits provison.

c. FUNERAL BENEFITS.

The K.A.I.R.A. requires a policy to provide $1,000 in PIP funeral benefits. It is questionable whether this amount is adequate.

In conducting a limited survey of funeral costs in the three largest cities in Kansas, it was found that the most inexpensive funeral costs more than $1,000. The lowest average cost of having a funeral ranged from $1,300 to $1,500. If the purpose of the PIP funeral benefits provision is to pay for the entire funeral, then the provision is too low. However, if the funeral benefits are designed to only pay part of the cost of the funeral, one would have to assume they are adequate.

d. REHABILITATION BENEFITS.

The K.A.I.R.A. requires that every policy provide $2,000 in rehabilitation benefits, which are designed to pay for the occupational therapy or psychiatric services required to train or retrain a person to obtain suitable employment. There is little information available to determine if these benefit levels are adequate, although it is known that rehabilitation benefits are used sparingly. Inasmuch as these benefits are closely tied to the cost of medical benefits, one would have to assume that these benefits have been cut in half by the increase in health care costs, as have the medical benefits. Therefore, although these benefits may be used sparingly, for a person who has been seriously injured and needs training or retraining, they may be inadequate.

e. SUBSTITUTION BENEFITS.

The K.A.I.R.A. provides benefits for appropriate and reasonable expenses incurred in obtaining ordinary and necessary services for the benefit of the insured or his family that the insured would normally have been able to perform. The person is entitled to $12.00 per day for 365 days for these benefits.

These benefits are mainly used to compensate homemakers for the cost of hiring someone to do the work they normally would have performed. It is difficult to determine whether these benefits are now adequate. But, inasmuch as the cost for help of this kind has probably increased as has all other labor, one could assume the amount of benefits may be somewhat deficient.

f. SURVIVORS' BENEFITS.

The K.A.I.R.A. provides allowances to be paid to survivors of a person killed in a motor vehicle accident for the loss of his monthly earnings up to $650 per month and substitution benefits. These benefits are available for one year after the date of death.

These benefits were designed to provide the decedent's family with the income they lost as a result of the death of the decedent. It is difficult to determine whether these benefits are adequate to meet the purposes of the K.A.I.R.A. Such a determination must be tied with the determination as to whether the disability benefits are adequate inasmuch as the two are closely related.

3. LIABILITY LIMITS.

Not only does the K.A.I.R.A. require all insurers who write motor vehicle liability insurance in Kansas to provide PIP limits in certain amounts, it also requires that every motor vehicle liability insurance policy offered within Kansas have liability limits of $15,000 per person and $30,000 per occurrence for bodily injury and $5,000 for property damage.

It has been questioned whether these statutorily stated liability limits are sufficient. In the 1980 legislative session, Senate Bill No. 809 was introduced to increase these liability limits to $25,000 per person/$50,000 per occurrence for bodily injury and $10,000 for property damage. A legislative memorandum was prepared by the Insurance Department's Fire & Casualty Division which determined that such an increase would result in a twenty-seven percent (27%) increase in bodily injury premium and result in a five percent (5%) increase in the property damage insurance premium.

While the Insurance Department has always considered the establishment of the amount of minimum liability limits to be a matter for the Legislature, the Department has acknowledged that the minimum required property damage limit appears to be inadequate in light of current motor vehicle market values. There are two arguments often advanced against increasing the minimum limits. The first is that mandatory legislation is not necessary because the voluntary market readily provides higher limits. The second is that requiring higher limits will increase premiums and result in more uninsured motorists because some motorists will be unable to afford the increased cost of the insurance.

4. LIABILITY EXCLUSIONS.

K.S.A. 40-3107 of the Act sets forth the mandatory contents of motor vehicle liability insurance policies issued in this State. Subsection (b) of this statute would have to be considered the omnibus provision of the No-Fault law, and sets forth for whom and under what circumstances the liability insurance coverage must provide protection. The relevant statute reads:

> "Every policy of motor vehicle liability insurance issued by an insurer to an owner residing in this state shall: . . . (b) insure the person named therein and any other person, as insured, using any such vehicle with the expressed or implied consent of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of any such vehicle within the United States of America or the Dominion of Canada, subject to the limits stated in such policy."

It has been argued that this language indicates that liability coverage must be

provided to protect the insured person, or any other person using the vehicle with his express or implied consent, for any loss where liability can be imposed by law. As such, it has been questioned whether there can be any exclusions to the liability coverage provided in motor vehicle liability insurance contracts in circumstances where liability can be imposed by law against an insured. A case involving this issue has been argued before the Supreme Court, and hopefully, the Court's decision will resolve this problem.

5. COMPULSORY INSURANCE REQUIREMENTS.

One of the key elements of the K.A.I.R.A. is the compulsory insurance requirement as set forth in K.S.A. 40-3104 and K.S.A. 40-3118. K.S.A. 40-3104 requires every owner of a motor vehicle to provide a motor vehicle liability insurance policy to comply with the Act. Every owner must provide coverage initially when he registers a vehicle and must continuously maintain insurance coverage in effect. Failure to do so will subject the owner to both criminal and administrative sanctions. Failing to keep the vehicle insured will subject the owner to a Class B misdemeanor with a six month jail sentence and a $1,000 fine, and allow the Director of Vehicles to revoke the tags and registration of the owner for sixty (60) days and suspend the owner's driver's license for up to one year.

Because of the stiff penalties that can be imposed upon an owner who does not continuously insure his vehicle, all owners in Kansas are assumed to have motor vehicle liability insurance. Unfortunately, this is not the case. Prior to the enactment of the No-Fault law, it was estimated that approximately eighty percent (80%) of all drivers in Kansas had motor vehicle liability insurance. Although no one really knows exactly how many motorists are now insured and how many are not, estimates range from two and one-half to ten percent ($2\frac{1}{2}$-10%) of all motorists in Kansas are uninsured. Unfortunately, there are no available figures to conclusively determine of how many vehicles in Kansas are not insured.

For the purposes of this review, however, an accurate estimate is not essential.

It is clear that there are some vehicles being operated in Kansas which do not have insurance and are involved in accidents, resulting in substantial hardship to many law-abiding Kansas residents. The question becomes what should be done to remedy this problem and at what cost.

Many discussions have been held with the Department of Revenue-Division of Vehicles regarding the administration of the compulsory insurance requirements of the law. Suggestions have been made that the penalties are not stiff enough, that the Hearing Officers are not strict enough and that prosecutors across the State are not interested in prosecuting violators of the Act.

There does not appear to be anything wrong with the penalties. In 1977, the criminal penalties were raised from a Class C to a Class B misdemeanor. The possible $1,000 fine should be enough to deter uninsured motorists if it is imposed. The real problem lies with the enforcement and administration. The problem starts at the County Treasurer's office where registration is allowed when someone falsifies insurance coverage. No one is sure how often this happens or what percentage of owners have done this. However, if there were tighter controls and requirements placed upon proof of insurance, the uninsured motorist problem could be improved.

Once an individual has falsified insurance to the County Treasurer and has been issued a tag and registration, there is little that can be done to check on him at the present time, short of his involvement in an accident. Spot-checks for insurance have been conducted on a limited basis by the Division of Vehicles, and have been somewhat successful in determining whether owners have continuously maintained insurance coverage in force.

At one time, law enforcement agencies arrested or ticketed drivers involved in accidents who failed to prove insurance coverage, but it is questionable at this time whether this practice can be allowed. The Division of Vehicles has been informed by certain law enforcement agencies that arrests are no longer being made and tickets are no longer being issued because it is not clear whether the Kansas statutes give the officers the authority to do this. To correct this problem, House Bill No. 2953 was proposed in the 1980 legislative session to

specifically allow members of law enforcement agencies the authority to request proof of insurance from owners of motor vehicles. However, the Bill did not pass.

Also, there have been suggestions that an individual should be furnished an insurance identification card when he purchases a policy, and be required to keep it with him at all times, either in the glove compartment of his car or on his person. Such a requirement might assist in the detection of uninsured motorists, but would be costly to administer.

One method of improving the uninsured motorist problem is to encourage prosecutors and judges across the State to actively prosecute violators criminally. At the present time, this is seldom done. If penalties were imposed both criminally and administratively, motorists would be encouraged to comply with the law.

There are two additional changes that could be made to improve the compulsory insurance requirement. The first is to re-define the definition of owner to include a long-term lessee. At the present time, owners are required to provide the insurance on the vehicle, but long-term lessees, meaning individuals who lease a vehicle for over thirty (30) days, are not required to have insurance on the vehicle. Generally, a long-term lessee is required through a contract with the lessor to purchase the insurance. If the lessee fails to do so, often times the lessor-owner is not given knowledge of it and the vehicle is operated without insurance. When this happens, it is the owner who is found to be out of compliance with the law.

One final change involves administrative sanctions against drivers who unknowingly operate uninsured motor vehicles. Currently, their drivers' licenses can be suspended for up to one year. This seems inequitable if they truly did not know they were operating an uninsured motor vehicle. It is the owner, rather than the driver, whose license should be suspended, for it was he who was out of compliance with the law.

It is generally recognized that the enforcement of the compulsory insurance

requirements of the Kansas No-Fault law is an area which presents a problem. Not only is this recognized by members of the insurance industry, but by the public as well; as was indicated by the responses to a public opinion survey recently conducted by the Department.

Exactly what should be done about the problem, and the severity of the problem, is not clear. It should be noted that it is expensive for the State to administer the compulsory requirements of the Act, and increases the insurers' costs of doing business in Kansas which are passed along to Kansas insureds through the cost of insurance premiums. While it is true that changes could be made to upgrade the enforcement of the compulsory insurance requirements, one must realize that these changes would be expensive and borne by the insuring public in the final analysis.

When contemplating the making of any changes, consideration should be given to how expensive the cost of the changes would be and how much of an increase in premium the insuring public would, or could, stand. Also, when considering the changes, one must question how successful the improvements would be and if the results would justify the expense. As was indicated earlier in this Report, it has been estimated that there are now approximately ten percent (10%) of the owners in Kansas who are uninsured. While this may seem like a lot of uninsured motorists, it has marked an increase in the number of automobile owners who have motor vehicle liability insurance over those that had insurance prior to the enactment of No-Fault.

Whether this increase in the number of insured motorists is sufficient, and whether ninety percent (90%) compliance with the compulsory requirements is acceptable or is the best that can be expected, are questions that remain unanswered. Realistically, it is doubtful whether one hundred percent (100%) compliance can ever be achieved no matter how much money is spent on enforcement, and no matter what enforcement laws are passed. One must realize that there is, and probably always will be, a certain percentage of owners who will find a way to break the law and will drive without insurance. Also, some studies have shown that a point of diminishing returns is reached when attempting to enforce the compulsory insurance requirements where the

improvement in enforcement no longer justifies the additional costs. The Legislature should examine all of these factors if they consider amending the compulsory insurance requirements of the K.A.I.R.A.

6. PROBLEMS OF INTERPRETATION.

Certain provisions of the K.A.I.R.A. have been subject to varying interpretations. Although the courts have resolved some of these problems of interpretation, there are many that remain unresolved. The following will focus on several provisions in the Act which are subject to different interpretations.

Disability Benefits

Many of the problems of interpretation involve disability benefits. Disability benefits are allowances for a person's loss of monthly earnings due to his inability to engage in available and appropriate gainful activity. The statute provides $650 a month in disability benefits not to exceed one year after the person is unable to engage in available and appropriate gainful activity. An insurer is required to pay one hundred percent (100%) of the loss up to the $650 amount unless the benefits are not includable as gross income for Federal income tax purpose, which allows the insurer to pay only eighty-five percent (85%) of the loss.

The question as to whether disability benefits are taxable as income was resolved by Internal Revenue Ruling 73-155, which held that disability benefits of this kind would not be taxed as income. Therefore, insurers are able to pay eighty-five percent (85%) of one's loss up to the $650 limit. The Revenue Ruling did not apply to survivors' benefits, however, so it does not appear that insurers can pay only eighty-five percent (85%) of survivors' benefits.

A question has arisen regarding how long from the date of accident or injury disability benefits are required to be paid. The language causing the confusion is included in the Act's definition of disability benefits, which provides for payments of not less than $650 per month "not to exceed one year" after the date the injured person becomes unable to engage in available and appropriate

gainful activity. The problem arises when a person's injuries are such that the person's disability is not continuous and exists for a period that extends beyond one year from the date of the accident. An example, which occurs frequently, involves minor but painful back or neck injuries where the disability and treatment for this type of injury can occur on an irregular and extended basis. Specifically, if a person is injured and disabled for six months, goes back to work for three months but then finds that the injury prevents him from continuing work and requires further disability, the question becomes whether the person is able to receive a total of twelve months of disability benefits or whether the benefits will be cut-off after one year from the date of injury. The definition of disability benefits appears subject to the interpretation that entitles a person to twelve months of benefits regardless of whether they are paid for a consecutive twelve month period after the injury. The one year period runs from the date when the person is unable to participate in available and appropriate gainful activity, not from the date of the original injury or from the date when the first period of disability occurs. In the above example, there were two periods of disability for the same injury which would appear to allow the person a total of twelve months worth of disability benefits, even though the payments would extend beyond a one year period.

Another problem area involves the determination of what a person's monthly earnings are. For regularly employed or self-employed persons, monthly earnings are defined as one-twelfth (1/12) of their annual earnings. To determine the income that a regularly employed person lost due to his injury, it is necessary to look at the income the person was making at the time of his injury, which could be paid as either a salary or an hourly wage. To do this, it appears that insurers must look at the number of working days a person missed and what was lost on those days based upon the number of days the individual worked in a month (not the number of days in a month) to determine the loss. This appears necessary to reflect the purpose of the disability benefits provision, which is to compensate the individual for what was lost in monthly earnings up to the minimum statutory limit of $650 per month. As such, theoretically it appears possible for a person to lose $650 a day and be entitled to that amount in disability benefits even if he was off work only one day.

It is more difficult to determine the loss of monthly earnings of a self-employed person. This problem arises often in Kansas inasmuch as there are many farmers, attorneys, insurance agents, and self-employed persons who do not make a monthly or hourly wage, or even a specific salary. In determining the loss of monthly earnings for someone self-employed, insurers must look at what the person actually lost. The key to making this determination is to look at the value of the service performed in relation to the business. This is necessary because the value of the services are worth something and, therefore, are compensable. It appears possible for the business of a self-employed person to actually suffer a loss for the year, and yet have the individual be entitled to benefits. To calculate what was lost, insurers can estimate what it would cost to hire someone to do the work the injured person performed.

People who work as salesmen, attorneys, insurance agents, etc., present another problem involving disability benefits. People in these types of professions might be injured and unable to work, and yet still receive income for the business they may have already performed. This does not mean, however, that they are not entitled to disability benefits. It appears they are entitled to recover disability benefits to compensate them for what income they lost because of their inability to work due to their injury.

Some insurers have contended that a person is not entitled to disability benefits when he has suffered only a loss of sick leave. However, this interpretation does not appear to reflect the purpose of the Act. It would appear that a person is entitled to disability benefits when he has suffered a loss of sick leave, even though he did not lose any income, because the sick benefits would no longer be available to the individual which would constitute a loss the insured has incurred due to the inability to engage in available and appropriate gainful activity. These benefits are usually considered to be part of a person's compensation and if they are no longer available, they would appear to constitute a compensable loss.

Some have contended that a person has to be totally disabled before he is able to receive disability benefits. Such an interpretation does not seem to reflect the purpose of the Act, which is to compensate a person for loss due to his inability

to engage in available and appropriate gainful activity. If a person is partially disabled, he would still be unable to engage in an available and appropriate gainful activity. As such, it would appear that compensation should be forthcoming. Providing disability benefits in such cases encourages injured persons to go back to work as soon as possible, although it may be only on a part-time basis which benefits both the injured person and insurer. This is also the case when one is unable to work at a part-time job which he had before the injury. The loss of a part-time job would entitle the person to compensation, even though he might still be able to work at his regular job because he would have lost income as a result of his inability to engage in the available and appropriate gainful activity of the part-time job.

A problem of interpretation which involves both disability benefits and survivors' benefits concerns whether a survivor is entitled to survivors' benefits to compensate him for loss of a decedent's social security benefits or some other type of deferred compensation or retirement income. It has been argued that survivors are not entitled to compensation for this loss because these benefits do not constitute earnings of the decedent at the time of the injury to qualify under the definitions of disability or survivors' benefits. Although literally this might be the case, these benefits could be considered as deferred earnings and, therefore, might fall within the language of the statute. This appears to be the better and more equitable interpretation, especially when one considers that the elderly are being charged a premium for disability and survivors' benefits just like all other motor vehicle owners.

Medical Benefits

There have been a few problems of interpretation involving PIP medical benefits. Medical benefits are those benefits which provide a person allowances for all reasonable expenses for necessary health care rendered by a practitioner licensed by the Board of Healing Arts, along with certain other expenses. The question has arisen as to whether travel expenses to the doctor's office should be considered a part of medical benefits. Although it is unclear whether these expenses could be considered medical benefits, in certain instances travel expenses might fall within the purview of the statute.

It has also been questioned whether the payment for a person's broken eyeglasses can be construed as a medical expense payment. It has been determined that although eyeglasses are not prosthetic devices (which are compensable under the medical benefits provision), the PIP medical will provide payment for the loss of eyeglasses if they were on the person at the time of the accident because this would constitute a bodily injury.

Another problem with regard to PIP medical benefits involves the reasonableness of expenses. The definition of medical benefits, which requires payment for only "reasonable expenses for necessary health care", can and has caused hardship to certain insureds in cases where the cost or extent of the treatment has been unreasonable (i.e., excessive). In such cases, insurers have paid only the reasonable expenses, which leaves the insured personally responsible for the balance. This problem is difficult to control and may be beyond the scope of No-Fault regulation in that the problem lies with the few health care providers who charge in excess of the reasonable and customary charge for the particular treatment. What regulation of No-Fault insurers that could be provided in regard to this problem appears to already exist because before insurers are allowed to deny payments of excessive charges, they must establish that the charges are in excess of the normal and customary charge for the treatment. Therefore, although the insureds may select the provider of their choice for treatment, total payment of the medical expenses may not be provided in all cases. Insurers should attempt to keep abreast of which providers charge excessively and advise insureds of this possibility. It should be noted that this situation does not occur a great deal and involves only a few questionable providers.

An additional problem involves the assignment of the payment of medical benefits to health care providers. This problem usually occurs when an individual is injured and incurs large medical expenses, which may exceed the medical benefits available, from many different health care providers (i.e., ambulances, hospitals, doctors, physical therapists, technicians, pharmacists, chiropractors, etc.). As a customary practice, each provider will require the insured to sign some kind of assignment of benefit agreement and attempt to recover their payment directly from the PIP carrier. It is questionable whether such

assignments are valid and whether the No-Fault Act requires the PIP carrier to honor the assignments. The No-Fault law is not clear as to what effect assignments have, but it is clear that the PIP benefits are for the benefit of and to be paid to the insured. There is no requirement that these benefits be paid to a provider. As such, some PIP carriers are reluctant to honor assignments and will make payments only to the insured. By doing this, insurers protect themselves from the possibility of honoring an improper assignment. Also, this benefits the insured because it allows him to distribute the payments to the various providers as the insured desires.

A question of interpretation involving not only the Kansas No-Fault law, but those of other No-Fault States, deals with the question of whether the United States military is entitled to reimbursement from a serviceman's PIP carrier for the medical services they provide a serviceman for injuries sustained in a private automobile accident. PIP carriers contend that because the military provides these medical services at no charge to a serviceman as part of the serviceman's compensation, they are, therefore, not responsible for reimbursement. The military argues that they should be able to recover the cost of the services rendered. At this time, the question remains unresolved in Kansas. There have not been any Kansas court cases on this issue, and the decisions of other jurisdictions are split.

At one time, there was a question as to how the payment of medical expenses should be made when medical benefits are available from both PIP and some type of collateral source. This question was resolved in 1979 with the approval of automobile medical payment exclusions and coordination of benefit provisions in certain group accident and health policies. PIP medical benefits, which have always been primary (with the exception of worker's compensation), are now, in almost all cases, the only benefits available from dollar one. The medical payments from group accident and health policies come into play on an excess basis only after all the benefits payable under a medical payment provision in an automoible liability policy have been paid. Theoretically, this result avoids duplication of benefits and reduces the cost of the accident and health policies. These provisions only apply to group policies.

What would probably have to be considered the major problem with the payment of PIP medical benefits at this time involves an insurer's right of subrogation for medical expenses paid in excess of $2,000. The statute states that an insurer has a right of subrogation to recover the PIP benefits which it has paid out. PIP medical benefits are defined as those benefits required to be provided in the Act, or in the case of medical benefits, $2,000. Therefore, it would appear that only $2,000 in benefits are subject to subrogation. Certain insurers provide medical benefits in excess of the $2,000 amount, denominate them as PIP, and contend they have a right of subrogation for the entire amount of medical benefits. This practice appears to be improper and results in an inequitable treatment of both Kansas insureds and insurers, because some insurers are allowed to subrogate while others are not. The matter is now being extensively litigated across the State.

Rehabilitation Benefits

Generally, the interpretation of rehabilitation benefits does not present much of a problem. Rehabilitation benefits are defined as allowances for reasonable expenses "for necessary psychiatric services, occupational therapy, and such occupational training or retraining as may be reasonably necessary to enable the injured person to obtain suitable employment." The most frequent question asked in regard to rehabilitation benefits is whether physical therapy can be covered under these benefits. Although the definition is not clear, it appears that physical therapy could be covered. The key would be whether the physical therapy is used as part of the occupational therapy of training or retraining the injured person. If so, they would be part of the rehabilitation benefits. If not, they would be covered only as medical benefits.

Also, a question has arisen regarding whether the treatment referred to in the definitions of rehabilitation benefits is limited to training a person to perform just one specific job. Because the definition refers to training a person to "obtain suitable employment", it does not appear that the treatment has to be so limited. Rather, it appears that for a seriously injured person, treatment need only be of the kind to give the person the capacity and ability to function again so that he will be rehabilitated to the extent that he can obtain some type of suitable employment.

Substitution Benefits

The K.A.I.R.A. provides substitution benefits, or essential services as they are sometimes called, to compensate injured persons for expenses they have incurred in hiring someone to perform services that they normally would have performed for themselves or their family, but were unable to perform because of their injuries. Generally, these benefits are used to pay for domestic services such as cleaning, cooking, running errands, mowing the lawn, etc. Because of their nature, claims for these expenses are easy to fabricate. As such, claims for these benefits are the most questionable of all the PIP claims made. To avoid any fraudulent claims, insurers require that the injured person show that the expenses were in fact incurred, and establish that they were appropriate and reasonable. Also, the services performed must be ordinary and necessary. While family members may perform the services, the family member should be billed to establish that the expenses were incurred.

Survivors' Benefits

Survivors' benefits are paid to the survivors of an individual who has been killed in a motor vehicle accident, to compensate the survivors for the deceased's loss.

To qualify for the benefits, one must be a "survivor" as defined in the Act, which is a "decedent's spouse or child under the age of 18". This limited definition of survivor excludes dependent relatives and dependent children over the age of 18 from receiving survivors' benefits. However, if a person qualifies as a survivor, benefits are provided regardless of whether the survivor suffered an economic loss, resided with the deceased, or was dependent upon him in any way.

Many do not realize that survivors' benefits consist of two parts: (1) loss of earnings, and (2) substitution benefits. A survivor is entitled to recover both of these benefits under the definition of survivors' benefits. (Of course, the survivor would be able to recover the loss of earnings more easily than substitution benefits because substitution benefits would need to be incurred, whereas qualification as a survivor would entitle one to the loss of earnings).

Miscellaneous Problems of Interpretation

It is often asked whether PIP can be off-set against benefits from an uninsured motorist recovery. The initial Act had a provision which allowed an off-set, but in 1977 this provision was deleted. In the 1979 Legislature, a bill was proposed to place the deleted provision back into the Act, but was unsuccessful. As such, it does not appear that a UM/PIP off-set is now available.

Since the enactment of the No-Fault law, it has often been questioned whether PIP benefits can be stacked under the Act. There have been two Supreme Court cases regarding this issue, with the most recent decision having been rendered on January 17, 1981. In the cases, the Court held that, in essence, it was the intent of the Legislature to permit insurers to insert provisions in their policies which prevent the stacking of PIP, and if the insurers had such anti-stacking provisions, they would be valid regardless of the number of coverages or policies available. As a result, it appears that stacking is not allowed and that the question of the stacking of PIP benefits may have been finally resolved.

There is a problem regarding notification of the Director of Vehicles when a vehicle is terminated from a multi-car policy. Currently, an insurer is required to send a notice of termination to the Director of Vehicles when a motor vehicle liability "policy" is terminated. However, it is unclear whether notification is required when a "vehicle" is dropped from the policy without terminating the policy. To give effect to the compulsory insurance requirements of the Act, it would appear that notification should be required when coverage on a vehicle is terminated, regardless of whether the policy is terminated.

For the K.A.I.R.A. to be most effective, all vehicles must be insured. To enforce this provision, when motor vehicle liability policies are cancelled or non-renewed by an insurer, the insurer is required to provide written notice of cancellation to the insured by certified or registered mail or United States post office certificate of mailing thirty (30) days prior to cancellation. This requirement is needed to allow the owner adequate time to procure other insurance so that he will not be without insurance and in violation of the Act. A question has arisen as to whether the insured can satisfy this requirement by

merely mailing the notice to the insured, or whether the insured must actually receive the notice for the termination to be proper. There appears to be a possible conflict of law. Prior to No-Fault, the cancellation of a motor vehicle liability policy would only be proper if the insurer could prove "actual receipt" of notice by the insured. This rule was set forth in the 1960 case of Koehn v. Central National Life Insurance Company, 187 Kan. 192. As to whether this rule is still applicable is not clear in light of the notice requirements set forth in the No-Fault law. While some contend that Koehn is still applicable, others contend that the No-Fault law supersedes Koehn and makes proper proof of mailing sufficient to terminate a policy.

At one point, it was questioned whether PIP insurers were entitled to a right of subrogation for claims they paid from the first dollar or if they were only entitled to a right of subrogation in instances where their insured would have a right to sue under the Act by surpassing the threshold. It appears clear now that a PIP insurer has no right to dollar one subrogation. Payments for smaller claims which do not surpass the threshold must be borne by the PIP carrier. However, although a PIP insurer has no subrogation claim on these payments, this does not mean that the PIP insured is barred from proceeding against the wrongdoer. The PIP insured is only barred from an action for non-pecuniary damages. There is no bar from proceeding against the wrongdoer for the actual damages incurred.

Another area which causes confusion involves PIP coverage for injuries suffered by individuals while riding on motorcycles. The No-Fault law allows a motorcycle owner to reject PIP benefits coverage. Therefore, when anyone is injured while riding on the motorcycle, there is no PIP available to provide the first party coverage from the motorcycle policy. However, this does not mean that all persons injured in motorcycle accidents are without PIP. The contrary is true because in many circumstances there will be PIP available from other applicable PIP policies.

The owner of a motorcycle who is injured while operating the motorcycle will have no coverage. The only policy from which he could receive PIP would be the policy insuring the motorcycle. And, if PIP was rejected, he would be without coverage. A policy he might have on a motor vehicle he owns would exclude

coverage. Persons injured while operating the motorcycle who do not own the motorcycle, are protected if they have another policy which would cover them. This policy could be from a vehicle they own or, if they are non-owners, from a policy covering a relative they reside with. When an individual is injured while riding as a passenger, he is assured of coverage. The injured person is able to receive PIP from his own policy, a relative's policy if available, a policy on the vehicle which struck him, or from the Assigned Claims Plan if there is no applicable policy available.

There is some confusion as to what happens to a non-resident injured in Kansas. Simply, if the non-resident was operating his own vehicle in Kansas, his policy of insurance is required to comply with Kansas law and provide PIP. If he was injured while riding as a passenger, he would be afforded PIP from the driver's policy. However, if the individual is injured as a pedestrian, there is no PIP available from the policies. Recovery would, however, appear to be available from the Assigned Claims Plan.

Many are still unaware of the territory to which a Kansas policy applies and the circumstances where coverage is available. An owner and the relatives residing with him are covered by the owner's policy, practically whenever and wherever they are injured, if they are "occupying" their vehicle, and any time they are injured in the State of Kansas, whether they are occupying the vehicle or not.

What causes the problem is that many people do not realize that once they are outside of Kansas, the coverage drops significantly. For example, if an owner is injured out of State while not an occupant of his vehicle, he will have no PIP coverage. This also applies to his relatives. And, if he is carrying a passenger out of State who is not a relative residing with him, there is no PIP coverage for the passenger. As such, the procurement of additional or extended PIP, or some form of medical payment coverage, is needed to provide coverage.

There is a difference of opinion as to how long a PIP insurer can be responsible for the payment of PIP benefits under the policy. The Act provides that no PIP claim can be filed after two years from the date of the injury. Whether this allows a PIP insurer to cut off payments after two years is questionable.

However, some have argued that this provision terminates the PIP insurer's obligation to provide PIP as some sort of statute of limitation. Perhaps the better argument is that this provision refers to only the filing of the initial claim for PIP benefits under the policy, and does not allow an insurer to stop payments on charges for treatments that extend beyond the two year period once the initial claim has been properly filed.

The foregoing highlights some of the problems of interpretation in the No-Fault law. Problems of interpretation should be expected in laws as complicated and as encompassing as the No-Fault law. Although these questions can and probably will be resolved by the Courts, the Legislature should be apprised of them so that they can consider whether to enact legislation to resolve these problems.

V. CONCLUSION.

In the past decade, there has been a great deal of legislative activity at both the State and Federal level involving the proposed enactment of No-Fault motor vehicle liability insurance to replace or modify the tort liability system as a means of compensating injured traffic victims.

The tort system, which is based upon fault, was heavily criticized for failing to properly compensate traffic accident victims. In two landmark and influential studies, the tort system was attacked as: inequitable because it failed to compensate many victims; unfair because it undercompensated some victims and overcompensated others; slow and cumbersome because of the inordinate amount of time it took to settle and pay claims; and overly expensive due to the administrative and defense costs incurred in claims settlement and litigation.

To correct these deficiencies, legislation was proposed to replace or modify the tort system with a system based upon first party benefits with No-Fault insurance that either eliminated or restricted tort lawsuits arising out of motor vehicle accidents. Such legislation was proposed at both the State and Federal level.

Although there has been no Federal legislation passed, twenty-five (25) States have enacted

No-Fault laws, and every State in the nation has considered the enactment of No-Fault legislation to one degree or another. Currently, there are twenty-three (23) States which have No-Fault laws in effect.

The No-Fault laws which have been passed are of three types. The first type is called an "add-on plan" because it merely adds first party benefits to the standard motor vehicle liability insurance policy, but does nothing to limit or restrict the right to sue in tort. There are eight States which have add-on No-Fault plans. The second type is called a "modified plan" because it adds first party benefits while modifying or limiting the right to sue in tort to cases that involve serious injury. There are fifteen (15) States which have modified No-Fault plans. The third type of plan is the "pure plan" which provides high or unlimited first party benefits with a complete elimination of the right to sue in tort. Currently, there are no pure No-Fault plans in effect, although some have categorized the Michigan No-Fault law as a pure plan.

The degree of success the No-Fault laws have had in meeting the goals for which they were enacted depends upon the particular plan. While all No-Fault plans appear to provide more benefits to more traffic victims more quickly than did the tort system, as to whether the No-Fault plans more equitably compensate traffic victims than did the tort system depends upon the particular law, the threshold, and the limits of PIP benefits provided in the law.

It is difficult to determine the rate impact of No-Fault legislation in relation to that of the tort system because the findings of the studies conducted to determine rate impact are somewhat inconclusive and difficult to compare. Rates in the States with add-on plans appear to have increased above what they would have under the tort system, which is to be expected because there is no limitation placed upon the right to sue to balance the additional cost of PIP benefits. Rates in States with modified plans appear to have risen at about the same level they would have under the tort system. The Michigan system appears to have led to a reduction in rates.

The Kansas No-Fault law appears to be successfully fulfilling the goals for which it was enacted and has marked an improvement over the tort system in several key areas.

Unquestionably, the Kansas No-Fault law has been an improvement over the tort system in regard to the speed in which claims are paid. This is to be expected because the Act is

specifically structured to achieve this result. For example, the primary and stated purpose of the No-Fault law is to provide prompt compensation for motor vehicle accident victims. No-Fault benefits are late if not paid within thirty (30) days from the time the proof of loss is furnished an insurer, while disability benefits are late if not paid within two weeks from the filing of proof of loss. If insurers fail to make timely payments, they are penalized with an interest charge of eighteen percent (18%) per annum on the late payments.

The No-Fault law not only provides benefits more quickly than did the tort system, it provides these benefits to more accident victims. One problem with the tort system was that often times it undercompensated or unfairly compensated traffic victims, while in some instances it failed to compensate traffic victims at all. For example, under the tort system, negligent drivers and one car accident victims often went uncompensated. Under the No-Fault law, almost all motor vehicle accident victims are able to receive the first party No-Fault benefits required by the law.

The No-Fault law also appears to compensate traffic victims more fairly than did the tort system. Many traffic victims under the tort system were either over or undercompensated. The No-Fault law, due to the tort threshold which limits suits for pain and suffering to only the more serious injuries, has reduced overcompensation in small claims. As to whether it has prevented undercompensation in larger claims is unclear.

Finally, the No-Fault law appears to have provided the previously discussed improvements in the compensation of accident victims at a cost no greater than that of the tort system. While an accurate determination of the rate impact of the Kansas No-Fault law is difficult to evaluate because the repeal of the guest statute and the enactment of the comparative negligence law took place the same year that No-Fault was enacted, most knowledgeable people in the industry believe that the premium rate for motor vehicle liability insurance under No-Fault has remained at the same level it would have been had Kansas retained the tort system. While it is true that motor vehicle liability insurance rates have risen in Kansas since the enactment of the No-Fault law, this increase should not be attributed to the change from the tort system to the No-Fault system. Rather, this increase should be attributed to the changes that have occurred in the economic climate in general. Since the enactment of the No-Fault law, it is estimated that health care costs have increased by eighty-nine percent (89%) while wages have increased by seventy-nine percent (79%), which has increased the insurers cost of providing medical and disability benefits. These economic

factors are of the type which affect insurance rates in the tort and No-Fault systems alike. Although the insurance rates have risen under No-Fault, it can be assumed that the tort rates would have risen as well and probably at the same level. Therefore, it appears that while premiums have increased under No-Fault, this increase is no greater than could have been expected under the tort system.

While the Kansas No-Fault law appears to be working successfully, it is not without problems or free of controversy. Many of its statutory provisions are subject to varying interpretations and disparate applications. Such a result is not that unusual, however, with a law that attempts to legislate an area as involved and complex as motor vehicle accident reparations. A problem that should be addressed deals with the adequacy of the tort threshold. One has to seriously question whether the current tort threshold is adequate to serve the purpose of reducing the percentage of the premium dollars paid for litigation and claim settlement costs to the extent that was originally intended by the Legislature.

In conclusion, although the Kansas No-Fault law is not without problems, it appears that it is working successfully by meeting the goals for which it was enacted by more equitably providing more benefits more quickly to more traffic victims at about the same cost as the tort system.