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Article

***69** AUTO INSURANCE: CRISIS AND REFORM

Harvey **Rosenfield** HYPERLINK \l Document2zzFN_Fa1 [FNa1]

***70** Auto insurance occupies a unique status within the U.S. economy. It is the only example of a product that most Americans are required by law to purchase but is provided exclusively by private industry on a for-profit basis. Most of the time, those who pay for the product will not have to use it. The involuntary nature of the relationship between motorists and their insurance companies is a source of significant frustration, particularly in communities where the cost of vehicle insurance exceeds the ability of residents to purchase it and motorists run the risk of substantial penalties for ***71** failure to carry a policy. HYPERLINK \l Document2zzFN_F1 [FN1] Further exacerbating the tension between insurers and their customers is the insurance companies' mission to make money, principally by averting risk through underwriting--a form of lawful discrimination--to obtain customers least likely to be responsible for claims. The same financial imperative also provides incentives for insurance companies to adopt claim avoidance and reduction strategies, HYPERLINK \l Document2zzFN_F2 [FN2] creating an inherently adversarial relationship with consumers. Add the record profits achieved by the auto insurance industry in recent years, HYPERLINK \l Document2zzFN_F3 [FN3] and the result is an incendiary pocketbook issue fraught with billions of dollars in consequences for both the nation's consumers and its insurance industry. Accordingly, auto insurance has enormous political implications. Each year elected officials throughout the nation wrestle with this complex and controversial issue.

The debate over insurance reform has centered almost exclusively on two distinct approaches. One is reform of the insurance industry. This approach focuses on the behavior and operation of insurance companies, calling for limits on profits and expenses through rollbacks, rate regulation, prohibition of unfair or abusive practices, and elimination of barriers to competition in the marketplace. The alternative approach, no-fault, calls for statutory limits on claims by and compensation to auto accident victims, in effect regulating public access to the courts. While the insurance industry reform approach focuses on cutting the price of the policy, the alternative no-fault approach focuses on reducing certain policy ***72** benefits for victims while at the same time expanding coverage to those who cause auto accidents.

There is now sufficient historical experience with both approaches to assess their impact upon consumers. This Article will

review the two approaches to insurance reform in the United States. First, it will briefly describe the history of modern auto insurance reform. Then it will analyze the impact of no-fault systems, including the recent proposal described as "choice" no-fault. Third, it will examine insurance industry reform, as enacted by California voters. The Article will conclude with a discussion of the politics of insurance reform.

I. HISTORY OF AUTO INSURANCE REFORM

A. The Personal Responsibility System

The modern auto insurance system dates back one hundred years to the introduction of the motor vehicle itself. HYPERLINK \l Document2zzFN_F4 [FN4] Policymakers considered that operating a motor vehicle on public property was a privilege. It was proper to require that motorists purchase auto insurance coverage to protect innocent third parties against injury and property damage. Of course, such insurance also protects the at-fault motorist against potentially enormous liability. The first compulsory insurance law went into effect in Massachusetts in 1927. HYPERLINK \l Document2zzFN_F5 [FN5] Since then, most states have adopted a requirement that motorists carry insurance coverage, although the specifics of that obligation vary widely from state to state. HYPERLINK \l Document2zzFN_F6 [FN6] In promoting an auto accident compensation system based on personal responsibility, policymakers were simply extending traditional American legal principles, embodied in the tort ***73** system, to a new technology--the automobile.

Under the personal responsibility system, the motorist who caused the accident is liable for any injuries or property damage that ensues, and accident victims seek compensation for their property and bodily injury losses from the person "at fault" (or his insurance company). HYPERLINK \l Document2zzFN_F7 [FN7] Only the innocent victim is paid compensation. The motorist who caused the accident is not entitled to any benefits if he is hurt, unless he had purchased his own "automobile medical payment" coverage or is covered by a health insurance policy. The traditional personal responsibility system imposes no arbitrary limits on the victim's right to seek compensation for the losses sustained; the kind and amount of compensation is decided by arbitrators, courts, or the parties themselves.

B. Development of the No-Fault Concept

In the early 1930s, a group of academics suggested an alternative approach, modeled after the workers' compensation system developed earlier in the century. The aim was to achieve rapid and full compensation of claims without the expense and delay involved in litigation by moving from the tort law-based liability or "third party" system to a "first party" system, in which individuals injured in automobile accidents would be compensated by their own insurance company regardless of fault. Compensation for non-economic damages-- principally the intangible pain and suffering experienced by a human being-- would be prohibited. HYPERLINK \l Document2zzFN_F8 [FN8]

The concept won scant attention until Professors Robert Keeton and Jeffrey O'Connell refined it in 1965. HYPERLINK \l Document2zzFN_F9 [FN9] They proposed a limited no-fault system applicable exclusively to minor auto accidents. Anyone injured in such an automobile collision would receive ***74** compensation for medical bills and wage loss, regardless of whether he had caused the accident. However, compensation for non-economic damages, known colloquially as "pain and suffering," HYPERLINK \l Document2zzFN_F10 [FN10] would be prohibited in all but the most severe accidents. Only accident victims with serious injuries--those meeting a threshold of $5000 non-economic damage--would have access to the tort system. HYPERLINK \l Document2zzFN_F11 [FN11] Motorists would retain the right to go to court to recover medical expenses and other economic costs that exceeded the no-fault benefits.

By 1974, with the considerable resources of the insurance industry in support, HYPERLINK \l Document2zzFN_F12 [FN12] nineteen states had enacted some form of limited no-fault, beginning with Massachusetts in 1971. HYPERLINK \l Document2zzFN_F13 [FN13] At its peak, twenty-four states had adopted no-fault laws. The laws were hardly uniform, however. Sixteen states instituted a mandatory no-fault system. In mandatory no-fault states, lawsuits seeking compensation for human pain and suffering are permitted for injuries meeting a certain threshold, the definition of which may vary considerably from state to state. States with "monetary" thresholds require the victim to demonstrate that his damages exceed a specific dollar amount in order to access the tort system to obtain human pain and suffering damages. States with "verbal" thresholds permit such lawsuits only if the injured party can demonstrate a normatively defined level of injury, such as "serious and permanent." Finally, eight states utilize hybrid systems, in which "no-fault" coverage supplements the required third party liability insurance. HYPERLINK \l Document2zzFN_F14 [FN14] In these "add-on" states, ***75** there are no limits on lawsuits. All no-fault systems permit recourse to the courts against at-fault drivers for payment of economic losses in excess of the no-fault benefits. No state has adopted a "pure" no-fault system, which completely bars access to the tort system.

By 1976, no-fault's progress came to a halt. Only the District of Columbia has adopted a no-fault law since 1976. Since then, however, six states have repealed their mandatory no-fault laws. HYPERLINK \l Document2zzFN_F15 [FN15] Presently, there are ten mandatory no-fault jurisdictions. HYPERLINK \l Document2zzFN_F16 [FN16]

From the mid-1970s through the early 1980s, no-fault, as well as auto insurance reform in general, remained a dormant

issue. It roared to prominence, however, in the mid-1980s, as the nation experienced a liability "insurance crisis."

C. The Insurance Industry "Cycle" and the 1985-88 "Insurance Crisis"

The price of all forms of liability insurance rose dramatically between 1985 and 1987, provoking a furor first among members of the business community and, eventually, among motorists. HYPERLINK \l Document2zzFN_F17 [FN17] The "insurance crisis" garnered the attention of lawmakers throughout the nation, spurring many proposals intended to address the perceived causes of the problem.

To understand the origins of the insurance crisis, it is critical to ***76** recognize the fundamental shift in the structure of the 250-year-old property/casualty insurance industry. Initially, insurance pools served as a mechanism for mutual risk sharing. Modern insurance companies, however, are financial institutions seeking to maximize profits, just like banks and savings and loans. While the sale of insurance--the underwriting process--is the principal source of revenue for insurance carriers, the income from investing those premiums is the principal source of profits for the industry.

Insurance rates, accordingly, reflect conditions in the financial marketplace as well as the assessment of risk. When interest rates are increasing, investment income from premiums produces a high return. Under such conditions, insurance companies reduce their prices and solicit and underwrite greater risks to attract capital for investment. When interest rates are low, however, and investment yields are correspondingly reduced, the industry increases premiums to maintain profit levels. This is known as the "insurance cycle" and has been substantially documented. HYPERLINK \l Document2zzFN_F18 [FN18]

The insurance "crisis" of the mid-1980s corresponded exactly to a trough in this financial cycle. Interest rates reached extraordinary levels in the United States in the early 1980s. HYPERLINK \l Document2zzFN_F19 [FN19] Insurance companies responded aggressively, competing for premium revenue to invest by lowering prices, despite, in many instances, clear indications that the risk of a sizable loss warranted higher rates. When interest rates dropped, however, so did the insurance industry's investment income. Moreover, many insurers found themselves paying costly claims on policies that had been under-priced relative to their risk in order to attract investment capital. To make matters worse, some of the insurers' hasty investments--in real estate and projects financed by savings and loans--had turned into major debacles. Finally, by 1984, faced with significant financial losses, the industry had only one choice in order to maintain profits: sharply increase premiums. ***77** During 1985 and 1986, the cost of liability coverage for businesses, municipal governments, non-profits, and, ultimately, motorists, rose rapidly. The industry also reduced the availability of coverage; the resulting shortages further boosted prices. HYPERLINK \l Document2zzFN_F20 [FN20]

For industry observers, this "crisis" was hardly unexpected. A leading stock analyst described the process as the "boom and bust nature of the industry ... as predictable as the tide in a three-year swing from flood to ebb." HYPERLINK \l Document2zzFN_F21 [FN21] Dennis Jay, a spokesperson for the Professional Insurance Agents, a trade association, stated that "[insurance companies] did not underwrite the business as well as they should have.... But it's very tempting to get the money in today to earn 21% interest and worry about the losses later." HYPERLINK \l Document2zzFN_F22 [FN22] A Washington state task force likewise concluded that the "insurance crisis" was "mostly a result of poor management practices by the [insurance] companies." HYPERLINK \l Document2zzFN_F23 [FN23]

However, when insurance policyholders and, later, elected officials demanded a justification for the rate increases, policy cancellations, and nonrenewals, they received an entirely different explanation. The insurance industry insisted that an enormous increase in claims and "excessive" jury verdicts--a "litigation explosion"--was forcing insurers to increase prices. The industry's solution was "tort reform": legislative alteration of the common law applicable to negligent or intentional wrongdoing to (1) limit compensation to plaintiffs; (2) tighten pleading, evidentiary, and other procedural requirements in such cases; and (3) reduce the attorneys' fees that could be negotiated through contingency fee arrangements. The insurance industry and many of its customers, particularly in the business and health care communities, became proponents of tort reform. HYPERLINK \l Document2zzFN_F24 [FN24] Between 1985 and 1987, forty-one states ***78** adopted one or more significant changes in their tort laws to limit the rights of injured Americans or, in the case of wrongful deaths, their next of kin.

In the context of auto insurance premiums, the preferred tort "reform" was no-fault. By 1986, however, when auto premiums began to rise in California and other urban states, many investigators and policymakers had begun to raise substantial doubts about the origin of the insurance crisis and the legitimacy of tort reform as the solution. HYPERLINK \l Document2zzFN_F25 [FN25] States that had enacted tort reforms had not obtained the promised rate reductions, HYPERLINK \l Document2zzFN_F26 [FN26] and reports of massive increases in the ***79** insurance industry's profits appeared to belie the insurers' claims that higher premiums were necessary. HYPERLINK \l Document2zzFN_F27 [FN27] An analysis prepared by six state Attorneys General reached the following conclusion:

> The facts do not bear out the allegations of an "explosion" in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation "explosion." Instead, the available data indicate that the causes of, and therefore the solutions to, the current crisis lie with the insurance industry

itself. HYPERLINK \l Document2zzFN_F28 [FN28]

In California, a controversial 1986 ballot proposition, sponsored by the insurance industry to restrict tort compensation in certain cases, had not delivered the premium savings promised. HYPERLINK \l Document2zzFN_F29 [FN29] Its failure ***80** shifted the focus of insurance reform in California from proposals limiting victims' tort rights to scrutiny of the practices of the insurance industry itself and the inability of state regulators to ameliorate the destabilizing insurance cycle.

D. Principles of "Insurance Industry Reform"

While they are not mutually exclusive, "tort reform" and "insurance industry reform" proceed from widely different premises. "Tort reform" proposals, such as no-fault, are premised on the assertion that the overuse or abuse of the civil justice system is responsible for premium increases. By banning some or all auto accident litigation--particularly by proscribing payment for non-economic damages--supporters claim that no-fault will reduce compensation as well as the "transactional costs" of the legal system, thereby enabling insurers to reduce their premiums.

The "insurance industry reform" approach views insurance companies as profit-oriented financial institutions. The vicissitudes of the U.S. economy-- particularly interest rates--are held to explain the pricing behavior of insurers. This approach also recognizes that although insurance companies are in the business of compensating for loss, they are fundamentally engaged in a profit-making enterprise, dependent upon investment income. As such, insurance companies not only have nothing to gain, but rather have a great deal to lose if accidents or claims decrease. Put another way, insurers typically operate on a "cost-plus" basis: accident costs are passed through to consumers along with a considerable mark-up for overhead and profit. HYPERLINK \l Document2zzFN_F30 [FN30] Thus, the more accidents and claims or the higher the medical and car repair costs, the greater the justification for higher rates, which, in turn, yields more revenue for investment and ultimately higher profits. In this regard, the present insurance system perversely rewards insurance companies for the very events ***81** insurance is designed to protect against. HYPERLINK \l Document2zzFN_F31 [FN31]

Moreover, the insurance industry reform approach recognizes the subjective nature of the underwriting process, as revealed by the inherent inability of insurance underwriters to correctly estimate the degree of risk posed by any one policyholder. Lastly, it acknowledges that an imperfect insurance marketplace often frustrates social policy goals--such as ensuring that all motorists have the opportunity to purchase compulsory insurance at a fair price. The insurance industry reform approach views the insurance function as being so directly related to the economy and society that insurers carry a quasi-public responsibility, which, in turn, requires public oversight and regulation. HYPERLINK \l Document2zzFN_F32 [FN32] In 1988, the two approaches to auto insurance reform were presented to California voters.

E. The 1988 California Insurance "Wars"

California is the single biggest market for insurance in the nation. Between 1985 and 1987, auto insurance premiums in California rose dramatically. HYPERLINK \l Document2zzFN_F33 [FN33] During 1987, California consumer advocacy groups sponsored legislation that would have instituted limited regulation of property-casualty insurance premiums, including auto insurance, and repeal of the industry's exemption from state ***82** antitrust laws. Opposition from insurers blocked the measure's passage, HYPERLINK \l Document2zzFN_F34 [FN34] and the advocates drafted a ballot proposition entitled "The Insurance Rate Reduction and Reform Act of 1988," which they placed before California voters on November 8, 1988. HYPERLINK \l Document2zzFN_F35 [FN35]

The initiative, which was qualified for the ballot as Proposition 103, addressed the industry's unique financial cycle and its cost-plus nature through a series of short- and long-term reforms designed to improve the insurance marketplace, remedy certain industry practices, and provide greater protection to policyholders. As described in greater detail below, Proposition 103 mandated a 20% rollback in automobile, homeowner, business, and all other property-casualty premiums; instituted stringent controls on insurance company profiteering, waste, and inefficiency through a regulatory process subject to public scrutiny and participation; ended monopolistic insurer practices; required insurers to base auto insurance premiums on driving safety record rather than zip code; mandated a 20% good ***83** driver discount; and made the Insurance Commissioner an elective post.

Concerned that it could not defeat Proposition 103, elements of the insurance industry responded by placing three separate measures on the ballot to compete with 103, one of which, Proposition 104, was their chief focus. HYPERLINK \l Document2zzFN_F36 [FN36] Proposition 104 called for the establishment of a no-fault auto insurance system in California, modeled upon New York's verbal threshold-based system. To pass Proposition 104 and defeat Proposition 103, insurers spent over sixty million dollars. HYPERLINK \l Document2zzFN_F37 [FN37] Most of these funds were expended on electronic and print advertising. The central issue in the campaign was which proposal would lower insurance premiums for motorists. HYPERLINK \l Document2zzFN_F38 [FN38] Thus, the two insurance reform alternatives came head-to-head in a highly visible public debate in the nation's largest state. On Election Day, Proposition 104 was defeated by a three-to-one margin. Proposition 103 was ***84** approved by 51% of the voters. HYPERLINK \l Document2zzFN_F39 [FN39]

F. Post-Proposition 103 Activity

The passage of Proposition 103 represented a dramatic turning point in the insurance reform debate. Driven by the California initiative, insurance industry reform occupied the focus of policymakers throughout the United States.

The insurance industry's initial response was stunned, then angry, denial. HYPERLINK \l Document2zzFN_F40 [FN40] Determined to discourage the similar efforts underway in other states, various insurers filed nearly 100 legal challenges to Proposition 103; none succeeded. HYPERLINK \l Document2zzFN_F41 [FN41] Meanwhile, Proposition 103's passage inspired similar efforts in nearly every state legislature in the nation. HYPERLINK \l Document2zzFN_F42 [FN42] Despite the industry's efforts to blunt further Proposition 103-style reforms, nineteen states enacted insurance industry reforms. HYPERLINK \l Document2zzFN_F43 [FN43]

***85** By contrast, the industry's intensive promotion of no-fault as an alternative to insurance industry reform has been a complete failure. Industry-sponsored no-fault legislation was defeated in high profile battles in several states. HYPERLINK \l Document2zzFN_F44 [FN44] A "pure" no-fault ballot measure, one of a package of three tort "reform" measures sponsored by the business community, including insurance companies, was placed before California voters in March, 1996; it was rejected by 65% of voters despite a $19 million campaign in its favor. HYPERLINK \l Document2zzFN_F45 [FN45] Indeed, since 1988, there have been serious efforts to repeal no-fault laws in at least six ***86** states; three were successful. HYPERLINK \l Document2zzFN_F46 [FN46]

G. Choice No-Fault

Confronted with the demise of no-fault systems throughout the nation, various academicians, consultants, and institutions sponsored by the insurance industry are now promoting a different no-fault proposal, which they call "consumer choice." HYPERLINK \l Document2zzFN_F47 [FN47] Like the original "pure" no-fault proposals, the "choice" system would completely prohibit claims for non-economic damages. However, to overcome the stigma associated with no-fault, the proposal has been packaged to suggest that every motorist will have the option of choosing either tort or "no-fault" coverage. In fact, the "choice" is illusory. Motorists who choose to be covered by the traditional personal responsibility system are still prohibited from suing a negligent motorist who has chosen to be covered under the no-fault option. To obtain pain and suffering coverage, the motorist operating under the tort system must purchase it as first-party coverage from her own insurer. Thus, a potentially negligent driver's choice to operate fault-free overrides another driver's choice to operate in a personal responsibility system in which negligent drivers may be held accountable. Drivers who choose no-fault impose their choice on drivers who do not. Legislation that would preempt state auto ***87** insurance laws and create a federal no-fault system based on the "choice" plan has been introduced in the United States Congress. HYPERLINK \l Document2zzFN_F48 [FN48]

II. EVALUATION OF NO-FAULT

As of 1995, ten states had mandatory no-fault laws. HYPERLINK \l Document2zzFN_F49 [FN49] Another eleven states and the District of Columbia had hybrid no-fault systems, under which tort lawsuits and compensation are not restricted. HYPERLINK \l Document2zzFN_F50 [FN50] Three of these states, Pennsylvania, New Jersey, and Kentucky, presently provide motorists with circumscribed choices for the kind of coverage they may purchase. Since 1989, four states have repealed their mandatory no-fault laws. HYPERLINK \l Document2zzFN_F51 [FN51] This section will analyze the merits of no-fault auto insurance to determine the reasons for its failure.

A. The Impact of No-Fault Upon Insurance Premiums HYPERLINK \l Document2zzFN_F52 [FN52]

As previously noted, the contemporary policy debate surrounding auto insurance reform has centered upon the pocketbook issue of price. Thus, the question of whether no-fault raises or lowers the cost of auto insurance is of major importance in the debate over auto insurance reform.

1. No-Fault States Have Highest Average Automobile Insurance Premiums

Of the ten states where auto insurance was most expensive in ***88** 1989, eight were no-fault states. Since then, three of those states--New Jersey, Connecticut, and Pennsylvania--have repealed their mandatory no-fault systems. HYPERLINK \l Document2zzFN_F53 [FN53] In 1995, six of the top ten most expensive states (including the District of Columbia as a state) had no-fault systems. HYPERLINK \l Document2zzFN_F54 [FN54] In 1995, New York--the model state for the "verbal threshold" no-fault proposals promoted by the insurance industry earlier this decade--was the fifth most expensive state in the nation, up from sixth place in 1994.

Table 1

States with Highest Average Auto Premiums

Rank	1989	1995

1	New Jersey [FNaaaa1]	$650	Hawaii [FNa1]	$737
2	California	$519	New Jersey [FNaaaa1]	$662
3	Connecticut [FNa1]	$473	Massachusetts [FNa1]	$640
4	Hawaii [FNa1]	$468	Rhode Island	$619
5	Dist. of Columbia [FNaa1]	$466	New York [FNa1]	$607
6	Pennsylvania [FNaaa1]	$439	Connecticut [FNaaaaa1]	$603
7	Maryland [FNaa1]	$429	Delaware [FNaa1]	$565
8	Massachusetts [FNa1]	$427	Dist. of Columbia [FNaa1]	$548
9	Florida [FNa1]	$421	Louisiana	$547
10	Rhode Island	$408	Nevada	$531

FNa1. Mandatory no-fault state
FNaa1. Mixed or hybrid no-fault state
FNaaa1. No-fault made optional 1990
FNaaaa1. No-fault made optional 1991
FNaaaaa1. No-fault repealed 1993, effective 1994

For each year between 1987 and 1995, a majority of the states ***89** with the highest average auto insurance premiums were no-fault states. Note that as several states repealed their no-fault laws, the number of no-fault jurisdictions within the top ten declined. HYPERLINK \l Document2zzFN_F55 [FN55]

Table 2

Number of No-Fault States Among Top Ten Most Expensive States, 1987-1995

Year	Rank
1987	9
1988	8
1989	8
1990	8
1991	8
1992	7
1993	7
1994	6

1995	6	

2. Premiums in Mandatory No-Fault States Rose Nearly 25% Faster Than in Non-No-Fault States

Auto insurance premiums in states with mandatory no-fault systems grew an average of 45.6% between 1989 and 1995, a growth rate nearly 25% faster than in personal responsibility system states. The latter saw an average increase of 36.8% over the same period. California, which implemented insurance industry reform during this period, is included for purposes of comparison. HYPERLINK \l Document2zzFN_F56 [FN56]

Table 3

Comparison of Growth of Average Auto Liability Premiums, 1989-95 [FN57]

	% Change 1989-95
Average of All Mandatory No-Fault States	45.6
Average of All Hybrid No-Fault States	37.1
Personal Responsibility States	36.8
California	-0.1

FN57. Figures are an average of each state's average auto liability insurance premium. Table 3 excludes states that repealed their mandatory no-fault systems during this period (Connecticut, Georgia, New Jersey, and Pennsylvania).

***90** Of the fifteen states with the greatest increases in the nation in auto liability premiums between 1989 and 1995, nine had some form of no-fault--either mandatory or hybrid systems.

Table 4

States with Highest Growth in Average Auto Liability Premiums, 1989-1995

	1989-95	Growth
1.	South Dakota [FNaa1]	78.6%
2.	Nebraska	68.2%
3.	Texas [FNaa1]	67.4%
4.	Kentucky [FNaa1]	65.8%
5.	West Virginia	62.9%
6.	Utah [FNa1]	61.4%

7.	Hawaii [FNa1]	57.5%
8.	New York [FNa1]	56.8%
9.	New Mexico	53.3%
10.	Rhode Island	51.8%
11.	Wyoming	50.9%
12.	Massachusetts [FNa1]	49.9%
13.	Delaware [FNaa1]	49.1%
14.	Oklahoma	49.0%
15.	Colorado [FNa1]	49.0%

FNa1. Mandatory no-fault state
FNaa1. Hybrid no-fault state

***91** 3. Repealing No-Fault Lowers Auto Insurance Premiums

Four states significantly altered their no-fault systems between 1989 and 1995: Georgia, Connecticut, Pennsylvania, and New Jersey. Georgia eliminated its no-fault system effective October, 1991, established stringent regulation of rates, and mandated a 15% rollback. The average auto insurance premium in Georgia fell 12.5% the next year. The state, once the sixteenth most expensive in the nation, ranked thirty-seventh in 1995. Table 5 below summarizes the changes in Georgia's annual average liability premium, its national rank, and the annual percentage change.

Table 5

Georgia: Average Liability Premium, Rank, and Percentage Change

Year	Average Liability Premium	Rank	% Change from Previous Year
1989	$324.93	17	7.3%
1990	$337.89	19	4.0%
1991	$341.73	23	1.1%
1992	$299.15	32	-12.5%
1993	$305.12	33	2.0%
1994	$309.34	36	1.4%
1995	$315.56	37	2.0%

Connecticut repealed its no-fault system effective January, 1994. After six annual increases of 8% or more, the average auto liability premium dropped 9.7% during 1994. The state, which for the four years prior to repeal was one of the three most

expensive states in the nation, now ranks sixth. Table 6 below summarizes the changes in Connecticut's average annual automobile liability premium, its national rank, and the annual percentage change.

Table 6

Connecticut: Average Auto Liability Premium, Rank, and Percentage Change

Year	Average Liability Premium	Rank	% Change from Previous Year
1987	$391.72	5	
1988	$427.91	4	9.2%
1989	$473.31	3	10.6%
1990	$522.10	3	10.3%
1991	$569.26	3	9.0%
1992	$614.73	3	8.0%
1993	$665.25	2	8.2%
1994	$600.93	5	-9.7%
1995	$603.11	6	0.4%

***92** Pennsylvania repealed its mandatory no-fault law effective July, 1990, making no-fault coverage optional. Motorists who chose to operate under the tort-based personal responsibility system were provided a 10% rollback, while those choosing no-fault were offered a 22% rollback. Insurers were required to fully inform motorists of their options and obtain a written election of the no-fault coverage; motorists who failed to make an election were assigned by default to the personal responsibility system. Despite the substantially greater refund offered under no-fault, an estimated 60% of motorists returned to the personal responsibility system. The reform legislation also included health care cost containment provisions and protections against arbitrary cancellations or surcharges. HYPERLINK \l Document2zzFN_F58 [FN58]

Pennsylvania, which had the sixth highest average auto liability insurance premium in 1989, dropped off the "top ten" chart as a result of repealing its mandatory no-fault system. Pennsylvania ranked nineteenth in 1995. Table 7 below summarizes the changes in Pennsylvania's average annual liability premium, its national rank, ***93** and the annual percentage change.

Table 7

Pennsylvania: Average Liability Premium, Rank, and Percentage Change

Year	Average Liability Premium	Rank	% Change from Previous Year
1987	$372.01	8	
1988	$399.50	9	7.4%
1989	$438.89	6	9.9%

1990	$432.72	11	-1.4%
1991	$413.05	15	-4.5%
1992	$433.06	15	4.8%
1993	$433.93	19	0.2%
1994	$447.02	18	3.0%
1995	$444.29	19	-0.6%

New Jersey is an instructive contrast to Pennsylvania. New Jersey repealed its mandatory no-fault law in 1989, but instituted an optional system in which all motorists are enrolled in no-fault unless they choose the personal responsibility system. New Jersey's new system does not contain the requirement that motorists be fully informed of the opportunity to choose between no-fault and the personal responsibility system, nor does it require an express waiver of tort law rights.

New Jersey, which had the most expensive average automobile liability insurance premium in the nation for four years in a row, ranked second highest in the nation in 1995. Table 8 below summarizes the changes in New Jersey's average annual liability premium, its national rank, and the annual percentage change.

Table 8

New Jersey: Average Liability Premium, Rank, and Percentage Change

Year	Average Liability Premium	Rank	% Change from Previous Year
1987	$494.59	1	
1988	$623.80	1	26.1%
1989	$649.73	1	4.2%
1990	$706.56	1	8.7%
1991	$583.32	2	-17.4%
1992	$649.60	2	11.4%
1993	$650.86	4	0.2%
1994	$639.52	3	-1.7%
1995	$662.04	2	3.5%

***94** The NAIC data demonstrate that no-fault systems--including mandatory no-fault laws--are more expensive than personal responsibility systems based on tort liability. The restrictions imposed by no-fault insurance schemes on tort-based compensation for non-economic damages do not offset the higher costs of no-fault. HYPERLINK \l Document2zzFN_F59 [FN59] Five reasons for this experience are:

(1) Under no-fault, both the innocent victim and the motorist who caused the accident are compensated with medical, wage loss, and other benefits regardless of who is at fault. Paying the claims of both parties is inherently more expensive than under the personal responsibility system, in which the liability policy of the at-fault ***95** driver covers the innocent driver only. This conclusion is affirmed by many insurance industry experts, including advocates of no-fault, who acknowledge that no-fault was not conceived as a cost-saving measure but rather as a more efficient method of providing unlimited accident benefits and avoiding lengthy legal disputes over issues of fault. HYPERLINK \l Document2zzFN_F60 [FN60] The nation's largest auto insurance company, State Farm, has stated: "The adoption of no-fault reparation systems may or may not lead to a reduction in the cost of auto insurance. The advantage of no-fault lies in a redistribution of insurance benefits based on need rather than fault, not its potential cost saving." HYPERLINK \l Document2zzFN_F61 [FN61]

(2) Under no-fault, insurance companies are required to provide benefits to policyholders on a first-party basis. Thus, no-fault claimants do not face the kinds of corroborative pleading, evidentiary, and procedural hurdles that exist under the personal responsibility system. As a result, no-fault offers policyholders greater opportunity to maximize their claims. For example, the availability of medical care up to the limits of the no-fault policy encourages greater utilization of health care services. The more generous the no-fault benefits, the greater the incentive to take advantage of them. HYPERLINK \l Document2zzFN_F62 [FN62] For ***96** the same reason, no-fault creates a fertile environment for inflated or fraudulent claims. For example, individuals who are not covered by other forms of health insurance, or who are hurt at work but seek greater benefits than their workers' compensation coverage provides, may file fraudulent claims under the no-fault system for injuries or illnesses not caused by the operation of a motor vehicle.

(3) No-fault does not reduce litigation costs. Litigation over property damage, which comprises the vast majority of car accident claims, continues under no-fault because no-fault systems typically retain the liability system for property claims. Litigation over whether a plaintiff has met the threshold after which lawsuits can be brought is common in no-fault states. Finally, there is anecdotal evidence that suits by motorists against their own insurance company for failure to pay no-fault benefits have skyrocketed.

(4) Liability insurance and other coverages remain necessary for many motorists in no-fault jurisdictions. Depending upon the generosity of the available no-fault benefits, motorists still must purchase additional first party coverage to protect themselves against serious accidents caused by uninsured, underinsured, or unregistered motorists. HYPERLINK \l Document2zzFN_F63 [FN63] Further, some motorists must also purchase additional liability coverage in the event that they cause an accident that results in damages to another motorist in excess of the no-fault benefits available to that driver. Absent such insurance, the at-fault motorist risks a potentially devastating civil judgment against his or her home or other assets. HYPERLINK \l Document2zzFN_F64 [FN64] Finally, under no-fault systems, motorists still must ***97** purchase property damage liability protection because no-fault typically covers only bodily injury.

(5) As discussed in greater detail below, HYPERLINK \l Document2zzFN_F65 [FN65] there is significant evidence that the threat of liability acts as a deterrent to dangerous driving. The absence of fault leads to higher accident rates and correspondingly higher losses that must eventually be recouped through rate increases.

B. No-Fault Contradicts Basic American Principles of Individual Responsibility and Accountability

No-fault systems explicitly contradict the fundamental principle of American justice that wrongdoers are held responsible for the harm they cause. HYPERLINK \l Document2zzFN_F66 [FN66] By eliminating "fault," no-fault effectively treats good drivers and bad drivers the same. HYPERLINK \l Document2zzFN_F67 [FN67] This is not merely a ***98** philosophical concern; a substantial body of evidence shows that no-fault leads to more accidents because it weakens the deterrent effect of the tort law. HYPERLINK \l Document2zzFN_F68 [FN68]

C. No-Fault Eliminates the Right to Full Compensation

As originally envisioned, no-fault systems would provide consumers with full compensation for medical expenses and wage losses arising from a motor vehicle accident. In exchange, motorists would sacrifice their common law right to sue to obtain compensation for pain and suffering for minor injuries. Victims of serious and/or permanent injuries, however, would be permitted to sue for such compensation. HYPERLINK \l Document2zzFN_F69 [FN69]

Much has been made of alleged abuses in claims for "pain and suffering" compensation, to the point where no-fault advocates rarely acknowledge the legitimacy of any such compensation, or, if they do, consider the trade-off worthwhile. HYPERLINK \l Document2zzFN_F70 [FN70] But by taking away the right of injured motorists to seek compensation for their pain and suffering, no-fault depersonalizes the human being, treating injured people as the equivalent of damaged property.

Moreover, recent proposals reflect a profound revision of the no-fault quid pro quo as the insurance industry attempts to formulate a ***99** less expensive form of no-fault. Instead of unlimited compensation for economic losses, motorists would be

required to trade their right to non-economic compensation for economic benefits that even some supporters of no-fault consider grossly inadequate. HYPERLINK \l Document2zzFN_F71 [FN71]

D. No-Fault Places Policyholders at a Disadvantage

By depriving consumers of the leverage of adequate legal remedies, no-fault proposals inevitably place consumers at a disadvantage. The elimination of compensation for accident victims' pain and suffering reduces the incentive for scrupulous lawyers to accept auto accident cases because the lawyers' fees would then have to be paid out of the victims' recovery of actual medical expenses and lost wages. Moreover, by discouraging lawyers from representing accident victims, the ban on pain and suffering compensation will indirectly limit a policyholder's ability to insist upon full payment of economic compensation, such as wage loss or medical bills. Without the ready availability of legal representation to plaintiffs, insurers will have less reason to eschew abusive settlement practices, such as "low-balling." HYPERLINK \l Document2zzFN_F72 [FN72]

***100** E. No-Fault Does Not Reduce Disputes and Litigation

Benefit levels, as well as threshold levels, obviously have a direct relationship to litigation in no-fault states. Jurisdictions in which the no-fault benefits are limited, depriving motorists of adequate compensation, or in which the threshold for pain and suffering claims is easily breached, are likely to experience higher levels of litigation. HYPERLINK \l Document2zzFN_F73 [FN73]

No-fault systems present unique inducements to litigation beyond excess-of-benefits liability claims against third parties. Disputes over whether a particular claimant's damages exceed the litigation threshold are the source of voluminous litigation in states with the less-quantifiable verbal threshold. HYPERLINK \l Document2zzFN_F74 [FN74] Moreover, there are reports of more frequent suits brought by policyholders against their own insurance companies for failure to pay no-fault benefits in good faith. HYPERLINK \l Document2zzFN_F75 [FN75] Finally, litigation over property damage--the single largest ***101** source of claims in most jurisdictions--will continue under no-fault because the liability system is retained for property claims. An analysis published in the Insurance Counsel Journal, a publication for insurance defense attorneys, concluded: "[W]hatever the advantages of no-fault, a reduction in court cases and court costs would not appear to be one of them." HYPERLINK \l Document2zzFN_F76 [FN76]

III. EVALUATION OF INSURANCE INDUSTRY REFORM

With the largest concentration of motorists of any state in the nation, HYPERLINK \l Document2zzFN_F77 [FN77] California has proven to be a fertile ground for insurance reform efforts. Prior to 1988, California was one of the few states in the nation that did not require insurance companies to obtain regulatory approval of rate changes. HYPERLINK \l Document2zzFN_F78 [FN78] Moreover, California law shielded the industry from both competition HYPERLINK \l Document2zzFN_F79 [FN79] and regulation. HYPERLINK \l Document2zzFN_F80 [FN80] Thus, neither the free market nor government supervision was permitted to moderate the impact on the economy of the insurance cycle.

The 1988 ballot initiative, Proposition 103, sought to impose regulation and create a more competitive and fair marketplace for insurance in California. HYPERLINK \l Document2zzFN_F81 [FN81] The following components comprise the ***102** Proposition 103 model of insurance industry reform.

A. Short Term Relief: The Insurance Rate Freeze and Rollback

In order to protect consumers during the transition to the new system established by the Proposition, and to offset the rate increases during the year prior to the election, the initiative froze automobile and other property-casualty insurance rates and premiums at 80% of the November 8, 1987, levels for one year. HYPERLINK \l Document2zzFN_F82 [FN82] The 20% rollback avoided "locking in" the excessive rates of the preceding years, during which time insurance rates rose well in excess of the inflation rate. HYPERLINK \l Document2zzFN_F83 [FN83] During the period of the rate freeze and rollback, November 8, 1988, through November 8, 1989, insurers were prohibited from raising rates or premiums. However, the initiative was drafted to allow an insurer to obtain increases from the Insurance Commissioner if the freeze or the rate rollback "substantially threatened" the company's solvency. HYPERLINK \l Document2zzFN_F84 [FN84]

The rollback provision of Proposition 103 became the focal point of the insurance industry's legal challenge to the initiative filed two days after the election. HYPERLINK \l Document2zzFN_F85 [FN85] In May, 1989, the California Supreme Court unanimously upheld the rollback but ruled that the "substantially threatened with insolvency" standard could be interpreted by the Insurance Commissioner in a manner that would deny insurers their constitutional right to obtain an adequate return on their property. HYPERLINK \l Document2zzFN_F86 [FN86] The court substituted a "fair rate of return" constitutional standard, ***103** leaving it to the Commissioner to determine on a company-by-company basis, through the individual rollback exemption hearings contemplated by HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" section 1861.01(b) of the California Insurance Code, whether the rate rollback would deprive an insurer of a fair rate of return. Virtually all of the insurance companies operating in California filed requests for a rollback exemption hearing, claiming that they would be deprived of a fair rate of return if forced to comply. HYPERLINK \l Document2zzFN_F87 [FN87]

The fair return standard is well established in constitutional jurisprudence, as is the corollary principle that not every enterprise is entitled to earn a rate of return--only those that operate reasonably and efficiently. HYPERLINK \l Document2zzFN_F88 [FN88] It was not until California's first elected Insurance Commissioner took office in 1990 that normative standards for analyzing insurer profitability and efficiency were promulgated as regulations. These regulations contained a "rollback" formula, the application of which determines whether an insurer should be ordered to issue premium rebates with interest. HYPERLINK \l Document2zzFN_F89 [FN89] Specifically, the rollback formula:

- caps the rate of return;

- establishes ceilings for executive salaries and sets an overall limit on expenses equal to the industry average, rewarding insurers who operate more efficiently with a higher rate of return. Expenses in excess of the limit cannot be included in the rate base;
- prohibits insurers from engaging in bookkeeping practices that inflate their claims losses and limits the amount: insurers can set ***104** aside as surplus and reserves; and
- forbids insurers from passing through to consumers the costs of the industry's lobbying, political contributions, institutional advertising, the unsuccessful defense of discrimination cases, bad faith damage awards, and fines or penalties.

Insurers challenged the formula as confiscatory. In August, 1994, however, the California Supreme Court unanimously upheld the regulations as constitutional. HYPERLINK \l Document2zzFN_F90 [FN90]

Between 1989 and 1997, insurance companies operating in California issued over $1.18 billion in premium refunds to more than seven million policyholders. HYPERLINK \l Document2zzFN_F91 [FN91] Among those companies that complied with the rollback were nine of the ten largest auto insurance companies operating in California. They represented 61.4% of the marketplace. HYPERLINK \l Document2zzFN_F92 [FN92]

B. Regulation

Proposition 103 changed California's insurance laws from a so-called "open competition" to a "prior approval" regulatory system. HYPERLINK \l Document2zzFN_F93 [FN93] ***105** Insurance companies are required to submit an application for desired rate changes to the Department of Insurance. To justify the request, the application must comply with disclosure requirements and financial standards promulgated by regulations. HYPERLINK \l Document2zzFN_F94 [FN94] Properly administered, the prior approval system disengages the insurers' traditional "cost-plus" approach, ending their ability to unilaterally pass through to policyholders all claims costs, accompanied by overhead and profits. HYPERLINK \l Document2zzFN_F95 [FN95] It substitutes a rate structure that encourages both insurers and consumers to engage in loss prevention. HYPERLINK \l Document2zzFN_F96 [FN96] Insurers are rewarded for research and innovative programs that lead to reduced losses and claims. HYPERLINK \l Document2zzFN_F97 [FN97] Consumers, in turn, are rewarded with lower premiums for their individual loss prevention efforts, such as installation of anti-theft or anti-fraud devices and maintenance of a safe driving record.

Between 1989 and 1994, most insurance rates in California remained frozen pending conclusion of the legal challenges and final compliance by insurance companies with the rollback requirement. However, a new Insurance Commissioner, Republican Chuck Quackenbush, took office in January, 1995. Mr. Quackenbush, an avowed opponent of Proposition 103, HYPERLINK \l Document2zzFN_F98 [FN98] lifted the rate freeze and has since stirred controversy by refusing to implement or enforce many of 103's statutory requirements, including the "prior approval" process, despite excessive premium levels in the state. HYPERLINK \l Document2zzFN_F99 [FN99]

***106** C. Competition

At its best, the insurance marketplace operates imperfectly. There can never be a truly "free," i.e., perfectly competitive, market for auto insurance because (1) consumers are compelled by law to purchase insurance; (2) there are many variations on the product, making comparison shopping difficult; and (3) the underwriting process is often subjective and by definition excludes certain willing purchasers. Regulation and competition, however, are not mutually exclusive. To encourage a more functional marketplace, Proposition 103 repealed a variety of statutory barriers to competition common in other jurisdictions.

1. Antitrust Exemption

The insurance industry won an exemption from California's antitrust laws in 1947; HYPERLINK \l Document2zzFN_F100 [FN100] similar exemptions remain on the books of virtually every other state and in federal law as well. HYPERLINK \l Document2zzFN_F101 [FN101] As a result, insurer-controlled "rating bureaus" freely distributed proposed pricing data, including projected losses, expenses, profits, and overhead charges, to all insurers who wished to obtain the information, allowing tacit price collusion. Proposition 103 repealed the ***107** insurance industry's exemption from the antitrust laws and prohibited the operation of "rating" and "advisory" organizations set up by the industry to circulate pricing and policy information to insurance companies. HYPERLINK \l Document2zzFN_F102 [FN102]

2. Commission Discounting

Commissions and related selling expenditures amount to between 15% and 30% of each year's premiums, according to a federal study. HYPERLINK \l Document2zzFN_F103 [FN103] Under California's so-called "anti-rebate law," similar to statutes in effect in most other states, insurance agents and brokers were prohibited by law from reducing their own commissions in order to offer consumers a lower price. HYPERLINK \l Document2zzFN_F104 [FN104] The anti-rebate law rewarded the inefficiency of some agents because it shielded them from competition by agents who were willing to work harder to satisfy their customers. A study by the United States Department of Justice estimated savings of 6% to 7% annually for insurance consumers merely by eliminating anti-rebate laws. HYPERLINK \l Document2zzFN_F105 [FN105] Proposition 103 repealed the state anti-rebate law. To date, however, few California agents have reduced their commissions, largely because insurance companies and trade associations representing agents have actively ***108** discouraged such competition. HYPERLINK \l Document2zzFN_F106 [FN106]

3. Bank Sales of Insurance

Proposition 103 repealed the statutory prohibition on the sale of insurance by financial institutions. HYPERLINK \l Document2zzFN_F107 [FN107] By 1992, an estimated 133 banks had obtained permission to enter the insurance business, including several of the state's largest banks. HYPERLINK \l Document2zzFN_F108 [FN108] Suits by insurance agents to block this provision of Proposition 103 were unsuccessful. HYPERLINK \l Document2zzFN_F109 [FN109]

4. Expanded Group Insurance

Proposition 103 empowered consumers to more easily negotiate group insurance purchases. HYPERLINK \l Document2zzFN_F110 [FN110] As a result, consumers are empowered to join together to negotiate the kind of policies and coverage they want, using their bargaining power in the insurance marketplace just as large corporations do when purchasing commercial insurance policies.

5. Consumer Comparison Shopping Service

It is a basic tenet of economics that consumers must be well informed if the marketplace is to operate correctly. A 1987 study documented the often insurmountable obstacles consumers confront ***109** when shopping for insurance. HYPERLINK \l Document2zzFN_F111 [FN111] Proposition 103 requires the California Commissioner to provide consumers with a current rate comparison survey for automobile, homeowner, and other lines of insurance. HYPERLINK \l Document2zzFN_F112 [FN112] Consumers are to be charged a modest fee to cover the costs of this system. The California Department of Insurance has not yet implemented this provision of 103. HYPERLINK \l Document2zzFN_F113 [FN113]

D. Fairness

Insurance is, by definition, a discriminatory enterprise. In order to allocate risk, insurance companies group individual consumers into a larger pool composed of similar risks. To a degree often poorly understood by the insurers themselves, the business of insurance depends on the consumer's trust in the fairness of the industry's classification system.

1. Emphasis on Driving Safety Record

Proposition 103 prohibits the use of "territorial rating," under which insurance companies determine an individual's automobile insurance premium by calculating claims payments made within the motorist's zip code. Instead, auto insurance premiums must be based primarily upon three rating factors in decreasing order of importance: a motorist's driving safety record, the number of miles he or she drives each year, and the motorist's years of driving experience. HYPERLINK \l Document2zzFN_F114 [FN114] ***110** Making the driver's own safety record the principal determinant of premiums gives motorists a strong incentive to drive safely.

The measure further requires insurers to grant a 20% good-driver discount to all qualifying consumers: individuals with a virtually clean driving record (one moving violation is permitted) for the preceding three years. HYPERLINK \l Document2zzFN_F115 [FN115] This provides a further incentive for careful driving.

A 1986 study prepared for the California Assembly by the National Insurance Consumers Organization (NICO) illustrates the discriminatory impact of the much criticized zip code-based system of territorial rating. HYPERLINK \l Document2zzFN_F116 [FN116] Of the 4.9 million cars insured in California between 1982 and 1984, 95.4% had no claims. HYPERLINK \l Document2zzFN_F117 [FN117] In central Los Angeles, 93.5% of the cars avoided claims. The modest difference in the number of claims is to be expected, given population density and reliance on automobiles in Los Angeles. Nevertheless, accident-free Los Angeles drivers paid on the average 66% more for property damage liability insurance than did the average accident-free driver outside Los Angeles. [FN118]

Judicial review of a legal challenge brought by insurers against implementation of this provision of the proposition blocked its implementation for more than three years. Insurers contended that rates must be "cost-based" under 103 and that the voters could not lawfully alter insurance classifications to substitute the "mandatory" factors for other factors that the industry argued could be shown to hold more predictive power (i.e., territory). On November 27, 1990, a California Court of Appeal dismissed the challenge without deciding the merits. HYPERLINK \l Document2zzFN_F119 [FN119] In December, 1994, the Department of

***111** Insurance published a study that rebutted the industry's subsequent contention that territorial rating was consistent with the provisions of Proposition 103. HYPERLINK \l Document2zzFN_F120 [FN120]

In 1997, the California Department of Insurance promulgated new regulations to implement this provision of the initiative. HYPERLINK \l Document2zzFN_F121 [FN121] An independent review of the rating plans filed by three major insurance companies, however, determined that they were not in compliance with the requirements of the law. HYPERLINK \l Document2zzFN_F122 [FN122] Two lawsuits were subsequently filed to compel the Insurance Commissioner to properly enforce the statute. HYPERLINK \l Document2zzFN_F123 [FN123]

2. Redlining

The failure of insurers to service particular communities, principally in urban areas, has been amply documented. HYPERLINK \l Document2zzFN_F124 [FN124] Proposition 103's emphasis on driving record and individual driving habits, discussed supra, establishes a more equitable system for determining premiums that requires insurers to diminish the importance of ***112** geography. Mandating the use of new rating factors, however, does not address the practical reality that the availability of insurance agents and brokers is extremely circumscribed in some communities. HYPERLINK \l Document2zzFN_F125 [FN125] To ensure that qualified drivers can obtain insurance regardless of where they live, the measure specifies that any good driver, as defined in the initiative, has the right to purchase an auto insurance policy from the insurer of his or her choice. HYPERLINK \l Document2zzFN_F126 [FN126] The absence of prior insurance coverage cannot disqualify an otherwise good driver. HYPERLINK \l Document2zzFN_F127 [FN127] This provision of Proposition 103 is in effect; however, many insurers have reportedly refused to comply with the provision, according to statements by insurance agents and consumers. HYPERLINK \l Document2zzFN_F128 [FN128]

3. Arbitrary Cancellations and Non-Renewals

A frequent complaint among automobile insurance policyholders is that insurance companies may cancel or fail to renew policies without justification, sometimes merely for the act of filing a claim. Proposition 103 prohibits such arbitrary actions unless based on one of three specific reasons: non-payment of premium, fraud, or the policyholder presents a substantial increase in the hazard insured against. HYPERLINK \l Document2zzFN_F129 [FN129] Regulations defining the "substantial hazard" exception ***113** have yet to be promulgated.

E. Public Accountability

"Capture" of the regulators by the regulated industry is common in state-based insurance systems, HYPERLINK \l Document2zzFN_F130 [FN130] and highly corrupting of public faith. The public accountability of those administering insurance industry reform is critical to its success. Proposition 103 contained three mechanisms to ensure such accountability.

1. Consumer Intervention

It is a basic tenet of democratic government that each party to a proceeding has the right to be fully represented. The adversarial process enhances openness, constructive change, and consumer acceptance. Proposition 103 provides several avenues for consumer representation in insurance matters. First, it authorizes individual consumers to go before the Department of Insurance or the courts if insurance companies fail to comply with their responsibilities under the proposition. If the Department of Insurance fails to enforce the law or respond effectively to consumers' complaints, consumers will not be "locked out" of the courts with no remedy, HYPERLINK \l Document2zzFN_F131 [FN131] as often occurs ***114** in states with lax regulators.

Second, Proposition 103 encourages non-profit consumer advocacy groups to intervene in the regulatory process to protect the interests of the public. Citizens groups that make a "substantial contribution" to a rate hearing or other matter before the Department of Insurance, or to an insurance matter that goes before a court, are entitled to receive reasonable attorney's fees and reimbursement of expenses for such costs as expert witnesses. HYPERLINK \l Document2zzFN_F132 [FN132] Assessments collected from insurers are used to fund this program. HYPERLINK \l Document2zzFN_F133 [FN133] Funded citizen intervention programs protect against unnecessary or duplicative proceedings, while providing consumers with the professional, skilled representation that insurance companies are able to obtain at policyholder expense. HYPERLINK \l Document2zzFN_F134 [FN134]

Insurers typically oppose the institution of mechanisms to enhance consumer participation in regulatory proceedings as prone ***115** to result in uncontrolled, ceaseless regulatory conflict. That view is false because even the best-funded citizens' groups rarely are able to contest any but the most important cases. HYPERLINK \l Document2zzFN_F135 [FN135] In California, there are approximately four organizations that routinely intervene in insurance proceedings. HYPERLINK \l Document2zzFN_F136 [FN136]

2. Elected Insurance Commissioner

In the majority of states, the Insurance Commissioner is a political appointee with no direct accountability to the public.

Often, the appointee is a former insurance industry executive, and the appointment a form of political patronage. It is no surprise then that state regulatory insurance agencies have frequently been criticized for poor enforcement and a pro-industry bias. HYPERLINK \l Document2zzFN_F137 [FN137] In California, for example, independent reports repeatedly criticized the appointed Insurance Commissioner for inaction during the 1985-87 insurance crisis, for failure to respond to consumer complaints, and for incompetent enforcement of the Insurance Code. HYPERLINK \l Document2zzFN_F138 [FN138]

Proposition 103 required that the Insurance Commissioner be elected, commencing in November, 1990. HYPERLINK \l Document2zzFN_F139 [FN139] Currently, twelve states elect their Insurance Commissioners. HYPERLINK \l Document2zzFN_F140 [FN140] The theoretical advantages of an elected Commissioner are consequential, particularly to the implementation of insurance industry reforms. An elected Commissioner is accountable to the public, rather than to other elected ***116** officials, whose own accountability to the public on specific issues may be less direct. Since only the voters may pass judgment on the Commissioner's performance, the Commissioner has the independence--and incentive--necessary to act in the public interest. Because voters will evaluate the Insurance Commissioner by the fairness of the rates and practices of insurers, a Commissioner who fails to satisfy the public should find it difficult to win re-election.

As a practical matter, however, the ability of insurance companies--a powerful constituency within the political economy--to elect sympathetic candidates has been demonstrated in several instances, HYPERLINK \l Document2zzFN_F141 [FN141] including the second election of the Insurance Commissioner in California in 1994. HYPERLINK \l Document2zzFN_F142 [FN142]

Critics argue that election of the Commissioner "politicizes" the office and may attract officials who view the position as a "stepping-stone" to higher office. That is certainly correct, to the same extent that every other office filled by popular vote is subject to the same politicization. And while a Commissioner's desire to be re-elected ***117** or to proceed to higher office would seem to work to the advantage of voters in their role as policyholders, to the degree that insurance companies are more concerned about electing a supportive candidate than is the general public, the insurance companies will be the more likely to successfully dominate the electoral process.

3. Statutory Remedies

Prior to Proposition 103, California's consumer protection, civil rights, and other statutes were inapplicable to the insurance industry by express statutory exemption. HYPERLINK \l Document2zzFN_F143 [FN143] The initiative repealed the exemption, making available to the consumers a host of state law remedies for improper conduct. HYPERLINK \l Document2zzFN_F144 [FN144]

F. The Impact of Proposition 103 on Premiums

Unlike no-fault, Proposition 103 makes no change in the amount of compensation paid to auto accident claimants, nor does it directly alter the system by which such claims are made or paid. Instead, "insurance industry reform" alters the insurance marketplace by regulating the rate-setting process as well as certain underwriting and marketing practices, and eliminating barriers to competition. Data drawn from NAIC reports HYPERLINK \l Document2zzFN_F145 [FN145] show that this approach to insurance reform has succeeded in restraining premium increases and has provided California consumers with substantial savings on their auto insurance.

Average auto liability premiums dropped 0.1% in California between 1989 and 1995. In the years immediately prior to Proposition ***118** 103, auto insurance premiums in California sustained double-digit increases. HYPERLINK \l Document2zzFN_F146 [FN146] Pre-election rate increases by insurance companies in anticipation of Proposition 103's passage, and post-election increases taken while Proposition 103 was stayed pending judicial review by the California Supreme Court, pushed the average liability premium in California to $519.39 by 1989. According to the NAIC data, California's average auto liability insurance premium in 1995 was $518.75--0.1%less than the 1989 figure. By comparison, during this same period liability premiums for the rest of the country grew 32.2%.

Table 9

Comparison of Average Liability Premiums, 1989-95

	1989	1990	1991	1992	1993	1994	1995
California	$519.39	$501.34	$522.95	$510.71	$508.05	$496.02	$518.75
Rest of Nation	$317.32	$338.55	$358.82	$381.69	$402.65	$411.40	$419.55

Table 10

Comparison of Growth in Average Liability Premiums, 1989-95

	-ange 1989-90	-ange 1990-91	-ange 1991-92	-ange 1992-93	-ange 1993-94	-ange 1994-95	-ange 1989-95
California	-3.5%	4.3%	-2.3%	-0.5%	-2.4%	4.6%	-0.1%
Rest of Nation	6.7%	6.0%	6.4%	5.5%	2.2%	2.0%	32.2%

***119** California's average liability premium, though still high, dropped significantly after the passage and implementation of Proposition 103. With its urban populations and extraordinary reliance on the automobile, California's average liability premium is still high compared to the rest of the nation. Since the passage of Proposition 103, however, California's rank relative to the nation has dropped. In 1989, California had the second highest average auto liability premium in the nation. By 1992, the state had dropped to eighth highest. In 1995, it was eleventh.

1. The Rate of Growth of the Average Auto Insurance Premium in California Has Slowed

In 1988, California had the seventh fastest rate of annual growth in auto insurance liability premiums in the nation. By 1994, California was forty-seventh. Between 1988 and 1994, California experienced the slowest rate of auto premium growth of any state. California had one of the six slowest rates of auto insurance premium growth in the nation each year between 1990 and 1994.

2. Proposition 103 Saved California Motorists an Estimated $14.7 Billion Between 1989 and 1995

In 1991, former Insurance Commissioner John Garamendi exercised his authority under Proposition 103 to order a freeze on all rate increases requested by insurance companies that had refused to pay their Proposition 103 rollback. Those that fulfilled their rollback obligation were permitted rate increases when justified based on informal application of the Proposition 103 regulatory formula developed by the Insurance Department. HYPERLINK \l Document2zzFN_F147 [FN147] Had these regulatory actions not occurred, California motorists would have paid an additional $14.7 billion in premiums, or $1171 per policyholder. HYPERLINK \l Document2zzFN_F148 [FN148] ***120** This figure does not include the premium refunds already paid to automobile insurance policyholders.

3. New Regulatory Approach Leads to Premium Increases in 1995

The preliminary NAIC data appear to reflect the impact of the laissez-faire philosophy HYPERLINK \l Document2zzFN_F149 [FN149] of Insurance Commissioner Quackenbush, who took office in January, 1995. During his first year in office, the average auto liability premium rose 4.6% over the previous year. This marked the first increase in four years, the largest since the passage of Proposition 103 in 1988, and more than double the average increase for the rest of the nation between 1994 and 1995. Between 1990 and 1994, California had one of the six slowest rates of auto liability insurance premium growth in the nation. By 1994, California ranked forty-seventh. In 1995, however, California experienced the tenth highest annual rate of growth in the nation.

4. Auto Insurance Profits in California Remain Excessive

Despite a lengthy freeze on rate increases and over $1 billion in premium refunds, the average profit of California auto insurance companies in 1995 was over 60% higher than the national average. HYPERLINK \l Document2zzFN_F150 [FN150] ***121** Confronted with 103's stringent rate regulation and rollback requirements, which ended the cost "pass-through" system, insurers have indeed tightened their belts as predicted: cutting agent commissions, reducing expenses, fighting fraud, and promoting loss prevention. HYPERLINK \l Document2zzFN_F151 [FN151] The excessive profits insurance companies are earning in California prove that further reductions in existing rates are justified.

***122** IV. THE POLITICS OF AUTO INSURANCE REFORM

Over the last decade, auto insurance has joined the ranks of other pocketbook issues, such as taxes and utility rates, which

generate enormous attention from politicians, the press, and the public.

For the auto insurance industry, which wrote $119.1 billion in premiums in 1995, much is at stake in the outcome of the debate. The policyholders who pay those premiums have an equal interest. Elected officials often attempt to balance their obligation to their constituents against the need to accommodate the insurance industry's powerful influence within the political economy. Nevertheless, public dissatisfaction with insurance companies, as reflected in the industry's consistently low ratings in opinion polls, HYPERLINK \l Document2zzFN_F152 [FN152] makes them a vulnerable target for politicians. In 1997, for example, a little known state legislator came within four points of unseating the incumbent governor of New Jersey by blaming her for the high auto insurance rates produced by the state's no-fault system. He called for its repeal and enactment of insurance industry reforms based on California's Proposition 103 model. HYPERLINK \l Document2zzFN_F153 [FN153]

The insurance industry, acutely aware of its impaired credibility, is not without its own strategy. The $259.7 billion property-casualty industry, of which auto insurance is a significant part, has generated and effectively exploited public antagonism toward lawyers and the tort system in the past, as noted above. HYPERLINK \l Document2zzFN_F154 [FN154] Proponents of no-fault frequently cast the issue as a referendum on the plaintiffs' lawyers who represent auto accident victims, almost always on a contingency fee basis. HYPERLINK \l Document2zzFN_F155 [FN155] Thus, the insurance industry has sought to place auto ***123** insurance reform within the parameters of the larger debate over the tort system, a context in which plaintiffs' lawyers make effective targets. HYPERLINK \l Document2zzFN_F156 [FN156] Indeed, many of the institutions and academics who have promoted no-fault auto insurance legislation, such as the Manhattan Institute and Professor Jeffrey O'Connell, receive substantial support from insurance companies, HYPERLINK \l Document2zzFN_F157 [FN157] and have previously promotedproposals to restrict tort law rights in product liability and medical malpractice cases. HYPERLINK \l Document2zzFN_F158 [FN158] Because the issue of sponsorship is itself critical in the ***124** insurance debate, insurers have worked hard to develop the appearance of consumer support for no-fault. HYPERLINK \l Document2zzFN_F159 [FN159]

The politics of insurance reform are well illustrated in the current effort by no-fault supporters to enact the federal "consumer choice" no-fault legislation. HYPERLINK \l Document2zzFN_F160 [FN160] The proposal, backed by the Republican congressional leadership, has received quiet support from insurance companies. HYPERLINK \l Document2zzFN_F161 [FN161] House Majority Leader Dick Armey (Republican, Texas) has equated auto insurance premiums with taxes, insisting that "choice" no-fault would "cut taxes" by $45 billion nationally. HYPERLINK \l Document2zzFN_F162 [FN162]

***125** Indeed, it is apparent that the politics of "choice" no-fault legislation transcend even the issue of insurance reform. In a Washington, D.C. seminar sponsored by the Heritage Foundation in 1996, no-fault proponents explicitly portrayed the "choice" legislation as a means of achieving highly partisan goals. No-fault advocate Michael Horowitz stated, "One needs to focus on the purely political side of the money that [the "choice" no-fault legislation] takes away from the tort bar." HYPERLINK \l Document2zzFN_F163 [FN163] Another participant, Grover Norquist, the President of Americans for Tax Reform, made the same point: because trial lawyers make substantial campaign contributions to Democratic candidates, and no-fault would reduce lawyers' income, passage of no-fault would enhance the political prospects of the Republican Party. "Trial lawyers are [a] bigger funder of the Democratic Party than the labor unions," HYPERLINK \l Document2zzFN_F164 [FN164] Norquist said.

> [O]n the level of what's important to do today for political ***126** reasons and for fights fought two years from now, five years from now, ten years from now, if this legislation is passed the people we have to argue with and fight with next year and five years from now, [will be] shorter and less powerful than they are today ... [T]hat makes ... future fights possible. HYPERLINK \l Document2zzFN_F165 [FN165]

Horowitz agreed that passage of no fault would "really make a difference in the [1996 congressional] election in terms of real seats in the House, real seats in the Senate ... a real payoff for what the Republican revolution is all about." HYPERLINK \l Document2zzFN_F166 [FN166]

V. CONCLUSION

Achieving auto insurance reform depends first upon defining goals and fundamental principles. In recent years, insurance reform efforts have focused primarily upon reducing premiums. Two methods for doing so have been tested.

One method is to reduce coverage and compensation. The preeminent proposal of this nature is no-fault. Proponents claim that reducing the value of the insurance product will result in a reduction in the price; the argument assumes that insurance carriers will pass through the cost savings to policyholders in the form of lower premiums. Still, traditional no-fault systems, even those with strict verbal thresholds, have not reduced insurance premiums, and in fact are responsible for greater increases in the average auto insurance premium than in personal responsibility system states. Thus far, the no-fault experiment has been an utter failure.

Whether any form of no-fault could achieve savings sufficient to offset the higher cost of compensating parties regardless of fault has yet to be determined; HYPERLINK \l Document2zzFN_F167 [FN167] no state has adopted a "pure" no-fault law, ***127**

and the voters of one state have overwhelmingly rejected it. Indeed, the results of the few plebiscites on no-fault suggest that barring access to the tort system as a means of reducing the price of automobile insurance is not acceptable to consumers. HYPERLINK \l Document2zzFN_F168 [FN168]

The second method for lowering auto insurance premiums has shown much more promise. As evidenced by the tangible results of California's Proposition 103, a combination of strong regulatory oversight and removal of barriers to competition can eliminate excessive profits, waste, and inefficiency and result in substantial savings for motorists.

HYPERLINK \l Document2zzFN_Ba1 [FNa1]. President, The Foundation for Taxpayer and Consumer Rights, Los Angeles, California; A.B., magna cum laude, 1974, Amherst College; J.D., M.S.F.S., 1979, Georgetown University. Author of Proposition 103. The author gratefully acknowledges the assistance of Jeannine Davis, Cynthia Dennis, C.J. Heisler, and Phil Roberto in the preparation of this Article.

HYPERLINK \l Document2zzFN_B1 [FN1]. For example, in 1990, the average annual premium for basic liability coverage for a 19-year-old male in downtown Los Angeles (zip code: 90001) was $2,850. See CALIFORNIA DEP'T OF INS., AUTO. PREMIUM SURVEY 24 (1990). The per capita income for residents of that zip code was $5,725. See CALIFORNIA STATE CENSUS DATA CTR., 1990 CENSUS, SUMMARY TAPE FILE 38, STATE OF CAL., SELECTED SOC. & ECON. CHARACTERISTICS 22 (1993). The premium for a single male who lives in inner city Los Angeles can be as high as $7,844. See Reply Brief at 11-2, exhibit 301, In re Class Plan Application of Farmers Ins. Exch., Mid-Century Ins. Co., and Truck Ins. Exch., No. PA-97-0079-00 (on file with author). Failure to meet California's "Financial Responsibility Law," HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAVES16000&FindType=L" Cal.Veh.Code ß 16000 (West 1971 & Supp.1998), can lead to a fine of up to $1,000 for the first offense, see id. ß 16029(a), and $2,000 for a second conviction within three years, see id. ß 16029(b). Vehicles may also be impounded. See id. ß 16029(c)(1).

HYPERLINK \l Document2zzFN_B2 [FN2]. See discussion infra Part I.D.

HYPERLINK \l Document2zzFN_B3 [FN3]. See Record $35.6 Billion After Tax Income; $6.1 Billion Pre-Tax Underwriting Loss, UNDERWRITERS' REP., Apr. 2, 1998, at 6.

HYPERLINK \l Document2zzFN_B4 [FN4]. The first known motor vehicle accident occurred in New York City in 1896. See Auto Insurance Nears 100th Anniversary, UNDERWRITERS' REP., Sept. 19, 1996, at 19.

HYPERLINK \l Document2zzFN_B5 [FN5]. See U.S. GEN. ACCOUNTING OFFICE, No. 86-2, AUTO INSURANCE: STATE REGULATION AFFECTS COST AND AVAILABILITY 67 (1986).

HYPERLINK \l Document2zzFN_B6 [FN6]. Typically, states require motorists to purchase minimum coverage for bodily injury liability to one person, with a ceiling on bodily injury coverage for all persons involved in any single accident, and modest property damage liability coverage. For example, California presently requires motorists to carry a minimum of $15,000 liability coverage for one person, with a total limit of $30,000 for all persons per accident, and $5,000 in property damage liability coverage. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAVES16056&FindType=L" Cal.Veh.Code ß 16056 (West 1971 & Supp.1998).

HYPERLINK \l Document2zzFN_B7 [FN7]. Virtually all modern health insurance policies accord the health insurer subrogation rights against the at-fault motorist to recoup benefits paid to the accident victim.

HYPERLINK \l Document2zzFN_B8 [FN8]. The Columbia University proposal was published in 1932. Benefits would be limited to specific amounts contained in a "schedule" similar to those in the worker's compensation field. COLUMBIA **UNIV.** COUNCIL FOR RESEARCH IN THE SOC. SCIENCES, REPORT BY THE COMM. TO STUDY COMPENSATION FOR AUTO. ACCIDENTS (1932). STATE FARM INS. COS., NO-FAULT PRESS REFERENCE MANUAL G-120 (1992).

HYPERLINK \l Document2zzFN_B9 [FN9]. See ROBERT A. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 181 (1965).

HYPERLINK \l Document2zzFN_B10 [FN10]. Compensation for human pain and suffering is only one form of "non-economic" damage recognized by American law. Other forms of non-economic damage to a person include loss of parental guidance or filial care, disfigurement, loss of limbs, sterilization, and inability to engage in sexual activity or to procreate.

HYPERLINK \l Document2zzFN_B11 [FN11]. See KEETON & O'CONNELL, supra note 9, at 8. Policyholders would be permitted to purchase coverage for their own pain and suffering in minor cases, however. See id. at 9. Property damage would

still be handled on a third party, or fault, basis. See id. at 8.

HYPERLINK \l Document2zzFN_B12 [FN12]. In the late 1960s and early 1970s, insurance trade associations proposed differing forms of no-fault. Large insurers tended to support "pure" no-fault: the complete abolition of tort liability in exchange for unlimited medical benefits and substantial wage loss benefits. See STATE FARM INS. COS., NO-FAULT PRESS REFERENCE MANUAL G-104 (1992).

HYPERLINK \l Document2zzFN_B13 [FN13]. See ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW 2D ß 1:1 (1992).

HYPERLINK \l Document2zzFN_B14 [FN14]. Some states gave motorists the option to buy the "add on" coverage, while others required its purchase. See STATE FARM INS. COS., NO-FAULT PRESS REFERENCE MANUAL G-121 (1992).

HYPERLINK \l Document2zzFN_B15 [FN15]. The Nevada Legislature repealed its no-fault law effective June, 1980; Georgia repealed its no-fault law effective October, 1991; and Connecticut repealed its no-fault law effective January, 1994. These states returned to the personal responsibility system. The District of Columbia moved from mandatory no-fault to an "add-on" system effective June, 1986. New Jersey and Pennsylvania repealed the mandatory portions of their no-fault laws in 1989 and 1990, respectively.

HYPERLINK \l Document2zzFN_B16 [FN16]. The mandatory no-fault states are: Colorado, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New York, North Dakota, South Dakota, and Utah. Twelve jurisdictions have hybrid no-fault systems: Arkansas, Delaware, District of Columbia, Kentucky, Maryland, New Jersey, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia.

HYPERLINK \l Document2zzFN_B17 [FN17]. For a more detailed description of the events, see The Manufactured Crisis, CONSUMER REP. 51, Aug. 1986, at 544. See also Nancy Nichols, The Manufacturing of a Crisis, THE NATION, Feb. 15, 1986, at 173 (discussing the sharp rise in premiums); Premium Increases and Refusals to Deal in the Property/Casualty Insurance Industry: Hearing Before the Judiciary Comm., 99th Cong. 5 (1986) (statement of Jay Angoff, Counsel, National Insurance Consumer Organization) (citing BEST'S INS. MGMT.REP. 31, Dec. 30, 1985, at 9).

HYPERLINK \l Document2zzFN_B18 [FN18]. E.g., Leonard W. Schroeter & William J. Rutzick, "Tort Reform "--Being an Insurance Company Means Never Having to Say You're Sorry, 22 GONZ.L.REV. 31 (1986-87); Robert B. Bienstock et al., Analysis of Liability Insurance Crisis, 1986 INST.OF PUB.LAW, U. N.M. 1.

HYPERLINK \l Document2zzFN_B19 [FN19]. Interest rates of 20% were not uncommon through the early 1980s. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TABLE NO. 806, STATISTICAL ABSTRACT OF THE UNITED STATES 507 (1992); see also The Manufactured Crisis, supra note 17, at 544.

HYPERLINK \l Document2zzFN_B20 [FN20]. See The Manufactured Crisis, supra note 17, at 544; Nichols, supra note 17, at 173.

HYPERLINK \l Document2zzFN_B21 [FN21]. James Nolan, Investors Light on P/C Firms, J. COM., May 15, 1986, at 14A.

HYPERLINK \l Document2zzFN_B22 [FN22]. The Manufactured Crisis, supra note 17, at 544.

HYPERLINK \l Document2zzFN_B23 [FN23]. Id. A report to the New York Governor's Advisory Commission on Liability Insurance concluded that "the industry's poor recent financial condition largely reflects self-inflicted wounds." Id.

HYPERLINK \l Document2zzFN_B24 [FN24]. Insurance company lobbyists argued that such revisions in state tort laws would (1) enable actuaries to better quantify risks for underwriting purposes and (2) limit overall claims payments, thus enabling insurers to lower the price of insurance. Business groups supported "tort reform" because of (1) the promised premium reductions and (2) the financial benefits of limiting their own legal accountability for defective products, medical negligence, environmental pollution, and even drunk driving.

HYPERLINK \l Document2zzFN_B25 [FN25]. For a comprehensive critique of the "litigation crisis" by consumer advocate Ralph Nader, see Ralph Nader, The Corporate Drive to Restrict Their Victims' Rights, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=22GONZLREV15&FindType=Y" 22 GONZ.L.REV. 15 (1986-87).

HYPERLINK \l Document2zzFN_B26 [FN26]. A highly damaging indictment of "tort reform" came from the insurance industry itself in April, 1987. The Insurance Services Office (ISO), the industry's principal data collection and distribution agency, released the results of a study intended to respond to demands from legislators across the country that the industry provide empirical data to support its claims that changes in tort laws would lower insurance premiums. The study examined the

responses of 1262 insurance adjusters from nine property-casualty insurance companies and two independent adjusting firms located in 24 states. The adjusters were asked to determine the impact of actual restrictions in the tort laws of 15 of the states on six hypothetical injury cases. In addition, they were asked to judge the impact of similar proposals that did not become law in the remaining nine states. Much to the chagrin of the insurance industry, the ISO report concluded that changes in tort laws would have little, if any, impact upon insurance rates. See HAMILTON, RABINOVITZ & ALSCHULER, INC., CLAIM EVALUATION PROJECT: NATIONAL OVERVIEW 7 (1997). One insurance industry official stated, "[s]ome state legislators are going to be shaking their heads after hearing us tell them for months how important tort reform is, and now we come out with a study that says the legislation they passed was meaningless." Robert A. Finlayson, Insurers Fear Reform Foes to Capitalize on ISO Study, BUS. INS., May 18, 1987, at 2.

Legislation enacted in Florida in the spring of 1986 at the behest of a coalition of insurance companies, medical lobbies, and corporations contained a panoply of restrictions on victims' tort rights. But the legislation also required insurers to reduce their insurance rates concomitantly, unless they could demonstrate to state regulators that the limitations on consumers' tort law rights would not reduce their costs. Six months after the law was enacted, two of the nation's largest insurance companies told the Florida Insurance Department that limiting compensation to injury victims would not reduce insurance rates. See National Ins. Consumer Org., "Tort Reform" a Fraud, Insurers Admit (Oct. 20, 1986) (news release) (on file with author). St. Paul Fire & Marine Insurance Co., the nation's largest medical malpractice insurer, and Aetna Casualty & Surety Co. provided an extensive "actuarial analysis" of five legislated limitations on tort law (including a $450,000 cap on non-economic damages and limits on punitive damages awards) that the insurance industry had promised would reduce premiums. The Aetna report concluded that one provision--reducing compensation to victims by the amount of compensation paid by collateral sources--would reduce rates by a maximum of .04%, while the other tort restrictions would have "no impact" on rates. Aetna asked for a 17% rate increase for its business contractor liability policy based on its analysis of the impact of the law. See Letter from Thomas L. Rudd, Superintendent of Insurance Department Affairs, Commercial Lines, Aetna Casualty & Surety Co., to Bill Gunter, Florida Insurance Commissioner, and Charlie Gray, Chief of Bureau of Policy and Contract Review for the Florida Department of Insurance (Aug. 8, 1986) (on file with author).

HYPERLINK \l Document2zzFN_B27 [FN27]. The insurance industry's profits grew at a furious pace during the period when insurers had insisted that they were forced to raise premiums in order to cover claims. Profits of the property/casualty industry increased from 2.4%return on net worth in 1985 to 16.0% in 1987--an increase of 567%. See NATIONAL ASS'N OF INS. COMM'RS (NAIC), REPORT ON PROFITABILITY BY LINE BY STATE 1991 (1992). Between 1975 and 1984, the entire property/casualty insurance industry made a record-breaking profit of $75 billion, yet, due to preferential treatment under federal tax laws, paid no federal income tax, according to the U.S. General Accounting Office. See Profitability of the Property/ Casualty Insurance Industry: March 13, 1986: Hearing before the Subcomm. on Oversight of the Comm. on Ways and Means, 99th Cong. 4 (1986) (statement of William J. Anderson, Director, General Government Division, U.S. General Accounting Office (GAO)). An October, 1989, GAO report concluded that the industry generated $78 billion in after-tax income from 1978 to 1987. See U.S. GEN. ACCOUNTING OFFICE, INSURANCE: PROFITABILITY OF THE AUTOMOBILE LINES OF THE INSURANCE INDUSTRY 2 (Oct. 1989).

HYPERLINK \l Document2zzFN_B28 [FN28]. Francis X. Bellotti et al., An Analysis of The Causes of The Current Crisis of Unavailability and Unaffordability of Liability Insurance, 1986 NAT'L ASS'N OF ATT'YS GEN. AD HOC COMM. ON INS. 45.

HYPERLINK \l Document2zzFN_B29 [FN29]. Proposition 51 enacted HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CACIS1431&FindType=L" section 1431 of the California Civil Code, which limited the application of the common law tort doctrine of joint and several liability to awards of compensation for non-economic damages. In a statement printed in the official state voter pamphlet, an executive of the insurance industry promised that if the measure passed, "[l]iability insurance, now virtually impossible to obtain, would again be available to cities and counties," and that "[p]rivate sector liability insurance premiums could drop 10% to 15%." CALIFORNIA SECRETARY OF STATE, BALLOT PAMPHLET, ARGUMENT IN FAVOR OF PROPOSITION 51, at 34 (1986).

HYPERLINK \l Document2zzFN_B30 [FN30]. In 1995, for example, insurance companies paid out a national average of 65¢ for every $1 in auto insurance liability premiums they received. See A.M. BEST, BEST'S AGGREGATES AND AVERAGES, PROPERTY-CASUALTY EDITION, UNITED STATES 101 (1996). This figure does not include investment income of 9¢ on every premium $1. See id. at 176.

HYPERLINK \l Document2zzFN_B31 [FN31]. A California insurance industry executive described the situation succinctly: "Who's unhappy? Not the doctors. Not the lawyers. And insurance companies can pass [the costs] along. If the public wants to tolerate this abuse, we'll deliver it." Mark Thompson, Highway Robbery, 11 CAL.LAW. 28, **29** (1991).

HYPERLINK \l Document2zzFN_B32 [FN32]. In most states, courts have held that insurance companies stand in a unique fiduciary relationship with their customers. See WILLIAM M. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION ß ß **1**.01-.05 (1996). Occasionally, the insurance industry itself acknowledges the imperfections of the private marketplace, as when

it urges government to subsidize or supplant private insurers in the sale of certain forms of property-casualty insurance, e.g., creation of the California Earthquake Authority, a state agency established to relieve insurance companies of the risk associated with earthquake insurance coverage. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS10089.50&FindType=L" Cal.Ins.Code ß ß 10089.50-.54 (West Supp.1998).

HYPERLINK \l Document2zzFN_B33 [FN33]. Between 1985 and 1986, automobile premiums in California increased by 22%, while the consumer price index increased 3.1%. See NATIONAL INS. CONSUMER ORG. (NICO), A CONSUMER TRIUMPH: PROPOSITION 103 REVISITED 19 (1992) (citing NATIONAL ASS'N OF INS. COMM'RS, supra note 27, 1981-91); CALIFORNIA DEP'T OF FIN., CALIFORNIA STATISTICAL ABSTRACT 60 (1996). The increases led to widespread public dissatisfaction. See, e.g., Scott Armstrong, California Car Insurance Revolt: Soaring Premiums Spark Drive for Reform Initiatives, CHRISTIAN SCI. MONITOR, Feb. 22, 1988, at 3; Sam Richards, Groups Target Insurance Rates, TRACY PRESS, Jan. 19, 1988, at 1.

HYPERLINK \l Document2zzFN_B34 [FN34]. The industry's political prowess in state capitals is well known. See, e.g., Walter L. Updegrave, How the Insurance Industry Collects an Extra $65 Billion a Year from You by ... Stacking the Deck, MONEY MAG., Aug. 1996, at 50. According to disclosure reports submitted by insurers and other lobbying associations to the California Secretary of State and the California Fair Political Practices Commission, the insurance industry spent over $108 million on lobbying expenses, excluding campaign contributions, in California alone between 1983 and 1996. See CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: 1983-1984 (July 1985); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1985 - DECEMBER 31, 1985 (Mar. 1986); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1986 - DECEMBER 31, 1986 (Apr. 1987); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1987 - DECEMBER 31, 1987 (1988); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1988 - DECEMBER 31, 1988 (Oct. 1989); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1989 - DECEMBER 31, 1989 (Mar. 1990); CALIFORNIA FAIR POLITICAL PRACTICES COMM'N, REPORT ON LOBBYING: JANUARY 1, 1990 - DECEMBER 31, 1990 (Nov. 1991); CALIFORNIA SECRETARY OF STATE, LOBBYING EXPENDITURES AND THE TOP 100 LOBBYING FIRMS: OCTOBER 1 - DECEMBER 31, 1991 AND CUMULATIVE TOTALS FOR CALENDAR YEAR 1991 (Mar. 1992); CALIFORNIA SECRETARY OF STATE, LOBBYING EXPENDITURES AND THE TOP 100 LOBBYING FIRMS: OCTOBER 1 - DECEMBER 31, 1992 AND CUMULATIVE TOTALS FOR TOTALS FOR CALENDAR YEAR 1992 (Mar. 1993); CALIFORNIA SECRETARY OF STATE, LOBBYING AND THE TOP 100 LOBBYING FIRMS: OCTOBER 1 - DECEMBER 31, 1993 and Cumulative Totals for Lobbying Expenditures 1993 (MAR. 1994); California Secretary of State, 1994 Lobbying Expenditures and the Top 100 Lobbying Firms (MAY 1995); California Secretary of State, Lobbying Expenditures and the Top 100 Lobbying Firms 1996 (APR. 1996); California Secretary of State, Lobbying Expenditures and the Top 100 Lobbying Firms 1996 (JUNE 1996).

HYPERLINK \l Document2zzFN_B35 [FN35]. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" Cal.Ins.Code ß 1861.01 (West 1998).

HYPERLINK \l Document2zzFN_B36 [FN36]. Proposition 101, sponsored by Coastal Insurance Company, limited payments for pain and suffering in excess of economic damages unless a specific threshold was met. Proposition 106, also sponsored by insurers, imposed limits on the size of contingency fees a plaintiff could pay to an attorney in any tort case. At the same time, the California Trial Lawyers Association and some consumer advocacy groups sponsored Proposition 100, a less comprehensive version of Proposition 103.

To defeat insurance industry, reform, insurers employed a "Trojan Horse" strategy unique to California's initiative process. Included within Proposition 104's text were provisions conflicting with each provision of Proposition 103. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CACNART2S10&FindType=L" Article II, section 10(b) of the California Constitution provides that, in the event that two measures with conflicting provisions are approved by the voters, the provisions of the initiative that obtained the greater number of voters prevail. With polls indicating overwhelming public support for Proposition 103, the insurance industry's political consultants recognized that the measure would be difficult to defeat. Instead, the insurers hoped to invalidate 103 by getting more votes for Proposition 104, a strategy that was revealed to voters by the official state ballot pamphlet. It noted that Proposition 104: "Cancels Prop. 100, 101, 103. Restricts future insurance regulation legislation." CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION G-88 (1998).

HYPERLINK \l Document2zzFN_B37 [FN37]. See Kenneth Reich, Insurance Fight Cost Initiative Backers a Total of $83.9 Million, L.A. TIMES, Feb. 7, 1989, at 3. The consumer advocates sponsoring Proposition 103, led by Ralph Nader, spent $2.9 million raised through modest donations from direct mail solicitations to the public. See Susan Seager, Insurance Initiative War Hits Record $63.5 Million, L.A. HERALD-EXAMINER,,,,,, Oct. 29, 1988, at A3.

HYPERLINK \l Document2zzFN_B38 [FN38]. See, e.g., Ramon G. McLeod, Voters Angry About Rates for Auto Insurance, S.F. CHRON., June 10, 1988, at A14. Consumer advocate Ralph Nader's support for Proposition 103 had a powerful impact upon many voters who found the presence of five insurance-related initiatives on the ballot confusing. See Arthur Lupia, Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections, 88 AM.POL.SCI.REV. 63, 72 (Mar. 1994).

HYPERLINK \l Document2zzFN_B39 [FN39]. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE 40 (1988).

HYPERLINK \l Document2zzFN_B40 [FN40]. A typical remark by an industry official portrayed Proposition 103 as "an example of mob rule." Don't Shoot the Messenger, BEST'S REV., Jan. 1990, at 95-96; see Mark Magnier, California Rate Rollback Incenses Auto Insurers, J.COM., Nov. 10, 1988, at 1A; Richard B. Schmitt & Sonja Steptoe, California's Voters Shake Up Insurers, WALL ST.J., Nov. 10, 1988, ß 2, at 1.

HYPERLINK \l Document2zzFN_B41 [FN41]. See Susan Seager, Insurers' New Policy: Sue to Stop Prop. 103, L.A. HERALD EXAMINER, Nov. 10, 1988, at 1; Kenneth Reich & Philip Hager, Nine Suits Challenge Auto Rate Rollbacks, L.A. TIMES, Nov. 10, 1988, at 1. A federal court, addressing a legal challenge by insurers against regulations implementing Proposition 103, later noted:

> Insurers doing business in California certainly have a right to challenge any unconstitutional aspects of the rate making process which have been forced on them by the initiative. But the multiple and overlapping assertions of these challenges in state court, before the commissioner, and in this court causes this court to question those tactics. Numerous insurers are involved in these multiple challenges, some represented by the same law firms. Some challenges are filed in state court and some are filed in federal. The challenges are at the same time identical, separate and overlapping. Some of that appears to be coordinated and calculated.

HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=345&FindType=Y&ReferencePositionType=S&SerialNum=1992080947&ReferencePosition=964" Fireman's Fund Ins. Co. v. Garamendi, 790 F.Supp. 938, 964 (N.D.Cal.1992).

HYPERLINK \l Document2zzFN_B42 [FN42]. See NATIONAL INS. CONSUMER ORG., supra note 33, at 35-36; Richard W. Stevenson, As California Tells Insurers What To Do, the Nation Listens, N.Y. TIMES, May 14, 1989, ß 4, at 5.

HYPERLINK \l Document2zzFN_B43 [FN43]. The most significant efforts were the following: Delaware permitted banks to sell insurance; Florida imposed a rate freeze; Maryland reinstated a "prior approval" regulatory system; New Jersey legislated a rate rollback and partially repealed the industry's exemption from the antitrust laws; Pennsylvania instituted a rate rollback; South Carolina instituted a rate rollback; and Texas repealed the industry's antitrust exemption and created the Office of Public Insurance Counsel to advocate the public interest in insurance matters. See NATIONAL INS. CONSUMER ORG., supra note 33, at 35-36. It is noteworthy that among the urbanized states where auto insurance premiums are most problematic and 103-style insurance industry reform proposals have been defeated, none has a process like California's, in which voters can circumvent legislative failure by direct ballot access.

HYPERLINK \l Document2zzFN_B44 [FN44]. Arizona voters rejected a no-fault ballot measure in 1990 by 85.1% to 14%. See PROFESSIONAL INS. AGENTS, WKLY. BULL. NO. 799, at 2 (Nov. 1990).

HYPERLINK \l Document2zzFN_B45 [FN45]. Proposition 200 would have:

- established a pure no-fault system;
- abolished fault-based tort liability for economic losses (including losses exceeding the no-fault coverage) unless the motorist who caused the accident was engaged in criminal conduct or the shipment of hazardous waste;
- abolished compensation for non-economic damages in all cases;
- required that taxpayer-funded public assistance programs and other forms of private insurance coverage bear auto accident victims' costs before auto insurers would have been responsible to pay claims;
- offered a total of $50,000 in benefits;
- promised substantially lower auto insurance premiums, without providing any statutory rate reduction requirement; and
- eliminated tort lawsuits against insurers who, in good faith, failed to pay no-fault benefits.

Recognizing that an insurance industry-sponsored ballot measure would have little chance of approval, the no-fault campaign strategy was to rely upon the financial resources of business groups supporting the other two "tort reform" measures to limit the need to accept insurance industry money for the no-fault campaign prior to the election. Nevertheless, the mostly conservative electorate rejected the other measures as well. Proposition 201, limiting lawsuits brought by shareholders victimized by investment fraud, was defeated by 60% to 40%. Proposition 202, which called for limits on contingency fees, lost narrowly by 51% to 49%. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE 58-60 (Mar. 1996). After the election, insurance companies donated nearly $1 million to help pay debts of the failed campaign (reports on file with

the California Secretary of State and the California Fair Political Practices Commission).

In Hawaii, a "pure no-fault" measure sponsored by State Farm Insurance was approved by the Legislature but vetoed by the Governor. See Ann Botticelli, No Reprieve for No-Fault: House Fails to Muster Votes to Override Cayetano Veto, HONOLULU ADVERTISER, June 30, 1995, at A1.

HYPERLINK \l Document2zzFN_B46 [FN46]. Georgia and Connecticut repealed their no-fault laws. In New Jersey and Pennsylvania, no-fault laws were made optional. Industry opposition blocked major efforts to repeal no-fault systems in Massachusetts (1992) and Hawaii (1995 and 1996). See Groups Push for Auto Insurance Reform, THE ENTERPRISE, Sept. 11, 1992, at 11; Marie Gendron, Nader: End No-Fault, BOSTON HERALD, Mar. 5, 1992, at 39; Ann Botticelli, Maner: Too Late to Use Nader No-Fault Reform Proposals, HONOLULU ADVERTISER, Apr. 13, 1995, at 8; Mike Yuen, Senators Doom No-Fault to Legislative Graveyard, HONOLULU STAR-BULL., July 6, 1996, at A3; Christopher Dauer, N.J. Legislators Propose Bill to Repeal Auto No-Fault Law, NAT'L UNDERWRITER, May 9, 1994, at 2.

HYPERLINK \l Document2zzFN_B47 [FN47]. Jeffrey O'Connell et al., HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=0103322834" Consumer Choice in the Auto Insurance Market, 52 MD.L.REV. 1016 (1993); Jeffrey O'Connell et al., Consumer Choice in the Tennessee Auto Insurance Market, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=27MEMSTULREV539&FindType=Y" 27 U.MEM.L.REV. 539 (1997); Jeffrey O'Connell et al., The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=55MDLREV160&FindType=Y" 55 MD.L.REV. 160 (1996); Jeffrey O'Connell et al., The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=54MDLREV281&FindType=Y" 54 MD.L.REV. 281 (1995); see also No-Fault's O'Connell Keeps Trying, Offers a Variation on Choice Plan, AUTO INS.REP., Mar. 13, 1995, at 1; Jeffrey O'Connell & Robert H. Joost, Giving Motorists a Choice Between Fault and No-Fault Insurance, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=72VALR61&FindType=Y" 72 VA.L.REV. 61 (1986).

HYPERLINK \l Document2zzFN_B48 [FN48]. S. Res. 625, 105th Cong. (1997); see also discussion infra note 71.

HYPERLINK \l Document2zzFN_B49 [FN49]. See supra note 16.

HYPERLINK \l Document2zzFN_B50 [FN50]. See supra note 16.

HYPERLINK \l Document2zzFN_B51 [FN51]. See supra note 15.

HYPERLINK \l Document2zzFN_B52 [FN52]. The tables referred to in this section summarize data drawn from annual reports published by the National Association of Insurance Commissioners (NAIC), most recently in State Average Expenditures & Premiums for Personal Automobile Insurance in 1995 (Jan. 1997). The NAIC report utilizes premium data reported to it by state insurance regulatory agencies. For purposes of this analysis, the NAIC data for "average liability premium," which includes no-fault insurance premiums, is examined because it is the portion of the insurance policy directly affected by distinctions between personal responsibility systems and no-fault systems.

HYPERLINK \l Document2zzFN_B53 [FN53]. No-fault, however, remains optional in Pennsylvania and New Jersey. See discussion infra Part II.A.3.

HYPERLINK \l Document2zzFN_B54 [FN54]. See infra Table 1.

HYPERLINK \l Document2zzFN_B55 [FN55]. See infra Table 2.

HYPERLINK \l Document2zzFN_B56 [FN56]. See infra Part III. for a discussion of California's insurance reform.

HYPERLINK \l Document2zzFN_B58 [FN58]. See All is Quiet in Pennsylvania Auto (Except for Ferocious Competition), AUTO INS.REP., Nov. 17, 1997, at 1, 5.

HYPERLINK \l Document2zzFN_B59 [FN59]. Manifestly, severe limitations on claims and/or compensation might so reduce payouts that insurers could reduce rates and still maintain their desired level of profitability. For example, the federal "choice" no-fault legislation not only eliminates the requirement that insurance companies pay for non-economic losses, but also makes other potential sources of compensation, for example, workers' compensation and taxpayer-subsidized programs such as Medicare, the primary source for payment of claims. See Auto Choice Reform Act of 1997, S.Res. 625, 105th Cong. ß 5(b)(3)(A). Other no-fault proposals would reduce benefits to as little as $15,000 in medical coverage. See supra note 60. Such policies might cost insurers less but would offer little or nothing of value to many motorists. Considerations of product value are a likely reason why no-fault proposals are disfavored by the public, notwithstanding promised price reductions.

HYPERLINK \l Document2zzFN_B60 [FN60]. The Deputy Insurance Commissioner of Michigan stated that the state's unlimited benefits, no-fault law "was never designed primarily as a savings measure. All of the arguments focused on paying people better and faster and enhancing rehabilitation by giving people money immediately." Morton C. Paulson, The Compelling Case for No-Fault Insurance, CHANGING TIMES, July 1989, at 49, 51 (quoting Jean Carlson, Michigan Deputy Insurance Commissioner). Testifying before the California Legislature, an official from New York State's Department of Insurance stated: "[W]e do not believe that the major impetus for enacting a no-fault law should be the expectation of premium reductions (though they may occur)...." New York's No-Fault System and Comprehensive Approach to Automobile Insurance in Light of California's Auto Insurance Reform Measures: Hearing Before the Assembly Comm. on Fin., Ins. and Pub. Inv., 1993-94 Legis. 11 (Cal.1993) (statement of Richard C. Hsia, Deputy Superintendent of Insurance, New York Department of Insurance).

After passage of Proposition 103, California insurers proposed no-fault legislation with benefits of $15,000 that would be split between bodily injury and extremely limited wage loss protection. The plan was described as "no frills no-fault." Kenneth Reich, Wilson Will Back No-Fault Initiative, L.A. TIMES, June 13, 1991, at 3. Industry officials, however, admitted that even this radical departure from no-fault's original promise of unlimited coverage would not necessarily lower premiums. According to a California insurance lobbyist, "[t]he new no-fault will not lower rates. No-fault will control rates. We have never said it will lower rates." ACIC Points Out Nader, Harvey Inconsistencies, UNDERWRITERS' REP., Oct. 3, 1991, at 5.

HYPERLINK \l Document2zzFN_B61 [FN61]. STATE FARM INS. COS., supra note 12, at G-402.

HYPERLINK \l Document2zzFN_B62 [FN62]. Referring to amendments to Massachusetts's no-fault law, an industry expert noted that the "actual additional costs [of] raising the [no-fault benefit] limit were roughly double what the [insurance] commissioner assumed.... What lawmakers failed to foresee were the behavioral changes of participants in the system which the auto reform precipitated." L.H. Otis, Massachusetts Auto Reform Law Called Failure, NAT'L UNDERWRITER, Dec. 23, 1991, at 4. Former Georgia Commissioner of Insurance Tim Ryles told the U.S. Congress: "[N]o matter what proponents tell you about insurance fraud, no-fault will not do anything to control it. On the contrary, no-fault is to insurance fraud what octane level is to gasoline: the more no-fault you have, the greater the fraud." Auto Insurance Reform: Hearings Before the Senate Comm. on Com., Science, and Transp., 105th Cong. 2 (1997) (statement of Tim Ryles, Ph.D.).

HYPERLINK \l Document2zzFN_B63 [FN63]. Obviously, to the extent no-fault drives up prices, the problem of underinsured and uninsured motorists is exacerbated.

HYPERLINK \l Document2zzFN_B64 [FN64]. An analysis by industry actuaries, noting that failure to purchase additional liability coverage "could have disastrous implications for consumers," explained:

> Consumers would be faced with the prospect of having no defense or indemnity protection for suits that might be brought against them for non-economic loss and/or for economic losses that exceed [the no-fault benefits] as defined by the statute.
>
> Regardless of whether or not such a claim would have any merit, the consumer (policyholder) would have to personally incur the cost of defending such actions and paying any settlement and judgment (if they are only carrying the basic personal injury protection policy). Even when New York enacted its no-fault law, liability insurance continued to be a mandatory requirement.

Donald McGrath et al., The Automobile Insurance Crisis: A Different Perspective, UNDERWRITERS' REP., Oct. 3, 1991, at 30.

HYPERLINK \l Document2zzFN_B65 [FN65]. See infra Part II.B.

HYPERLINK \l Document2zzFN_B66 [FN66]. No-fault also conflicts with a central tenet of American democracy: that any individual may have access to the judicial system--the one branch of government in which a citizen is accorded stature equal to that of any corporation, no matter how powerful--to hold wrongdoers fully accountable for the harm they cause. American courts have generally upheld most legislated restrictions on common law tort rights, including no-fault laws. See generally JOOST, supra note 13, at ß 2:21.

HYPERLINK \l Document2zzFN_B67 [FN67]. This philosophical objection should not be discounted as an explanation for the popular aversion to no-fault. Irresponsible behavior that leads to death and injuries may nevertheless fall outside the scope or prosecutorial resources of the criminal justice system. Addressing such matters is a singular purpose of the civil justice system, the viability of which distinguishes civilized society from lawless rule or even anarchy. Arbitrary restrictions on the right of accident victims to hold wrongdoers accountable subvert this important function of the judicial branch, contribute to public frustration, and undermine confidence in our democratic institutions.

That no-fault eliminates the distinction between good and bad drivers is not meant to suggest that insurance companies do not discriminate between such drivers for the purpose of determining product prices through "rating plans." See discussion infra Part III.D. Carriers routinely assess fault for purposes of setting premiums. The constraints, if any, upon the ability of insurance companies to unilaterally assign fault for rating purposes are a function of state regulatory requirements and vary widely.

HYPERLINK \l Document2zzFN_B68 [FN68]. See, e.g., Frank A. Sloan, Effects of Tort Liability and Insurance on Heavy Drinking and Drinking and Driving, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=38JLECON49&FindType=Y" 38 J.L. & ECON. 49 (1995); Frank A. Sloan, Tort Liability Versus Other Approaches for Deterring Careless Driving, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=14INTLREVLECON53&FindType=Y" 14 INT'L REV.L. & ECON. 53, 60, 66, 69 (1994). In their 1987 book, The Economic Structure of Tort Law, conservative theorists William M. Landes and Richard A. Posner found that systems based on tort liability lead to lower accident rates. They argue that if the incentive to take care is reduced by limiting the liability of a potential wrongdoer, people will be less careful, and the cumulatively significant result will be more fatal accidents. See WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); see also Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter? HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DocName=42CLA377&FindType=Y" 42 UCLA L.REV. 377 (1994).

HYPERLINK \l Document2zzFN_B69 [FN69]. See KEETON & O'CONNELL, supra note 9 and accompanying text.

HYPERLINK \l Document2zzFN_B70 [FN70]. For a typical example of a derisive view of compensation for pain and suffering, see John E. Calfee & Clifford Winston, The Consumer Welfare Effects of Liability for Pain and Suffering: An Exploratory Analysis, BROOKINGS PAPERS: MICROECONOMICS 133 (1993). "Awards for pain and suffering may be imposing a substantial deadweight cost on consumers." Id. at 134. For a thorough critique of the conventional wisdom, see Steven P. Croley & Jon D. Hanson, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 HARV.L.REV. 1787 (1995).

HYPERLINK \l Document2zzFN_B71 [FN71]. As noted, the industry has promoted "no frills" no-fault proposals with highly limited benefits in order to offer an alternative to insurance industry reform proposals that offer lower premiums. See supra note 60. Dr. Robert Hunter, former Insurance Commissioner of Texas and founder of the National Insurance Consumers Organization, (NICO), is a nationally respected advocate of no-fault systems that provide unlimited benefits. He described "no frills" no-fault legislation offering $15,000 in no-fault benefits as "a poor trade-off for consumers and a catastrophe for the seriously injured." Letter from J. Robert Hunter, President, NICO, to the Honorable Bill Lockyer, Chair, California Senate Judiciary Committee 3-4 (May 28, 1991) (on file with author).

HYPERLINK \l Document2zzFN_B72 [FN72]. Many no-fault proposals explicitly deprive policyholders of traditional state consumer protection laws that permit insurers to be sued and face heavy penalties should they fail to settle claims in good faith. For example, Senate Resolution 625, the federal "choice" no-fault legislation, abolishes the ability of juries to punish an insurance company with a punitive damage award for failure to pay claims in good faith. S.Res. 625, 105th Cong. ß 5(b)(4)(B)(i) (1997). Since insurers have an inherent financial incentive to deny claims, the threat of a financial penalty is often the only leverage a policyholder can wield to force an insurance company to comply with its legal obligations. While no-fault proposals often contain provisions requiring insurance companies to pay claims promptly or face interest penalties, this is an illusory protection. See id. The proposals typically allow an insurance company to refuse to pay benefits that are in "reasonable dispute," with the insurance company authorized to determine in the first instance whether a dispute is "reasonable." Id. ß 5(b)(4)(B).

HYPERLINK \l Document2zzFN_B73 [FN73]. Of course, under some "pure" no-fault proposals, motorists would be prohibited from recourse to the courts once no-fault benefits expire, even if the claimant is left with unpaid economic losses. Note that such proposals would force the most seriously injured to seek recourse to taxpayer-subsidized programs, such as welfare.

HYPERLINK \l Document2zzFN_B74 [FN74]. A study of auto accident litigation in Michigan determined that 22% (241) of the 1119 reported cases concerned the bodily injury threshold requirement, where the question was whether the claimant's injuries were serious enough to permit a suit against a negligent third party. See George T. Sinas, No-Fault: A Perspective From Michigan, June 30, 1990, at 15 (unpublished study, on file with author). Referencing New York's similar "serious and permanent" verbal threshold for recovery of pain and suffering in assessing no-fault legislation in California, three insurance industry actuaries noted that

> [t]his area of the law remains very unsettled in New York and there appears to be a reluctance on the part of the judiciary to deny claimants access to the courts.... We have no reason to believe that the situation would be any different in California ... we anticipate that there will be a great deal of litigation over this issue alone.

McGrath et al., supra note 64, at 30.

HYPERLINK \l Document2zzFN_B75 [FN75]. This is reflected in Michigan lawsuit filings. During the period 1977-89, of the 1119 appellate opinions in Michigan addressing no-fault, 73% (826) were first party cases in which insureds were suing their own insurance company to obtain no-fault benefits. See Sinas, supra note 74.

A Michigan lawmaker told Maine legislators considering no fault legislation to beware of the argument that no-fault would reduce the number of lawsuits:

> What we did not count on when we enacted our no-fault legislation was a drastic increase in first-party litigation. You are seeking to enact no-fault legislation to contain costs, to provide prompt and adequate coverage and to reduce the need for litigation. Auto no-fault does not result in a reduction of litigation. The number of first party auto no-fault lawsuits filed in Michigan is nearly three times as great as the number of third party suits. Most of our insureds who file suits find themselves not suing a liable negligent driver [the third party], but, rather, suing their own insurer for their own first party benefits. This has resulted in driving up administrative costs and has considerably lengthened the time it takes for insureds to receive benefits. Auto no-fault does not reduce the number of suits filed or the cost of litigation.

Auto Insurance Reform: Hearing on S.140 Before the House Comm. on Econ. Dev. and Energy, Educ., Ins. and Labor (undated statement of Michigan Representative Nelson W. Saunders) (on file with author).

HYPERLINK \l Document2zzFN_B76 [FN76]. Norman K. Risjord, Does No-Fault Reduce Litigation, INS. COUNS. J., Jan. 1986, at 389, 392.

HYPERLINK \l Document2zzFN_B77 [FN77]. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TABLE NO. 1001, STATISTICAL ABSTRACT OF THE UNITED STATES 606 (1992).

HYPERLINK \l Document2zzFN_B78 [FN78]. Michigan, Illinois, and Ohio, like California, were so-called "open competition" states. JEFFREY A. EISENACH, FEDERAL TRADE COMM'N, THE ROLE OF COLLECTIVE PRICING IN AUTO INSURANCE (1985).

HYPERLINK \l Document2zzFN_B79 [FN79]. See, e.g., HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1643&FindType=L" Cal.Ins.Code ß 1643 (West 1947) (prohibiting sale of insurance by banks), repealed by Proposition 103, ß 7 (West 1988).

HYPERLINK \l Document2zzFN_B80 [FN80]. See McBride-Grunsky Insurance Regulatory Act, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1850&FindType=L" Cal.Ins.Code ß ß 1850-HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1860.3&FindType=L" 1860.3 (West 1947), provisions repealed by Proposition 103, ß 7 (West 1988).

HYPERLINK \l Document2zzFN_B81 [FN81]. A complete copy of the text of Proposition 103 as enacted by California voters on November 8, 1988, appears in the Appendix at the end of this Article.

HYPERLINK \l Document2zzFN_B82 [FN82]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" Cal.Ins.Code ß 1861.01 (West 1998).

HYPERLINK \l Document2zzFN_B83 [FN83]. Supra note 33.

HYPERLINK \l Document2zzFN_B84 [FN84]. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" Cal.Ins.Code ß 1861.01(b) (West 1998).

HYPERLINK \l Document2zzFN_B85 [FN85]. On November 10, 1988, the California Supreme Court granted the requests of numerous insurance companies and trade associations to stay the initiative in its entirety. SeeHYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&ReferencePositionType=S&SerialNum=1989068049&ReferencePosition=1250" Calfarm Ins. Co. v. Deukmejian, 771 P.2d 1247, 1250 (Cal.1989). On December 7, 1988, the court vacated the stay except as to the provisions (1) requiring a rate reduction to 20% below 1987 rates and (2) requiring insurers to enclose in their bills an insert notifying insureds of the opportunity to join a nonprofit corporation to advocate their interests pursuant to HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.10&FindType=L" section 1861.10(c) of the California Insurance Code. See id. For a discussion of HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.10&FindType=L" section 1861.10(c) of the California Insurance Code, see infra note 131 and accompanying text.

HYPERLINK \l Document2zzFN_B86 [FN86]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&ReferencePositionType=S&SerialNum=1989068049&ReferencePosition=1251" Calfarm, 771 P.2d. at 1251-52. "The risk that the rate set by the statute is confiscatory as to some insurers from its inception is high enough to require an adequate method for obtaining individualized relief." HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1989068049" Id. at 1255.

HYPERLINK \l Document2zzFN_B87 [FN87]. See Kenneth Reich, 443 Insurers Seek Rollback Exemptions, L.A. TIMES, June 27, 1989, ß I, at 3.

HYPERLINK \l Document2zzFN_B88 [FN88]. See, e.g., HYPERLINK "http://www.westlaw.com/Find/Default.wl?

rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1928125861&ReferencePosition=446" Aetna Ins. Co. v. Hyde 275 U.S. 440, 446-47 (1928); HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=583&FindType=Y&ReferencePositionType=S&SerialNum=1975103663&ReferencePosition=627" Troy Hills Village v. Township Council, 68 N.J. 604, 627 (1975).

HYPERLINK \l Document2zzFN_B89 [FN89]. FINDINGS AND DETERMINATIONS OF THE INS. COMM'R, STATE OF CAL., FILE NO. RCD-1, IN THE MATTER OF DETERMINATION OF EXPOSURE BASIS, RESERVE-STRENGTHENING, EXECUTIVE COMPENSATION, AND EFFICIENCY STANDARDS FOR 1989 RATE CALCULATIONSSSSS (Aug. 14, 1991); see also FINDINGS AND DETERMINATIONS OF THE INS. COMM'R, STATE OF CAL., FILE NO. RCD-2, IN THE MATTER OF DETERMINATION OF RATE OF RETURN, LEVERAGE FACTOR, AND PROJECTED YIELD FOR 1989 RATE CALCULATIONS (Aug. 14, 1991).

HYPERLINK \l Document2zzFN_B90 [FN90]. See Twentieth Century Ins. Co. v. Garamendi, 878 P.2d (Cal.1994), cert. denied sub nom. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1995026634" Century-National Ins. Co. v. Quackenbush, 513 U.S. 1153 (1995), and HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1995052227" State Farm Mut. Auto. Ins. Co. v. Quackenbush, 513 U.S. 1153 (1995).

HYPERLINK \l Document2zzFN_B91 [FN91]. See California Dep't of Ins., Garamendi Orders 28 Insurance Companies to Pay $1.2 Billion in Proposition 103 Rollbacks (Nov. 22, 1994) (news release) (on file with author); CALIFORNIA DEP'T OF INS., RATE SPECIALIST BUREAU, PROPOSITION 103 ROLLBACK SETTLEMENT STATUS REPORT (1996); CALIFORNIA DEP'T OF INS., STIPULATION AND CONSENT ORDERS OF DECEMBER 23, 1994.

HYPERLINK \l Document2zzFN_B92 [FN92]. The companies, in order of their 1996 market share, are: Farmers Insurance, California State Automobile Association, Allstate Insurance Group, Auto Club of Southern California, Twentieth Century Insurance Company, Mercury General Group, United States Automobile Association, Safeco Insurance Companies, and California Casualty. See In re Rate Rollback Liability of State Farm Group, File No. REB-5184 (Dep't Ins. Admin.Law Bureau 1995) (proposed decision) (on file with author). The state's largest insurer, State Farm, challenged its rollback obligation. An administrative law judge ruled that State Farm owed no rollback refund, largely on the grounds that its expense data was justified and reasonable. See id. The Insurance Commissioner rejected the proposed decision. See Decision and Order of the Commissioner (Apr. 5, 1996) (on file with author). State Farm appealed the Commissioner's decision to the superior court, which reversed. See State Farm Ins. Group v. Quackenbush, No. 977832 (S.F.Super.Ct.1997). The Commissioner is now appealing the Superior Court's decision.

HYPERLINK \l Document2zzFN_B93 [FN93]. A 1986 study by the U.S. General Accounting Office concluded that insurance rates were higher in states without such prior approval systems. See U.S. GEN. ACCOUNTING OFFICE, supra note 5.

HYPERLINK \l Document2zzFN_B94 [FN94]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.05&FindType=L" Cal.Ins.Code ß 1861.05 (West 1998).

HYPERLINK \l Document2zzFN_B95 [FN95]. Id.

HYPERLINK \l Document2zzFN_B96 [FN96]. Under an effective regulatory regime, efficiency is rewarded with higher profits; inefficiency is rewarded with a lower rate of return. The normative standards by which insurer profits, expenses, surpluses, reserves, accounting practices, and other behavior are to be measured are based upon the regulations developed for the rollback exemption hearings.

HYPERLINK \l Document2zzFN_B97 [FN97]. For a discussion of the loss prevention responsibilities of insurance companies, see Ralph Nader, Loss Prevention and the Insurance Function, 21 SUFFOLK U.L.REV. 679 (1987).

HYPERLINK \l Document2zzFN_B98 [FN98]. Quackenbush, then a member of the California Assembly, urged voters to defeat Proposition 103 in a campaign mailer attributed to "Republican Leadership for Insurance Reform," but mailed to voters by Californians Against Unfair Rate Increases, a group sponsored by independent agents and insurers. See Letter from Republican Leadership for Insurance Reform to Republican Voters (Oct. 7, 1988) (on file with author).

HYPERLINK \l Document2zzFN_B99 [FN99]. The record profit levels in California are well documented. In 1996, the average return on net worth for insurance companies selling private passenger auto insurance was 60% higher in California than in the United States as a whole. See NATIONAL ASS'N OF INS. COMM'RS, REPORT ON PROFITABILITY BY LINE BY STATE 36, 41 (1996). Consumer advocates have asked California Commissioner Quackenbush to exercise his authority under HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.05&FindType=L" section 1861.05(a) of the California Insurance Code to order appropriate rate reductions. See CONSUMERS UNION, PETITION

FOR INVESTIGATION TO DETERMINE WHICH PRIVATE PASSENGER AUTO INSURANCE RATES IN CALIFORNIA ARE EXCESSIVE AND TO REDUCE RATES PURSUANT TO CCR SECTION 2644.1 (1996). However, the Insurance Commissioner rejected this and similar requests by consumer organizations to take such enforcement action or even to promulgate the regulations needed to do so. See CONSUMERS UNION, PETITION FOR RULEMAKING ADOPTING GENERIC DETERMINATIONS TO APPLY TO RATE APPLICATIONS PURSUANT TO CCR SECTION 2646.3 AND ADMINISTRATIVE PROCEDURES ACT SECTION 11340.6 (1996); CALIFORNIA DEP'T OF INS., ANALYSIS OF CONSUMERS UNION EXCESS PROFITS PETITION PRIVATE PASSENGER AUTOMOBILE INSURANCE (1996) (denying petition). A group of California policyholders has sued the largest insurance companies in the state demanding return of an estimated $1.6 billion in excessive premiums charged in violation of Proposition 103. See Walker v. State Farm Ins. Group, No. 991395 (S.F.Super.Ct.1997).

HYPERLINK \l Document2zzFN_B100 [FN100]. See McBride-Grunsky Insurance Regulatory Act, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1850&FindType=L" Cal.Ins.Code ß ß 1850-HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1860.3&FindType=L" 1860.3 (West 1947), provisions repealed by Proposition 103, ß 7 (West 1988).

HYPERLINK \l Document2zzFN_B101 [FN101]. See McCarran-Ferguson Act, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1011&FindType=L" 15 U.S.C. ß ß 1011-HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1015&FindType=L" 1015 (1994).

HYPERLINK \l Document2zzFN_B102 [FN102]. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.03&FindType=L" Cal.Ins.Code ß 1861.03 (West 1993). Proposition 103, however, permits insurers to exchange certain historical data, as opposed to projections, about claims. This enables insurers--particularly new or small carriers--to obtain information that will assist them in developing their own projections and prices. All such information must also be provided to the Insurance Commissioner and to the public. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.03&FindType=L" Cal.Ins.Code ß 1861.03(b) (West 1993). The initiative further permits insurers to continue to participate in special joint pooling arrangements to make insurance more available to certain kinds of customers, such as daycare centers and automobile drivers, as long as they are established by the Insurance Commissioner or by law. See id. A series of legislative modifications, at the behest of insurers, concluded in 1996 with an enactment that purported to permit insurance advisory organizations to resume distribution among insurers of data on projected losses for price-setting purposes. See id. ß 1855.5. Under Proposition 103 section 8(b), such amendments are prohibited. SeeHYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1995245681" Amwest Surety Ins. Co. v. Wilson, 906 P.2d 1112 (Cal.1995). No challenge to the amendment has yet been filed.

HYPERLINK \l Document2zzFN_B103 [FN103]. See BUREAU OF CONSUMER POTECTION & BUREAU OF ECON., FEDERAL TRADE COMM'N, LIFE INSURANCE COST DISCLOSURE 86-87 (1979).

HYPERLINK \l Document2zzFN_B104 [FN104]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS750.1&FindType=L" Cal.Ins.Code ß 750.1 (West 1993), repealed by Proposition 103, ß 7 (West 1998).

HYPERLINK \l Document2zzFN_B105 [FN105]. U.S. DEP'T OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE: A REPORT OF THE U.S. DEPARTMENT OF JUSTICE TO THE TASK GROUP ON ANTITRUST IMMUNITIES 302 (1977).

HYPERLINK \l Document2zzFN_B106 [FN106]. In 1994, an administrative law judge ruled that it did not violate the antitrust laws for an insurance company to terminate an insurance broker who engaged in such competition, so long as the company's action was not the product of pressure from other brokers. See In re Prudential Ins. Co., OAH Nos. L-60175, L-60174, L-60173, L-60172, L-60171, Case Nos. UPA 0053-AP, UPA 0054-AP, UPA 0055-AP, UPA 0056-AP, UPA 0057-AP (Cal. Dep't of Ins. 1993).

HYPERLINK \l Document2zzFN_B107 [FN107]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1643&FindType=L" Cal.Ins.Code ß 1643 (West 1993), repealed by Proposition 103, ß 7 (West 1998). California's antitrust and consumer protection laws, applicable to the business of insurance pursuant to HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.03&FindType=L" section 1861.03 of the California Insurance Code, ensure that financial institutions do not attempt to coercively tie the sale of insurance to other financial products or services they provide--a frequent argument against permitting competition from banks.

HYPERLINK \l Document2zzFN_B108 [FN108]. See NATIONAL INS. CONSUMER ORG., supra note 33, at Part ii.

HYPERLINK \l Document2zzFN_B109 [FN109]. See, e.g., HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=226&FindType=Y&SerialNum=1991148235" Sanford v. Garamendi, 233 Cal.App.3d 1109 (1991).

HYPERLINK \l Document2zzFN_B110 [FN110]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.12&FindType=L" Cal.Ins.Code ß 1861.12 (West 1988).

HYPERLINK \l Document2zzFN_B111 [FN111]. See CALIFORNIA PUB. INTEREST RESEARCH GROUP, PICK A PRICE, ANY PRICE, A REPORT ON INCONSISTENT PRICE QUOTING OF AUTOMOBILE INSURANCE (1987).

HYPERLINK \l Document2zzFN_B112 [FN112]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.04&FindType=L" Cal.Ins.Code ß 1861.04(a) (West 1988).

HYPERLINK \l Document2zzFN_B113 [FN113]. Several private firms have entered the California marketplace to provide similar information, though with limited scope and at a significant cost. See Consumer Access to Multiple Competitive Rates Grows Through Insweb Deal With Consumers Car Club, AUTO INS.REP., Dec. 1, 1997, at 8; Progressive Offers California Auto Rate Comparisons, UNDERWRITERS' REP., Nov. 27, 1997, at 12.

HYPERLINK \l Document2zzFN_B114 [FN114]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" Cal.Ins.Code ß 1861.02(a) (West 1988). The Commissioner can approve additional rating factors but only pursuant to a formal rulemaking process and only if they "have a substantial relationship to the risk of loss." Id. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" ß 1861.02(a)(4); see Consumers Union v. Quackenbush (Southern Cal. Auto Club), No. 982191 (S.F.Super.Ct.1997); Proposition 103 Enforcement Project v. Quackenbush (Safeco Insurance Co.), No. 982646 (S.F.Super.Ct.1997). Such additional factors must be shown by statistical analysis to hold predictive power once the first three "mandatory" factors are applied to determine the majority of the premium. Additional factors approved by the commissioner will have relatively little impact on premiums, as the initiative requires that all optional factors combined cannot collectively outweigh the three mandatory factors in determining a motorist's premium. See generally HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" Cal.Ins.Code ß 1861.02(a) (West 1988).

HYPERLINK \l Document2zzFN_B115 [FN115]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" Cal.Ins.Code ß 1861.02(b) (West 1988).

[FN115]. NATIONAL INS. CONSUMER ORG., INSURANCE IN CALIFORNIA: A 1986 STATUS REPORT FOR THE ASSEMBLY ß IV, at 14-16 (1986). The NICO report's recommendations are reflected in HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" section 1861.02 of the California Insurance Code.

HYPERLINK \l Document2zzFN_B116 [FN116]. See NATIONAL INS. CONSUMER ORG., INSURANCE IN CALIFORNIA: A 1986 STATUS REPORT FOR THE ASSEMBLY ß IV, at 14-16 (1986).

HYPERLINK \l Document2zzFN_B117 [FN117]. See id.

HYPERLINK \l Document2zzFN_B119 [FN119]. See Allstate Ins. Co. v. Gillespie, No. B050439, 1992 Cal.App. LEXIS 194, at *1 (Cal.Ct.App. Feb. 20, 1992), modifying, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=226&FindType=Y&SerialNum=1990168918" 225 Cal.App.3d 798 (1990).

HYPERLINK \l Document2zzFN_B120 [FN120]. See OFFICE OF POLICY RESEARCH, CALIFORNIA DEP'T OF INS., IMPACT ANALYSIS OF WEIGHTING AUTO RATING FACTORS TO COMPLY WITH PROPOSITION 103 (1994). The study found that, contrary to the industry's predictions, eliminating territory as the primary determinant of premiums would not result in substantial premium increases for good drivers. See id. at 4.

HYPERLINK \l Document2zzFN_B121 [FN121]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000937&DocName=10CAADCS2632.1&FindType=L" Cal.Code Regs. tit. 10, ß 2632.1 (1997).

HYPERLINK \l Document2zzFN_B122 [FN122]. Virtually all insurance companies in the state were found to be misinterpreting the regulations in order to continue to base premiums on territory, in violation of Proposition 103. See Kenneth Reich, Loophole Seen Gutting New Car Insurance Plan, L.A. TIMES, Oct. 4, 1997, at A1. An industry trade journal noted that Insurance Commissioner Quackenbush had improperly approved the rating plans: "[T]he commissioner has been misleading the public and the media by proclaiming that under his new rules territory is no longer the dominant factor in setting auto insurance rates." California Class Plan Ruling Should Be in Quackenbush's Hands; What Will He Do? AUTO INS.REP., Nov. 17, 1997, at 1,

3.

HYPERLINK \l Document2zzFN_B123 [FN123]. See Proposition 103 Enforcement Project v. Quackenbush and Spanish Speaking Citizens' Found., Inc. v. Quackenbush, consolidated case No. 796071-6 (Alameda Super.Ct. filed Mar. 25, 1998).

HYPERLINK \l Document2zzFN_B124 [FN124]. See, e.g., CALIFORNIA COUNCIL OF URBAN LEAGUES ET AL., BROKEN PROMISES: THE THIRTY-THIRD INSURANCE COMMISSIONER'S RECORD ON REDLINING AND MINORITIES (1990); Consumer Credit and Insurance: Hearing Before the House Subcomm. on Consumer Credit and Ins., 103rd Cong. (1993) (statement of Honorable John Garamendi, Insurance Commissioner, State of California); INSURANCE AVAILABILITY AND AFFORDABILITY TASK FORCE, NATIONAL ASS'N OF INS. COMM'RS, URBAN INSURANCE PROBLEMS AND SOLUTIONS: INTERIM REPORT (1994).

HYPERLINK \l Document2zzFN_B125 [FN125]. See KHALID AL-FARIS, CALIFORNIA DEP'T OF INS., SELLING AND SERVICING LEVELS OF PRIVATE PASSENGER AUTO LIABILITY IN URBAN CITIES (1993).

HYPERLINK \l Document2zzFN_B126 [FN126]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" Cal.Ins.Code ß 1861.02(b)(1) (West 1998).

HYPERLINK \l Document2zzFN_B127 [FN127]. See id. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" ß 1861.02(b)(3)(C)(c).

HYPERLINK \l Document2zzFN_B128 [FN128]. See Vlae Kershner, Agents Say Insurers Forcing Them to Skirt Prop. 103, S.F. CHRON., Feb. 5, 1990, at A1; Scott Ard, Farmers Sued for Denying Coverage, THE DAILY REV. (Alameda County, Cal.), Mar. 3, 1990, at 1; Vlae Kershner & David A. Sylvester, Survey Shows Biggest Insurers Sidestep 103, S.F. CHRON., Feb. 8, 1990, at A1.

HYPERLINK \l Document2zzFN_B129 [FN129]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.03&FindType=L" Cal.Ins.Code ß 1861.03(c) (West 1993). The California Supreme Court has ruled that this provision does not prevent an insurance company from terminating its policyholders as part of a plan to cease doing business in the state. SeeHYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=233&FindType=Y&SerialNum=1990030121" Travelers Indem. Co. v. Gillespie, 50 Cal.3d 82 (1990). Indeed, Proposition 103 contained a specific provision intended to protect California policyholders against a boycott or market withdrawal by insurance companies. Under HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.11&FindType=L" section 1861.11 of the California Insurance Code, the Insurance Commissioner is empowered to establish a "joint underwriting authority" in which all insurance companies selling any form of insurance in California must participate to provide coverage in the event of a shortage in any specific line of insurance. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.11&FindType=L" Cal.Ins.Code ß 1861.11 (West 1993).

Immediately after the passage of Proposition 103, most insurers in the state ceased selling new policies to exert pressure upon the California Supreme Court to rule favorably on the industry's request for an immediate stay of the ballot measure. The state Attorney General subsequently found the boycott to be a violation of the antitrust laws made applicable by the measure, although he declined to prosecute. See E. Scott Reckard, Insurers' Pullout Blamed on Conspiracy, THE ORANGE COUNTY REG., Jan. 3, 1991, at A3. Despite repeated threats that many insurers would leave the state if Proposition 103 became law, no major auto insurance company closed its California operations after the passage of Proposition 103. See Jay Angoff, Editorial, Quit California? Don't Bet on It, L.A. TIMES, Dec. 1, 1988, at ß II, at 7. Indeed, one analysis concluded that more insurance companies had applied to do business in California since the passage of Proposition 103 (85) than withdrew (3), or had requested permission to withdraw, as of July, 1990 (25). The three companies that withdrew were: Allegiance Life, Teachers Insurance, and Travelers (which withdrew from eight other states simultaneously). See L.P. Baldocchi, The Post-103 Competitive Climate in California, UNDERWRITERS' REP., July 26, 1990, at 1.

HYPERLINK \l Document2zzFN_B130 [FN130]. Dan Noyes, Center for Investigative Reporting, "Sorry We Could Not Be of More Help": How the California Department of Insurance Regulates a Trillion Dollar Industry 39 (1986); Walter L. Updegrave, How the Insurance Industry Collects an Extra $65 Billion a Year From You By Stacking the Deck, Money Mag., Aug. 1, 1996, at 50.

HYPERLINK \l Document2zzFN_B131 [FN131]. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.10&FindType=L" Cal.Ins.Code ß 1861.10(a) (West 1993). However, in HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4040&FindType=Y&SerialNum=1992071748" Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377 (1992), the California Supreme Court substantially limited immediate recourse to the courts. In a lawsuit brought by the state's Attorney General against an insurer under California's Unfair Competition Act, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CABPS17200&FindType=L" Cal.Bus. &

Prof.Code ß 17200 (West 1996) for violating the anti-redlining provision of Proposition 103 HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.02&FindType=L" Cal. Ins.Code ß 1861.02(b) (West 1988), the court ruled that in matters involving regulation of rates, the courts should first defer to the administrative expertise of the regulatory agency. The court's opinion imported a primary jurisdiction requirement that did not previously reside within the Unfair Practices Act. Concerns that the courts are ill-equipped to handle the complexities of insurance rate matters plainly motivated the decision. Presumably, the proposition's explicit purpose of permitting recourse to the courts in the event that a recalcitrant Insurance Commissioner fails to enforce the law would not be barred by the Farmers decision in cases when recourse to the administrative agency is futile.

HYPERLINK \l Document2zzFN_B132 [FN132]. Section 1861.1(b) of the California Insurance Code was loosely modeled upon a similar consumer representation system in effect at the California Public Utilities Commission. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAPUS1801&FindType=L" Cal.Pub.Util.Code ß 1801 (West 1994).

HYPERLINK \l Document2zzFN_B133 [FN133]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS12979&FindType=L" Cal.Ins.Code ß 12979 (West 1998).

HYPERLINK \l Document2zzFN_B134 [FN134]. An additional device to guarantee effective consumer representation was struck from the measure by the California Supreme Court. See id. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.10&FindType=L" ß 1861.10(c). Insurance consumers were to be given the opportunity to establish and join a democratically created and controlled advocacy organization. A staff of advocates, funded by voluntary contributions and grants, would represent consumers on insurance matters before the Insurance Commissioner, the courts, and the state legislature. In order to enable the advocacy organization to obtain the support of consumers, insurers were to be required to enclose special notices within their premium bills, informing their customers of the opportunity to participate in the program. (Insurers would be reimbursed by the organization for any additional expenses caused by insertion of the notice.) However, the California Supreme Court excised this provision of Proposition 103, ruling that HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.10&FindType=L" section 1861.10(c) violated HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CACNART2S12&FindType=L" Article II, Section 12 of the California Constitution, which prohibits an initiative from "naming or identifying" a private corporation. HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=233&FindType=Y&ReferencePositionType=S&SerialNum=1989068049&ReferencePosition=832" Calfarm Ins. Co. v. Deukmejian, 48 Cal.3d 805, 832 (1989). A subsequent effort in the California Legislature to create such an advocacy group was blocked by insurance industry lobbyists.

HYPERLINK \l Document2zzFN_B135 [FN135]. It is the absence of professional representation that can be troublesome for insurers: a vacuum is created that is often filled by individual citizens, with little or no resources and little training. These individuals have a more difficult time participating in proceedings effectively, and the proceedings themselves are forced to move more slowly in order to accommodate the individuals.

HYPERLINK \l Document2zzFN_B136 [FN136]. See CALIFORNIA DEP'T OF INS., INTERVENOR PROGRAM (visited July 1997) < http://www.insurance.ca.gov/docs/ldconsum.htmp>.

HYPERLINK \l Document2zzFN_B137 [FN137]. See NATIONAL ASS'N OF INS. COMM'RS, 1995 INSURANCE DEPARTMENT RESOURCES REPORT 2, at tbl. 1 (1996); High Turnover In Regulators Ranks, PIA/CIIG Study, INS. J., May 14, 1990, at 12 (reporting that 37% of Insurance Commissioners were employed in the insurance industry before taking office).

HYPERLINK \l Document2zzFN_B138 [FN138]. See AUDITOR GEN. OF CAL., THE DEPARTMENT OF INSURANCE NEEDS TO FURTHER IMPROVE AND INCREASE ITS REGULATORY EFFORTS (1987); NOYES, supra note 130, at 39; ROBERT SHIREMAN, CONSUMERS UNION, BARK BUT NO BITE: TOOTHLESS REGULATION BY THE DEPARTMENT OF INSURANCE HAS LEFT CALIFORNIA CONSUMERS UNPROTECTED (1987).

HYPERLINK \l Document2zzFN_B139 [FN139]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS12900&FindType=L" Cal.Ins.Code ß 12900 (West 1997) (enacted by Proposition 103, ß 4).

HYPERLINK \l Document2zzFN_B140 [FN140]. See NATIONAL ASS'N OF INS. COMM'RS, supra note 137.

HYPERLINK \l Document2zzFN_B141 [FN141]. See Susan Briggs, U.S. Drops Indictment of Mississippi Commissioner, BEST WK., Aug. **29**, 1994, at 3; L.H. Otis, Delaware Funding of Regulator Questioned, NAT'L UNDERWRITER, Nov. 11, 1996, at **1**.

HYPERLINK \l Document2zzFN_B142 [FN142]. Republican Assembly Member Chuck Quackenbush defeated the Democratic candidate by 49% to 43%. See CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE, GENERAL ELECTION (1994). Insurance companies and agents donated $2.5 million to his campaign, approximately 70% of his total campaign receipts, according to campaign disclosure statements on file at the Office of the Secretary of State of California. Mr. Quackenbush never made public appearances; his campaign emphasized a law enforcement platform. See Richard Rambeck, What Criteria Do Voters Use in Electing Commissioners? INS. WK., Nov. 11, 1996, at 30. Commissioner Quackenbush has fueled controversy and continuing criticism from consumer advocates for favoring insurance industry positions. See, e.g., Ann Bancroft, Insurance Commissioner Cost Public $221 Million, Group Says, DAILY NEWS (Los Angeles), Feb. 9, 1995, at 7; Nick Budnick, If It Quacks ... When Big Insurance Talks, Chuck Quackenbush Listens, SACRAMENTO NEWS & REV., Sept. 12, 1996, at 18; Carolyn T. Geer & Ashlea Ebling, A Quack In The China Shop, FORBES, Oct. 20, 1997, at 89; Mark Gladstone, Quackenbush Accused of Delaying Probe of Donor, L.A. TIMES, Sept. 26, 1996, at A3; Editorial, Insurance Commissioner Should Avoid Conflicts, S.F. CHRON., Mar. 7, 1997, at A26; Editorial, Insurers Are Finding a Friend in Quackenbush, L.A. TIMES, Aug. 2, 1996, at B8; Editorial, The Insurers' Commissioner, S.F. CHRON., May 24, 1996, at A26; Thomas S. Mulligan, Quackenbush, Consumer Group Trade Jabs, L.A. TIMES, Feb. 9, 1995, at D2; Russ Nichols, Quackenbush: Bought, Paid For, DAILY COM. (Los Angeles), Mar. 31, 1995, at 1; Editorial, Quackenbush Ducks, SACRAMENTO BEE, July 11, 1995, at B6; Editorial, Quackenbush vs. The Press, SACRAMENTO BEE, Jan. 22, 1997, at B6; James P. Sweeney, Foe Claims Quackenbush Strongly Favors Insurers, SAN DIEGO UNION-TRIB., Feb. 8, 1995, at A3.

HYPERLINK \l Document2zzFN_B143 [FN143]. See, e.g., McBride-Grunsky Insurance Regulatory Act, HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1850&FindType=L" Cal.Ins.Code ß ß 1850-HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1860.3&FindType=L" 1860.3 (West 1947), provisions repealed by Proposition 103, ß 7 (West 1988).

HYPERLINK \l Document2zzFN_B144 [FN144]. See HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.03&FindType=L" Cal.Ins.Code ß 1861.03(a) (West 1993).

HYPERLINK \l Document2zzFN_B145 [FN145]. NATIONAL ASS'N OF INS. COMM'RS, supra note 52. One caveat regarding the 1995 NAIC data should be noted. Shortly after the publication of the 1995 NAIC report in January, 1997, consumer advocates determined that some 1995 California premium data had been omitted from the report and notified the NAIC. Though unaware of the problem, NAIC officials subsequently confirmed this discovery and stated that the California Department of Insurance had failed to provide the NAIC with complete data. The NAIC has stated that it will attempt to correct the omission in future reports. Therefore, the 1995 data presented here should be considered preliminary.

HYPERLINK \l Document2zzFN_B146 [FN146]. See supra note 33 and accompanying text.

HYPERLINK \l Document2zzFN_B147 [FN147]. See supra Part III.A. Because the rate freeze continued through most of Commissioner Garamendi's entire term, as insurers pursued their legal challenge to his regulations, he did not promulgate provisions of the regulatory formula needed to govern rate change requests under HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.05&FindType=L" section 1861.05 of the California Insurance Code. The California Supreme Court upheld the regulations five months before he left office. See Twentieth HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4040&FindType=Y&SerialNum=1994171956" Century Ins. Co. v. Garamendi, 8 Cal. 4th 216 (1994).

HYPERLINK \l Document2zzFN_B148 [FN148]. The estimate is based on the methodology utilized by NICO. NICO utilized "combined average premium" data from the NAIC. See NATIONAL INS. CONSUMER ORG., supra note 33, at 18.

The insurance industry has claimed that the economic recession, not Proposition 103, was responsible for holding premiums down in California during Commissioner Garamendi's tenure. Since the recession affected the entire nation, it cannot explain why the average liability premium in California remained stable during a period when it grew by 32% for the rest of the nation. Insurers have argued that increased unemployment in California and fewer motor vehicles on the road are responsible. Unemployment statistics show, however, that of the ten states with the highest unemployment rates in the nation between 1990 and 1993, nine had an average increase in their premiums of 27.6% during that period. California is the tenth state. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992 (1994). Similarly, there were more vehicles on the road in California in 1993 than in previous years, and the total mileage driven in California rose between 1990 and 1993. See NATIONAL ASS'N OF INS. COMM'RS, supra note 52.

HYPERLINK \l Document2zzFN_B149 [FN149]. See supra note 52.

HYPERLINK \l Document2zzFN_B150 [FN150]. See NATIONAL ASS'N OF INS. COMM'RS, REPORT ON PROFITABILITY BY LINE BY STATE IN 1995 (1996).

HYPERLINK \l Document2zzFN_B151 [FN151]. One of the areas in which the impact of Proposition 103 has been most obvious is in the efforts by insurance companies to fight fraud. Two years after Proposition 103 passed, the Los Angeles District Attorney noted that, "until coming under pressure to lower rates under Proposition 103, [insurance] carriers simply settled claims and passed the cost to consumers in the form of higher premiums. 'That has begun to change,' he said. 'Insurance companies are getting serious about fraud.' " Lois Timnick, 51 to Face Charges in Auto Insurance Fraud Roundup, L.A. TIMES, Oct. 18, 1990, at B4. Heightened scrutiny of claims by insurers is at least partly responsible for the 48% reduction between 1989 and 1994 in lawsuits for personal injury auto accidents filed in California Superior Courts. See JUDICIAL COUNCIL OF CAL., 1996 ANNUAL REPORT 109. Industry observers have noted the industry's cost-cutting mentality and attributed it to insurance industry reform. See, e.g., Richard Yingling, Rebuilding Crumbling Loyalties, BEST'S REV., Sept. 1, 1990, at 57, 59. "[L]ow expense ratios [are] a common factor among many of [the] auto insurers that posted underwriting profits. They have avoided expense-hungry products, outsourced functions or eliminated the middle man from their operations." Auto Insurers Dominate List of Top Combined-Ratio Results, BEST WK., Feb. 7, 1994, at P/C1, P/C2. The impact of Proposition 103 on the behavior of the insurance industry has extended beyond California. As the U.S. economy entered a recession in the early 1990s--accompanied by a drop in investment income to which the industry would normally respond with premium increases--industry officials warned each other to avoid the destabilizing premium gyrations of the mid-1980s. As one insurance executive explained, "The last soft market was driven purely by the need for cash to invest.... We all know we can't do the dumb things we did last time.... We will not see a repeat of 1985-86." Mark A. Hofmann & Christine Woolsey, Marketplace Not What It Used To Be: Insurers, BUS. INS., July 13, 1992, at 55. Another executive has observed: "I don't think you'll see a 1985-1986 repeat. There are too many regulatory restraints put in place to preclude it. A lot of regulations addressed our own stupidity. We made the bed and now we have to lie in it." Mark A. Hofmann & Christine Woolsey, Insurers Say Expectation of Price Turn Pushed Back, BUS. INS., Jan. 10, 1994, at 1, 14. And a senior official with the Insurance Services Office, an industry trade group, warned:

> As an industry, nothing will disrupt our relations with customers faster--not to mention regulators and public-policy makers--than an abrupt recovery from our current underwriting down cycle.... Remember the fallout from the last recovery: California's Proposition 103 and other price-suppression laws, threats to the industry on the antitrust front, and virulent consumer hostility.

Not Like 1985's: ISO Official Predicts Next Upturn in Cycle to be Gradual, INS. WK., Oct. 19, 1992, at 15, 15.

HYPERLINK \l Document2zzFN_B152 [FN152]. In a recent poll of California voters' confidence in thirty-four institutional entities, insurance companies scored the lowest. Six times as many people reported that they had "not much," rather than "a lot" of confidence in insurers. See MARK DICAMILLO & MERVIN FIELD, THE FIELD INST., ONLY A FEW OF SOCIETY'S INSTITUTIONS ENGENDER A LOT OF PUBLIC CONFIDENCE (1997).

HYPERLINK \l Document2zzFN_B153 [FN153]. See Texas Commissioner Bomer Fires First Shot in National Rate Cut War, AUTO INS. REP., Mar. 16, 1998, at 1, 2. In California's 1998 gubernatorial campaign, Democratic primary candidate Al Checci called for a 10% rate rollback based on the excessive profits achieved by California auto insurers. See id.

HYPERLINK \l Document2zzFN_B154 [FN154]. See supra Part I.C.

HYPERLINK \l Document2zzFN_B155 [FN155]. For example, the proponents of the pure no-fault initiative defeated by California voters in 1996 based their entire campaign on an anti-lawyer theme. See Hallye Jordan, Limits Sought for Fees, Lawsuits: Lawyer-Bashing Advocates Hope to Convince Voters, SAN JOSE MERCURY NEWS, Mar. 21, 1996, at A1.

HYPERLINK \l Document2zzFN_B156 [FN156]. See DICAMILLO & FIELD, supra note 152 (placing the legal profession in second to last place, just ahead of insurance companies).

HYPERLINK \l Document2zzFN_B157 [FN157]. For example, the New York-based Manhattan Institute has published numerous proposals to restrict the right of consumers to seek judicial recourse under state tort laws. It is one of a number of non-profit organizations which, through the sponsorship of academicians, has sought to portray its work as scholarly and non-partisan. Senior fellow Michael Horowitz was an early leading advocate of "choice" no-fault. See Michael Horowitz, Editorial, Let Drivers Tailor Auto Insurance ..., N.Y. TIMES, Mar. 21, 1993, at F11. The Institute is supported by large corporations that actively promote "tort reform," including such insurance firms as State Farm, Aetna, Cigna, Metropolitan Life, Safeco, and Travelers Insurance. See MANHATTAN INST., JUDICIAL STUDIES PROGRAM MISSION STATEMENT AND OVERVIEW (1992). A fundraising solicitation by the Institute was unusually explicit in stating the benefits to corporate donors of its advocacy of tort "reform": "We feel confident that any funds made available to the Judicial Studies Program will yield a tremendous return at this point--perhaps the highest 'return on investment' available in the philanthropic field today." Letter from William M. Hammett, President of Manhattan Institute (Nov. 1992) (corporate solicitation letter accompanying JUDICIAL STUDIES PROGRAM MISSION STATEMENT AND OVERVIEW) (on file with author).

Campaign disclosure reports reveal that University of Virginia Professor Jeffrey O'Connell was paid at least $67,000 by the insurance industry in 1988 to tour California in opposition to Proposition 103 and in support of Proposition 104, the insurance

industry-sponsored "no-fault" initiative. See Campaign Disclosure Statement, Schedule E, Citizens for No-Fault, Sponsored by California Insurers (July 23, 1988-Sept. 30, 1988) (Oct. 1, 1988-Oct. 22, 1988) (on file with author).

HYPERLINK \l Document2zzFN_B158 [FN158]. For example, Professor O'Connell has urged the application of "no-fault" to medical negligence. See O'Connell Devises New No-Fault Plan, NAT'L UNDERWRITER, Aug. 24, 1979, at 4. Manhattan Institute staff have advocated statutory limits on the size of the contingency fee injured plaintiffs may pay a lawyer to represent them. See Peter Passell, Contingency Fees in Injury Cases Under Attack by Legal Scholars, N.Y. TIMES, Feb. 11, 1994, at 1. In addition, Manhattan Institute staff blamed the nation's health care crisis on lawsuits. See Jeffrey O'Connell & Michael Horowitz, The Lawyer Will See You Now: Health Reform's Tort Crisis, WASH. POST, June 13, 1993, at C3. Similarly, financial consultant Andrew Tobias, a supporter of no-fault legislation, authored a paper that argued that the legal system, rather than the insurance system, was responsible for massive increases in the cost of medical malpractice insurance. See Andrew Tobias, Treating Malpractice: Report of the Twentieth Century Fund Task Force on Medical Malpractice Insurance, PRIORITY PRESS PUBLICATIONS (1986).

HYPERLINK \l Document2zzFN_B159 [FN159]. After the passage of Proposition 103, the insurance industry's California political consultant wrote a confidential memorandum urging the industry to find ways to co-opt grass-roots consumer and minority organizations in order to successfully promote no-fault. This would be necessary, he argued, because, "[w]ithout consumer credibility, reform concepts are easily discredited as special interest pocket-lining by the Industry.... The Insurance Industry desperately needs the credibility of third parties to endorse and advance efforts to control insurance costs in California." CLINTON REILLY CAMPAIGNS, AGENDA 1989: THE LESSONS OF THE 1988 INSURANCE CAMPAIGN 3 (1988).

HYPERLINK \l Document2zzFN_B160 [FN160]. See supra note 48. As of this writing (October, 1998), congressional leaders were seeking to schedule House and Senate floor votes on "choice" no-fault legislation.

HYPERLINK \l Document2zzFN_B161 [FN161]. While State Farm and several other large auto insurers support the legislation, other insurance trade associations have stated their opposition, fearing that federal preemption of state auto insurance laws would inevitably be followed by demands for federal regulation of the insurance industry, which insurers have sought to avoid, so far successfully, since the McCarran-Ferguson Act. See supra notes 100-01.

HYPERLINK \l Document2zzFN_B162 [FN162]. Peter Passell, Rep. Armey to Offer Bill Aimed at Cutting Auto Insurance Costs, N.Y. TIMES, June 18, 1997, at D1. The legislation calls for unprecedented federal preemption of state tort, insurance, and regulatory laws. Preemption is automatic, unless one of two events intervenes:

(1) The appropriate insurance regulator in each state issues a general finding, based on evidence adduced at a public hearing, that the measure will not reduce the "average" premium by 30% for those choosing no-fault. See S.625, 105th Cong. ß 8(b)(1)(A) (1997). Senate Bill 625, however, requires the regulator to compare the cost of liability, medical payment, and uninsured and underinsured motorist coverages in the pre-no-fault marketplace against only the cost of no-fault coverage after no-fault takes effect. S.625 ß 8(b)(2). Thus, it makes it all but certain that the 30% finding will be reached. Insurance companies and pro-industry state regulators will have no trouble providing the actuarial "studies" needed to support such a general finding. Moreover, the industry is given the right to challenge an adverse finding in court. See S.625 ß 8(b)(1).

(2) The state's legislature passes a law affirmatively rejecting the imposition of no-fault. See S.625 ß 8(a). This simply pits the politically-powerful insurance lobby in each state against opponents of no-fault, who have the burden of mustering legislative action. It is not too difficult to determine how that battle would turn out in most states. While the proponents of the legislation have portrayed it as mandating a 30% rate cut, the negative "finding" upon which federal preemption may be avoided is in no way such a mandate. No provision of the legislation requires a reduction of auto insurance rates or premiums.

In any case, many state regulators do not have either the authority or resources to effectively review premiums. While Senate Bill 625 overrides state tort laws governing the protection of consumers, it provides no authority for state regulators to order refunds, or to lower rates, even if such reductions could be justified. Nor does Senate Bill 625 prevent insurance companies from increasing rates prior to its effective date or subsequently raising premiums after reducing them. Finally, assuming state regulators had the authority and inclination to order a substantial rollback, across the board rate reductions are subject to legal challenges by insurance companies, and no insurance company can be forced to reduce its rates if such action would deprive it of a fair return. SeeHYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=233&FindType=Y&ReferencePositionType=S&SerialNum=1989068049&ReferencePosition=816" Calfarm Ins. Co. v. Deukmejian, 48 Cal.3d 805, 816 (1989). Because Senate Bill 625 provides no empirical basis for the 30% figure, any such reduction, if ordered, would be vulnerable to constitutional attack by the insurers as "arbitrary" and "irrational." Another fatal defect may be the process by which insurers can seek relief from the reduction. If the state statutes that the federal legislation says are to govern the rollback process do not contain the constitutionally-required due process hearing protections, the courts will strike down the rollback. SeeHYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&SerialNum=1990138624" Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508 (9th Cir.1990) (distinguishing Proposition 103's due process protections).

Finally, the legislation's cost-shifting mechanism transfers responsibility for coverage from private insurance companies to

public programs. Accident victims must first turn to other programs for payment. Victims of catastrophic accidents would be forced to rely on taxpayer-funded welfare and health care programs to foot the bill for medical and rehabilitation expenses and wage loss before auto insurance coverage applies. Senate Bill 625 requires a victim's auto insurance benefits to be reduced by the amount of benefits obtained by such persons from workers' compensation insurance, state-mandated disability insurance, social security disability insurance, or any similar federal or state law providing disability benefits. S.625 ß 5(b)(3).

HYPERLINK \l Document2zzFN_B163 [FN163]. Heritage Foundation Conference Panel on Tort Reform 8 (Mar. 19, 1996) (Wash., D.C.) (transcript of recording, on file with author).

HYPERLINK \l Document2zzFN_B164 [FN164]. Id. at 5.

HYPERLINK \l Document2zzFN_B165 [FN165]. Id. at 7-8.

HYPERLINK \l Document2zzFN_B166 [FN166]. Id. at 19. Norquist also pointed out the strategic significance of no-fault's alleged cost savings: "[I]t paints everybody on the other side as the hostage to special interests, the trial lawyers not a particularly popular special interest at the expense of the general interest, at the expense of the average American." Id. at 7.

HYPERLINK \l Document2zzFN_B167 [FN167]. In their recent publications, Professor O'Connell and most other no-fault proponents rest their claims concerning no-fault's purported cost savings on a series of computerized projections made by the RAND Corporation. See, e.g., O'CONNELL, supra note 47. The RAND study was based upon an elaborate computer simulation and made numerous questionable assumptions about human behavior in order to conduct its investigation. See STEPHEN J. CARROLL, RAND INSTITUTE FOR CIVIL JUSTICE, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS 4019 (1991). The RAND analyses are themselves based upon extrapolations from a study, by an insurance industry trade association, of claims closed by thirty-four insurance companies over a two-week period in 1987. Using closed claim studies to estimate insurance costs is flawed since smaller claims are over-represented and larger, more expensive claims are under-represented in such studies, especially during periods when the average size of a claim is growing. This is a particularly serious defect in the RAND report, since no-fault's benefit system may increase the amount paid out for higher claims. Since RAND's data already inflates the proportion of small claims, the net result is significant under-estimates of no-fault's likely cost. Moreover, the industry data reflected subjective estimates by insurance adjusters of future medical and other bills that might be submitted by the claimant in the future. Insurers routinely inflate such estimates for financial and tax purposes. Moreover, RAND's analyses assume that in any given state, individual behavior will remain the same regardless of whether the system is changed to no-fault. This is highly suspect; the availability of first party payments may encourage injured people to file claims who do not presently do so, perhaps from fear of insurance rate increases. Indeed, the fact that thresholds of all kinds gradually fail to limit litigation suggests that behavior within no-fault systems itself changes over time. For a critique of RAND's methodology and conclusions concerning "choice" no-fault, see AIS Risk Consultants, Inc., Analysis of RAND Report: The Effects of a Choice Automobile Insurance Plan Under Consideration by the Joint Economic Committee of the United States Congress (1997) (unpublished study, on file with author).

HYPERLINK \l Document2zzFN_B168 [FN168]. See supra note 56 and accompanying text. As no-fault advocates, Keeton and O'Connell acknowledged, in their initial discussion of no-fault three decades ago, that "[p]roposals to eliminate completely the common law action for negligence arising out of automobile accidents are perhaps doomed to founder as unable to muster the necessary widespread political support." KEETON & O'CONNELL, supra note 9, at 164.

***128** APPENDIX

Complete Text of Proposition 103 as Enacted by California Voters on November 8, 1988

INSURANCE RATE REDUCTION AND REFORM ACT

SECTION 1. FINDINGS AND DECLARATION.

The People of California find and declare as follows:

Enormous increases in the cost of insurance have made it both unaffordable and unavailable to millions of Californians.

The existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates.

Therefore, the People of California declare that insurance reform is necessary. First, property-casualty insurance rates shall

be immediately rolled back to what they were on November 8, 1987, and reduced no less than an additional 20%. Second, automobile insurance rates shall be determined primarily by a driver's safety record and mileage driven. Third, insurance rates shall be maintained at fair levels by requiring insurers to justify all future increases. Finally, the state Insurance Commissioner shall be elected. Insurance companies shall pay a fee to cover the costs of administering these new laws so that this reform will cost taxpayers nothing.

SECTION 2. PURPOSE.

The purpose of this chapter is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace, to provide for an accountable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians.

SECTION 3. REDUCTION AND CONTROL OF INSURANCE RATES.

Article 10, commencing with HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" Section 1861.01 is added to Chapter 9 of Part 2 of Division 1 of the Insurance Code to read:

Insurance Rate Rollback

1861.01. (a) For any coverage for a policy for automobile and any other form of insurance subject to this chapter issued or renewed on ***129** or after November 8, 1988, every insurer shall reduce its charges to levels which are at least 20% less than the charges for the same coverage which were in effect on November 8, 1987.

(b) Between November 8, 1988, and November 8, 1989, rates and premiums reduced pursuant to subdivision (a) may be only increased if the commissioner finds, after a hearing, that an insurer is substantially threatened with insolvency.

(c) Commencing November 8, 1989, insurance rates subject to this chapter must be approved by the commissioner prior to their use.

(d) For those who apply for an automobile insurance policy for the first time on or after November 8, 1988, the rate shall be 20% less than the rate which was in effect on November 8, 1987, for similarly situated risks.

(e) Any separate affiliate of an insurer, established on or after November 8, 1987, shall be subject to the provisions of this section and shall reduce its charges to levels which are at least 20% less than the insurer's charges in effect on that date.

Automobile Rates & Good Driver Discount Plan

1861.02. (a) Rates and premiums for an automobile insurance policy, as described in subdivision (a) of Section 660, shall be determined by application of the following factors in decreasing order of importance:

(1) The insured's driving safety record.

(2) The number of miles he or she drives annually.

(3) The number of years of driving experience the insured has had.

(4) Such other factors as the commissioner may adopt by regulation that have a substantial relationship to the risk of loss. The regulations shall set forth the respective weight to be given each factor in determining automobile rates and premiums. Notwithstanding any other provision of law, the use of any criterion without such approval shall constitute unfair discrimination.

(b)(1) Every person who (A) has been licensed to drive a motor vehicle for the previous three years and (B) has had, during that ***130** period, not more than one conviction for a moving violation which has not eventually been dismissed shall be qualified to purchase a Good Driver Discount policy from the insurer of his or her choice. An insurer shall not refuse to offer and sell a Good Driver Discount policy to any person who meets the standards of this subdivision. (2) The rate charged for a Good Driver Discount policy shall comply with subdivision (a) and shall be at least 20% below the rate the insured would otherwise have been charged for the same coverage. Rates for Good Driver Discount policies shall be approved pursuant to this article.

(c) The absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability.

(d) This section shall become operative on November 8, 1989. The commissioner shall adopt regulations implementing this section and insurers may submit applications pursuant to this article which comply with such regulations prior to that date, provided that no such application shall be approved prior to that date.

Prohibition on Unfair Insurance Practices

1861.03. (a) The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (Civil Code Sections 51 through 53), and the antitrust and unfair business practices laws (Parts 2 and 3, commencing with section 16600 of Division 7, of the Business and Professions Code).

(b) Nothing in this section shall be construed to prohibit (1) any agreement to collect, compile and disseminate historical data on paid claims or reserves for reported claims, provided such data is contemporaneously transmitted to the commissioner, or (2) participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.

(c) Notwithstanding any other provision of law, a notice of cancellation or non-renewal of a policy for automobile insurance shall be ***131** effective only if it is based on one or more of the following reasons: (1) non-payment of premium; (2) fraud or material misrepresentation affecting the policy or insured; (3) a substantial increase in the hazard insured against.

Full Disclosure of Insurance Information

1861.04. (a) Upon request, and for a reasonable fee to cover costs, the commissioner shall provide consumers with a comparison of the rate in effect for each personal line of insurance for every insurer.

Approval of Insurance Rates

1861.05. (a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter. In considering whether a rate is excessive, inadequate or unfairly discriminatory, no consideration shall be given to the degree of competition and the commissioner shall consider whether the rate mathematically reflects the insurance company's investment income.

(b) Every insurer which desires to change any rate shall file a complete rate application with the commissioner. A complete rate application shall include all data referred to in Sections 1857.7, 1857.9, 1857.15, and 1864 and such other information as the commissioner may require. The applicant shall have the burden of proving that the requested rate change is justified and meets the requirements of this article.

(c) The commissioner shall notify the public of any application by an insurer for a rate change. The application shall be deemed approved sixty days after public notice unless (1) a consumer or his or her representative requests a hearing within forty-five days of public notice and the commissioner grants the hearing, or determines not to grant the hearing and issues written findings in support of that decision, or (2) the commissioner on his or her own motion determines to hold a hearing, or (3) the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in which case the commissioner must hold a hearing upon a timely request.

***132** 1861.06. Public notice required by this article shall be made through distribution to the news media and to any member of the public who requests placement on a mailing list for that purpose.

1861.07. All information provided to the commissioner pursuant to this article shall be available for public inspection, and the provisions of Section 6254(d) of the Government Code and Section 1857.9 of the Insurance Code shall not apply thereto.

1861.08. Hearings shall be conducted pursuant to Sections 11500 through 11528 of the Government Code, except that: (a) hearings shall be conducted by administrative law judges for purposes of Sections 11512 and 11517, chosen under Section 11502 or appointed by the commissioner; (b) hearings are commenced by a filing of a Notice in lieu of Sections 11503 and 11504; (c) the commissioner shall adopt, amend or reject a decision only under Section 11517(c) and (e) and solely on the basis of the record; (d) Section 11513.5 shall apply to the commissioner; (e) discovery shall be liberally construed and disputes determined by the administrative law judge.

1861.09. Judicial review shall be in accordance with Section 1858.6. For purposes of judicial review, a decision to hold a hearing is not a final order or decision; however, a decision not to hold a hearing is final.

Consumer Participation

1861.10. (a) Any person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.

(b) The commissioner or a court shall award reasonable advocacy and witness fees and expenses to any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a substantial contribution to the adoption of any order, regulation or decision by the commissioner or a court. Where such advocacy occurs in response to a rate application, the award shall be paid by the applicant.

***133** (c)(1) The commissioner shall require every insurer to enclose notices in every policy or renewal premium bill informing policy-holders of the opportunity to join an independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum. This organization shall be established by an interim board of public members designated by the commissioner and operated by individuals who are democratically elected from its membership. The corporation shall proportionately reimburse insurers for any additional costs incurred by insertion of the enclosure, except no postage shall be charged for any enclosure weighing less than 1/3 of an ounce. (2) The commissioner shall by regulation determine the content of the enclosures and other procedures necessary for implementation of this provision. The legislature shall make no appropriation for this subdivision.

Emergency Authority

1861.11. In the event that the commissioner finds that (a) insurers have substantially withdrawn from any insurance market covered by this article, including insurance described by Section 660, and (b) a market assistance plan would not be sufficient to make insurance available, the commissioner shall establish a joint underwriting authority in the manner set forth by Section 11891, without the prior creation of a market assistance plan.

Group Insurance Plans

1861.12. Any insurer may issue any insurance coverage on a group plan, without restriction as to the purpose of the group, occupation or type of group. Group insurance rates shall not be considered to be unfairly discriminatory, if they are averaged broadly among persons insured under the group plan.

Application

1861.13. This article shall apply to all insurance on risks or on operations in this state, except those listed in Section 1851.

Enforcement & Penalties

1861.14. Violations of this article shall be subject to the penalties set forth in Section 1859.1. In addition to the other penalties provided in this chapter, the commissioner may suspend or revoke, in whole ***134** or in part, the certificate of authority of any insurer which fails to comply with the provisions of this article.

SECTION 4. ELECTED COMMISSIONER

HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS12900&FindType=L" Section 12900 is added to the Insurance Code to read:

(a) The commissioner shall be elected by the People in the same time, place and manner and for the same term as the Governor.

SECTION 5. INSURANCE COMPANY FILING FEES

HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS12979&FindType=L" Section 12979 is added to the Insurance Code to read:

Notwithstanding the provisions of Section 12978, the commissioner shall establish a schedule of filing fees to be paid by insurers to cover any administrative or operational costs arising from the provisions of Article 10 (commencing with HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CAINS1861.01&FindType=L" Section 1861.01) of Chapter 9 of Part 2 of Division 1.

SECTION 6. TRANSITIONAL ADJUSTMENT OF GROSS PREMIUMS TAX

Section 12202.1 is added to the Revenue & Taxation Code to read:

Notwithstanding the rate specified by Section 12202, the gross premiums tax rate paid by insurers for any premiums collected between November 8, 1988 and January 1, 1991 shall be adjusted by the Board of Equalization in January of each year so that the gross premium tax revenues collected for each prior calendar year shall be sufficient to compensate for changes in such revenues, if any, including changes in anticipated revenues, arising from this act. In calculating the necessary adjustment, the Board of Equalization shall consider the growth in premiums in the most recent three year period, and the impact of general economic factors including, but not limited to, the inflation and interest rates.

SECTION 7. REPEAL OF EXISTING LAW

Sections 1643, 1850, 1850.1, 1850.2, 1850.3, 1852, 1853, 1853.6, 1853.7, 1857.5, 12900, Article 3 (commencing with Section 1854) of Chapter 9 of Part 2 of Division 1, and Article 5 (commencing with Section 750) of Chapter 1 of Part 2 of Division 1, of the Insurance Code are repealed.

***135** SECTION 8. TECHNICAL MATTERS

(a) This act shall be liberally construed and applied in order to fully promote its underlying purposes.

(b) The provisions of this act shall not be amended by the Legislature except to further its purposes by a statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electorate.

(c) If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

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