South Carolina Law Review

Volume 27 | Issue 5 Article 5

3-1976

The South Carolina Automobile Reparation Reform Act (Part II): Compulsory Insurance--A Synopsis and Appraisal

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NOTE

THE SOUTH CAROLINA AUTOMOBILE REPARATION REFORM ACT (PART II): COMPULSORY INSURANCE—A SYNOPSIS AND APPRAISAL

I. INTRODUCTION

Hazards facing today's motorist force upon him casualty counts unmatched by those of even the most fierce of wartime battles. Statistics from the National Safety Council show that during 1974, 46,200 persons died in traffic accidents while 1.8 million suffered disabling injuries.[1] Total costs resulting from the accident toll climbed to $20.2 billion.[2] Estimates for the first quarter of 1975 indicate that the staggering trend will continue, despite reduced speed limits occasioned by fuel energy conservation efforts. Traffic deaths for the first 3 months reached 9,460, disabling injuries were estimated at about 350,000, and accident costs ran to slightly over $3.4 billion.[3]

The figures readily amplify the fact that one of the most critical socio-economic and legal problems facing modern society

1. Recht, *1974 the Year of the Big Turnaround*, TRAFFIC SAFETY, March, 1975, at 17.

2. *Id.* In its annual report the South Carolina Highway Department stated that during 1974, 76,986 accidents occurred on the highways of South Carolina resulting in 873 fatalities, 18,863 injuries, and an economic loss of $180,000,000. SOUTH CAROLINA TRAFFIC ACCIDENTS, 1974.

3. Recht, *March Deaths Go Up 2 Per Cent*, TRAFFIC SAFETY, June, 1975, at 28.

is that of compensating victims of automobile accidents. In the past, various methods have been employed to provide protection for traffic victims. However, the continued presence of the financially irresponsible motorist has prevented a total solution from being reached. Moreover, the gravity of the problem confronting society is acutely recognized when one considers that, although in 1964 there were over 87 million registered motor vehicles and approximately 95 million licensed drivers it has been estimated that in 1974 there were about 135 million vehicles and about 126 million drivers on the highways of the United States.[4]

In 1972, the South Carolina General Assembly by concurrent resolution established a special committee to study the automobile insurance system in South Carolina and to recommend a legislative program of automobile insurance reform.[5] Recognizing that the problems inherent in the South Carolina system were far-reaching and interrelated,[6] the Committee undertook extensive, first-hand investigation into the insurance programs of states having problems similar to those of South Carolina. Although the Committee introduced a bill during the closing weeks of the 1973 session, passage of the bill was not gained until the summer of 1974.[7] The Automobile Reparation Reform Act not

4. NATIONAL SAFETY COUNCIL, TRAFFIC ACCIDENT FACTS (1974 Digest), at 2.

5. Concurrent Resolution S-674, 99th Gen. Assembly of S.C., 2d Sess. (1972).

6. As the Committee was soon to learn, the problem with automobile insurance in South Carolina wasn't simply the problem of the Assigned Risk Plan or even whether or not to adopt no-fault insurance. There were also problems of the complete availability of automobile insurance to the South Carolina motorist; the problem of the uninsured motorist and the habitual offender; the problem of automobile insurance premium rates. Every issue was like a tentacle growing out from a key issue—automobile insurance.

COMMITTEE TO MAKE A STUDY AND INVESTIGATION OF AUTOMOBILE INSURANCE PLANS INCLUDING THE NO-FAULT AUTOMOBILE INSURANCE SYSTEM, 99TH GEN. ASSEMBLY OF S.C., 2d SESS., SECOND REPORT at 1 (Comm. Print 1974) [hereinafter cited as SECOND REPORT]. As one authority has noted:

> The primary areas of most serious concern to the insureds are generally stated to be:
>
> 1. Difficulties of some individuals or groups in obtaining insurance, cancellations, or non-renewals of policies, and other manifestations of a "tight" or selective insurance market.
>
> 2. Rising premium rates, which some critics claim are approaching "prohibitive" levels, for a product generally regarded as a social necessity.
>
> 3. Inequities and unreasonable delays in compensation of accident victims, together with court congestion, high legal costs, and related problems attendant upon litigation of negligent liability cases.

J. INS. INFORMATION, Jan.-Feb., 1968, at 19.

7. No. 1177, [1974] S.C. Acts & Jt. Res. 2718.

only mandated first party economic loss coverage and established compulsory insurance, but also abolished the state's assigned risk plan and substituted a reinsurance facility to provide insurance for the residual market.

The purpose of this note is twofold. First, the need for compulsory insurance in South Carolina will be examined from the perspective of the failure of earlier insurance systems to adequately compensate the victims of automobile accidents. Second, the provisions of the Automobile Reparation Reform Act will be analyzed with emphasis on the alterations which the Act necessitated in the prior systems and on South Carolina's new approach to the problem of the residual market. Subsidiary provisions to be discussed include those for the undesirable insured, family immunity, consumer protection, and the recently promulgated rate structure, including the merit-rating system.

II. FINANCIAL RESPONSIBILITY LAWS

As early as 1925, the state of Connecticut, in recognition of the problem posed by the financially irresponsible driver, enacted the first "safety responsibility law."[8] By the year of the Columbia Report in 1932,[9] 18 states had followed suit.[10] Presently, all 50 states and the District of Columbia have some form of financial responsibility statute.[11]

8. CONN. PUBLIC ACT ch. 183 (1925). Financial responsibility laws were designed originally not only to assure compensation to victims of accidents but also to aid in accident prevention; hence, they were frequently referred to as "safety-responsibility laws." Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 305 & n.17 (1950) [hereinafter cited as Grad].

9. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, (Columbia University Council for Research in the Social Sciences 1932).

> The study showed that there was little chance of recovery from any but insured motorists and brought out the hardships to the injured person and his dependents resulting both from his not collecting damages and from the delays and costs of recovery. It indicated the burden cast on public and private relief by injuries for which no damages were paid. The study covered the various plans then existing to improve the situation, through financial responsibility laws and through the then recent Massachusetts Compulsory Insurance Law, and included a statistical study of the effects of the Massachusetts law and of the various financial responsibility laws then in effect.

Grad, *supra* note 8, at 300.

10. Grad, *supra* note 8, at 307.

11. Note, *A Survey of Financial Responsibility Laws and Compensation of Traffic Victims: A Proposal for Reform*, 21 VAND. L. REV. 1050 (1968) [hereinafter cited as 21 VAND. L. REV.].

These early responsibility laws, which were known as "proof-type" statutes, required a motorist who failed to satisfy a judgment resulting from an accident or who was convicted of a serious driving violation to file proof of his financial ability to pay judgments arising from future accidents or, in default of such proof, to suffer the revocation of his license and suspension of his automobile registration.[12] Promoted vigorously by the insurance industry, these statutes were designed not only to provide compensation to accident victims but also to promote accident prevention.[13] Assuming that there existed a bad class of drivers who would be isolated by allowing each member to have one accident, advocates of these laws maintained that their enactment would decrease the number of accidents by eliminating the bad driver, increase the proportion of insured vehicles and drivers, and cause the payment of more accident claims.[14]

Upon implementation of these laws, however, their inherent inadequacies became apparent and considerable criticism ensued.[15] An obvious deficiency was the fact that the victim of the

12. R. Hayes, *Are the Financial Responsibility Laws in Need of Revision?—Two Recent Supreme Court Cases May Indicate Such a Result*, 38 INS. COUNSEL J. 617, 618 (1971) [hereinafter cited as Hayes].

13. W. Aberg, *Effects of and Problems from Financial Responsibility Laws*, 1943 INS. LAW J., at 72.

14. 21 VAND. L. REV., *supra* note 11, at 1051.

15. As one authority put it:

> Although financial responsibility legislation had been on trial for no more than seven years when the Columbia Report was published, its weaknesses had become so readily apparent that later writers have not added substantially to the criticisms offered by the Columbia Committee. It found that, even assuming an habitually careless class of drivers to exist, financial responsibility laws as then constituted were not effective in segregating it; there was no evidence that such legislation did operate to compel careless drivers to insure, nor did it cause any general voluntary increase in the carrying of liability insurance. Where motorists actually came under compulsion of the law, administrative weaknesses in the legislation would frequently render it ineffective, for many such drivers would fail to surrender registration plates and license cards, or would continue to operate vehicles in violation of the law. This situation was found particularly acute where the driver was not the owner, and hence could not be compelled to insure the vehicle. Furthermore, since a motorist who had had an accident could always elect to leave the highway, financial responsibility laws carried no guarantee that a victim would recover a judgment or that such a judgment would be satisfied. The "first" accident victim was left especially unprotected. Finally, the Committee found that one of the main purposes of the law was completely unfulfilled, for there was no evidence of a decrease in the number of accidents or of any relationship whatsoever between the number of accidents and the number of license revocations or suspensions.

Grad, *supra* note 8, at 306.

uninsured motorist's first accident was usually left without a remedy. Since the statute operated only to require the uninsured motorist to prove his ability to pay damages resulting from future accidents, the driver was allowed "one free bite." It was "of little solace to the injured victim to know that the negligent driver who was responsible would have to insure for the protection of future victims."[16] A further serious shortcoming was the failure of the provisions of these "proof-type" statutes to take effect until a judgment had actually been rendered and left unsatisfied. "Most accident victims assayed the financial position of their injuries before bringing suit, and few were willing to go to the time and expense of suing a defendant who appeared judgment-proof."[17] Furthermore, the administrative provisions of the laws impeded enforcement. The effectiveness of the laws depended on accurate accident reporting by the injured party who, upon finding himself with no remedy, felt little incentive to file the report with the highway department.[18] Thus, the victim of an uninsured motorist's first accident generally made little effort to enforce what he viewed as a hollow statute, and as a result, the very driver at whom the new acts were aimed often went untouched by its sanctions.[19]

In response to the weaknesses of the postjudgment financial

16. 21 VAND. L. REV., *supra* note 11, at 1052.

17. Comment, *Financial Responsibility Law in Constitutional Perspective*, 61 CAL. L. REV. 1072, 1074 (1973) [hereinafter cited as 61 CAL. L. REV.].

18. 21 VAND. L. REV., *supra* note 11, at 1052.

> Administrative weaknesses rendered these laws ineffective even within their own limits. Accurate accident reporting, on which financial responsibility laws depend, has nowhere been fully achieved since reporting of accidents is largely a matter of private initiative by injured parties and becomes a pressure device to secure the payment of judgments. But where there are no assets or insurance to satisfy an eventual judgment, or where a settlement has been made, the private incentive to report the accident is lacking, and even motorists who were clearly at fault are never forced to insure. Moreover, these laws frequently contain liberal provisions for installment payments on judgments so that the possibility of license revocation is substantially reduced. Other inherent difficulties include lack of coordination between the courts and the motor vehicle commissioner, leaving it to the insured party to file the record of conviction or adverse judgment with the commissioner. Where proof of financial responsibility is actually given, the possibility of policy cancellation or lapse presents a serious problem and requires the close attention of the motor vehicle commissioner if the provisions for surrender of licenses and registrations are to be adequately enforced.

Grad, *supra* note 8, at 306-07.

19. 61 CAL. L. REV., *supra* note 17, at 1074.

responsibility remedies, the state of New Hampshire in 1937 enacted a more stringent type of financial responsibility statute which virtually, if not literally, mandated liability insurance.[20] This statute, and others patterned after it, was called a "security-type" statute, because it required a driver who was involved in an accident resulting in personal injury and property damage exceeding a minimum statutory amount, to deposit security,[21] thereby demonstrating his ability to pay a *potential* judgment arising out of *that* accident. Most jurisdictions which have enacted similar statutes do not initially require proof of *future* financial responsibility on the basis of the mere involvement in an accident. However, if the motorist is convicted of a serious traffic violation or the injured party chooses to sue the defendant and obtain a judgment, he then must not only satisfy the past judgment but also must give proof of his financial responsibility for a specified length of time, ranging from 1 year to an indefinite period.[22]

Patterned closely after New Hampshire's statute, the South Carolina Safety Responsibility Act does not affect South Carolina motorists until they are involved "in an accident resulting in injury to or death of any person or total property damage to an apparent extent of $100 or more . . . ."[23] Unlike the statutes of most jurisdictions, however, the law in South Carolina requires the motorist not only to deposit security but also to demonstrate his financial responsibility for the future.[24] Within 5 days after the

20. N.H. LAWS ch. 161 (1937). By 1943, similar acts were adopted by Indiana, Maine, Michigan, New York, Oregon, and Vermont. The American Automobile Association incorporated similar provisions into many of its model safety responsibility bills, and in 1944 the Uniform Vehicle Code was amended to include a security provision.

Eventually, every state in the nation, except Massachusetts, adopted a form of the prejudgment security statute. For a detailed breakdown and study of the various provisions of the different states, *see* Appendix B, R. KEETON and J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

21. Of course, no security deposit is required if the owner of the vehicle has a valid liability insurance policy at the time of the accident. Most jurisdictions require a security deposit from both the driver and the owner of the vehicle, and impose the requirement regardless of fault. However, a number of states require some preliminary finding of probable fault by the commissioner before the security requirement becomes applicable.

22. Grad, *supra* note 8, at 310. The most common period required is 3 years.

23. S.C. CODE ANN. § 46-721 (Cum. Supp. 1973).

24. Among those states requiring both a security deposit and a demonstration of financial responsibility for the future are Alaska, Arizona, Florida, Georgia, Indiana, Maine, Mississippi, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Vermont, and Washington. *See* Chart, AM. INS. ASS'N., ANALYSIS OF LAWS RELATING TO AUTOMOBILE INSURANCE (Dec., 1974).

occurrence, the driver is required to forward a written report of the accident to the Highway Department. Section 46-722 further provides that upon receipt of the accident report, the Highway Department must "within sixty days thereafter, suspend the license of each operator or driver and all registration of each owner of a motor vehicle involved in such accident" and revoke a non-resident's privilege of operating his motor vehicle in South Carolina unless:

> (a) such operator, driver or owner or both shall deposit security in a sum not less than two hundred and fifty dollars or such additional amount as the Department may specify that will be sufficient to satisfy any judgment that may be recovered for damages resulting from the accident which may be recovered against the operator or owner and
> (b) such owner and operator shall immediately give and thereafter maintain proof of financial responsibility on all motor vehicles owned or operated by them.[25]

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25. S.C. CODE ANN. § 46-722 (Cum. Supp. 1973). Although this section would provide compensation to the victim of a "first" accident and furthermore would insure payment of adequate relief in the case of a future accident, its effect is severely diminished by the exceptions created by the section following it:

> § 46-723. Same; exceptions.—Section 46-722 shall not apply to any of the following:
>
> (1) To the operator or owner if the owner had in effect at the time of the accident an automobile liability policy with respect to the motor vehicle involved in the accident;
> (2) To the operator, if not the owner of the motor vehicle, if there was in effect at the time of the accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;
> (3) To the operator or owner if the liability of the operator or owner for damages resulting from the accident is, in the judgment of the Department, covered by any other form of liability insurance policy or bond;
> (4) To any person qualifying as a self-insurer under § 46-709 of this chapter;
> (5) To the operator or owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of any one other than such owner or operator;
> (6) To the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating the motor vehicle without his permission, express or implied;
> (7) If, before the date that the Department would otherwise suspend the license and registration or non-resident's operating privilege under § 46-722 there shall be filed with the Department evidence satisfactory to it that the person who would otherwise have to file security (a) has been released from liability, (b) has been finally adjudicated not to be liable, (c) has executed a warrant for confession of judgment, payable when and in such installments as the parties have agreed to or (d) has executed a

Subsequent sections of the law specifically designate the additional events which will trigger the demonstration of the required proof. Section 46-735 provides that all courts in which a judgment is rendered and left unsatisfied for a period of 60 days must immediately forward a copy of the judgment to the Highway Department. Upon receipt, the Department is authorized to suspend the license and registration of any person against whom the judgment is rendered.[26] Section 46-744 sets forth a further circumstance requiring proof of future financial ability by providing that if the South Carolina Highway Department, under any law of the state, suspends or revokes the license of any person upon receiving a record of conviction, or a forfeiture of bail, it must also suspend the registration unless that person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by him. This registration remains suspended until he gives and maintains proof of future financial responsibility.[27]

Although "security-type" financial responsibility statutes have been consistently sustained upon constitutional grounds in the overwhelming majority of the courts,[28] their inadequacies, like

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duly acknowledged written agreement, providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident; or

(8) To the owner of any legally parked vehicle when struck by another vehicle.

Thus, if the driver falls into one of the above-stated situations, he may ignore the requirements of § 46-722.

26. S.C. CODE ANN. § 46-737 (Cum. Supp. 1973).

27. Section 46-747 provides that proof of financial responsibility may be given by (1) obtaining a certified insurance policy, (2) filing a bond, or (3) filing a certificate of deposit of money or securities.

28. In the past, the courts have concluded that enactment of the statutes is a reasonable exercise of a state's police power and thus have held that these laws do not violate: the equal protection clause, Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471 (1944), *cert. denied* 323 U.S. 806 (1944); the due process clause, Reitz v. Mealey, 314 U.S. 33 (1941), Hadden v. Aitker, 156 Neb. 215, 55 N.W.2d 620 (1952); the provision against self-incrimination, Surtman v. Secretary of State, 309 Mich. 270, 15 N.W.2d 471 (1944), *cert. denied* 323 U.S. 806 (1944); or the prohibition against imprisonment for a civil debt, Sullivan v. Butler, 175 Tenn. 468, 135 S.W.2d 930 (1940). The statutes have also been found not to constitute an improper delegation of judicial power to an administrative body, Escobedo v. State Department of Motor Vehicles, 35 Cal.2d 870, 222 P.2d 1 (1950), nor to be special legislation, Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481 (1931).

In this regard, however, two recent Supreme Court decisions indicate that the validity of the statutes may not be sustained in the future. In Bell v. Burson, 402 U.S. 535 (1971), the Court determined that Georgia's statute violated petitioner's riqht to procedural due

those of the earlier "proof-type" statutes, are clearly evident in terms of providing compensation to accident victims. While the primary purpose of these statutes is to aid the victim of the first accident, even here there is no assurance that he will be compensated for his injuries. Forcing the payment of security for the first accident does exert some pressure on the uninsured motorist, but there is no statutory provision compelling the operator or driver to secure insurance until he is actually involved in an accident.[29] The statutes tend to be remedial rather than preventive, because they operate after the fact and still allow the uninsured motorist one "free accident." Other critical weaknesses of the laws are their inherent gaps. Victims of the hit-and-run driver are left with no known tortfeasor against whom he can invoke the law. Additionally, the laws provide no remedy to those injured by an uninsured driver of a stolen vehicle or a driver who operated a vehicle without the consent of the insured, "as well as those cases where the insurer disclaims liability or denies coverage after loss."[30]

A. *Uninsured Motorist Provisions*

Although the rigorous enforcement of the "security-type" of financial responsibility laws did induce substantial majorities of the motorists in the various states to obtain insurance, the actual number of uninsured motorists continued to increase as the motoring public rapidly grew in the period following World War II.[31] As a result,

> pressures began to develop for legislation directed at compensation rather than control—that is, for the adoption of some state sponsored plan which would assure indemnification for all those

process. A week later, in Perez v. Campbell, 402 U.S. 637 (1971), the Court found that the Motor Vehicle Responsibility Act of Arizona directly conflicted with the Federal Bankruptcy Act and was, therefore, unconstitutional as violative of the Supremacy Clause. To date, no case has been brought challenging the constitutionality of the responsibility statute in South Carolina. *See*, G. PETERSON, THE FINANCIAL RESPONSIBILITY LAWS: A TIMELY REPRISAL OF A DISCRIMINATORY SCHEME 298 (1972).

An extensive study of the constitutional questions raised by financial responsibility statutes may be found in Annot., 35 A.L.R. 2d 1011 (1954).

29. However, the Acts did have a direct effect on the uninsured motorist who was unable to deposit security for the damages of his first accident, for he was required to stay off the highway until he was either exonerated by a court or satisfied all claims against him.

30. 21 VAND. L. REV., *supra* note 11, at 1057.

31. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 10 (1969) [hereinafter cited as WIDISS].

> who were injured by uninsured motorists, through the distribution of at least part of the economic cost of such injuries to the entire community of motorists.[32]

The enactment of compulsory insurance laws as well as statutes providing for the maintenance of unsatisfied judgment funds was strongly advocated.[33] Many argued in addition that the problem of the financially irresponsible driver could best be eliminated by developing a proposal that would allow compensation without regard to fault.[34]

In the early fifties, the state of New York began moving toward a system of compulsory insurance when Thomas E. Dewey, then governor of the state, announced his support for the program.[35] In an effort to forestall the enactment of compulsory insurance, a group of New York insurance companies in 1955 voluntarily instituted uninsured motorist coverage.[36] Although representatives of the insurance industry argued that the availability of the uninsured motorist provisions was sufficient to deal with the problem, the New York Legislature in 1956 enacted a compulsory insurance requirement.[37] Within two years following New York's adoption of the law, the insurance industry, determined to avoid the enactment of similar insurance systems in other states, made the new uninsured motorist protection generally available throughout the United States.[38] This approach to solving the problem of the financially irresponsible motorist was

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32. *Id.*

33. Legislation, *Compulsory Liability Automobile Insurance in New York*, 26 FORDHAM L. REV. 170 (1957); Note, *Compulsory Insurance in New York*, 8 SYRACUSE L. REV. 223 (1957); Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME L. REV. 5 (1967-8); Risjud and Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82 (1955-6).

In general, an unsatisfied judgment fund is created by sums covered by the insurance industry as an add-on cost to the registration fee. It is most frequently used in conjunction with either compulsory insurance or uninsured motorist protection in order to fill the loopholes left by their statutes. The four statutes having such funds are Maryland (MD. ANN. CODES ACT, 66 ½ §§ 7-601 to -635 (1957)); Michigan (MICH. COM. LAWS §§ 257.1101 to 1131 (Supp. 1965)); New Jersey (N.J. REV. STAT. §§ 39-6-61 to 39-6-104 (Supp. 1971)); and North Dakota (N.D. CENT. CODE §§ 39-17-01 to 39-17-10 (Supp. 1971)).

34. Note, *The South Carolina Insurance Reform Act (Part I): "No Fault" and Contributory Negligence—A Synopsis and Appraisal*, 26 S.C.L. REV. 705, 708-09 (1975).

35. WIDISS, *supra* note 31, at 11.

36. Caverly, *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, 1956 INS. LAW J. at 19, 23.

37. N.Y. VEH. & TRAFFIC LAW §§ 93 to 93-k (Supp. 1956).

38. WIDISS, *supra* note 31, at 14 & n.32.

met with rapid acceptance. In 1957, New Hampshire enacted the first mandatory uninsured motorist law,[39] and was followed within 11 years by 46 other states.[40]

Under these statutes, the coverage provided by uninsured motorist provisions becomes operative when an insured (or others named in the policy) is injured due to the use, ownership, or operation of an uninsured motor vehicle. The endorsement generally covers compensation for death, personal injury, sickness and disease within limits corresponding to the minimum requirements of the state's financial responsibility law.[41] Throughout the states, the uninsured motorist statutes tend to incorporate the same provisions.[42] Generally, they provide that no policy or contract:

> shall be issued or delivered unless it contains a provision by endorsement or otherwise, herein referred to as the uninsured motorist provision, undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . .[43]

Thus, recovery is permitted under the individual's own policy if he is legally entitled to recover damages from the uninsured motorist. By predicating one's right to compensation on the existing system of negligence, recovery depends on a finding of another's fault.[44] The claimant's rights under the endorsement do not, how-

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39. N.H. REV. STAT. ANN. § 268.1 (Also N.H. LAWS 1955, § 76.1).

40. WIDISS, *supra* note 31, at 15.

41. Such limitation on the amount of recovery has been noted as an inadequacy of uninsured motorist coverage:

> This, of course, means the purchaser who desires extensive liability protection is able to secure insurance that protects him in the event that a claim is made against him for his own negligence, but is unable to acquire from the same company uninsured motorist insurance that would afford a comparable amount of protection in the event that a family member is injured by an uninsured motorist. This has been, and continues to be, an undesirable limitation on the scope of the coverage provided by the uninsured motorist endorsement.

A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE at 1 (Supp. 1974) [hereinafter cited as WIDISS SUPPLEMENT].

42. Numerous articles have been written on uninsured motorist statutes providing extensive discussion on the scope of coverage, exclusions, defenses, and limitations upon recovery. *See, e.g.*, Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUNSEL J. 57 (1967); Graham, *The Uninsured Motorist Endorsement: Its Terms and the Developing Case Law*, 19 FED. INS. COUNSEL Q. 85 (1968); Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME L. REV. 5 (1967-8).

43. S.C. CODE ANN. § 46-750.33 (Cum. Supp. 1973).

44. Although South Carolina has adopted a modified form of "no-fault" legislation, the provisions do not abolish the plaintiff's requirement of proving the defendant's negli-

ever, rest on his securing a prior judgment against the uninsured driver, nor on a showing that the offending motorist is unable to pay. Rather, compensation under the uninsured motorist coverage is conditioned on whether the damages were caused by the uninsured motorist.

The South Carolina Uninsured Motorist Law was enacted in 1959.[45] Adopted as an amendment to the Safety Responsibility Law, the statute was substantially amended in 1963[46] and again in 1971.[47] The present statute, which for the most part was left untouched by the 1974 Automobile Reparation Reform Act, continues South Carolina's mandatory requirements of uninsured motorist coverage. Similar to other jurisdictions, the South Carolina Act provides that the insured may recover all sums to which he is legally entitled as damages from the owner or operator of an uninsured motor vehicle within the limits specified in the financial responsibility requirements. The burden of providing this

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gence. However, in those jurisdictions which have established a true "no-fault" system, one author has suggested that uninsured coverage will apply to those accidents involving the financially irresponsible where the damages exceed the coverage provided by the no-fault insurance. *See* WIDISS SUPPLEMENT, *supra* note 41, at 2.

45. No. 311, [1959] S.C. Acts & Jt. Res. 567, *amending* No. 723, [1952], S.C. Acts & Jt. Res. 1853. Amended in minor respects in 1960, No. 803, [1960] S.C. Acts & Jt. Res. 1902, the law required all insurance policies issued after January 1, 1961 to include:

> an endorsement or provision undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than [ten thousand dollars because of bodily injury to or death of one person, twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, or five thousand dollars because of injury to or destruction of property of others in any one accident.]

Additionally, the spouse, relative of either if a resident of the same household, and any passenger in the insured vehicle were covered. Losses sustained were to be paid by the insurance company carrying the policy on the insured person (or others named in the policy) involved in the accident.

The law provided for the maintenance of an uninsured motorist fund, created by the payment of $20 by all persons operating an uninsured motor vehicle in the state. The fund, which was under the supervision and control of the state insurance commissioner, was to be annually distributed, after administration costs, to the various insurance companies in proportion to the number of policies bearing the endorsement written by each company to the total number of policies for the preceding year.

While the statute forbade arbitration, the insurance companies were allowed to reserve a right of subrogation and thus subsequently proceed against the uninsured motorist to the extent of the amount paid on the loss. For a general discussion of this early law, *see* Patterson, *The South Carolina Uninsured Motorist Act*, 13 S.C.L.Q. 528 (1961).

46. No. 312, [1963] S.C. Acts & Jt. Res. 526. For an excellent article on the statute as it existed in 1963, *see* Doar and Richardson, *The South Carolina Uninsured Motorist Law*, 15 S.C.L. REV. 739 (1963).

47. No. 458, [1971] S.C. Acts & Jt. Res. 854.

coverage is placed on the insurance companies, who until 1971 were reimbursed in part from the uninsured motorist fund.[48] In that year, the General Assembly provided that an uninsured motorist premium of $3 would be charged to the purchaser by the insurer to defray the cost of providing the additional coverage.[49] Section 4(a) of the 1972 Automobile Reparation Reform Act decreased the uninsured motorist premium to $2.50, $1 of which is to be transferred to the Highway Department to provide funds for the enforcing and administering of the 1972 Automobile Reparation Reform Act. With the institution of a compulsory system of insurance and vigorous enforcement by the Highway Department, the uninsured motorist, it is hoped, will become a thing of the past. According to the Insurance Department, the $1.50 earmarked for victims of uninsured motorist accidents, should prove to be too high as fewer and fewer uninsured motorists operate on our highways.[50]

B. Assigned Risk Plans

Although the uninsured motorist provisions solved the dilemma of injuries caused by uninsured vehicles, another problem associated with financial responsibility laws became apparent. As noted earlier, such financial responsibility laws, while not absolutely requiring liability insurance, virtually, if not literally, mandated such coverage, thereby filling a social need by providing protection both for the insured and the innocent victim who might suffer bodily injury or property damage to his motor vehicle. However, as long as liability coverage was not required, insurers and insureds alike could placidly enjoy a take-it-or-leave-it attitude toward liability insurance.

It would be fair to say that as a whole the more responsible and conscientious citizens sought to insure themselves against the claims and lawsuits of others while the less responsible and

48. No. 312, [1963] S.C. Acts & Jt. Res. 526.

49. No. 458, [1971] S.C. Acts & Jt. Res. 854. Although the 1971 amendment continued the collection of uninsured motorist fees which were channeled into the uninsured motorist fund, the distribution from the fund was restricted to two purposes—defraying the administrative costs of the Highway Department and subsidizing highway safety programs as appropriated by the General Assembly.

In 1973, the General Assembly authorized the fund to also be used to implement a statewide alcohol safety action program. No. 225, [1973] S.C. Acts & Jt. Res. 260.

50. S.C. DEPT. OF INSURANCE, BULL. NO. 17-74, FIRST INTERPRETIVE BULLETIN ON S-371, at 41 (July 12, 1974) [hereinafter cited as S.C. DEPT. OF INSURANCE].

conscientious were not so inclined. With the advent of financial responsibility laws, virtually millions of heretofore uninsured risks were suddenly forced on the automobile insurance market of America. From this situation evolved the insurance industry's strategy of selectivity and the ensuing problems of availability. In essence, the larger direct writers[51] became highly selective, accepting only those risks which could be categorized as the *"creme de la creme."* This so called "creaming" or "cream skimming" process produced lower loss ratios[52] which, when combined with the direct writers' generally lower expense structures, produced significantly lower premiums for those chosen few who qualified. The remainder were left to seek "required" insurance from the "bureau" or "stock" companies,[53] which in turn were forced to increase and intensify their practices of selectivity in order to remain competitive with the direct writers. Thus, as the practice of selectivity spiraled, a sizable portion of America's drivers found themselves unable to obtain insurance in the voluntary market.

Reacting to these pressures, the insurance industry, state legislatures, and state insurance departments devised a solution which seemed appropriate at the time. Their solution, the assigned risk plan concept, was conceived and quickly enacted in all 48 states—South Carolina in 1947.[54] Under this concept, drivers who were unable to obtain coverage on the voluntary market applied under the assigned risk plan and were assigned as "undesirable" risks on a rotating basis among companies doing business in the state. Participation in the assignment system was mandatory for all insurers doing business in the state,[55] and the number

51. Direct writers are those companies whose marketing system does not include the use of separate independent agents to whom additional commissions must be paid. Instead, these companies contract with agents who write insurance policies only for the particular company with which they are associated. For example, companies such as Allstate, Nationwide, and State Farm hire their own agents who write policies only for that respective company.

52. Generally speaking, "loss ratio" indicates the comparison, expressed in a percentage, of premiums collected against losses paid.

53. Generally, "bureau" or "stock" companies are those companies who contract with independent agents for the marketing of their coverage. Many rely upon the Insurance Services Office or "the bureau" to file rates on their behalf, but in any event the rates charged by the stock companies roughly parallel each other. However, the rates charged by those companies are usually somewhat higher than those charged by direct writers.

54. S.C. CODE ANN. § 46.719 (1962). Ultimately, all 50 states enacted some form of assigned risk plan.

55. S.C. CODE ANN. § 46.719 (1962); AUTOMOBILE INSURANCE PLANS SERVICE OFFICE, SOUTH CAROLINA AUTOMOBILE INSURANCE PLAN § 24 (1972).

of assignments was based on the amount of business the insurer did in the given state.[56]

However, the second class treatment and higher rates afforded those relegated to the confines of the plans soon gave rise to cries for reform. The industry maxim that "an underwriter never gets fired for saying no" soon forced millions of "clean" risks[57] into assigned risk plans around the country. Indeed, in the early 1970's some 4 million insureds found themselves thrust into assigned risk plans, even though approximately 2.7 million were "clean" risks.[58] Paradoxically, figures indicated that 3.6 million of the 4 million assigned risk insureds had no accidents in a given year.[59]

In South Carolina abuses and discrimination reached such proportions that the assigned risk plan became a major campaign issue in the 1970 gubernatorial election. In that election, then Lt. Governor John C. West waged a vigorous campaign promising to find a reasonable substitute for South Carolina's assigned risk plan.[60] At that time, South Carolina had the dubious distinction of the second largest percentage of assigned risk plan insureds in the nation.[61] Shortly after the 1970 election, Governor West addressed a joint session of the General Assembly solely on the topic of automobile insurance and urged South Carolina solons to initiate immediate reforms.[62]

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56. *See* note 55 *supra*.

57. A "clean" risk is one who has not had an accident or committed any chargeable driving violation during the previous 3 years.

58. FEDERAL INSURANCE ADMINISTRATION, DEP'T. OF HOUSING AND URBAN DEVELOPMENT, FULL INSURANCE AVAILABILITY 2, 3 (Sept., 1974) [hereinafter cited as FULL INSURANCE AVAILABILITY].

59. *Id.* at 2.

60. Interview with John C. West, former Governor of South Carolina, June 18, 1975.

61. FULL INSURANCE AVAILABILITY, *supra* note 58, at 49-50. By the industry's own figures contained in its last assigned risk plan rate filing, 65 to 72 percent of the South Carolina drivers in the plan were "clean" risks by assigned risk plan standards. If generally accepted voluntary market standards are applied, the "clean" risk figure jumps to more than 80 percent under voluntary industry standards; an accident involving only property damages of under $200 is not counted against a driver's "clean" status. In all, roughly 20 percent of 200,000 South Carolina drivers were forced to seek liability insurance through the assigned risk plan with the "clean" risk paying up to 80 percent more than his equally clean neighbor who was fortunate enough to find insurance on the voluntary market. Further, if the assigned risk insured desired or needed physical damage coverage, as in the instance of financing his car, he was inevitably forced to seek out the high-risk, high-rate substandard or nonstandard writer, who specialized in the writing of physical damage insurance, to supply such coverage, since it was not available under the assigned risk plan.

62. Address by Governor John C. West to the South Carolina General Assembly, Feb. 18, 1971.

Responding to the Governor's call for action, the General Assembly, by joint resolution,[63] created a special joint study committee[64] comprised of senators, representatives and governor appointees. The Committee quickly launched a series of hearings and meetings and began working on drafts of legislation.[65] Following the Committee's first report,[66] legislation was introduced simultaneously in both houses.[67] The two identical bills proposed to abolish the assigned risk plan in this state and attacked virtually every phase of the problems which plagued the South Carolina automobile insurance system. Included were provisions which would establish a Maryland-type state fund in South Carolina.[68] The ensuing debate which raged both on and off the legislative floors centered primarily around the state fund provisions.

During this period, North Carolina, under the prodding of its consumer-oriented Commissioner of Insurance John Randolph Ingram, became the first state in the nation to abolish its assigned risk plan in favor of a "take all comers" provision.[69] Also during this period, Federal Insurance Administrator George K. Bernstein began urging prompt state action to adopt a program of full insurance availability.[70] Legislative leaders, having con-

63. Concurrent Resolution S-674, 99th Gen. Assembly of S.C., 2d Sess. (1972).

64. S-674 created the Joint Legislative Committee to Make a Study and Investigation of Automobile Insurance Plans Including the No-Fault Automobile Insurance System, more commonly known as the Automobile Liability Insurance Study Committee. Its members included Sen. J. Ralph Gasque, Chairman; Sen. Walter J. Bristow, Sen. John Drummond, Rep. Dolphus C. Medley, Rep. Robert W. Kemp, Rep. Robert H. Burnside, Mr. Kermit S. King, Mrs. Sue B. McElveen, and Mr. Jasper T. Hiers.

65. The Committee has held 77 meetings and made 5 trips to investigate the legislative programs enacted in other states.

66. COMMITTEE TO MAKE A STUDY AND INVESTIGATION OF AUTOMOBILE INSURANCE PLANS INCLUDING THE NO-FAULT AUTOMOBILE INSURANCE SYSTEM, 99TH GEN. ASSEMBLY OF S.C., 2d SESS., FIRST REPORT (Comm. Print 1973).

67. S.371, 100th Gen. Assembly of S.C., 1st Sess. (1973); H. 1039, 100th Gen. Assembly of S.C., 1st Sess. (1973).

68. In Maryland, a state owned and operated insurance company was established to write those risks which could not find insurance on the voluntary market. *See* MD. ANN. CODE art. 48A, § 243-243L (Supp. 1974). This system was bitterly opposed in South Carolina by all segments of the insurance industry which viewed the state fund concept as an ominous threat to the traditional enterprise system. *See* SECOND REPORT, *supra* note 6, at 3.

69. North Carolina, in enacting a system of compulsory insurance, also provided for a Reinsurance Facility. *See* N.C. GEN. STAT. § 58-248.26 *et seq.* (1975). Massachusetts and New Hampshire have followed suit. South Carolina also provided for a Reinsurance Facility in the Automobile Reparation Reform Act—the operation of the Reinsurance Facility will be discussed at a later point in this paper.

70. Full insurance availability contemplates elimination of the separate assigned risk market and the integration of all risks into a single voluntary market in which holders of

ferred at length with Commissioner Ingram and Mr. Bernstein, were impressed with this concept.[71] Based on the recommendations of the Study Committee, legislation was introduced replacing the state fund plan with a system of Full Insurance Availability.[72] Again, the insurance industry was divided in its attitude toward the new proposal, but a substantial portion opposed the measure with the same vigor that it had opposed the state fund.

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valid drivers licenses would be free to choose the agent and the company from which they wish to obtain coverage. Companies, however, which do not desire to retain particular risks on their books would be permitted to reinsure such risks through a pooling arrangement, and the losses of those risks would be shared on a proportionate basis by the industry as a whole. FULL INSURANCE AVAILABILITY, *supra* note 58, at 9-16.

71. Howard B. Clark, former South Carolina Chief Insurance Commissioner, was serving during this period under Mr. Burnstein as Deputy Administrator and deserves much of the credit for developing the final concept of full insurance availability. He visited his home state of South Carolina on numerous occasions urging the state to adopt full insurance availability legislation. Later, on January 14, 1974, he was appointed Chief Insurance Commissioner of South Carolina and continued to wage a vigorous campaign for the adoption of full insurance availability. Mr. Clark resigned his position with the South Carolina Insurance Department, effective June 15, 1975, and has returned to the Federal Insurance Administration as Deputy Administrator.

72. The first S.371 insurance bill which was drafted by the original Study Committee was introduced in the Senate on April 19, 1973, and referred to the Committee on Banking and Insurance. On June 12, 1973, debate on this piece of legislation was adjourned until January 1, 1974. In June of 1973, S.397, 100th Gen. Assembly of S.C., 1st Sess. (1973), increased the membership of the Committee to 15 by adding Sen. Paul M. Moore, Sen. Edward E. Saleeby, Rep. Nick A. Theodore, Rep. A. Lee Chandler, Dr. Paul D. Weston, and Mr. E.S. Ervin. The enlarged Committee met for the first time on August 1, 1973. During January of 1974, the Committee decided to completely rewrite the original S. 371. The second version of S. 371, which as amended later became the Automobile Reparations Reform Act, was introduced on January 8, 1974. On that date, it was specially ordered for debate on January 22, 1974. On February 6, 1974, it was recommitted to the Banking and Insurance Committee and favorably reported out with amendments on the 7th of February 1974 and passed by the Senate on the 12th of February, 1974. It was introduced into the House on February 13, 1974 and was committed to the Labor, Commerce and Industry Committee. On March 7, 1974, the Committee reported the bill out with a favorable majority. The bill was continuously debated from March 21 to April 4, 1974. Its second reading was received on April 4, 1974, and the third reading on April 9, 1974. On April 10, 1974, it was sent to a conference committee composed of Senators Gasque, Moore, and James M. Morris, and Representatives Chandler, Theodore, and James H. Moss. It came back from the conference committee on June 28, 1974 and the conferrees were granted free conference powers by their respective chambers on the same day. S. JOUR. 2048 (daily ed. June 28, 1974), and H.R. JOUR., Vol. II, 2653 (daily ed. June 28, 1974). On the 29th of June, 1974, the House received and adopted the Free Conference Report of the conference committee, H.R. JOUR., Vol. II, 2728 (daily ed. June 29, 1974); the Senate received the Free Conference Report on June 29, 1974. S. JOUR. 2058 (daily ed. June 29, 1974), and adopted the report on July 2, 1974, S. JOUR. 2147-48 (daily ed. July 2, 1974). The bill was enrolled for ratification and signed into law by the Governor on July 9, 1974.

Opponents argued that integration of the voluntary and involuntary market would penalize voluntary market insureds by increasing their rates.[73] This would result, they said, from placing the highly rated "clean" assigned risks in the voluntary market.

Proponents pointed to the discriminatory nature of the assigned risk plan and cited the energy crises and other factors which would tend toward stabilizing or reducing rates.[74] They argued that such a situation presented an opportune time to eliminate once and for all the inequities of the assigned risk plan. Opponents in the meantime began to push their own joint underwriting association concept and legislation to establish such an association was soon introduced.[75]

Despite vigorous and heated debate, nonidentical versions of the bill (S.371) finally passed both houses[76] and were sent to a joint conference committee. Although substantial differences existed between the two versions,[77] full insurance availability provisions were safely intact in each of them. The conference committee debate centered primarily upon the reparations or no-fault issue and the issue of establishing a statutory rating bureau.[78] No one on the committee seriously questioned the provisions establishing a system of full insurance availability. A compromise was hammered out and a single version was approved by both houses

73. H.R. JOUR., Vol. I, 1114-22 (daily ed. Apr. 3, 1974); *Minutes of the House Labor, Commerce, and Industry Comm.*, 100th Gen. Assembly of S.C., 2d Sess. (Feb. 12, 1974).

74. *Minutes of the Automobile Liability Insurance Study Committee*, 99th Gen. Assembly of S.C., 2d Sess. (Nov. 11, 1973 and Dec. 5, 1973).

75. Under the joint underwriting association or "servicing carrier" concept, a small number of companies (*e.g.*, six to ten) volunteer to write and service the undesirable risks, maintaining records and books apart from their regular books of business. The losses and expenses of these risks are shared proportionately by all insurers. At the present time, Florida, Hawaii, and Missouri have "service carrier" plans.

76. *See* note 72 *supra*.

77. For example, the House version, unlike the Senate bill, contained a medical threshold of $500 in medical expenses as a prerequisite for a suit in tort. H.R. JOUR., Vol. I, 982-88 (daily ed. Mar. 21, 1974). Also, the House expunged from its version a Senate provision for a Rating and Statistical Bureau which would promulgate a uniform pure loss component. H.R. JOUR., Vol. I, 992-93 (daily ed. Mar. 21, 1974). When the bill went to the conference committee, the conferees adopted a State Rate and Statistical Division as part of the South Carolina Department of Insurance and gave the new bureau the authority to determine, but not promulgate, the pure loss component. *Minutes of the Conference Committee on S-371*, 100th Gen. Assembly of S.C., 2d Sess., at 3-8 (May 15, 1974). The operation of the Division will be discussed in Part III, B, of this paper.

78. *Minutes of the Conference Committee on S-371*, 100th Gen. Assembly of S.C., 2d Sess. (May 29, 1974, June 5, 1974, June 12, 1974, June 13, 1974, June 19, 1974, June 26, 1974, and June 28, 1974).

of the General Assembly.[79] The bill was signed into law by Governor West on July 9, 1974,[80] with most of its provisions taking effect on October 1, 1974.[81]

III. COMPULSORY INSURANCE

By enacting a system of full insurance availability, the 1974 South Carolina General Assembly joined the growing number of states[82] which have enacted compulsory insurance. The purpose of compulsory insurance laws, like that of financial responsibility laws, is to provide a financially responsible defendant for every person injured in a motor vehicle accident. Compulsory laws, however, are preventive legislation rather than remedial. Their provisions become operative when a motor vehicle is registered and not merely upon the subsequent occurrence of an accident. Generally, these provisions require all owners of automobiles to produce an insurance policy before license and plates may be issued.[83] Thus, in essence, these laws incorporate mandatory financial responsibility requirements as a prerequisite to owning and operating a car.[84]

In 1925, Massachusetts became the first state to enact a system of compulsory liability insurance.[85] Although originally attacked by laymen as well as the insurance industry itself, the Massachusetts statute has remained virtually unchanged since

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79. *See* note 72 *supra*.

80. No. 1177, [1974] S.C. Acts & Jt. Res. 2718.

81. *Id.*

82. Today, a total of 20 states have enacted a form of compulsory insurance. A number of these states made liability insurance compulsory under no-fault legislative enactments, whereas others amended their financial responsibility laws to require owners to demonstrate the minimum limits of financial responsibility as a condition to registering their motor vehicles. Among those states which have mandatory provisions are California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Utah. *See* Chart, AM. INS. ASS'N., ANALYSIS OF LAWS RELATING TO AUTOMOBILE INSURANCE (Dec., 1974).

Generally, compulsory insurance laws only mandate bodily injury and property damage coverage for victims of the insured. These statutes do not require the driver to obtain physical damage coverage on his own automobile.

83. As an alternative, the various laws generally allow the owners to file cash, bond, or collateral in an amount equal to the minimum insurance contract's limits of liability; however, obtaining an insurance policy is the only pragmatic method of demonstrating one's financial responsibility under compulsory statutes. D. BICKELHAUPT, GENERAL INSURANCE 665 n.27 (9th ed. 1974) [hereinafter cited as D. BICKELHAUPT].

84. *Id.* at 665.

85. MASS. GEN. LAWS ch. 90, § 34 (1925).

that early date. Almost 30 years passed before New York, in 1956, enacted the second compulsory insurance statute in the United States.[86] However, today, less than 20 years later, 20 states have incorporated mandatory provisions in their automobile insurance statutes.[87]

The South Carolina compulsory insurance law, which is found in Article IV of section I of the 1974 Automobile Reparation Reform Act, is not unlike the basic provisions of the earlier compulsory statutes. Under the South Carolina provisions, every person at the time of registration and licensing of a motor vehicle must declare the vehicle to be an "insured motor vehicle"[88] and further execute and furnish to the Highway Department a certificate that the motor vehicle is an "insured motor vehicle" upon which insurance will be maintained during the registration period.[89] In order to qualify as an "insured motor vehicle," an insurance policy meeting the minimum requirements of section 46-750.11 of the Code[90] must be obtained on the automobile by the person applying for the vehicle's registration. Although the compulsory statutes of the other states generally allow alternative means of demonstrating financial responsibility, this statute defines the required security only in terms of insurance.[91] However,

86. N.Y. VEHICLE AND TRAFFIC LAW, 93 (Supp. 1958).

87. *See* note 82 *supra*.

88. Automobile Reparation Reform Act § 1, art. IV, § 1. This section refers to Section 10 of Article II for the definition of the required security maintained on an insured motor vehicle. This reference is incorrect—the intended reference is to Section 9 of Art. II. S.C. DEPT. OF INSURANCE, *supra* note 50, at 16.

89. Automobile Reparation Reform Act § 1, art. IV, § 2.

90. Prior to the 1974 Act, Article 5 of the Motor Vehicle Safety Responsibility Act set the minimum limits of bodily injury and property damage liability insurance policies at $10,000 because of bodily injury to or death of one person in any one accident, and, subject to such limit for one person, $20,000 because of bodily injury to or death of two or more persons in any one accident, and $5,000 because of injury to or destruction of property of others in any one accident. Section 4 of the 1974 Act, in response to increasing inflation, amended these limits upward to $15,000 for injuries sustained by one person and to $30,000 for two or more persons. The minimum limits for property damage remained at $5,000.

91. Chapter 2 of Title 46 of the South Carolina Code had provided for the registration and licensing of uninsured motor vehicles. Section 46-135 of Chapter 2 provided that an insured motor vehicle was one (1) upon which there was bodily injury liability and property damage liability insurance issued by a carrier authorized to do business in the state, (2) upon which a bond had been given or cash or securities delivered in lieu of insurance, or (3) whose owner qualified as a self-insurer. Thus, under this provision an owner could operate his automobile if he met one of these stated alternatives. Additionally, section 46-136 of Chapter 2 allowed an uninsured motorist to register his car and obtain his license plates if he paid an uninsured motorist fee. With the enactment of the 1974 Act, which

the Act does allow the Commissioner to approve and accept another form of security in lieu of a liability insurance policy if he finds that such other form of security provides the benefits required by this Act.[92] Although this provision might appear to allow the owner or operator numerous alternative methods of demonstrating security, the language has been construed narrowly. According to the Insurance Department's Interpretative Bulletin, the only other form of security which would be approved would be a form of self-insurance which would provide first-party benefits as well as covering the self-insurer's potential liability.[93]

The Act provides stiff penalties for those who try to circumvent its requirements. Section 7 of Article IV of section I provides that any person who knowingly makes "a false certificate as to whether a motor vehicle is an insured motor vehicle" or presents to the Highway Department "false evidence that any motor vehicle sought to be registered is insured," is guilty of a misdemeanor. Upon conviction, the person may either be fined not less than $50 nor more than $100 or imprisoned from 10 to 30 days. Further, the Highway Department may deny registration of the person's motor vehicle and may also refuse to reissue his license for a period of 6 months. If the owner of a motor vehicle upon which the registration and license plates have been suspended sells the automobile to any member of his family who resides in the household, he is guilty of a misdemeanor for which he may be fined $100 and imprisoned for 30 days.[94] Section 8 of Article IV of section I makes it a misdemeanor to knowingly operate an uninsured motor vehicle, and a fine of $100 and imprisonment for 30 days may be imposed upon conviction. Furthermore, subsequent to the conviction of one operating an uninsured motor vehicle, the Highway Department is authorized "to suspend the driving privilege and all license plates and registration certificates issued in such person's name for a period of thirty days."[95] The privileges of the motorist are not to be reinstated until proof of his financial responsiblity has been filed. Although not specifically defined in the Act, it would seem to be clear that proof of responsibility here

requires one to obtain insurance as a condition precedent to registering his motor vehicle, Chapter 2 of Title 46 was repealed *in toto*.

92. Automobile Reparation Reform Act § 1, art. II, § 9.

93. S.C. DEPT. OF INSURANCE, *supra* note 50, at 17.

94. Automobile Reparation Reform Act § 1, art. IV, § 5.

95. *Id.* § 1, art. IV, § 8.

refers to the proof required under South Carolina's Financial Responsibility Law.[96]

Prior to the enactment of the Automobile Reparation Reform Act, an insurance company was required to notify the insured 60 days in advance of the company's cancellation or refusal to renew an insurance policy.[97] No restrictions were placed on the insurer's right to non-renew or to cancel an insurance policy. However, if the insurer refused to renew or cancelled due to (1) the nonpayment of premiums or (2) the loss by suspension or revocation of a driver's license or vehicle registration by the named insured or another operator of the insured's household, the notice had only to be given 15 days prior to its effectiveness.[98] With the enactment of the Automobile Reparation Reform Act, insurance companies are not allowed to cancel with impunity but rather are forbidden to refuse to write or to renew automobile insurance policies unless (1) the operator's permit has been revoked or suspended, (2) there exists a valid and enforceable outstanding judgment due to the failure of the applicant to pay insurance premiums, or (3) the principal operator or insured has simply failed to pay insurance premiums when due.[99] Section 3 of Article IV of section I states that the notice required under section 46-750.65 of the Code is to be continued.[100] Thus, in attempting to read the existing code together with this provision of the Automobile Reparation Reform Act, it is first necessary to note that the 60 day rule is no longer of use since it applied to those cases where the companies were free to cancel or refuse to renew at will. Apparently, the 15 day notice requirement is to be continued for those situations in which the companies are allowed to cancel or not renew the policy. Aware of the fact that the present code only requires the notice to be given to the insured on policies as defined in section 46-750.61,[101] the drafters added a 30 day period of notice for all

96. S.C. DEPARTMENT OF INSURANCE, *supra* note 50, at 20.

97. S.C. CODE ANN. § 46-750.65 (Cum. Supp. 1973).

98. *Id.*

99. Automobile Reparation Reform Act § 3, art. III, § 1.

100. In addition to providing for the 60 day and 15 day notice rules, the code also requires that the notice must state the reasons for the insurer's action and advise the insured both of his right to review and of his possible eligibility for insurance through the assigned risk plan. Since the assigned risk plan was abolished by the Automobile Reparation Reform Act, it is an unfortunate oversight that the General Assembly did not rewrite section 46-750.65 to conform to the 1974 Act.

101. Section 46-750.61 defines "policy" to mean an automobile liability policy which is delivered or issued for delivery in South Carolina and which insures a single individual

policies not covered under existing law[102] and further provided that such notice must be forwarded to the insured at his designated address by either certified mail or by regular mail when evidenced by a post office receipt form.[103]

Detailed responsibilities are imposed in the event of a motor vehicle being or becoming uninsured during the period in which it is licensed. The statute provides that immediately upon the cancellation or expiration of insurance policy, the owner must reobtain insurance on the vehicle.[104] If insurance has not been obtained within 5 days subsequent to the effective date of the cancellation or expiration of the policy, the owner is required to

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or husband and wife who are of the same household. The only types of vehicles which may be designated include (1) private passenger or station wagon automobiles which are not used as public or livery conveyances for passengers or rented to others or (2) any other four-wheel motor vehicle with a load capacity of 1500 pounds or less which is not used in the occupation, profession or business of the insured. The definition specifically excludes application of (1) any policy issued under an assigned risk plan, (2) any policy insuring more than four automobiles, (3) any policy covering garage, automobile sales agency, repair shop, service station or public parking place operation hazards, or (4) any other contract which provides insurance to an insured and incidentally provides insurance with respect to such motor vehicles. Again, the reference to "policies issued under the assigned risk plan" is an unfortunate carry-over. In order to avoid confusion in future times, the General Assembly should amend this definition to conform to the provisions of the 1974 Act.

102. Automobile Reparation Reform Act § 1, art. IV, § 3. Insurance policies not covered under the existing code and which would require the 30 day notice of the 1974 provision would most likely include policies covering physical damage insurance. Physical damage insurance policies basically provide collision and comprehensive coverages, with or without deductibles. Collision pays for damage to the insured's own automobile resulting from an automobile accident. Comprehensive coverage pays for other damage to the insured's own automobile such as, for example, that resulting from vandalism. If a deductible amount is in effect for either or both of the coverages, the insurer is not responsible for paying the amount of the deductible. Although the Automobile Reparation Reform Act in Section 1, Article II, section 3(c) provides for mandatory offering of collision insurance coverage by the companies, it is not required to be purchased by the customer. Neither the present code nor the Automobile Reparation Reform Act affect the company's right to not renew or cancel collision or comprehensive insurance. However, in order to protect the consumer the drafters provided the 30 day notice requirement to allow him time to obtain this coverage.

103. In prescribing the specific means by which to effect notice, the Automobile Reparation Reform Act departs from the earlier code. Although as previously discussed, the existing code did require the company to notify the insured of its position to cancel or refusal to renew, there were no directions placed on the company's notification method. In light of the consumer orientation of the Act and the finding of the General Assembly in Section 3, Article II, section 1, that "automobile insurance has become a legal and practical necessity for individuals," these protective methods are surely not radical but rather illustrate the desire of the General Assembly to afford the insured every opportunity to maintain insurance.

104. Automobile Reparation Reform Act § 1, art. IV, § 4.

surrender the license plates of the motor vehicle and the registration certificate issued for it.[105] Further, when such a vehicle is or becomes an uninsured motor vehicle, the burden is placed on the insurance company to notify the Highway Department in writing within 10 days of the cancellation or expiration.[106]

The Highway Department, upon learning of the termination of the policy, is thereafter required "to suspend the license plates and registration certificate and must initiate, within 15 days of the notice of cancellation, the necessary action to recover the license plates and registration certificates."[107] Once the tags and certificates have been turned in or otherwise recovered by the Highway Department, they may not be reissued to the owner until sufficient evidence of insurance has been filed.[108] Section I, Article IV, section 4 of the Automobile Reparation Reform Act provides special relief to those owners whose vehicles become uninsured during the period of licensing but who, at the time of suspension, have been able to obtain liability insurance coverage. The owner may immediately appeal the suspension to the Insurance Commissioner, who upon determining that the person does have sufficient liability insurance coverage, notifies the Highway Department which then voids the suspension.[109]

If, however, upon suspension of his registration and license plates the owner "refuses" to surrender his certificate of registration and motor vehicle tags, the Highway Department is author-

105. *Id.*

106. *Id.* This notice is specifically stated to be in addition to the notice required under section 46-720.26 of the Code of Laws. Prior to the 1974 Act, insurance companies were not required to notify the Highway Department of the cancellation or expiration of a policy of insurance except as provided under South Carolina Code § 46-720.26. The substance of this section, which requires a 10 day prior notice to the Highway Department for certified policies, may now be found in South Carolina Code § 46-702(7)(h) (Cum. Supp. 1973). Under certain circumstances, the Highway Department requires a motorist to present a certified policy before registration of the vehicle is permitted. Probably the most common example of an instance in which extra proof is required is a driver with a previous license revocation.

It should be noted that Section 1, Article IV, section 4 contains a typographical error. That section states that the insur*ed* must give notice to the Highway Department within 10 days of cancellation or revocation. The correct statement is that the insur*er* must give notice. If the statute only required the insured to notify the Highway Department, the enforcement provisions would be rendered virtually worthless since no insured would notify the Department. It is integral to the Act that the insurance company provide the notice.

107. S.C. DEPT. OF INSURANCE, *supra* note 50, at 18.

108. Automobile Reparation Reform Act § 1, art. IV, § 4.

109. *Id.*

ized to take possession of these items and the owner must pay a reinstatement fee of $25 in addition to obtaining liability coverage.[110] The "willful failure" of an owner to return his motor vehicle license plates and registration certificate is a misdemeanor for which one may be charged $100 or imprisoned for 30 days.[111]

Section 10 of Article IV of section I prohibits the issuance of any contract or policy of insurance "issued to meet the financial responsibility requirements" for a period of less than 6 months. It should be noted that, particularly in Article IV of Section I, the statute deals with the required "security" that owners and operators must maintain to register and operate their motor vehicles. The section under discussion, however, refers to "financial responsibility requirements" and seems to be dealing with the type of financial responsibility requirements contemplated where proof of financial responsibility for the future is required under South Carolina's Financial Responsibility Act. One method of demonstrating one's financial responsibility for the future, which apparently is addressed here, requires the owner or operator to obtain a certified policy of insurance.[112] Therefore, it would seem "that this section is intended to relate to persons required to furnish certified policies as opposed to those situations simply involving 'security' evidence of which everyone is, of course, required to furnish."[113] According to the Insurance Department, however, a better reading of this section would prohibit such short-term policies from meeting either the requirements of "security" necessary to register one's car or "proof of financial responsibility" as required by the Financial Responsibility Act:

> As to that part of the Section which stipulates that policies shall be issued for a policy period of not less than six months, it is abundantly clear that policies issued for a term of less than six months are entirely improper and can and should be prohibited, . . . and without respect to whether such policies are of-

110. *Id.*

111. *Id.* Section 6 and Section 9 of Article IV of section 1 authorize the Highway Department to adopt, promulgate, rescind, and enforce rules and regulations as may be necessary to carry out the provisions and intent of the provisions dealing with compulsory insurance. In order to avoid abrogating the due process rights of an owner and to provide him with sufficient notice of what actions constitute a "refusal" as opposed to a "willful failure," carefully drawn regulations addressing these definitions must be promulgated by the Department.

112. *See* S.C. CODE ANN. § 46-747 (1962).

113. S.C. DEPT. OF INSURANCE, *supra* note 50, at 20.

> fered as proof of financial responsibility for the future or simply as evidence of security . . . . Thus, it is certain that, in either context, policies containing a policy period of less than six months will not be permitted.[114]

Section 10 of Article IV of section I further provides that these short-term policies are prohibited "notwithstanding any power of attorney which may purport to give the attorney in fact the right to effect cancellation on behalf of the insured." This language, therefore, provides a further safeguard by precluding the termination of a policy within the 6 months period even under a power of attorney which is generally obtained by a premium service company.[115]

Since compulsory insurance statutes require one to demonstrate financial ability prior to operating one's vehicle, advocates of these laws maintain they are far superior to the usual financial responsibility law. Hailed as a "guarantee of protection to the public against financial loss,"[116] compulsory insurance statutes have gained widespread acceptance throughout the nation. The enactment of compulsory laws, however, does *not* mean that all drivers will be insured. Generally, 2 or 3 percent of the motorists in compulsory insurance states remain uninsured. Among these are: (1) the hit-and-run driver, (2) drivers of stolen vehicles, (3) motorists whose policies have lapsed subsequent to the date of registration, and (4) fraudulently registered cars. Further, interstate travel will bring in numbers of motorists whose laws do not have mandatory provisions.[117] Due to this fact, all of the states (except Maryland) which have incorporated compulsory provisions into their insurance statutes have retained the provisions dealing with uninsured motorist coverage which allows the innocent victim of an accident involving an uninsured motorist to collect payments from his own insurer.[118] Likewise, most compul-

114. *Id.* Construing this section to include policies other than those obtained to satisfy proof of financial responsibility is really unnecessary. Due to the mandate of coverage, which is discussed at a later point in this paper, renewals on policies whether written for 1 month or 1 year may not be refused as long as the risk remains an insurable risk.

115. *Id.* at 21.

116. D. BICKELHAUPT, *supra* note 83, at 665.

117. *Id.* at 665-66.

118. If, on the other hand, the injured party was at fault in an accident involving an uninsured motorist, his only recourse would be to recover under the no-fault provisions (if any) of his own insurance policy. Article II of Section 1 of the Automobile Reparation Reform Act provides the recovery allowed under the no-fault provisions of the South Carolina law. For an analysis of the no-fault provisions, *see* Note, *The South Carolina Insurance Reform Act (Part I): "No Fault" and Contributory Negligence —A Synopsis and Appraisal*, 26 S.C.L. REV. 705 (1975).

sory states have also retained their earlier financial responsibility statutes in hopes that such laws will fill any gaps left by their compulsory laws.

Although the 1974 South Carolina Legislature repealed that part of the Financial Responsibility Law which required the filing of security by an uninsured following an accident, the remainder of the statute was retained. Provisions in the retained portion of the statute deal specifically with foreign motorists operating vehicles in South Carolina. Article 4 of the Financial Responsibility Law contemplates reciprocal agreements among states to suspend the driving privileges of resident drivers with unsatisfied judgments in sister states.[119] The first 3 sections of the Article[120] contain the procedures to be utilized under reciprocal agreements. If a person fails to satisfy any judgment within 60 days, the court in which the judgment is rendered must forward a certified copy of the judgment to the Highway Department.[121] Where the person is a nonresident, the Department will suspend operating privileges in South Carolina[122] and will forward a copy of the judgment to the official in charge of the issuance of licenses and registration certificates in the nonresident's home state.[123] If that state recognizes these reciprocal provisions, it will suspend the license and registration of the nonresident until he makes arrangements to satisfy the outstanding judgment.[124]

The Highway Department will also suspend a South Carolinian's license and registration if he suffers an unsatisfied judgment in another state. The Department has interpreted section 46-737 of the Code to provide such authority.[125] In that provision, the General Assembly did not limit the Department's suspension authority to only domestic judgments, for the Department is required "upon receipt of a certified copy of judgment . . . [to] suspend the license and registration and any nonresident's operating privilege of any person against whom the judgment was rendered . . . ." Thus, license and registration suspension is sup-

119. Letter from Walter Safrit, Staff Counsel of American Mutual Fire Insurance Company, to Margaret Christian, June 30, 1975 [hereinafter cited as Letter from W. Safrit].

120. S.C. CODE ANN. § 46-735-37 (1962).

121. *Id.* § 46-735 (1962).

122. *Id.* § 46-737 (1962).

123. *Id.* § 46-736 (1962).

124. Letter from W. Safrit, *supra* note 119.

125. *Id.*

ported by any judgment—domestic or foreign. Without this interpretation, article 4 would be of little value, because suspension in the driver's home jurisdiction is the only method of obtaining satisfaction of an outstanding judgment.[126] This procedure, however, does not present a total solution. As one commentator has noted:

> The problem created by the out-of-state driver has not been solved for it is small consolation for the uncompensated victim of such motorist when criminal sanctions are invoked, or the nonresident's driving privileges are revoked, or his license taken away in his state of domicile by virtue of reciprocal provisions.[127]

In addition, a further gap is recognized by the 1974 Act itself. Since an insurance policy need not begin at the start of the registration period, it is quite likely that some policies will be cancelled or expire without renewal at some point after registration. In such event, the Automobile Reparation Reform Act requires the motorist to immediately obtain insurance or surrender his license plates and registration certificates within 5 days of cancellation or expiration.[128] Although it seems probable that surrender would be something less than immediate, the authors of the legislation foresaw this problem and provided for prompt enforcement of the mandates of the Automobile Reparation Reform Act by the Highway Department. Upon the Highway Department's receipt of the required notice from the insurer that an insurance policy has been cancelled or expired, the Department is required not to reissue registration certificates or license tags for the vehicle which has become uninsured until insurance has been verified.[129] Furthermore, the Automobile Reparation Reform Act provides that:

> Upon receiving information to the effect that a policy is cancelled or otherwise terminated on any motor vehicle registered in South Carolina, then the Department shall suspend the license plates and registration certificate and shall initiate such action as may be required within fifteen days of such notice of

126. *Id.*

127. Note, *Motor Vehicle Financial Security Act of 1956: New York's Answer*, 32 N.Y.U.L. REV. 147, 164 (1957).

128. Automobile Reparation Reform Act § 1, art. IV, § 4.

129. *Id.*

cancellation to pick up the license plates and registration certificate.[130]

The Department's central computer is now programmed to accept notices of suspended insurance policies throughout the state and publishes a suspension list on a biweekly basis which is forwarded to a special task force of 16 patrolmen whose sole responsibility is the enforcement of these provisions.[131] While it might appear that a danger period could exist during which cars may be driven without insurance, even though they were originally legally registered, as a practical matter it seems unlikely that this will occur. Since the Highway Department is required by the Act to receive a 15 day notice of all insurance cancellations and the suspension list is published biweekly by the Department and immediately referred to the special task force, fears of inadequate enforcement appear unfounded.

A. The Reinsurance Facility

In actuality, the Reinsurance Facility[132] is only incidental to the main thrust of the full insurance availability plan and acts purely as an escape valve. For the insuring public of South Carolina, the so-called "mandate of coverage"[133] or "mandate to write" is the important facit. Beginning on October 1, 1974, each driver with a valid driver's license and the ability to pay a premium is free for the first time to choose the agent and the company from whom he wishes to buy all of his automobile liability and physical damage insurance.[134] He cannot be rejected, cancelled,

130. *Id.*

131. During the month of May, 1975, the Highway Department received notice of 15,573 insurance cancellations. Under section 4 of Article IV of Section 1, the Highway Department is required to give immediate notification to the vehicle owner by first class mail that if insurance is not reinstated on the vehicle, the owner will forfeit his license tags. Through this procedure, the Department cleared 8,345 cancellations, either by picking up the license tags or by verifying that the owner actually had insurance. S.C. HIGHWAY PATROL, PALMETTO PATROLMEN, table 322 (May 31, 1975). According to Emory P. Austin, Director of the Motor Vehicle Division of the Highway Department, the enforcement process of the Automobile Reparation Reform Act "is certainly functioning much more efficiently in getting the uninsured motorists off the highways than were the provisions of the old Uninsured Motorist Act."

132. Automobile Reparation Reform Act § 3, art. V.

133. *Id.* § 3, art. III.

134. Section 3, Article III, section 1 provides the general mandate. Section 3, Article III, section 2 additionally provides that insurers may make no distinctions in their decision to write insurance except those "relevant to and reflected in insurers' rating classifications

or nonrenewed so long as he retains his driver's license and pays the premium. Nor can he be discriminated against in any fashion, such as an insurer's offering special premium finance plans to some customers and refusing them to others.[135] Standing behind this new concept of availability is the South Carolina Reinsurance Facility directed by a board of governors appointed by the Chief Insurance Commissioner and the Governor.[136] Under the new system, an agent has no choice but to accept an application from any insurable risk and send it to the company of the insured's choice which he represents.[137] However, at the company underwriting level, a decision can be made to reinsure any risk which the company does not wish to retain in its books of business.[138] Actually a paper transaction, the company sends the premium, minus the actual expense it incurs in writing and servicing the risk, to the reinsurance pool. The pool then bears any loss which the risk incurs, but the company and its agent continue to service the risk. Expenses and losses, or profits should there be any, are borne by all companies doing business in South

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under risk and territorial classification plans promulgated by the [Insurance] Commissioner and approved by the [Insurance] Commission."

135. Automobile Reparation Reform Act § 3, art. III, § 2. *See also id.* § 13.

136. Section 3, Article V, section 9 provides that the operations and affairs of the Reinsurance Facility are to be under the direction and control of a Governing Board of 15 persons. The Governor of South Carolina is authorized to appoint three members to represent consumers, and the Chief Insurance Commissioner is directed to appoint twelve of the members. Eight members of these twelve are required to be appointed to represent the insurance industry—two who represent the American Insurance Association, two who represent the American Mutual Insurance Alliance, two who represent the National Association of Independent Insurers, one who is a stock insurer, and one who is a nonstock insurer. In addition this section provides that four persons are to be selected to represent agents, of whom two represent mutual agents and two represent stock agents.

137. This mandate is contained in Section 3, Article III, section 1, which further provides that "[e]very such automobile insurance risk constitutes an insurable risk unless the operator's permit of the named insured has been revoked or suspended and is at the time of application for insurance so revoked or suspended; *provided*, however, that no insurer may be required to write or renew automobile insurance on any such risk if there exists a valid and enforceable outstanding judgment secured by an insurer, an agent, or licensed premium service company on account of automobile insurance premiums which the applicant or insured or any principal operator who is a member of the named insured's household has failed or refused to pay unless such applicant or insured shall pay in advance the entire premium for the full term of the policy sought to be issued or renewed or the annual premium, whichever is the lesser; nor shall any such insurer be precluded from effecting cancellation of any such automobile insurance policy, either upon its own initiative or at the instance of an agent or licensed premium service company, because of the failure of any such named insured or principal operator to pay when due any such automobile insurance premium or any installment payment thereof . . . ."

138. Automobile Reparation Reform Act § 3, art. V, § 1(1).

Carolina on a basis proportionate to the companies' car year writings.[139] Important is the concept that neither the insured nor his agent know whether the insured has been reinsured or not, thus avoiding the stigma previously associated with the assigned risk plan.

The reinsurance facility concept is not new. It was introduced in Canada in 1967[140] and has suffered a somewhat stormy existence in that country. The two obvious defects in the Canadian facility are that participation is not mandatory and there are no restraints put upon utilization of the facility, which results in substantial "dumping" of risks into the pool.[141]

The South Carolina plan is free of such defects. Participation in the Facility by all insurers is mandatory.[142] Likewise there are definite restraints which prohibit or discourage overutilization and cites 35 percent or more of an insurer's book of business as a prima facie case of overutilization. Further, a 5 year weighted formula adopted by the Board of Governors monetarily penalizes companies who excessively utilize the Facility and rewards companies who keep risks on their own books.[144] Finally, an underwriter who ships good business upstream to the Facility will find that it comes back to haunt him in the form of regular reports issued by the Facility on the losses of the business reinsured.[145]

Perhaps the most serious defect in the South Carolina statute is that the mandate of coverage extends only to individual private passenger motor vehicles; hence, there is no mandatory participation in the statute for small commercial risks. The South Carolina Insurance Commission, which heartily endorsed the concept, had recommended that small commercial risks be included under the mandate of coverage and be eligible for reinsurance.[146] In the Senate version of the legislation, such a provision

139. *Id.* § 3, art. V, § 4.

140. 1975 INS. LAW J. 9, 11.

141. *Minutes of the Automobile Liability Insurance Study Committee*, 99th Gen. Assembly of S.C., 2d Sess. (Nov. 11, 1973).

142. Automobile Reparation Reform Act § 3, art. V, § 2.

143. *Id.* § 3, art. V, § 5(1).

144. If, for example, an insurer's overall share of the market is 10 percent, but he reinsures 20 percent of his own book of business, his share of expenses and losses of the facility will be an average of the two, or 15 percent. Likewise, the aggressive insurer which expands its writings in contrast to the carrier which constricts its writings, will be rewarded with a smaller participation ratio.

145. S.C. DEPT. OF INSURANCE, BULL. NO. 27-74, PLAN OF OPERATION OF THE SOUTH CAROLINA REINSURANCE FACILITY, at 4 (Sept. 23, 1974).

146. S.C. DEPT. OF INSURANCE, *supra* note 50, at 24.

was included but later amended out under the urging of speciality insurers who write primarily commercial insurance.[147] It has become obvious since October 1, 1974 that availability for small commercial risks, such as the corner service station, the "Ma and Pa" grocery and the downtown florist, constitutes as much of a problem as the private passenger risk. Action by the Board of Governors now permits the Facility to accept a limited variety of small commercial risks,[148] but legislation would be required to bring them under the mandate of coverage. In its 1975 Legislative Recommendations,[149] the South Carolina Insurance Commission recommended such legislation, and it is currently being considered for introduction in the 1976 session by the Committee.[151] The Reinsurance Facility has a far-reaching, progressive quality about it which cannot be overlooked. Prior to the Automobile Reparation Reform Act, problems of availability plagued only the automobile insurance system in South Carolina. In other states, however, particularly those with large metropolitan centers, availability problems in such lines as fire and homeowners insurance became prevalent in densely populated ghetto areas. These problems, in some 28 states, have led to the establishment of Fair Access to Insurance Requirements (FAIR) plans[152] which operate in similar fashion to assigned risk plans, and, like their automobile insurance counterparts, have become fraught with discriminations and inequities. One can readily see that availability problems in those lines, as well as perhaps other lines of insurance, will inevitably come to South Carolina. When they arrive, the problem-plagued insurance lines need only be added by statute

147. S. JOUR. 430-31 (daily ed. Feb. 12, 1974). On June 13, 1974, the conference committee voted unanimously to include small commercial risks. However, as last minute opposition gathered strength in the House during the vote to grant free conference powers to its conferees, the provision was removed by a poll of the conferees prior to the Free Conference Report. The Free Conference Report did not extend the mandate of coverage or mandatory participation in the Reinsurance Facility to small commercial risks. S. JOUR. 2058-97 (daily ed. June 29, 1974).

148. S.C. DEPT. OF INSURANCE, ORDER No. 13-74, at 2, 3 (Sept. 26, 1974).

149. 67 S.C. DEPT. OF INSURANCE ANN. REP. 2 (1974).

150. Interview with William V. Woodson, III, Staff Counsel for the Automobile Liability Insurance Study Committee, in Columbia, S.C., June 18, 1975.

151. Address by Howard B. Clark, Deputy Administrator, Federal Insurance Administration, Department of Health, Education, and Welfare, to the Automobile Liability Insurance Study Committee, Nov. 11, 1973.

152. FULL INSURANCE AVAILABILITY, *supra* note 58, at 30.

to the reinsurance facility system and the mandate of coverage to provide an effective solution.[153]

B. *The Rate and Statistical Division*

It would seem almost axiomatic that a state insurance regulatory authority, in order to effectively regulate the insurance industry, must have current credible statistical data sufficient to conduct continuing tests and comparisons as to rate levels. Indeed, in South Carolina, there is a statutory requirement[154] that each insurer doing business in this state submit an annual report to the Insurance Commissioner on its financial condition and activity no later than March 1 of each year. However, the annual reports have heretofore defied meaningful comparison with each other and with the market as a whole.

All insurance companies operate on systems of classifications and territories. The classifications are based primarily upon the use made of the motor vehicle along with such factors as the age of drivers. Premium levels vary significantly from class to class. The territorial system, which likewise calls for varying rates from territory to territory, is then utilized. Finally, if a company uses a merit rating plan which calls for additional charges for accidents and violations, that plan is added to produce final rates paid by policyholders.

Prior to the passage of the Automobile Reparation Reform Act, there was no uniformity in the systems of classifications, territories or merit rating plans. Thus, insurers utilized a variety of systems, and many did not even subscribe to any merit rating plan at all. To further confuse matters, an individual insurer's statistical plan upon which the annual report was based had only to be consistent with whatever systems of classifications and territories the insurer was currently using. Thus, to analogize, each

153. Availability of medical malpractice professional liability insurance has become a critical problem in South Carolina. However, unlike lines such as automobile and homeowners insurance, medical malpractice is not required or desired by the populace as a whole. Rather, it is designed for purchase only by the few thousand physicians and surgeons who practice in South Carolina and would not effectively lend itself to a Reinsurance Facility which is designed to provide coverage availability as needed for the entire population. Thus, acting under authority granted him by an Act of the General Assembly, No. 306, [1975] S.C. Acts & Jt. Res. 823, the Chief Insurance Commissioner has mandated the establishment of a separate joint underwriting association for medical malpractice insurance, which operates in similar fashion to the Reinsurance Facility.

154. S.C. CODE ANN. § 37-293 (1973 Cum. Supp.).

year the Insurance Department was barraged with apples, oranges, and grapefruit, and asked to make meaningful comparisons among them. One need not possess a degree in actuarial science to perceive that making meaningful comparisons was impossible.

Recognizing the need for uniformity, the General Assembly provided authority for the Insurance Commissioner to promulgate uniform systems of classifications and territories, a uniform statistical reporting plan, and a uniform merit rating system.[155] Further, it authorized the establishment within the Insurance Department of a Rate and Statistical Division to receive the new uniform data and perform meaningful tests and comparisons.[156]

Acting under his new authority, the Insurance Commissioner immediately has moved to promulgate uniform systems of classifications and territories.[157] Relatively simple in nature, a system of nine classifications and eight territories is mandatory upon all insurers doing business in South Carolina.[158] It is anticipated that as uniform statistical data begins coming into the Rate and Statistical Division, the systems will be modified from time to time to correspond with the results of tests and comparisons among the classifications and territories.[159]

Further responding to the General Assembly's mandate for uniformity, the Insurance Commissioner has also promulgated a uniform merit rating plan.[160] His plan differs from many previously in existence in that, with the exception of the initial 15 percent discount for "clean risks," it is predicated upon dollar amounts rather than percentages.[161] This approach seems entirely

155. Automobile Reparation Reform Act § 3, art. IV, §§ 2, 4.

156. *Id.* § 3, art. IV. Section 3, Article IV, section 4(a) provides that the Chief Insurance Commissioner through the Rate Division is authorized to fix, establish and promulgate a uniform statistical plan or plans as may be necessary for the gathering and compiling of statistical data to enable the Insurance Department to determine a proper rate within an objective classification based on uniform statistical data.

157. S.C. DEPT. OF INSURANCE, ORDER No. 3-74 (Aug. 1, 1974).

158. The systems were modeled after the then existing systems utilized by the Insurance Services Office (ISO), a voluntary nongovernmental bureau which files rates on behalf of member and subscriber companies writing approximately 38 percent of the automobile insurance business in South Carolina.

159. ORDER No. 3-74, *supra* note 157, has already been amended to expand the 1-C classification in the Uniform Classification System to include the use of an automobile in a car pool or other ride-sharing agreement. S.C. DEPT. OF INSURANCE, ORDER No. 1-75 (May 29, 1975).

160. S.C. DEPT. OF INSURANCE, ORDER No. 3074, art. III (Aug. 1, 1974).

161. *Id.*

logical in that widely differing premiums are permitted between the various classifications and territories.[162]

To insure proper administration of the collection and comparison of the new uniform statistical data, it is obvious that a highly competent staff of statistical technicians would be required. However, the immediate assembly of such a staff is a virtual impossibility. Thus, the General Assembly authorized the Insurance Commissioner to contract at his discretion with an independent statistical agent to perform all or some of the duties of the Rate and Statistical Division.[163] In this regard, a contract has been executed with the Automobile Insurance Plans Services Office (AIPSO) on an interim basis, and AIPSO has been appointed statistical agent for all insurers doing business in South Carolina.[164]

Although even the intelligent layman would understand little of the complicated details surrounding the promulgation of the uniform systems, their importance to the insuring public cannot be over emphasized, as they will greatly increase and improve the Insurance Department's ability to effectively regulate the system of automobile insurance in South Carolina. For the most part, future changes which result will be neither revolutionary nor dramatic in the eyes of the public, but will continually keep insurance rates in line within economic realities of the day. It will, however, take at least 18 months for the Division to gather sufficiently credible uniform data to begin making tests and comparisons which will surely result in changes in the various uniform systems.[165]

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162. For example, a male under the age of 25 may be charged a premium of $200, while a 35-year-old married man with no youthful drivers in his family, who uses his car only for pleasure and to drive short distances to and from work, may find his rate to be only $100. If both drivers commit the identical violation which would call for a percentage increase of 10 percent, for example, the young single man will have his rate increased by $20 while the 35-year-old married man will suffer only a $10 increase. This obvious discrimination does not occur under the Chief Insurance Commissioner's plan in that the same dollar increase will apply to both drivers.

163. Automobile Reparation Reform Act § 3, art. IV, § 4(c).

164. AIPSO is a nongovernmental bureau which administers and files rates for the assigned risk plan.

165. Address by Claude E. McCain, Chairman, South Carolina Insurance Commission, to the Automobile Liability Insurance Study Committee, June 5, 1975.

C. *Antidiscrimination and Consumer Protection Provisions*[166]

Enacting a system of compulsory insurance creates a two-pronged problem. The first prong, which has been previously discussed, focuses upon the requirement that every vehicle owner must own an automobile liability insurance policy to compensate victims who suffer injuries or property damage. The second prong evolves from the first and centers upon the availability of such insurance to the motoring public. If liability insurance is required, a successful compulsory insurance statute must contain provisions to enable a vehicle owner to acquire insurance without unnecessary, irrational or undue burdens. Recognizing this need, the General Assembly has specifically provided for truly full enforcement of the Automobile Reparation Reform Act's mandate of coverage.[167]

Article VI of Section 3 of the Act is generally addressed to prohibiting and precluding unfair practices calculated to result in the evasion of the mandate of coverage to the competitive disadvantage of other insurers or with the result of placing pressures upon the Facility by way of excessive utilization. This Article makes it an act of unlawful discrimination for any insurer to make distinctions between policyholders or applicants with respect to coverage, rates, claims, or other services, except for such distinctions as are provided for in promulgated and approved classification and territorial plans.[168]

Additionally, an insurer which customarily accepts risks directly from applicants through employees or exclusive agents is prohibited from refusing to accept an insurable risk or requiring that certain classes or types of risk be placed only through some particular agent or employee. On the other hand, if such an insurer customarily accepts such risks through independent agents, it may not refuse acceptance of an insurable risk from any of its agents or require that certain classes or types of risk be placed only through particular agents.[169]

Section 3, Article IV, section 2 provides that where an agent represents more than one insurer of automobile insurance, he

166. Special credit should be given William V. Woodson, III, Staff Counsel for the Automobile Liability Insurance Study Committee, who is responsible for this section of the note.

167. Automobile Reparation Reform Act § 3, art. VI.

168. *Id.* § 3, art. VI, § 1.

169. *Id.* § 3, art. VI, § 2.

must place the risk with the insurer named or described by the applicant. If, however, the applicant relies on the skill and judgment of the agent, the agent may place the risk with any insurer represented by him so long as that is agreeable to the applicant.[170] Because of the manifest danger of collusive agreements calculated to send certain unwanted classes of risks "down the street" to some other insurer, the section provides that an insurer is precluded from making an agreement with any agent or from offering any such agent anything of value to induce the agent to place any particular type of risk with any other insurer. Not only is any such agreement "utterly void" but every such act of collusion or conspiracy is made an act of unfair competition on the part of both the insurer and agent, which if provided results in a mandatory suspension or revocation of the license for not less than a year in addition to any other penalties or liabilities which might follow from such act.[171]

An insurer which offers automobile insurance through the mails is prohibited from restricting its offerings to certain counties, areas, or zip-code territories, and the Commissioner is authorized and directed to "police" the provision through such examination of the records as may be necessary.[172]

Any act in violation of this Article is deemed an act of unlawful discrimination and unfair competition which, if willful, requires the suspension or revocation of the offending insurer's certificate of authority for not less than 6 months, and any agreement made in violation of the section is void.[173] In enforcing the mandate of coverage, it is clear that the General Assembly intended to prohibit excessive utilization of the Facility for unfair competition purposes or for purposes of unfairly discriminating against certain classes or types of risks. The Insurance Commission is expressly directed to prohibit every such unreasonable or excessive utilization of the Facility. A prima facie case of excessive or unreasonable utilization is established through a showing that an insurer or a group of insurers under the same management has ceded more than 35 percent of total direct premiums as reported in the most recent annual statement of such insurer or group.[174]

170. *Id.* § 3, art. VI, § 2(1).
171. *Id.*
172. *Id.* § 3, art. VI, § 2(2).
173. *Id.* § 3, art. VI, § 4.
174. *Id.* § 3, art. VI, § 5(1).

Finally, the General Assembly made provision for a survey by the Commissioner at the end of 6 months in response to complaints of want of access or want of outlets for policy producers to ascertain if sufficient market outlets exist in all areas. Upon his finding of an insufficiency of market outlets in particular areas or that certain producers have been deprived of a market for risks previously serviced by them, the Commissioner may, after consultation with the Reinsurance Facility, designate one or more insurers to service such areas through agents appointed by them or designate such producers as agents of any such insurer or insurers.[175]

One of the principal consumer protection features of the Automobile Reparation Reform Act is the unfair claims practices section.[176] This section establishes a list of practices which, if committed by an automobile insurer without cause and with sufficient frequency to indicate a general business practice, may result in civil penalties to the insurer.[177] Generally, any attempts at misrepresenting policy provisions relating to coverages, and any unreasonable delay in responding to claims or communications regarding claims are prohibited. Additionally, an insurer cannot seek to compel policyholders to institute a lawsuit to recover amounts due with respect to claims arising under its policy by offering substantially less than the amount ultimately expected to be recovered through suit.[178]

Anticipating that there might well be some short-term adjustment difficulties in the implementation of the Act, the General Assembly empowered the Insurance Commission to hold public hearings at such times during 1974 and 1975 as it may select in order to determine whether insurers issuing automobile insurance policies have realized or may reasonably be expected to realize unanticipated or excessive profits either as a result of the effect of the energy crisis or automobile safety engineering features on loss experience.[179] If the Commission determines, following such hearings, that such profits have resulted or are reasonably likely to result, it must direct the insurers to set aside sufficient sums in a special reserve to assure the availability of

175. *Id.* § 3, art. VI, § 6.
176. *Id.* § 3, art. VII, § 2.
177. *Id.* § 3, art. VII, § 3.
178. *Id.* § 3, art. VII, § 2(5).
179. *Id.* § 3, art. VIII, § 1.

funds for a fair and reasonable sharing of the excessive or windfall profits by the policyholders accounting for such profits. The Commission is to credit any insurer which has paid policyholder dividends or has otherwise returned to policyholders such unanticipated or excessive profits. The Commission may, if it deems it necessary or appropriate, establish separate rates of return for each insurer.[180] The Commission may direct that the insurers use all or part of the described reserve fund to make payment of such returns and may make such orders with respect to disposition of the special reserve fund as may be necessary to carry out the purpose of this Article. Failure of an insurer to return the amounts determined by the Commission is made sufficient cause to revoke the right of that insurer to do business in the state.[181]

IV. FAMILY IMMUNITY[182]

Beginning in 1891 with the Mississippi case of *Hewlette v. George*,[183] which involved a charge of false imprisonment, the American courts adopted a general rule prohibiting the maintenance of actions between a parent and a minor child for personal torts, regardless of whether the acts were intentional or negligent in character.[184] Citing no authorities, the *Hewlette* court stated,

> so long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.[185]

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180. *Id.* § 3, art. VIII, § 2.

181. *Id.* § 3, art. VIII, § 2(1).

182. An excellent discussion of the concept of the parent-child immunity may be found in McCurdle, *Torts Between Parent and Child*, 5 VILL. L. REV. 521 (1960) [hereinafter cited as McCurdle].

183. 9 So. 885 (Miss. 1891).

184. W. PROSSER, LAW OF TORTS 864 (4th ed. 1971) [hereinafter cited as PROSSER]. It should be pointed out that actions are generally permitted "against one who is not a parent but merely stands in the place of one, such as a stepfather, or another relative who has custody of the child." *Id.* It has also generally been accepted that property tort actions are maintainable between a parent and minor child. McCurdle, *supra* note 182, at 527.

185. 9 So. at 887.

Following the reasoning of the *Hewlette* court, jurisdictions have most often offered parental discipline and the desire to prevent the disturbance of domestic tranquility as the chief reasons in barring such suits.[186] This reasoning has been given even in cases of rape[187] and brutal beatings.[188]

Courts have also stressed that to allow the institution of such suits would only encourage fraud and collusion.[189] Other decisions have been based on the reasoning that paying damages to one member of a family would unfairly jeopardize the other members' right to the family funds which should be used for the benefit of all.[190] Furthermore, the difficulty in apportioning any recovery so that the guilty party does not benefit from his own wrong has also been voiced as a persuasive reason to deny such actions.[191] However, numerous inroads into the common law's broad grant of immunity soon began to be created as the courts developed various exceptions to the general rule.

It is generally accepted that an emancipated child may maintain a suit against the parents for personal torts.[192] Usually, the parents' surrender of the right to the child's earnings and services or of parental control constitutes emancipation.[193] It has been indicated by some courts that emancipation must be complete in order to remove the immunity—that the filial ties must be completely severed.[194] And there is authority to the effect that

> where the harmful act on which the action is based occurred before emancipation, the courts have held that the right to maintain the action must be determined as of the time of the wrongful act and that the fact of emancipation cannot create a right of action when none existed at that time.[195]

Generally, if an additional relationship has been established

186. PROSSER, *supra* note 184, at 865.

187. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

188. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903).

189. *See, e.g.*, Villaret v. Villaret, 169 F.2d 677 (D.C. Cir. 1948).

190. Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905).

191. Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954).

192. Sanford, *Personal Torts Within the Family*, 9 VAND. L. REV. 823 (1956) [hereinafter cited as Sanford].

193. Weinberg v. Underwood, 101 N.J. Super. 448, 244 A.2d 538 (1968); Logan v. Reaves, 209 Tenn. 631, 354 S.W.2d 789 (1962).

194. Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170 (1953).

195. Sanford, *supra* note 192, at 837, *citing* Rambo v. Rambo, 195 Ark. 832, 114 S.W.2d 468 (1938); Reingold v. Reingold, 115 N.J. 532, 181 A. 153 (1935); Luster v. Luster, 299 Mass. 480, 13 N.E.2d 438 (1938).

between the parent and child, such as that of master and servant or carrier and passenger, or if the tort arose out of the business activities of the parent,[196] the rule of immunity has often been abrogated. As one commentator has noted:

> The theory underlying such a position is that when the tort arises out of the additional relationship rather than out of the natural parent-child relationship, the latter relation is merely incidental or irrelevant and thus should not affect the question of liability.[197]

Another area in which courts allow such suits is in actions based on the intentionally malicious or wanton infliction of personal injuries.[198] The courts rest their decisions on the theory that by engaging in such wrongful conduct, the parent-child relationship has been abandoned.[199] These decisions have emphasized that in such situations the policy generally espoused supporting family peace has no application, since by the wrongful conduct the family harmony has already been destroyed. If the cause of action is based on actions arising out of the parent's exercising his right to discipline the child, courts generally deny recovery.[200] However, if the parent abuses the child and his right to discipline, the courts are divided as to whether or not a child can maintain the action.[201]

Although these judicially created exceptions do allow injured parents and minors to sue each other in particular instances, some courts, in expressly disapproving their earlier decisions, indicated that the immunity's application should be further restricted.[202] Finally, in 1963 Wisconsin abolished the parent-child immunity except in specifically limited circumstances.[203] Soon

196. Sanford, *supra* note 192, at 834.

197. *Id.*, *citing* Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932).

198. PROSSER, *supra* note 184, at 866-67.

199. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952); Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951).

200. Sanford, *supra* note 192, at 836.

201. *Compare* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930) (holding the actions may be allowed), *with* McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903) (disallowing the maintenance of such suits).

202. *See, e.g.*, Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952).

203. Two areas in which Wisconsin retained the rule of immunity are those involving the exercises of parental control and authority and those involving parental discretion concerning food and care. PROSSER, *supra* note 184, at 867.

thereafter other jurisdictions, following Wisconsin's lead, repudiated the common law immunity by judicial decision.[204]

In 1974 the South Carolina General Assembly decided to join this recent trend by providing in the Automobile Reparation Reform Act that:

> An unemancipated child may sue and be sued by his parents in an action for personal injuries arising out of a motor vehicle accident. In any such action there shall be appointed a guardian *ad litem* as provided by law for such child.[205]

Although limited to personal injuries received in a motor vehicle accident,[206] the provision may be logically considered a natural component of a system of compulsory insurance. Now that all drivers will carry liability insurance, it becomes very difficult to maintain the arguments against allowing recovery:

> It is apparent that the two reasons which have come to be regarded as the principal, if not the only, ones for denying a cause of action in tort between parent and minor child, *viz.* danger of disrupting or disturbing domestic tranquility and interference with the exercise of parental rights and the performance of parental duties in the matter of rearing and disciplining the child, have no application when the action is, in substance if not in form, against an insurance company which the action is not unfriendly, a recovery by the child is no loss to the parent, their interests unite in favor of recovery, no strained family relations will follow, family harmony is assured instead of disrupted . . . .[207]

As noted earlier, the fear of instituting collusive suits had been voiced as a leading policy consideration against allowing the maintenance of these actions. Although it may be argued that

204. These states include: Alaska, Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Arizona, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); California, Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Hawaii, Tamashiro v. De Gama, 51 Hawaii 74, 450 P.2d 998 (1969); Illinois, Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Kentucky, Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971); Louisiana, Rouley v. State Farm Mut. Auto. Ins. Co., 235 F. Supp. 786 (W.D. La. 1964); Minnesota, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); New Hampshire, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); New Jersey, France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); New York, Gelbman v. Gelbman, 23 N.Y. 434, 245 N.E.2d 192, 297 N.Y.S.2d 529h(1969); and North Dakota, Nuelle v. Wells, 154 N.W.2d 364 (N,D. 1967).

205. Automobile Reparation Reform Act § 4B.

206. One leading authority recognized the need for change in the area of automobile liability insurance. *See* McCurdle, *supra* note 182, at 559.

207. *Id.* at 549.

collusive suits should not be more frequently instituted among family members than in other situations,[208] it is a valid argument that the presence of liability insurance (regardless of whom the parties are) will probably have a significant role in encouraging suits. Most of the courts which have addressed this problem, however, have refused to focus on the central question. Rather, they have gone "off on the narrow technical ground that liability insurance does not create liability, but only *recompenses* it when it otherwise exists."[209] If this theory of reasoning is accepted and followed, then, as heretofore discussed, only the basic criticism that a system of compulsory insurance encourages litigation is again at issue. Certainly, it may be validly argued that if a legislature has overcome the criticisms which are generally voiced against adopting a system of compulsory insurance, the common law immunity should not stand in the way of allowing an injured party to recover damages in situations where the insured could be subject to legal liability were it not for the parent-child relationship."[210]

V. CONCLUSION

With the enactment of compulsory insurance, the South Carolina General Assembly has taken what most view as the ultimate step in eliminating uncompensated victims of automobile accidents. Furthermore, the General Assembly left intact the uninsured motorist coverage to protect those who are injured by persons who disobey the law by failing to obtain the required insurance coverage. Also, by retaining certain provisions of the financial responsibility law, the drafters sought to encourage out-of-state drivers to obtain insurance coverage. The enforcement provisions are the backbone of the South Carolina insurance law—efficient operation by the state's administrative arm with voluntary cooperation of the industry is imperative. However, equally as important to the Act's success over the long run is the

208. PROSSER, *supra* note 184, at 866.

209. *Id.* at 868 (emphasis added). In light of South Carolina's recent abolition of the immunity by statute, it is interesting to note that the decisions which have addressed the problem of the conflict which arises by the presence of both compulsory liability insurance and the child-parent immunity have advocated that a solution be reached by legislative means rather than by the courts. *See, e.g.*, Harralson v. Thomas, 269 S.W.2d 276 (Ky. 1954); Levesque v. Levesque, 99 N.H. 147, 106 A.2d 563 (1954); Schwenkhoff v. Farmers Mut. Auto. Ins. Co., 6 Wis. 2d 44, 93 N.W.2d 867 (1929).

210. McCurdle, *supra* note 182, at 560.

General Assembly's decision to continue to channel the necessary funds to the Highway Department for the specific enforcement of the provisions of the law.

It would appear that the problem with any omnibus reform package is that due to the nature of the legislative process overlaps and omissions are likely to occur. The Automobile Liability Insurance Study Committee continues to meet on a regular basis to monitor the progress of automobile insurance reform in South Carolina, and, therefore, changes in certain areas should receive prompt attention following the convening of the 1976 session. First, in order to protect the accident victim from all potential tortfeasors, small commercial risks should be brought within the mandate of coverage both for liability insurance and participation in the Reinsurance Facility. Second, there are changes of a purely technical nature that need to be made to avoid redundancy and confusion. Hopefully, such "house-cleaning" amendments as well as action on the small commercial risk problem can be prefiled to allow for committee study prior to the next legislative session.

Finally, short-term difficulties are to be expected during the transition of the South Carolina rating structure to a uniform basis. However, the long-term benefits to the consumer are projected to far outweigh any temporary adjustment difficulty in the change-over. The consumer in South Carolina may expect to enjoy the benefits which will accrue from a proper rate approved within an objective classification system based on uniform statistical data.

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