

MOTOR VEHICLE NO-FAULT, UNDERINSURED, AND UNINSURED INSURANCE - BACKGROUND MEMORANDUM

Senate Bill No. 2262, Section 1 (attached as an appendix), requires the study of the motor vehicle no-fault, underinsured motorist, and uninsured motorist insurance systems. The bill was introduced to exclude motorcycles from uninsured and underinsured motorist coverage unless the claim is made on a motorcycle that is described in the policy. At present, uninsured coverage for bodily injury under a parent's motor vehicle policy may provide coverage for that parent's child when injured while riding a friend's uninsured motorcycle. The result may be an insurance company paying for bodily injury claims incurred on a motorcycle when the insurance company does not insure motorcycles. The bill was to provide for this study, and the legislative history does not reveal any reason for removing the substantive provisions of the bill.

MOTOR VEHICLE INSURANCE

This state requires motor vehicle insurance for three situations. For all three situations, minimum limits are mandated by law. The first situation is in which the insured person injures another person or damages another person's property. A person must purchase liability insurance to answer for bodily injury or property damage that arise from this situation. Although liability insurance is a specific kind of insurance, the term is commonly used to include all mandatory coverages, including the uninsured motorist, the underinsured motorist, and basic no-fault insurance. In this memorandum the term will be used in the specific sense. The second situation is in which another person injures the insured person and does not have any or enough liability insurance to pay for the bodily injury to the insured person. A person must purchase uninsured and underinsured motorist insurance to answer for bodily injury that arises from this situation. The third situation is in which the insured person's body is injured and the insured person's insurance pays for economic loss from bodily injury regardless of fault. A person must purchase basic no-fault or personal injury protection (PIP) insurance to answer for injuries that arise from this situation. Under all of the situations for which mandatory coverage is required, there is not any mandatory coverage for property damage done to the insured person by another person who is not insured.

FAULT

North Dakota Century Code (NDCC) Section 32-03.2-01 provides a definition of fault which includes a negligent individual in a motor vehicle

collision. Who is at fault determines who should pay if there is a motor vehicle collision. Who is at fault in an accident in turn, except in no-fault insurance, determines whose insurance is going to pay to indemnify the party at fault or which insurance company is going to use the right of subrogation against a party at fault.

Under NDCC Section 32-03.2-02 this state has adopted modified comparative fault. Modified comparative fault means that contributory fault does not bar recovery in an action by any person to recover damages for death or injury to persons or property unless the fault was as great as the combined fault of all the persons who contributed to the injury. In other words, a claim is not barred unless a person is 51 percent at fault. The damages allowed are reduced by the proportion of contributing fault of the person recovering.

Under NDCC Section 32-03.2-02.1, notwithstanding modified comparative fault, in an action to recover damages for injury to property, the damages may not be reduced by contributing fault if three conditions are met. The party must be seeking damages as a result of a two-party motor vehicle accident, the direct physical property damages sought are not more than \$5,000 and the indirect damages do not exceed \$1,000, and the percentage of fault of the person against whom recovery is sought is over 50 percent. In 2003 House Bill No. 1263 clarified this section and provided that the section applies regardless of whether the person seeking damages also seeks damages for personal injury; however, personal injury damages are not available under the section.

LIABILITY INSURANCE

Under NDCC Section 39-08-20 a person may not drive a motor vehicle in this state without liability insurance. The owner of the vehicle is responsible for acquiring liability insurance. In addition to purchasing liability insurance, the driver must provide proof of insurance upon request by a law enforcement officer. The liability insurance must be in the amount required by Chapter 39-16.1.

North Dakota Century Code Chapter 39-16.1, "Proof of Financial Responsibility for the Future," works in concert with Chapter 39-16, "Financial Responsibility of Owners and Operators." The purpose of these two chapters is to protect innocent victims of motor vehicle accidents from financial disaster. Both chapters are for a motor vehicle owner who has already had an accident or has been convicted of certain traffic offenses. The sanctions imposed by Chapter 39-16 are intended to guarantee financial responsibility for a first accident. In contrast,

the sanctions imposed by Chapter 39-16.1 are designed to establish proof of financial responsibility for future accidents. The minimum limits for liability insurance in Section 39-16.1-11 are \$25,000 per person and \$50,000 per accident for bodily injury and \$25,000 per accident for property damage.

Under NDCC Section 39-08-20, the offense of not having liability insurance is a Class B misdemeanor, and the sentence must include a fine of at least \$150. The second offense within 18 months includes a fine of at least \$300. In addition, the offender's license is marked. The individual's license is suspended until that person has an insurance carrier provide the department a certificate of insurance showing insurance for three years.

UNINSURED AND UNDERINSURED MOTORIST INSURANCE

Under NDCC Section 26.1-40-15.2 a liability insurance policy may not be issued unless uninsured motorist coverage is provided for an amount equal to or in excess of the limits stated in Section 39-16.1-11. Uninsured motorist coverage covers bodily injury in the minimum amount of \$25,000 per person and \$50,000 per accident. Section 26.1-40-15.3 requires underinsured motorist coverage at the limits equal to the limits of uninsured motorist coverage. Uninsured motorist coverage is for bodily injury protection for the insured person if the other party causing the injury does not have insurance. Underinsured motorist coverage is for the insured person if the other party causing the injury had bodily injury liability coverage less than the amount of the insured person's underinsured motorists coverage.

The remainder of the provisions of law relating to uninsured and underinsured insurance relates to what happens if there is other insurance, e.g., workers' compensation or no-fault, or if there are multiple uninsured and underinsured policies; who and if the insurance company may seek recovery from the party at fault or, in other words, who against and if the insurance company may use the right of subrogation; if the insurance coverage does not apply; and other general provisions relating to the insurance contract.

NO-FAULT INSURANCE

Generally, the term "no-fault automobile insurance" refers to a type of automobile insurance under which claims for personal injury are made against the claimant's own insurance company rather than against the insurer of the party at fault. *Black's Law Dictionary*, 411-412 (Abridged 5th Ed. 1983).

In 1975 the North Dakota Legislative Assembly enacted the North Dakota Auto Accident Reparations Act, which provides for a no-fault automobile insurance system. This no-fault automobile insurance law became effective on January 1, 1976, and remains in effect with amendments today. North Dakota Century Code Chapter 26.1-41 is entitled "Auto Accident

Reparations," and this chapter comprises most of the state's no-fault automobile insurance law. Under this system the owner of an insured motor vehicle (secured person and secured motor vehicle) is required to have insurance coverage for the payment of basic no-fault benefits and liabilities covered under motor vehicle liability insurance.

Under a no-fault system there are limitations on the right of a victim to sue if injured in a motor vehicle accident. North Dakota Century Code Chapter 26.1-41 precludes tort actions by injured parties for damages covered by no-fault insurance. The insured person is exempt from paying for economic loss to the extent that an injured person has been paid or will be paid basic no-fault benefits. In addition, Chapter 26.1-41 prohibits all tort actions for the bodily injury unless there is a serious injury. A serious injury means an accidental bodily injury that results in death, dismemberment, serious and permanent disfigurement, or disability beyond 60 days, or which results in medical expenses in excess of \$2,500.

What and Who Is Covered?

Under NDCC Section 26.1-41-01 a basic no-fault insurer is required to pay basic no-fault benefits not to exceed \$30,000, without regard to fault, for economic loss resulting from accidental bodily injury. The statutorily required basic no-fault benefits do not apply to damage to personal property, such as an automobile.

Basic no-fault benefits include payments for medical expenses, for work loss, for replacement services, and death benefits. Medical expenses are covered for necessary remedial treatment and care at reasonable charges. Work loss has a limit of 85 percent of loss of income up to a maximum of \$150 per week. Survivors may receive income loss not to exceed \$150 per week in case of death. Replacement services are for the actual expense of the loss of services of the injured person in the household. These payments are limited to up to \$15 per day. Death benefits for funeral expenses are limited to \$3,500.

Under NDCC Section 26.1-41-06 the insurer is required to pay for the economic loss that results from accidental bodily injury sustained by:

1. The owner, or any relative of the owner, of a motor vehicle while occupying any motor vehicle or while a pedestrian as a result of being struck by a motor vehicle or motorcycle;
2. Any other person while occupying the secured motor vehicle; or
3. Any pedestrian as a result of being struck by the secured motor vehicle.

Under NDCC Section 26.1-41-07 there are certain circumstances under which an otherwise eligible injured person is not entitled to no-fault benefits, including if the injured person intentionally caused

injury and also if the injured person was not in lawful possession of the motor vehicle.

What Policy Pays?

Under NDCC Section 26.1-41-13 a basic no-fault insurer has the primary obligation for economic loss from bodily injury unless there is workers' compensation coverage. Under Section 26.1-41-13(3) the basic no-fault insurer pays for the first \$10,000 of medical expenses and the medical insurance pays the remainder. This coordination of benefits is designed to ensure that there is not a double payment. If there are multiple no-fault policies, the occupant's vehicle coverage has priority over the injured passenger's coverage, followed by the assigned claims plan. The assigned claims plan pays no-fault benefits to an individual not otherwise excluded by law or on the financial inability of the basic no-fault insurer. Generally, an insurer does not have the right of subrogation, only arbitration against the adverse insured for limited amounts.

How Is What Is Paid Determined?

Under NDCC Section 26.1-41-11 an insurer may require the insured person to have a physician of the insurer's choice examine the insured person. These examinations are called independent medical examinations by the insurer. Generally, the examinations are used to determine if the injury claimed was caused by the accident or was a preexisting or subsequent condition.

During the 2001-02 interim the Budget Committee on Health Care received a report from the Insurance Commissioner on independent medical examinations. The committee learned that insurance companies may hire physicians to conduct an independent medical examination to determine whether an individual who has been injured in an automobile accident is healed or requires further treatment. The main issue of the study of these examinations was to ensure that the examinations are unbiased and impartial. While North Dakota has two reviews--the treating physician and the independent medical examination physician--the committee learned that some states have implemented a third review which is a form of no-fault alternative dispute mechanism, including arbitration, mediation, informal conciliation, or review panels.

The committee received information on the Insurance Department's personal injury protection/no-fault closed claims study. The committee learned the 2001-02 study was conducted with the cooperation of the top 25 automobile insurance writers in the state, which involves 82 percent of the market. Of the 4,371 total closed claims during the August 2001 to August 2002 time period, 148 claims resulted in an independent medical examination and 54 claims in an independent records review. Based on the

information reviewed, the department developed the following conclusions:

1. Of all the claims involving benefits being paid, relatively few require an independent medical examination to be performed.
2. For those claims in which an independent medical examination was performed, the majority result in the termination of benefits.
3. Because of insufficient claims volume, the department is unable to make any credible observation regarding the average cost for providers of independent medical examinations.
4. Independent medical examinations and independent records reviews were performed more frequently in state than out of state.
5. The frequency in which an independent medical examination was requested when the primary medical provider was a chiropractor is equal to the frequency in which the primary medical provider was a physician.
6. Independent medical examinations and independent records reviews were requested more frequently on those claims in which a previous similar injury existed.

The Insurance Department did not make any recommendations as a result of its study; however, the department did suggest that if the Legislative Assembly chooses to make a change in this area, it may wish to authorize an alternative dispute mechanism rather than the formal legal process, especially for smaller claims.

Benefits of No-Fault Systems

Advocates of the no-fault system assert that the system has several advantages over the traditional fault system, including sure and certain relief, which involves an increased rate of compensation for physical injuries, a higher number of individual payments, and quicker and more effective medical relief; decreased litigation, especially the number of minor suits; access by accident victims to a greater amount of money from automobile insurance; and payment of a higher portion of premium payments to injured claimants.

The legislative history of the bill creating the no-fault system in this state indicates there were a variety of factors raised in support of the proposed no-fault system. Items considered in 1975 included an anticipated decrease in length of the waiting time for insurance benefits under a no-fault system; an anticipated increase in the number of first-party benefits without an increase in insurance rates; an increase in the proportion of premium dollars paid to injured claimants, resulting primarily because of the decrease in administrative costs such as examining and defending accident cases; and an increase in coverage in that insurance coverage would be provided for "single car accidents" and the traditional

system generally does not provide coverage for "single car accidents."

2003 LEGISLATIVE SESSION

During the 2003 legislative session the Legislative Assembly enacted a number of bills relating to motor vehicle insurance. These bills include House Bill No. 1190, House Bill No. 1238, Senate Bill No. 2224, Senate Bill No. 2238, and Senate Bill No. 2275.

House Bill No. 1190 provides that in any claim for uninsured or underinsured motorist benefits, the insured and the insurer bear responsibility for one's own attorney's fees incurred unless the insurance contract specifically provides otherwise or unless the insurance company is found to have acted in bad faith. The bill removes the July 31, 2003, expiration date on NDCC Section 26.1-41-20. This section prohibits a person that had two convictions for driving without liability insurance and was driving without liability insurance from receiving noneconomic loss for serious injury in action against an insured person. In addition, the bill lowers the previous convictions requirement from two to one. The bill removes glass and hail damage from being used to determine whether a vehicle must be issued a salvage certificate.

House Bill No. 1238 allows a person to be convicted for failure to have liability insurance when the person purchases liability insurance after the accident notwithstanding NDCC Section 26.1-30-18. Section 26.1-30-18 states an insurance policy covers the insured at 12:01 a.m. on the day on which the coverage begins. The bill places the burden of proof as to the time of the acquisition of the policy with the driver or owner of the motor vehicle.

Senate Bill No. 2224 provides that the doctrine of efficient proximate cause applies only if separate, distinct, and totally related causes contributed to the loss and provides that an insurer may contract out of the efficient proximate doctrine.

Senate Bill No. 2238 requires an insurer to provide an insured with specific consumer protection information if the insured determines a vehicle to be a total loss and continues to provide comprehensive or collision coverage on that vehicle.

Senate Bill No. 2275 increases the amount of no-fault medical expenses a no-fault insurer may coordinate with a health insurer from in excess of \$5,000 to \$10,000. In short, the no-fault insurer pays the first \$10,000 of medical expenses. The health insurer pays medical expenses after \$10,000. As

engrossed in the Senate, this bill would have repealed this state's no-fault laws effective August 1, 2005, and would have provided for a Legislative Council study on the no-fault insurance system. The legislative history reveals the reason for the consideration of the repeal of the no-fault system in 2005 appears to have been to ensure the serious study of no-fault insurance.

There was testimony for and against the increase. Generally, health insurers were for the increase. The reason for the increase is that inflation has increased the cost of medical procedures. Because the threshold has stayed at \$5,000 for 18 years, medical insurance has had to pay for more medical expenses as inflation has caused more expenses to exceed the threshold.

Generally, no-fault insurers were against the increase. They argued that health insurers are more efficient at administering insurance for medical expenses. One example showed that medical insurers had over a 30 percent lower expense ratio. Medical insurers have the experience, expertise, and size to more efficiently administer medical insurance. In addition, the increase lowers the amount of no-fault benefits available for benefits that are not medical expenses.

There was also testimony against no-fault insurance in general. It was stated that since 1990, two states have repealed their no-fault laws and four more have considered repealing their no-fault laws. The main reason for the removal of the no-fault system was that the system's inefficiency caused abuse of the system.

SUGGESTED STUDY APPROACH

The area of motor vehicle insurance law is a complex area of the law. There are many disagreements and lawsuits surrounding motor vehicle insurance coverage each year. Because of the contentiousness and complexity of the area of insurance law, the committee may consider receiving testimony from interested parties on which particular issues are most important. After deciding which issues to investigate, the committee may want to receive testimony on those issues from interested parties, including the Insurance Commissioner, motor vehicle insurance companies, insurance customers, medical insurance companies, attorneys, medical doctors, and chiropractors.

ATTACH:1

**Fifty-eighth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 7, 2003**

SENATE BILL NO. 2262
(Senator Mutch)

AN ACT to provide for a legislative council study of motor vehicle and motorist insurance systems.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE COUNCIL STUDY - MOTOR VEHICLE NO-FAULT, UNDERINSURED MOTORIST, AND UNINSURED MOTORIST INSURANCE. The legislative council shall study, during the 2003-04 interim, the motor vehicle no-fault, underinsured motorist, and uninsured motorist insurance systems. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the fifty-ninth legislative assembly.