STATE OF MAINE

106TH LEGISLATURE

HEARING BEFORE COMMITTEE ON BUSINESS LEGISLATION

ON NO FAULT INSURANCE: LD-1425, LD-1770

BOOK III OF IV

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STATE OF MAINE
106th LEGISLATURE

COMMITTEE ON BUSINESS LEGISLATION

HEARINGS ON NO FAULT INSURANCE:
LD-1, LD-1420, LD-1425, LD-1770

I N D E X -- May 19, 1973

Bill	Speaker	Page
1425	Bennett	56
	Berry	1
	Hogerty	97
	Keeton	5
	Lawrence	97
	McKusick	2
	McTeague	94
	Smith	102
	Spangenberg	58, 92
1770	Baron	151
	Brown	156
	Keeton	166
	Marcotte	104
	McKusick	162
	Smith	108, 150
	Spangenberg	123, 169

SEE ALSO: Appendix, for Exhibits

P R O C E E D I N G S

SENATOR COX. Call to order this meeting of the Committee on Business Legislation. We're going to operate -- try to operate the way we intended yesterday, and that is, if there's going to be a long debate, we'll take an hour for the proponents and then we'll switch over to the opponents for an hour, and then we'll go back and forth. The room is probably empty because of the various people having to fly up, who have information to give us.

The first bill we will hear today is LD-1425, an Act relating to the Uniform Motor Vehicle Accident Reparations Act. We will first hear from the sponsor, Senator Berry.

SENATOR BERRY. Thank you. Mr. Chairman and members of the Business Legislation Committee: it is a pleasure for me to sponsor this No-Fault Insurance Bill and it is my hope that out of the considerations of the Committee on the several bills, a good No-Fault Bill

SENATOR BERRY (Continued): will emanate for the benefit of the people of the State.

I would now like to introduce Attorney Vincent McKusick of Portland, who has been leading the effort on behalf of this particular form of No-Fault Insurance.

MR. McKUSICK. Thank you, Senator Berry. Let me say, Mr. Chairman and members of the Committee, that I appear before you today as -- in my capacity as a Commissioner on Uniform State Law. And it is with great pleasure that I am able to bring to you today, to discuss UMVARA, or the Uniform Motor Vehicle Accident Reparations Act, my fellow Commissioner from Massachusetts, one of the Massachusetts Commissionerson Uniform State Laws, Robert Keeton.

Since the publication in 1965 of the Keeton-O'Connell Basic Protection Plan, the name Keeton has come to be synomymous with No-Fault Auto Insurance. And we're certainly very privileged to have him with us today. Bob Keeton is a native of Texas and he was a trial lawyer there for some years and you're going to be -- there's some remnant of that Texas accent.

MR. MCKUSICK (Continued): even though he's been one of us New Englanders for almost 20 years. He teaches insurance and tort law and trial practice at Harvard Law School. He -- From that experience and also from his observation of No-Fault Insurance -- No-Fault insurance legislation as it is developing around the country, make him -- makes him uniquely qualified to talk with the Committee this afternoon about 1425, which is UMVARA, as we call it in short, and -- and also about No-Fault in general

Before I introduce Commissioner Keeton, I would like to very quickly tell you a little bit about the work of the National Conference of Commissioners on Uniform State Laws. The Conference consists of about 210 Commissioners, at least three from each State, plus the District of Columbia, Puerto Rico and the Virgin Islands. All lawyers, they are appointed by the Governor and in the case of the State of Maine, subject to confirmation by the Executive Council. They serve completely without pay. And in 81 years of existence of the Conference, much of the major legislation of the States around the country have come out of the

MR. MCKUSICK (Continued): drafting efforts of the National Conference. For example, the Uniform Commercial Code, which is now the law in every State, with the sole exception of Louisiana, and I'm sure that was a piece of uniform -- that was a Uniform Act, which was considered by the Business Legislation Committee of a predecessor Legislature.

The -- Specifically, the National Conference meets each year for eight or nine days of a heavy working session. Much of the initial work in preparing the proposed Uniform Act is done naturally in Committee. And, specifically, on the -- on UMVARA a Committee -- a drafting Committee, plus a special review Committee consisting of a total of 20 members, 20 Commissioners representing the whole spectrum of -- of the legal profession, have worked on it intensively for a period of about a year and a quarter meeting in three day meetings, Friday, Saturday and Sunday, almost every month. According to the Conference Rules, the -- the statute proposed, the Uniform Act, must be debated in two successive annual sessions of the Conference in a

MR. MCKUSICK (Continued): legislative type committee of the whole. And that was done in August of 1971, and again in August 1972, and the result was the adoption by a vote by States of UMVARA as a Uniform Act and its promulgation as such. Commissioner Keeton and I had the pleasure -- or I had the pleasure of -- of serving on that drafting Committee with Professor Keeton and, as I say, some 18 others.

It's certainly been a great pleasure to welcome Commissioner Keeton to the State of Maine and I do want to take this opportunity to state publicly my personal appreciation to -- to him for taking time from his heavy schedule at Harvard Law School to come up here at his own expense and to talk to the Committee in regard to LD-1425, UMVARA, and No-Fault proposals generally. Commissioner Keeton.

COMMISSIONER KEETON. Thank you very much, Mr. Chairman, and members of the Committee. I am grateful for the opportunity of appearing before you.

I would like to add one further thing to what Mr. McKusick has said about the work of that special committee.

COMMISSIONER KEETON. He modestly downgraded his own role. He was an extremely valuable member of that special Committee of the National Conference of Commissioners on Uniform State Laws. UMVARA came before the Conference as whole and was approved last summer.

I think it might be useful to place UMVARA and LD-1425, which is exactly the UMVARA Bill, in context with the various proposals that you have heard and that are being discussed around the country. In the first place, we might divide them into two major groups. There are now 14 states that have enacted some form of legislation that has been referred to by its proponents of the various forms as No-Fault Insurance legislation. But those 14 divide very sharply into two major groups, besides (1) that we put aside the Illinois bill which has been declared unconstitutional and did not quite fit within either of these two patterns.

One of those patterns is the Add-On pattern. And that is a bill that simply takes the present system as it is, primarily a fault and liability insurance system,

COMMISSIONER KEETON. (Continued): that is, one in which a claim must be based upon fault and is actually paid by a liability insurance company on behalf of the person found to be or claimed to be at fault. It takes that system and adds on to it a requirement that in addition to liability insurance, the automobile insurance policy contain a no-fault insurance coverage that will pay some benefits for out of pocket losses. That kind of bill does not include any limitation of the right to recover in tort. And as a consequence there are certain things that clearly result. One is if you pass an Add-On bill, premiums to the policy holders are going up. There is just no other way it can happen, because the bill does nothing at all about changing the existing system. Whatever costs are there in the existing system, they continue to be there. And something is added because the new coverage is added on top.

Now, proponents of these bills sometimes, not too often, but sometimes argue that they at least hope that they will not increase the cost, because they hope that people who have been paid these added on no-fault

COMMISSIONER KEETON (Continued): benefits will forego their tort claims. I think if we take the time to examine the incentive structure of the bill, it is clear that that will not be so, because we can surely draw the inference that although I hope it is the case, and I believe it is the case, that most citizens in most States, and certainly most citizens in this State, will not make fraudulent claims, it is the case that many of them will at least respond to the incentive structure in the bill for legitimate claims. And when you enact an Add-On bill that takes care of the out of pocket expenses up to a certain amount, it tends to have, as part of that incentive structure, a -- an effect of financing rather than discouraging tort cases, because it relieves the incentive to settle promptly to get cash to take care of out of pocket bills, and instead, those bills are paid promptly, and what reason is there not then to press farther with the fault claim for the pain and suffering, in addition to the no-fault benefits that have already been paid?

So, if we want to be realistic, the Add-On bills

COMMISSIONER KEETON (Continued): will increase costs -- are bound to increase costs to the policy-holders. Among the bills you have before you, Legislative Documents #1 and #1770 are Add-On bills.

Now, the second type of bill is a bill that undertakes to do something about the waste, the inefficiency, the unfairness and the high cost of the fault and liability insurance system.

Let me speak for just a moment about the key element of unfairness, that part, that point about the unfairness that has its most dramatic impact in any fault and liability insurance system for the handling of claims arising from automobile accidents. That is the unfairness that has been documented by field studies, both within the insurance industry based on the claims paid and by field studies out of the universities over and over again, beginning in the early thirties with the Columbia study and concluding most recently, the most recent large scale study, being done by the United States Department of Transportation as a part of the complex six million dollar study that the Department of

COMMISSIONER KEETON. (Continued): Transportation is sponsoring. This phenomenon has been documented over and over again, that the small injuries, the slight injuries, are heavily over-paid in comparison with the more serious injuries.

Now, to give you some nationwide figures, a study of actual claims paid by liability insurance companies, a sample out of six States scattered across the nation for a period of a few weeks in February, 1968, which is one of the careful documented studies in this area, shows that when the total economic loss associated with an injury was less than $100, all the medical expense, wage loss, everything added up together was less than $100, the average settlement of those claims, when the claimant was represented by a lawyer, was 7.14 times the economic loss. And when he was not represented by a lawyer, it was 4.5 something times the economic loss.

In contrast with that, when there are really serious injuries that involve twenty-five hundred, five thousand or even more of economic loss, a person was lucky to recover his economic loss and never recovered a multiple

COMMISSIONER KEETON. (Continued): anywhere near these multiples that apply in the slight injury cases.

So the inequity I'm talking about here, is that the fault and liability insurance system, because of the way it operates, and I'll come back in a moment to -- to talk about why it is that way, actually does result in payment of slight injuries in high multiples of the out of pocket losses, and payment of serious injuries in low multiples or even in less than the actual out of pocket losses.

Now, if we were to distinguish between slight injuries and serious injuries, and to give this proportionate benefits to one or the other, surely we would all agree that the injuries that should be disproportionately benefited would be the serious injuries, not the minor injuries. So this is an injustice, both among claimants and toward policy holders, who are being required by the system, as a result of its characteristics, to pay for a kind of coverage that they never would choose if they really had a choice.

And you have the opportunity in presenting these No-Fault bills and choosing among them, to give the

COMMISSIONER KEETON (Continued): consumers a choice, that they have not had before, to give them a choice to buy the kind of coverage that will give them high protection for economic loss including the losses in serious injuries, if they are willing to give up some of this accepted payment of slight injury cases. And I think that there's no doubt that if you put that question to the individuals and explain the systems to them, there's no doubt which way they would choose, They don't have that opportunity to choose, because the system must be a system for the whole body of citizenry in the State. The individual citizen cannot be given that choice today. He can be given that choice if the Legislature will enact a bill that is what I would refer to as a genuine No-Fault Bill.

Now, I turn to that second group of bills to describe the characteristics of the bill that would correct this inequity and waste that exists in the present fault and liability insurance system and would be preserved by the Add-On bills, such as LD-1 and LD-1770. Under this other group of bills, there is an elimination of

COMMISSIONER KEETON. (Continued): the right to recover in tort for non-economic loss -- pain and suffering, we all -- ordinarily call it. In the UMVARA Bill, the term non-economic loss is used as a matter of drafting clarity because there are some differences among States and even within States, about the way of talking about the pain and suffering claims, exactly what is meant by them. And the definition of non-economic loss here makes that very much clearer.

There is in these bills what might be referred to as a trade-off, an elimination of the right to recover for non-economic loss in the less serious cases, while giving to everybody a right to be protected, to be secure in protection for the payment of his economic losses, and under the UMVARA Bill to be paid for those economic losses for a lifetime. Under some of the other bills, not anything like that good benefits, but nevertheless a trade-off is still there.

So it's a good place, then, we should separate in thinking about these bills, the Add-On bills from the true No-Fault bills, the genuine No-Fault bills that

COMMISSIONER KEETON. (Continued): have this trade-off of eliminating some of the waste and inequity of the fault and liability insurance system and using the savings resulting from that in part at least to improve the benefits for economic losses.

Now, among the bills that have this genuine No-Fault principle, those enacted up to this point in Massachusetts and Florida and Connecticut and New Jersey and Michigan and New York and Utah, vary in the extent of benefits. None of them has given as generous benefits as UMVARA recommends. The closest is Michigan, which has essentially adopted the UMVARA pattern of benefits with respect to medical expense, giving lifetime protection for medical expense, but has put $1,000 a month for 36 months limit on the other kinds of economic losses essentially, mostly work loss, wage loss. So it provides for that $36,000 wage loss, whereas UMVARA would provide for a comparable level per month for a lifetime.

Now, obviously, the first question you would want answered is, what does that kind of generosity of benefits

COMMISSIONER KEETON. (Continued): cost? And before this matter came before the National Conference of Commissioners on Uniform State Laws last August for action, cost studies had been made for the Special Committee, by the three segments, the three main segments of the Insurance Industry, The American Insurance Association, the American Mutual Insurance Alliance and the National Association of Independent Insurers. And I'm sure it will not surprise you to hear that they differed, in their cost estimates. But it may surprise you to hear that the difference was far narrower, far narrower than the differences had been in previous years. For example, when we had this Legislative debate going on in Massachusetts, in 1967 through 1970, when the cost estimates of opponents of No Fault Insurance were based on the assumption that there would be 2.7 times as many claims under the No Fault system as under the existing system, and those obviously who were supporting it estimated there would be 1.3 times as many claims. We all turned out to be wrong. There have been fewer

COMMISSIONER KEETON. (Continued): claims instead of more, as the thing has actually worked out. The extent of the exaggeration of slight injury cases and the causing of those to turn up as personal injury claims in the total system was much greater than any of us anticipated.

But as I say, the cost estimates that we received for the Special Committee on UMVARA turned out to have a much narrower range. And a consultant to this special committee, Professor Williams from the University of Minnesota, who has also done a lot of work in the various cost estimates, made an analysis of the cost estimates for us on the basis of which they could be translated into what would probably happen if UMVARA were enacted in particular States. And that translation shows a comparison of figures, which I'll state in a moment, but perhaps before I state them, I should indicate exactly what it is we are comparing here.

Under the fault and liability insurance system, the existing system, the package of insurance that's in-

COMMISSIONER KEETON. (Continued): cluded in this comparison, is a packet -- package of insurance worth $25,000 per person, $50,000 per accident, liability insurance coverage.

Now, that of course, is higher than your existing financial responsibility limits. It happens to be the same, I believe, as the coverage in 1770 and LD-1 proposes $25,000 per accident which is not quite as generous as that, because there will be cases in which there are two persons injured so that 25 per person and 50,000 per accident would in these cases provide greater benefits. But we can say that the two proposals, the Add-On proposals that are -- before you, number 1 and number 1770, have essentially a package very nearly the one that was being used in this comparison. Also in this comparison there were semi-uninsured motorist coverage of 10-20, $10,000 per person and $20,000 per accident, and a medical payment coverage of a modest amount, $1,000, I believe, was the amount of medical payments coverage -- yes, $1,000 was the amount of the medical payments coverage. Now, also in their comparison, they included the property damage. And that would

COMMISSIONER KEETON. (Continued): make -- that would not make it exactly comparable to 1770, because it does not. It would make it quite comparable to number 1, because it does undertake to include property damage within the provisions. That is the package on one side that's being compared.

The package on the other side is UMVARA. Notice that under UMVARA, instead of paying $25,000 per person limit on your guaranteed benefits, there is no limit. You have lifetime coverage for all your economic losses, medical expenses without any kind of even -- so-called internal medicine, except that you're entitled only to the reimbursement for semi-private accommodations in the hospital rather than private, unless you need intensive care, in which you can have the private. And there's only $1,000 for funeral expenses. Those are internal limits. And on the wage loss side, again, lifetime coverage with an internal limit of $200 per week which works out to just a little less than the $1,000 a month figure that I referred to as being -- appearing

COMMISSIONER KEETON. (Continued): in the Michigan Bill. Those are the kinds of benefits under UMVARA, lifetime coverage. You do under UMVARA, although having insurance for all of your economic losses you have this benefit, give up your right to pain and suffering damages, for non-economic damages, except in the severe injury cases, and the tort exemption in UMVARA is a strong tort exemption. It really defines severe injury. In that respect it's a much stronger tort exemption for example than that appearing in Representative Trask's Bill 1420.

The comparison in cost between these two bills, present system or UMVARA, the American Insurance Association estimates translated by our consultant, Professor Williams, to apply to Maine, show a 16% savings. The American Insurance Association estimates a 6% savings. The National Association of Independent Insurers estimates an 11% increase. Now, there are differences among them, as I indicated, but rather narrow differences. And what we can say is, that the

COMMISSIONER KEETON. (Continued): industry overall, if you take an average of the industry's views, forecast modest savings.

And look at the difference in the benefits at -- if -- if an individual has a chance at the time he's buying insurance coverage, before he knows which kind of accident he's going to have, a slight injury or a serious injury accident, and he's asked which of these would you rather have for the same price, is there any doubt that he will take lifetime protection for economic losses rather than this lottery ticket for excessive payment of 7.1/4 times the amount of his economic loss in a slight injury case? I think if we had a way of putting that question to the public generally, there's not the slightest doubt how it would come out. And in fact you, as their representatives, have the responsibility on your shoulders to make that choice because you make it by not acting here, as well as by acting. If this Legislature passes no bill this year, it will be a choice forced on all consumers of this State to continue with this fault and liability insurance system in which you buy

PROFESSOR KEETON (Continued): the protection that would give you overpayment of the slight injuries and no assurance of payment beyond $25,000, when with the same money, you could buy lifetime protection for the economic losses by simply giving up this right to recover the non-economic losses except in the severe injury cases.

Now, as you can see, the National Conference of Commissioners on Uniform State Laws, when this problem faced them -- was presented to them, a body of hard headed lawyers, all of them were lawyers, as Professor -- as Mr. McKusick mentioned, came to the conclusion that the good legislation, the best legislation in this area, is a bill of the UMVARA type. It has a strong tort exemption and provides lifetime protection for economic losses, all of which can be done without requiring the citizens of this State to pay any more and probably slightly less than they would be paying if they're buying this 25-50 coverage, essentially the package that is being proposed that they be re-

PROFESSOR KEETON (Continued): quired to buy under the Add On bills that are before you.

Now, perhaps I should add that of the several bills before you, certainly LD-1420 is second best among these several bills. It does have the trade-off principle recognized, it does undertake to some extent to limit tort claims. But I would have to add that if with ordinary comparison, instead of just looking at the bills that are before you at this point, if we look at the bills that are under consideration in the United States generally, including all the laws that have been passed, LD-1420 is weaker than any genuine No-Fault bill that's been passed in any other state. In other words, we have seven states already having enacted true No-Fault legislation. LD-1420 would be weaker than any of those seven. Now, that is not to say that there's anything wrong with the structure of 1420. It's alright. In structure, it's good, in structure. All we'd have to do to up-grade it, in relation to the legislation that has been passed and even in comparison with UMVARA, though it wouldn't make it

PROFESSOR KEETON (Continued): as good as UMVARA, is to change two provisions: One, the amount of benefits. It only requires $2,000 of No-Fault benefits and as I've just indicated to you, out of the cost studies made for the National Conference, you can provide lifetime benefits within the range of cost we're talking about, if you'll cover it with another provision, that I'll turn to in a moment. So -- and let me add that no other State that has enacted No-Fault legislation of any kind, even the Add On bills, have made it less than $2,000 and few have made it -- very few have made it that low. The only other genuine No-Fault bill that's that low is Massachusetts, which was the first, and I think the pioneering State could be forgiven for being a little more careful in its pioneering, and too careful, obviously. None of us anticipated how successfully the bill would operate and as the data that are now in to the years of operation in Massachusetts have demonstrated that we were too cautious, much too cautious for the benefits provided

PROFESSOR KEETON (Continued): under that bill. So that's the first amendment that could be changed that would enormously improve 1420.

The second thing that would need to be changed is Section 128, the tort exemption provision. And here too, 1420 is weaker than any of the genuine No-Fault bills that have been passed. It is weaker than the bills in any of these seven states, Massachusetts, Florida, Connecticut, New Jersey, Michigan, New York and Utah. It needs to be tightened.

If you have 1420 before you, I am looking at Page 5 of the bill, Section 128, and if you analyze that Section, you'll see this interesting thing about it, that there are seven different ways you can establish your right to have a tort action. One is to establish that you have more than $2,000 of damages. That is, if the jury in its findings on the evidence that's before them at the trial, comes up with the figure in excess of $2,000. That's for damages for everything, wage loss, economic loss, pain and suffering, everything, and the Court says the evidence sustains

PROFESSOR KEETON (Continued): that finding, that establishes a right to tort recovery regardless of whether anything else is established. That by itself establishes the right to a tort recovery. Now, in that one case, it only establishes a right to tort recovery in excess of the $2,000. In all the other cases, it establishes the right to tort recovery from the first dollar. And this $2,000 limitation applies only to that one case.

Now, another fact of that is that even if you can't show any of these other things that I'll come to in a moment, and all you have is the plea, giving evidence of back pain, uncorrobated by any objective finding, no X-ray findings to support it, the doctor says, "I can't find anything wrong, no muscle tension, nothing," and the Plaintiff continues to complain of pain, is it not likely that the trial judge will say, "Well, if the jury believes you and believes it's worth more than $2,000, that's it. The law permits it."

Now, to be effective, a tort exemption provision must be self-executing to a considerable degree.

PROFESSOR KEETON (Continued): That is, it must be so clear how it would apply to a particular case that when a claimant consults a lawyer, the lawyer tells him, "It isn't worth trying a tort claim --- case, in this instance." It must be that clear. If it isn't that clear, then the lawyer, serving his proper role, and let it be clear that I'm not saying this, criticizing the Bar, because I maintain that it is their job to represent their clients, and if you establish a law, within which there is an incentive structure that says, "This claim is worth something in tort," then it's the lawyer's job to press it. That's what he's supposed to do in the representation of his clients. So if this bill passes, whenever a claimant comes to a lawyer and says, "I'm hurting still", it will be the lawyer's job to press the claim. Then consequently, you cannot expect any substantial savings in expense in the administration of a system from a bill that has that provision in it, that allows one to make a

PROFESSOR KEETON (Continued): collectible claim and a likely recovery in tort anytime he complains of pain. And that pain that the lawyer thinks that the jury might think it was worth more than $2,000.

So you cannot expect that 1420 as written would eliminate any substantial body of tort claims. And if it won't eliminate any substantial body of tort claims, you cannot expect it to be available at the same price, but only at a higher price than the existing system, because unless it succeeds in eliminating some of these tort claims, it is in effect still just an Add On bill.

Now, the other six ways you can go about establishing your right to a tort claim under 128 is to establish more than $500 of medical, or looking at the following sentence, to establish either one of the descriptive types of injuries. Now, the way the bill is drafted, as I indicate, it necessarily opens up this right to a tort action in any case, regardless whether you have one of these descriptive types

PROFESSOR KEETON (Continued): of injuries, in which there is evidence that would support a $2,000 damages finding by the jury. That is the thing that must -- must be changed, I submit, if 1420 (123) is converted into an acceptable bill. And there are various ways you could change it. One is by simply changing that figure $2,000 to a high enough figure, that it would have self-executing dimensions. That is, if you put it, for example, at $5,000, then it still would be the case that the lawyer's advice to the claimant with slight injury would be, "There's not enough chance the jury would award that much to make it worth while to press the claim," so it would practically eliminate the body of claims. But I would submit that if you do that, then you ought to either use that as the sole criterion, which is actually the way Professor O'Connell and I proposed that it be done in the tort exemption back in 1965. No Legislature has done it yet that way. Instead all the Legislatures that have enacted, have not used this deduction, this $2,000

PROFESSOR KEETON (Continued): figure at all, but instead have used some of the other techniques that appear in 1420. So there are two ways you could strengthen that. One is just to stop the sentence in the -- in Section 128 in the seventh line after the phrase, "vehicle in the state." Just stop it at that point, and raise the $2,000. Then you would have the kind of tort exemption that Professor O'Connell and I originally recommended.

The other way to do it is to strike out the "up to $2,000" to any person. Strike that out and use the other kind of criteria.

Now, I -- of course, I would recommend that you take instead of Section 128, the tort exemption provision of UMVARA.

And I -- to be clear, let me add in conclusion, that I want to be very explicit on the proposition, that in talking about ways in which 1420 might be strengthened, I am in no sense hedging in the least my

PROFESSOR KEETON (Continued): recommendation to the Committee that UMVARA should be accepted fully. It is far the best bill.

1420 could be made into a good bill, by the kinds of changes I've suggested. But here the choice is still, if you've made those changes, you would still be giving the citizens of this State an opportunity to buy longer term protection at approximately the same or slightly lower rates than at present, if you stiffen that tort exemption. But why not go the further step and give them lifetime protection, which you can do by enacting UMVARA?

I would also call attention to the fact that these estimates on cost were made not by proponents of the bill. These have been made by the Industry, the people who are going to have to live with the operation of the bill on the cost side, and if there's any incentive structure as far as the cost estimates are concerned, it is plainly an incentive to overstate

PROFESSOR KEETON (Continued): the cost rather than to understate, because these estimates will come back to bite them if the bills are passed, or if they try to get higher premiums than these estimates indicate. So if there is any error in these, I submit it is probably an error on the high side.

So I feel quite confident in forecasting that if a bill of the UMVARA type is enacted in this state, it would produce not only the greatly improved benefits but also premium costs probably slightly lower than they would be either under LD #1 or LD 1770. Thank you very much, Mr. Chairman.

SENATOR COX. Are there any questions of Mr. Keeton? Representative Deshaies.

REPRESENTATIVE DESHAIES. I have one or two here. You made that remark very early in your presentation and I was hoping you could elaborate on it. Why are smaller claims consistently overpaid?

PROFESSOR KEETON. Oh, yes, I forgot to come back to that. Thank you.

In order for a liability insurance company to defend against a claim in which the medical expenses, let's say, are $75, mostly consisting of X-rays to find there's nothing wrong in the bone structure and a couple of visits to the doctor during the period immediately afterwards, in order for a company to defend against that claim, if it's tried all the way through, just the trial, it'll cost them something more than $1,000. In order to defend, to the appellate court, if they have to go to that far, very much more. Now, as a matter of fact, when the liability insurance company looks at the question at the early stage, asks itself, what is the best way out of this for us, economically, the answer is to pay that $714 for a $100 claim, instead of trying it out. So the many reasons for this phenomenon of the heavy overpayment of the slight injuries is the practical significance of the cost of defense. Now, that practical significance is to give to every claim,

PROFESSOR KEETON (Continued): legitimate or not, a substantial nuisance increment to its value. If it's a valid claim for a small amount, it blows up that amount to a lot more. If it's a fraudulent claim, then it makes it worth something, when it wasn't really on its merit worth anything. You know, it really isn't fraudulent claims that's killing us on costs. It's the multiplication of the value of the small meritorious claim that now comes to be about $714 for $100 worth of economic loss.

REPRESENTATIVE DESHAIES. Thank you. My other question here, you mentioned Michigan as having near model legislation as far as No-Fault is concerned. How does Michigan No-Fault differ from 1425? In what areas?

PROFESSOR KEETON. Michigan's bill is -- mainly, the key difference is -- are on benefits and the tort exemption. Now, there are some technical differences. The Michigan bill was to some extent modeled after an earlier draft of UMVARA, but put the technical differences

PROFESSOR KEETON (Continued): aside. They're not nearly as important as these two key differences on the benefits side. Michigan's benefits are just like UMVARA's on medical expenses: lifetime. But on wage loss, it's limited to a maximum $36,000, three years protection at $1,000 a month. And since the $1,000 a month is pretty close to what it is in UMVARA, the real difference is three years protection instead of lifetime protection on wage loss. That's the difference on the benefits side.

Now, corresponding with that, they have a weaker tort exemption. These two things are tied together. If you want to get lifetime protection without added cost, then you're going to have to get a little stiffer on the tort exemption, eliminate not only slight injuries, but pain and suffering for larger injuries, or maybe even we should describe it in more restricted terms than that. Eliminate the right of pain and suffering, except in the case of severe injuries. That's

PROFESSOR KEETON (Continued): what UMVARA proposes to do. Michigan does not go that far.

REPRESENTATIVE DESHAIES. All right. Thank you. How does 1425 -- Ld-1425, does it meet Federal standards?

PROFESSOR KEETON. Yes.

REPRESENTATIVE DESHAIES. It does?

PROFESSOR KEETON. Yes. Well, let me -- let me elaborate on that more. On the benefit side and on the tort exemption side, yes. But now, there are some technical provisions that are in the current draft of the National No-Fault bill that 1425 would not meet. I hope that before a National No-Fault bill is enacted, if it is, that it will be perfected. 1425 is better than a -- than a National bill that's now pending, in some respects, technically. But I can't say that 1425 would not have to be modified at all, if the National No-Fault bill passes in its present form. It would be technical modification rather than benefit structure modification. Modifications that would not

PROFESSOR KEETON (Continued): affect the total cost of premiums, for example.

REPRESENTATIVE DESHAIES. You mentioned a percentage of savings or additional cost, and I didn't write them down. I wonder if you'd mind repeating them, please?

PROFESSOR KEETON. You mean, the comparison --

REPRESENTATIVE DESHAIES. Projected -- Right. Projected savings or the projected cost.

PROFESSOR KEETON. This is the cost of UMVARA in comparison with the 25-50 package, etc., and these are the estimates from three different segments of the industry as interpreted by our consultant, Professor Williams. You understand that the three segments of the industry did not do this for all states for us. And so Professor Williams had to take an all state workout by one group, the NAII, and turn it into the overall estimates for the other two in order to get this and here's what they come out to. The AIA, we'll

PROFESSOR KEETON (Continued): call it the Adapted AIA, adapted by Professor Williams, 16% savings. The adapted AMIA estimates, 6% savings. The NAII estimates, 1% increase.

REPRESENTATIVE DESHAIES. Increase?

PROFESSOR KEETON. Right.

REPRESENTATIVE DESAHAIES. Fine, Thank you. One last question. You may not wish to answer this. You may wish to defer it. How do you feel about Blue Cross administering BI claims.

PROFESSOR KEETON. Well, the UMVARA does not put Blue Cross in the business of administering BI claims. Now, we have, of course, appearing before the UMVARA Special Committee, representatives of Blue Cross, as well as liability, all segments of the industry, etc., and we didn't satisfy any of them with our recommendations. I -- Blue Cross had a lower cost ratio or overhead in administering their present kind of benefits. But if they went into the business of administering these BI claims for wage losses, well, they couldn't

PROFESSOR KEETON (Continued): possibly maintain that same cost ratio. So it's very misleading for it to be suggested that because they have lower cost ratios on what they're paying, they could also have lower cost ratios if they were handling the wage losses. And if -- I think it would be undesirable for this coverage to be split up and passed around among a lot of different insurers. I think it's much better from the point of view of the customer to be able to go to fewer places, if there are some circumstances in which you don't want to make it a single place, which points you toward Social Security. But instead fewer places at least within the private enterprise system than would be involved if we had the automobile insurers handling the liability side of this business, which is still preserved for the severe injury cases, and Blue Cross handling part of it: Automobile property damage insurers handling -- I guess Blue Cross doesn't want to take care of wrecked automobiles, so that means you've

PROFESSOR KEETON (Continued): got to have another insurer to do that. My own personal feeling is that it is not desirable to pass this over to Blue Cross.

REPRESENTATIVE DESHAIES. Thank you.

SENATOR COX. Any further questions? Representative Tierney.

REPRESENTATIVE TIERNEY. I'd like to say at the outset, Professor Keeton, that it's quite an honor for a law school dropout like myself to have the opportunity to ask a question from a Professor that I was studying under about a year ago. I'm quite serious when I say so.

PROFESSOR KEETON. Thank you.

REPRESENTATIVE TIERNEY. I just have a couple more. One has to do with -- I'm sure that I won't ask anything unique, because you've been working with this for so long. But I was wondering a little bit about wage replacement. You have a $200 limit on that, is that correct?

PROFESSOR KEETON. Right.

REPRESENTATIVE TIERNEY. And I thought that was good, but it seems to me at first to be quite unfair to the person -- it's fair to a lawyer, a doctor or someone who makes more than that, but it might be unfair to the person on the other side. Then I started to do a little more and found you took care of the guy who's making more by giving him the right to sue.

PROFESSOR KEETON. Well, --

REPRESENTATIVE TIERNEY. Well, he's --

PROFESSOR KEETON. -- if he's over the limitation, yes.

REPRESENTATIVE TIERNEY. Yes. But I mean, in other words, if -- if the guy's making $500 a week, he's going to get a crack at -- at the tort money. But there isn't a parrallel, at least in my studies, for a person who makes a lot less.

PROFESSOR KEETON. Yes. Now, but -- but notice that the thing that we give to that person who's making $500 is not any greater right to sue for pain and suffering.

REPRESENTATIVE TIERNEY. No. I understand that.

PROFESSOR KEETON. But only for his actual loss.

REPRESENTATIVE TIERNEY. I understand. Looking at the way the whole system works. My wife hasn't worked in ages. She's home now taking care of my little boy. And she gets hurt. Her wage loss is nothing. I'm not paying her a dime.

PROFESSOR KEETON. Yes, but --

REPRESENTATIVE TIERNEY. How do you determine that loss?

PROFESSOR KEETON. She will have work loss. That's not wage loss. That also can be reimbursed up to $200 a week, too.

REPRESENTATIVE TIERNEY. Work loss. I don't --

PROFESSOR KEETON. For example, if the housewife is disabled and you engage substitute services --

REPRESENTATIVE TIERNEY. Oh, I see --

PROFESSOR KEETON. -- then, there is reimbursement up to $200 a week.

REPRESENTATIVE TIERNEY. Sir, you made the basic point -- you made it very strongly, that what we're

REPRESENTATIVE TIERNEY (Continued): doing, we're giving up the right to sue for lifetime protection. OK?

PROFESSOR KEETON. Yes.

REPRESENTATIVE TIERNEY. OK. And assuming that you're not going to be paid anything anymore.

PROFESSOR KEETON. Right.

REPRESENTATIVE TIERNEY. But if -- had she been working, she would have made out pretty well. Or maybe a relative -- what if it was a 17 year old son, who was injured. What about him? There's no wage loss.

PROFESSOR KEETON. Yes. In all of these cases, you're using persons who are not working at the time of the accident, but might be working or would be working later in their lives. And this bill provides for the payment of those losses, as they occur.

Let's take the student. His earnings and his education is postponed here as a result. He gets out of school a year later. He is entitled to reimburse-

PROFESSOR KEETON (Continued): ment for that year of earnings when it comes, that he doesn't get because he's now in his last year of school instead of out working and earning.

So we're talking -- now this will not happen in too many cases, because the percentage of permanent injuries, or long term injuries that create this problem is very small. But, the cost studies on what that would add to the structure indicates that it's so small that we can afford to guarantee those people reimbursement for their losses when they occur, even though at the time the accident occurred, they're not working. And that's what this bill does. If you look at the total structure of 1425, you see that it does not provide for lump sum payments for these long term economic losses. Instead it provides for periodic payments, month by month.

And so, let's say the wife who is not working when she has young children, but expects to go back to work after the children are grown, to teach or to

PROFESSOR KEETON (Continued): practice a profession, or whatever. Then if she is so disabled, that either the time she returns to work is delayed or that she's not able to return to it, then at that moment when she would have returned to it, she begins to collect for the economic losses, wage losses up to $200 a week that she would have earned, had she not been injured in that accident.

REPRESENTATIVE TIERNEY. I -- I can see the problem. Perhaps it's in the actuary ledger, perhaps it's not. There's two things you haven't discussed. What about the guy, -- All right, let's say he's 35, he only went to the fourth grade, like my neighbor, and he has never made more than $4,000 a year; I know because I make out his income tax. And he never will. And if he gets hurt in a car accident, and I, as a legislative --

MRS. BROWN, the reporter: I'm sorry; can you speak a little louder, please?

REPRESENTATIVE TIERNEY. You see the point I'm get-

REPRESENTATIVE TIERNEY (Continued): ting at.

PROFESSOR KEETON. Yes.

REPRESENTATIVE TIERNEY. That the system still seems to inherently discriminate, even though they suffer the exact amount of pain and the exact --

PROFESSOR KEETON. Well, --

REPRESENTATIVE TIERNEY. -- amount of agony is involved.

PROFESSOR KEETON. I think I understand your point here. Let me phrase it another way. You're raising the question: Isn't an injury worth a certain sum regardless who suffers it? Well, I think not. You see, what we're proposing to do here, and what the tort system does now, -- incidentally if you have criticism in this respect, it's even stronger against the tort system, that this bill would modify, than it is against what this bill would set up. Because you see, in the tort system, your neighbor is not entitled to any compensation other than the actual reimbursement of whatever his loss would have been,

PROFESSOR KEETON (Continued): plus the non-economic.

REPRESENTATIVE TIERNEY. That's what I'm talking about, the non-economic --

PROFESSOR KEETON. All right. Now, this bill preserves the same rights to non-economic recovery for you or him, regardless of what your earnings are. You see, the provision -- the tort exemption relating to non-economic recovery is unrelated to economic losses. You don't have to meet any threshold of economic loss or anything -- there is no threshold of economic loss, which related to the claim of injury. So, you and he are treated exactly alike on the non-economic injury. And the reason you are not treated alike on the economic injury, is because you have different injuries. And if there's a discrimination, it's against you, then, for the reason you pointed out a while ago. I think it's a justified discrimination.

Let me carry it one step further. If you didn't make that discrimination, by having this limit of $200 a week, then obviously to be fair, you'd have to set

PROFESSOR KEETON (Continued): up different rates for the higher earning person than the lower earning person. Now, this does that informally by saying, "If you want that full protection, you buy Add-On coverage", for the person who earns $500 a week. But that's the better way of doing it, than making it part of the compulsory package and than having to adjust your rate structure to earnings. For several reasons it's better. One is that the person who's earning $500 a month might not want to insure himself for the full 500. You give him a choice. If you make it part of the compulsory package, then you force him to buy it whether he wants to or not and then you must face up to the inequity of the rate structure and force him to pay a much higher rate than the person who's earning $200 a week.

REPRESENTATIVE TIERNEY. You meant $500 a week?

PROFESSOR KEETON. I meant $500 a week instead of a month. Yes, thank you.

REPRESENTATIVE TIERNEY. That -- that was quite obvious.

REPRESENTATIVE TIERNEY (Continued): My question is, I guess, it was raised yesterday, it's probably raised often, how do you divide -- you said something about unless the injury is severe?

PROFESSOR KEETON. Yes.

REPRESENTATIVE TIERNEY. Is it going to take some litigation to define the word severe?

PROFESSOR KEETON. Well, it's defined in Section 5 of 1425. I have been using the word "severe" as a shorthand. If you look on Page 6 of the printed bill, subparagraph 7, Damages for Non-Economic Detriment in Excess of $5,000, but these are the cases that are -- in which there is a tort action preserved for non-economic detriment, but only if the accident causes death, a significant permanent injury, serious permanent disfigurement or more than six months of complete inability of the injured person to work in an occupation. Those phrases, "significant permanent injury", "serious permanent disfigurement", or "more than six months of complete inability of the injured person to work in an

PROFESSOR KEETON (Continued): occupation", are the definitions of severity in this bill.

REPRESENTATIVE TIERNEY. Well -- So, to repeat my same question: What is a serious permanent disfigurement? That's kind of asking what's bad --

PROFESSOR KEETON. Yes.

REPRESENTATIVE TIERNEY. -- or what's serious and what isn't?

PROFESSOR KEETON. Yes.

REPRESENTATIVE TIERNEY. OK.

PROFESSOR KEETON. Yes. And -- And -- That's right.

REPRESENTATIVE TIERNEY. Would significant permanent injury also require litigation in order to determine --

PROFESSOR KEETON. Sure. Certainly.

SENATOR COX. Any further questions? Representative Donaghy.

REPRESENTATIVE DONAGHY. Mr. Keeton, I understood you to say that we were giving these people certain choices. Couldn't we be giving them far more choices if we gave them higher medical benefits, choice of higher medical

REPRESENTATIVE DONAGHY (Continued): benefits and some weekly -- some weekly indemnity of some sort for loss of wages, and kept our same system that we already have in the light of -- of present experience in the insurance business here in Maine?

PROFESSOR KEETON. No, because what the present system forces on you, whether you like it or not, is to pay a high percentage of your automobile insurance premium -- I suppose it's probably on the order of 40% of your bodily injury automobile insurance premium to cover the cost of the claimant in slight injury cases, if you should have one. Or, actually, it's not you. If somebody else, for whose injury you're responsible should have one. That's the way it is under the present system. In other words, what I'm saying to you is, that there's no way you can broaden the choice to the public without the tort exemption because that's the only way you can eliminate this present forced choice to pay a large part of your automobile bodily injury liability insurance premium

PROFESSOR KEETON (Continued): to cover these lower payments of slight injury cases.

Now, actually, you could broaden the choice in another way. I don't recommend it, but you could broaden it by simply adopting the tort -- the tort exemption and stopping there.

The trouble with doing that is that a great majority of these people would not understand what they have given up, if you did it that way, without an enormous educational campaign, and very few people, if any, would elect to buy the minimal coverage for liable -- the residual liability coverage, which is all that would be left. It wouldn't make any sense for anybody who could afford to buy anything more. And the only sensible reason anybody would have to buy that little would be to get on the road without any protection, because that's all he could afford.

I'm sure nobody would urge us -- nobody has urged anywhere that we broaden the range of choice

PROFESSOR KEETON (Continued): that way. But to -- to stick to the range where it's rather a serious question for us, in order to broaden the choice, you have to get rid of this practical compulsion that we're now under, under the fault and liability system to pay a large part of our bodily injury premium to sustain the cost of paying -- overpaying slight injuries.

REPRESENTATIVE DONAGHY. Perhaps some of the public would be willing to pay for the right to sue the rich millionaire who drives under the influence of alcohol; his car smashes up a fender and runs over a child somewhere else.

PROFESSOR KEETON. Well, if they are bringing that suit to satisfy the punishment urge, then we can preserve that in a variety of other ways. In fact, we do and the law already has. It doesn't work very well. But if they are bringing suit for the compensation, then what I'm saying to you is, that UMVARA does it a lot better. Take this person who has this serious injury,

PROFESSOR KEETON (Continued): and they think they can make out in the tort claim against that millionaire, they can collect. But he'd have to make out the tort claim first. UMVARA eliminates that necessity. And, secondly, if we want to look at the total problem we're facing everywhere, instead of just the assumption that he's going to hit -- be hit by a rich millionaire, the chances are 99 to 1 or maybe a little worse than that, that the person who drives drunk and injures him is also going to be financially irresponsible and won't have a penny more responsibility than what the law compels him to have. And so he has this $500,000 economic loss injury and what does he get out of it? $10,000, the financial responsibility limit, or under 1420 and number 1, $25,000. And UMVARA gives him lifetime protection for economic loss. Now, I think the person who really understands this -- hypotheticals, is going to think, "I'd rather have the protection in the 99% cases, even if it doesn't quite give me as much as I would have had in that one case, out of

PROFESSOR KEETON (Continued): this." I think that's what the person who understands it is going to answer every time.

REPRESENTATIVE DONAGHY. May I compliment you on your salesmanship on lifetime protection.

PROFESSOR KEETON. Thank you.

SENATOR COS. Representative Clark.

REPRESENTATIVE CLARK. Commissioner Keeton, do you have statistics or other substantial data to justify the claim that --- there is currently overpayment of slight injury?

PROFESSOR KEETON. Oh, yes, yes, that's documented. It's documented in the Columbia study in 1930. It's documented in the Connard, Morgan, Pratt, Voltz and Bombaugh study in the State of Michigan in 1960. It's documented in the Department of Transportation study, 1970. It's documented in the AIA studies of which I have given the figures a while ago on actual claims payments from claims filed. In other words, there really is no dispute about that. I don't think

PROFESSOR KEETON (Continued): you'll find anyone challenging the proposition that this disparity in claims occurs. Now, you may find someone who says, "The reason there are overpayments is just that the others are underpayments." Some people will argue that you ought to get six times as much for economic -- for non-economic as for economic.

REPRESENTATIVE CLARK. Further, who -- who says that the payment is an overpayment, the insurance company or the policy holders?

PROFESSOR KEETON. Let me explain the way in which I'm using overpayment, here. I'm talking about an inequity among claimants.

REPRESENTATIVE CLARK. Right.

PROFESSOR KEETON. And so, it is overpayment relative to the way the serious injury case is being treated. Now, I don't for a moment say that the person who has pain and suffering ought not to be given as much. If we could provide that -- if we could provide seven times as much for settlement of claims for everybody, then, wonderful, let's do it.

PROFESSOR KEETON (Continued): But what I'm saying is, it's wrong, it's fundamentally wrong, it's unfair, to be giving lower multiples of payment to the people who have the more severe injuries and higher multiples of payment to the people who have the less severe injuries. So I'm using overpayment in this relative sense among injured persons.

REPRESENTATIVE CLARK. Thank you.

SENATOR COX. Any further questions? None. Thank you very much. We will now switch to hear from those who oppose LD-1425.

MR. BENNETT. Mr. Chairman and members of the Committee: I'm Herbert Bennett from Portland. I have the privilege today of bringing before you Craig Spanenberg who also comes here without compensation as did Mr. Ring come without compensation yesterday. This gentleman was chosen to come before you, as was Mr. Ring. He handled the Grace case and in my opinion, he is one of the most knowledgeable attorneys in the country in the No-Fault area. Mr. Spangenberg

MR. BENNETT (Continued): is from Cleveland, Ohio, and was specifically --

SENATOR COX. Speak into the mike, please.

MR. BENNETT. And was specifically chosen to come before you on this particular bill because he served on the Advisory Committee of the Conference of Commissioners on Uniform State Laws. He also served for two years on the Legal Advisory Committee to the Department of Transportation study on Automobile Reparations.

He also has been Chairman of the International Symposium on Automobile Reparations held at Marbella, Spain, in 1970 by the International Academy of Trial Lawyers. This happens to be an Association limited to no more than 500 lawyers from all over the world and you have to be invited to become a member of this Association. Mr. Spangenberg has been President of that Association. I'm sure you're going to find that he can provide you with a great deal of information

MR. BENNETT (Continued): on this bill. And I will ask that since Professor Keeton went into 1420, that Mr. Spangenberg also address himself to 1420. Mr. Spangenberg.

MR. SPANGENBERG. Good afternoon, ladies and gentlemen. I didn't really come to Maine to tell you what kind of bill to enact, because that's your problem and it's your State. I just hope that whatever you do, you do for the right reason. And my sole function really is to tell you what the true facts about the insurance reparation system are and who says what and why and I hope what the figures mean.

First, there's no doubt that society has some interest in seeing that everyone injured by an accident, gets medical treatment, gets the bone set, gets the lacerations sewed, gets taken over the first phase of injuries. I don't think that's limited to automobile accidents and most first party reparations systemscover all injury and indeed all sickness.

MR. SPANGENBERG (Continued):

Society undoubtedly has some interest in easing the economic blow when a man -- working man is injured. And most union contracts now cover that with wage continuation programs and those who don't have it, commonly -- commonly buy some such protection.

In addition to that, there's the major philosophic question, whether there's any difference between right and wrong. The interesting thing to me at the International Symposium was that every nation in the free world has a system in which first party benefits are paid whether you're right or wrong. But in every country, the individual is judged as to whether he was right or wrong, and if he was in the right, he will get full reparation under a tort system with no threshold and no limitation.

That's the present system in Manitoba, Saskatchewan, Ontario, Nova Scotia, Norway, Sweden, West

MR. SPANGENBERG (Continued): Germany, France, England, Spain, Italy and Japan. Nowhere else has anyone adopted the view that the way to make the system cheap is to shear away the rights of the innocent victim, take the money value of those rights and put it back in the fund to pay the fellow who hit him. That kind of approach is a United States approach and is called a threshold system.

In order to discuss how the tort system works, I think it would be helpful if you and I understand the vocabulary of insurance company accounting, because I would like to discuss efficiency with you. But efficiency has to do with some insurance company terms: (1) Net earned premium: If you paid $120 premium to an insurance company under regular insurance company accounting, which is a kind of Chinese algebra, which states that they did not receive $120. They received 10 or 1/12 of the premium. The other 110 would be parked out in the reserve called "unearned premium reserve", the theory being they will earn it,

MR. SPANGENBERG (Continued): month by month, even though they have it now.

The unearned premium reserve is invested in construction loans and other things, and earns a substantial return. The entire earning from the unearned premium reserve, however, is not considered to be income. It is transferred directly to unearned surplus. Month by month, the monthly premium now earned, is taken out of the unearned premium reserves and placed in income. But because it's an on-going business, about half of all premiums at any one time are parked out in the unearned premium reserve.

If the policy holder hits someone, it might be his fault, the Committee will establish a loss reserve. That is, in a particular case, they may say, "we will have to pay $2500 sometime to settle this loss." That is immediately entered on the books as loss. The money, although not paid, is parked out in "loss reserve." It, too, is invested. Again, the income goes to "unearned surplus."

MR. SPANGENBERG (Continued):

If it happens, two years later, the case is settled for $1700, you would think that the $300 difference, having been charged as an operating loss, would be replaced and become operating income. Not so. The savings from settling at less than the reserve figure, again, are transferred directly to "unearned surplus".

A final reserve that's important comes if you have a very good year. Here Insurance Commissioners become unhappy if you show too large an underwriting profit. And the answer to that is to assemble a Committee and imagine that some policy holders must have hit somebody during the year, but didn't tell you. And the people that they hit didn't make a claim, but in a year or two they might get a ruptured disc and might then make a claim. It would only be fair to pay it out of this year's premiums, so you must have a loss IDNR reserve, loss incurred

MR. SPANGENBERG (Continued): but not reported.

Now, to illustrate how this can affect reported profits in a given year, be advised that in 1971, which was a magnificent year, Aetna saw fit to increase its Loss IBNR reserve from six million dollars to fifty million dollars, thus, adding forty-four million dollars of loss and showing a rather small underwriting profit.

The name of the game is cash flow. I once said in jest at a legislative hearing, "If you really want to cut premiums, you can cut them all 60%, because that's what liability insurers pay off. Simply write the policy, pay the agent, investigate the claim, make the reports, do everything you do now, but pay nothing: then you save the 60% you pay off. The insurance company is happy because it has its 40%."

Now, that was said in jest, of course, but it illustrates, if you're going to cut premiums, you're probably going to cut benefits. That's the only way to do it. But an insurance company afterwards took

MR. SPANGENBERG (Continued): me aside, and said, "That's wrong. We would make less if we only got 40% of the premium. We do more with the cash flow on 100% of the premium paying out the 60%." And I'm sure because of the numbers I have given you, that is true.

Now, let's look at the efficiency question, since I have heard and you will hear that the tort system is inefficient. I would define efficiency from the consumer's standpoint as being the amount of the premium dollar that gets paid back to the public. That is, the public pays a dollar in premium. How much comes back in payment of benefits?

Well, we have been told that if you went to No-Fault, it would be as efficient as fire insurance. I have here, not my numbers, the numbers of all insurance companies in the United States for the last decade, as reported in Best's "Aggregates and Averages," which shows how much of the premium dollar

MR. SPANGENBERG (Continued): is paid back. Losses incurred in fire insurance, 49.6% out of the net unearned premiums of 3.096 billion, with an underwriting profit of 12.5% to the insurer. But the efficiency or pay up to the public, 49%. The best business to be in is the surety insurance. That pays back 23 cents of the dollar. Life insurance, 28 cents of the dollar. Automobile liability insurance 64.9% of the premium dollar. It is the kind of insurance that pays back most, aside from Group Health & Accident is Automobile liability insurance, with BI and PD. Group Health & Accident pays back a substantial amount. That's the Blue Cross operation in which the hospital or others do all the bookkeeping work and absorb most of the overhead.

But let's take the kind of Health & Accident insurance that you would buy from Mutual of Omaha or Travelers Insurance. This pays back: Mutual, 62 cents of the premium dollar: Stocks, 48 cents of the premium dollar. That is Automobile liability

MR. SPANGENBERG (Continued): insurance is more efficient in paying out claims money than is almost any other kind of insurance, including all the No-Fault insurances. Including also a typical No-Fault insurance of auto collision, which is paid regardless of loss and does not pay quite as much as the liability -- of the premium dollar as does liability insurance.

To understand some of the rapid developments in insurance in the last few years, I think you should know that in 1968 when the DOT studies were at their peak and UMVARA was starting, Health & Accident Insurance generally was very profitable, automobile insurance was generally quite unprofitable. Aetna Casualty was one of the giants in the Health & Accident field and AIA was determined to have the United States convert to a health & accident no-fault kind of automobile insurance, total abolition of tort, total compulsion to buy health &

MR. SPANGENBERG (Continued): accident insurance. This they knew would give them a competitive advantage over the mutuals, whose experience was more in liability lines.

That situation has now changed. A few months ago, representatives from all the major groups met at Camelback Inn, in Scottsdale, Arizona, and agreed on a new program. And the new program is, that we must preserve the tort system and many of the companies that had been arguing for big exemptions, big thresholds and big benefits, have turned around and have now said that the proper figure to pay is only $5,000. Why the change in the Camelback Accord, or as I call it, the Phoenix Open. There's so many of them made the cut! (Laughter) The change is that auto liability insurance has turned around in the last three years dramatically and has become extravagantly profitable, so much so that it's difficult to find any more reserves to put the money away in. And the big health & accident

MR. SPANGENBERG (Continued): insurers, Prudential and Metropolitan, are taking out licenses all over the country to get into casualty insurance. And the rest of the insurers would like to keep a fault system in order to keep the competitive advantage over Prudential and Metropolitan. There is a great deal of self-interest among the different groups, as you might well imagine.

Let us turn now to the place that UMVARA plays in this scheme. UMVARA's basic philosophy is that the catastrophically injured victim must be paid. There is no doubt about the fact that most injured victims do not have very much economic loss. In testimony before the Senate Commerce Committee in the past month the Insurance Industry men reiterated data from the DOT studies on personal injury claims that shows that about 80% of all the victims have economic losses of less than $500; 90% have losses of less than $1,000. When you get to losses under

MR. SPANGENBERG (Continued): $2500, you're reaching 96.3% of all victims. That is, most victims do not have heavy economic loss. On the other hand, a very small number of victims suffer very large losses. This is the point of Professor Keeton; this is the point of Senator Hart.

Those numbers came from the DOT economic consequences study and I would like you to make careful note of it. It is said in that DOT study that annually about 4.4 million people are injured. That's 2% of the population. Of that number 45,000, that is, 1% of all injured people, not of the whole population, 1% of all injured people have catastrophic losses exceeding $25,000 each. They range from $45,000 to over $350,000, high earnings wage earner, wife, children killed, young. The average loss, $76,000.

It is said that all our systems are inadequate to pay them and that's true. The Health & Accident systems don't. Social Security does not, although designed to, but it doesn't pay as much as the wage

MR. SPANGENBERG (Continued): loss is. And automobile insurance does not, although I am happy to say that I've had truck cases, where truck insurance does and I've sued trucking companies that were so big they were self-insured, because they were larger than the insurance companies I normally deal with. So many of the defendants are collectible on those large losses. But many are not.

Another fact that is a little startling is that most, by this I mean, a majority, of seriously injured victims were totally wrong. Over a third of them are injured or killed in single car accidents. 53% of all fatalities on the Interstate system are single car, off the road, roll over or impact with trees, abutments or fixed objects. These 53% of fatality cases do not have a tort claim. You don't sue the tree. This is said to be unfair by opponents of the tort system. Most of us think that's simple logic, when you're dealing with right and wrong as tort does. The fellow who, in his own car drives off

MR. SPANGENBERG (Continued): the road, should not ask other motorists to pay his losses. Of the remaining multiple car serious injury cases, a study by Carbide and Brainard reported in DOT's price variability study showed that over half were head-on, wrong side of the road collisions. I think you could have predicted that. These are heavy impacts and do produce serious injury. But, of course the driver on the wrong side of the road, or across the median of the freeway, does not now recover in tort, nor should he. The man he hits on the right side of the road, however, does and should.

It then follows that if you set up a system that says, "we are going to pay all seriously injured victims, all losses," you are saying, at least two-thirds of them now are paid nothing and have no demand on society, but the new system will have to pay them. I said two-thirds. The actual number is higher because there are others that come about through intersection collisions, etc.

MR. SPANGENBERG (Continued): Now, let's look at the numbers. The DOT studies said, the loss of this 1% group is 3.4 billion dollars per year, of which only 169 million is paid out of tort, which means the new system has to pay over 3 billion dollars. The efficiency figures I have given you now come into play. How much premium do you have to collect to pay out over 3 billion? The answer, over 5 billion. What was the total premium collected at standard rates in the whole United States from all people who bought standard insurance in the same year as those studies -- the figures -- those studies? The answer is 3½ million. Now, the million premium was all used up, paying the lesser claims. You can't save enough out of that to pay 5 billion more. I just heard a lot about the overpayment of the small claims, let me digress. You were citing Connard. Let me tell you Connard said, "All I am saying is, very small economic loss cases are paid more multiples. No one should say this constitutes overpayment."

MR. SPANGENBERG (Continued): I quote Professor Connard, I think it's page 195. He said, "The additional payment is payment for psychic loss, general damages for pain and suffering, and furthermore," he said, "which most people believe in, and most of the people I interviewed wanted to retain." Now, how does this come about? A housewife gets a broken arm, in many places in this country and in Maine, where she can get an X-ray set and have a cast put on for less than $50. And she settles for $350. The No-Fault proponents say this is dreadful. She was paid seven times her economic loss. The simple fact is, she was paid for the pain and misery of six weeks in the cast with a broken arm and a little residual disability. And she would think that's right. And some of you would think that's right. If it was your wife I'm sure you would. In fact, State Farm interviewed -- interviewed or questioned all its policy holders, over three million, said, "Do you

MR. SPANENBERG (Continued): believe in the system that the man at fault should pay?" 94%, "Yes." "Should he pay the full compensation?" 91%, "Yes." DOT wasn't satisfied with that. They did a public attitude study. "Should we change the present system?" 80% said no. No, it isn't a public demand that you shouldn't pay this, for disability.

Passman Insurance Company of Kentucky went out on his own, interviewed people and said, "If I cut your rates, would you give up pain and suffering?" "Yes." "Well, if you had a limpy leg the rest of your life, had some disability, should you be paid for that?" "Of course." Now, why did he get two different answers?

The facts are, before, insurance companies did a survey which said only 20% of the people had the slightest idea of what pain and suffering means. It's insurance company shorthand. It's jargon. It means disability. It means more than the sense of physical hurt. For example, on this case -- I'll quote you one. I had a

MR. SPANGENBERG (Continued): school girl getting off the bus, crossing in front of the bus, the driver passed the school bus, hit her, knocked her about 30 feet, shattered her femur. She wound up with a thigh bone two inches shorter than the other, wore a special shoe, limped around.

Now, there's a principle in medicine called Wolfe's Law. Now, here forgive me. I've been in medical cases for thirty-five years. I know a lot more about medicine than Professor Keeton though he may know more law. The child's long bone is injured. At the time the child reaches adulthood, the short bone will have grown back to the proper length to match the other bone. It almost invariably happens. And it did. I've seen the little girl since. By the time she was 13, her legs were the same length. But she suffered a crippled childhood. Would she recover under UMVARA? Certainly not. It was not a permanent disability. It only took away her childhood.

MR. SPANGENBERG (Continued):

Now, permanent means permanent. What significant means, I don't know, because it's never been defined in any case. What a serious disfigurement is, I don't know. I've seen people with awful scars on the body, are they -- is that a serious disfigurement, when normally the suit covers them? These are undefined terms. They -- The definitions of UMVARA are designed to take findings of DOT, which said that about 5% of the people would have severe injuries -- serious injury defined as more than three weeks loss of work, instead of 6 months, or any degree of permanent disability or any degree of permanent disfigurement and then whittle those out with the result that the UMVARA definitions of what the threshold should be will work out to 97% of all innocent victims should have no claim in tort at all. 97%! Only 3% will have serious permanent disability or significant -- excuse me, it's permanent significant disability or serious permanent disfigurement.

MR. SPANGENBERG (Continued):

The test on temporary disability, I know, because I was there when the invention was made as to how to define it and the -- you read that bill and you'll find out that if you, as a legislator, on the sixth month after you were injured could reach out of bed and get the phone and talk to one constituent about his problems, you would be a nuisance case. That definition is "unable for more than six months to perform even part of the duties on any day normally associated with his occupation." Now, in order to meet that test, you have to be dead or a quadriplegic. I can't conceive of anyone hurt that badly, who wouldn't wind up with permanent significant disability. It's just not medically possible. So the temporary disability definition adds nothing to it.

One of the questions was, "What do you do for the fellow who lost more than $200 a week." It was said, "Well, he could sue for the excess." Yes, he can.

MR. SPANGENBERG (Continued): After six months. That's taken away. And yet $200 a month, but you can't get the excess wage loss until after you have been disabled for more than six months and then it starts there and then you can sue and have a claim in tort. But you lose the first six months. But that's detail.

What I'm arguing with about UMVARA is philosophy, and cost. And before I get to the philosophy, I should deal with cost. I might turn to my own notes, because I was there when the actuaries were there.

Actuaries are a special breed of people. I've got to tell you a story, if you don't mind a little levity, of the three actuaries who went deer hunting. They flushed a great buck and the first one shot and missed, 10 feet ahead. The other one shot and missed 10 feet behind. The third one dropped his rifle, grabbed the skinning knife and went charging after the deer, saying, "We got him!" (Laughter)

MR. SPANGENBERG (Continued):

Actuaries deal with averages. But they also deal with basic data. So three groups of actuaries came in to tell us what UMVARA would cost. And AIA said it would be cheaper. And AMIA said it'll be a little more. And AMIA -- ANII said it'll be a lot more.

Well, we asked if the members of the Advisory Committee could examine. Now, the Advisory Committee was there to give advice. The Drafting Committee was not there to take it. I'll guarantee they never took advice. But we were allowed to put some questions.

I questioned the AIA man, I said, "What is your basis? Here's a plan that's going to pay wage loss for life. On your actuarial basis, what is the longest wage loss you've calculated?" His answer, 99 weeks. To that actuary, no one will ever be paid for more than 99 weeks of disability. That's less than two years, isn't it? And he said, "Paying two years of disability gives me a cheap cost figure for paying his lifetime

MR. SPANGENBERG (Continued): disability." Now, to him that was reasonable. To me it's completely insane. He assumed no one would be paid more than $20,000 ever for medical loss. The bill says unlimited medical loss. Why didn't you put in more than 20? "I didn't have any cases in my data base where they had paid more than 20." Therefore, it didn't exist.

How about assigned claims, we said. He said, "I didn't count any cost for assigned claims." The NAII -- ANII actuary said it was going to cost at least 11% of the premium to pay assigned claims, because that's being paid by premiums paid by premium payers for people who didn't have insurance. It has to cost. It's not in the AIA figures.

And so it went. How many more will be paid? AIA said 20%. NAII said 80%. DOT figures say 100%. Florida, Massachusetts said fewer. Brainard who analyzed the Massachusetts figures, said, "It's a funny thing. The single car cases are being paid