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A Primer on Minnesota No-Fault Automobile Insurance

Michael K. Steenson

Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

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Abstract
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Keywords
Minnesota No-Fault Act, automobile insurance, basic economic loss benefits, automobile insurance regulation, optional insurance coverage, torts

Disciplines
Insurance Law | Torts | Transportation Law
A PRIMER ON MINNESOTA NO-FAULT AUTOMOBILE INSURANCE

MICHAEL K. STEENSON†

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† James E. Kelley Professor of Law, William Mitchell College of Law. The author wishes to acknowledge the assistance of Professor Christine Ver Ploeg, and David Johnson and Jennifer Johnson, William Mitchell students, in preparing this Article.
I. Introduction

The Minnesota No-Fault Automobile Insurance Act (the Act) became effective on January 1, 1975. The statute that emerged from the intense legislative debates contains thirty sections. The legislation was not only complex, given the novelty of the no-fault concept and the terminology used to implement it; the statute was also imperfect.

Gaps and uncertainties in the legislation have necessitated frequent judicial construction and legislative modification of the Act. With the passage of time many of the problems created by

1. See Act of Apr. 11, 1974, ch. 408, 1974 Minn. Laws 786 (current version at Minn. Stat. §§ 65B.41-.71 (1980)).
the Act have been resolved by the supreme court. In addition, since its passage in 1974, the Act has been amended in every session of the legislature. Most of the amendments have been

motorist insurance); Travelers Ins. Co. v. Springer, 289 N.W.2d 131 (Minn. 1979) (workers' compensation insurer's right to subrogation under section 176.061(7) not abrogated by No-Fault Act); Record v. Metropolitan Transit Comm'n, 284 N.W.2d 542 (Minn. 1979) (coordination of workers' compensation and basic economic loss benefits); Gudvangen v. Austin Mut. Ins. Co., 284 N.W.2d 817 (Minn. 1979) (clarifying 284 N.W.2d 813 (Minn. 1978) on rehearing) (uninsured motorist law unchanged by adoption of No-Fault Act), appeal dismissed, 444 U.S. 1062 (1980); Haagenson v. National Farmers Union Property & Cas. Co., 277 N.W.2d 648 (Minn. 1979) (construction of "arising out of maintenance or use of a motor vehicle," right to recover for bad faith refusal to pay basic economic loss benefits); Murray v. Walter, 269 N.W.2d 47 (Minn. 1978) (application of tort thresholds); Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978) (stacking of basic economic loss benefits); Kaysen v. Federal Ins. Co., 268 N.W.2d 920 (Minn. 1978) (uninsured motorist coverage; assigned claims plan).

4. See Act of May 17, 1975, ch. 160, 1975 Minn. Laws 461 (requiring plan of reparation security be maintained only during period when use of motor vehicle is contemplated; establishing arbitration procedures); Act of Mar. 25, 1976, ch. 79, 1976 Minn. Laws 201 (amendments concerning subrogation and indemnification); Act of Apr. 8, 1976, ch. 180, 1976 Minn. Laws 627 (excluding school buses from priority governing vehicles used in business of transporting persons or property); Act of Apr. 9, 1976, ch. 233, 1976 Minn. Laws 858 (excluding commuter vans from definition of "commercial vehicle" and from the priority governing vehicles used in business of transporting persons or property); Act of May 20, 1977, ch. 188, 1977 Minn. Laws 311 (requiring subrogated insurers to pay a proportionate share of attorney's fees and costs); Act of May 25, 1977, ch. 266, 1977 Minn. Laws 437 (providing for payment to self-employed disability and income loss benefits for cost of hiring a substitute employee and amending definition of "inability to work;" amending conditions for payment of uninsured motorist insurance benefits; requiring deduction from tort recovery of basic economic loss benefits "payable in the future;" amending provision governing indemnity); Act of May 26, 1977, ch. 276, 1977 Minn. Laws 474 (amending mandatory offer provision); Act of Mar. 28, 1978, ch. 711, 1978 Minn. Laws 681 (increasing medical expense tort threshold to $4,000); Act of May 3, 1979, ch. 57, 1979 Minn. Laws 84 (amending coordination provision); Act of May 25, 1979, ch. 190, 1979 Minn. Laws 295 (amending definition of "owner;" amending indemnity provision; amending penalty for failure to pay benefits; amending assigned claims exclusionary provision; amending penalty and registration provision to include motorcycles; adding provision allowing commissioner of insurance to standardize insurance coverages); Act of May 25, 1979, ch. 221, 1979 Minn. Laws 464 (amending medical expense benefit coverage to cover reasonable transportation expenses; amending disability and income loss provision to include compensation for lost unemployment benefits and to clarify method of computing disability and income loss benefits); Act of Apr. 11, 1980, ch. 539, 1980 Minn. Laws 700 (amending coordination provision to include medicare benefits and alter conditions for coordinating workers' compensation benefits and other insurance coverages; repealing mandatory offer of benefits and mandatory offer of deductible provisions); Act of Apr. 30, 1981, ch. 74, Minn. Sess. L. Serv. 288 (West 1981) (commissioner may by rule require motorcycle owners to show proof of 65B.48 security to be registered); Act of May 29, 1981, ch. 312, § 3, Minn. Sess. L. Serv. 1249, 1250 (West 1981) (making a person fleeing a peace officer by means of a motor vehicle or motorcycle liable for all bodily injury and property damage suffered by any other person).

designed to correct oversights or to plug gaps in the legislation; others have been in reaction to judicial constructions of the Act.

This Article will explore the Minnesota No-Fault Automobile Insurance Act. The Article will first provide a brief explanation of the history of automobile insurance regulation in Minnesota to place the Act in context. This will be followed by a concise explanation of the basic principles and working provisions of the Act. The Article will then proceed to a more detailed explanation of the Act. The intent of this Article is to provide a starting point in understanding how no-fault works in Minnesota.

A. A Concise History of Automobile Insurance Regulations in Minnesota

The first automobile insurance legislation in the United States designed to deal with the problem of inadequate compensation for victims of automobile accidents was a financial responsibility statute enacted in Connecticut in 1925. Other states, including Minnesota in 1933, soon followed suit. The financial or safety responsibility laws requires motorists, who, according to certain criteria, were financially irresponsible, or were found to be reckless, to furnish proof of future financial responsibility as a precondition to receiving or retaining a driver’s license or nonresident operating privilege. Because the financial responsibility acts required proof

96-499, § 953, reprinted in [1980 Laws] U.S. Code Cong. & Ad. News 2599, 2647 (to be codified at 42 U.S.C. § 1395yy(b)). As amended, the law reads as follows:

(b) Payment under this subchapter may not be made with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made (as determined in accordance with regulations), with respect to such item or service, under a workman’s compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance. Any payment under this subchapter with respect to any item or service shall be conditioned on reimbursement to the appropriate Trust Fund established by this subchapter when notice or other information is received that payment for such item or service has been made under such a law or plan, policy, plan, or insurance. The Secretary may waive the provisions of this subsection in the case of an individual claim if he determines that the probability of recovery or amount involved in such claim does not warrant the pursuing of the claim.


7. Ultimately, various forms of financial responsibility laws were enacted in all states except Massachusetts, which had made liability insurance compulsory before the real push for financial responsibility acts. R. Keeton & J. O’Connell, Basic Protection For The Traffic Victim 105 (1965).

8. Minnesota’s act was typical. It provided for the revocation of a person’s driver’s
of future financial responsibility only, there were obvious drawbacks to the legislation as a means of ensuring that injured individuals would be able to collect damages from the person negligently causing their injuries.\(^9\)

The Minnesota Safety Responsibility Act of 1933 was repealed and replaced in 1945 by a new Safety Responsibility Act.\(^{10}\) Unlike the 1933 act, the new act required a driver or owner involved in a motor vehicle accident causing personal injury, death, or property damage in excess of fifty dollars to furnish security in an amount sufficient to satisfy any judgment against the driver or owner arising from the accident.\(^{11}\) Under certain circumstances, such as when the driver or owner had not satisfied any judgment entered against him or when he had committed certain offenses resulting in license revocation, proof of future financial responsibility also was required.\(^{12}\)

Although there were several amendments to the Safety Responsibility Act, nothing of significance was added to the automobile

license upon conviction of, or forfeiture of a bond or collateral for, a variety of offenses, including manslaughter arising from the operation of a motor vehicle, driving a vehicle while under the influence of intoxicating liquor or narcotic drug, any crime punishable as a felony under the motor vehicle laws of Minnesota, failure to stop and disclose identity at the scene of an accident, or three charges of reckless driving within the preceding 12 months. Act of Apr. 21, 1933, ch. 351, § 2, 1933 Minn. Laws 574, 575. The act further provided that upon revocation there could be no renewal or issuance of a license until the person proved his ability to respond in damages in the amount of at least $3,000 for any one person injured or killed, subject to the limit of at least $10,000 for any one accident, resulting from the ownership or operation of a motor vehicle. \(\textit{Id.}\)

The act also provided that the right of any person to operate a motor vehicle and the license of any person to operate a motor vehicle would be suspended in the event of failure to satisfy judgments for damages resulting from the ownership or operation of a motor vehicle. Renewal was predicated on furnishing proof of financial responsibility. \(\textit{Id.}\) § 3, 1933 Minn. Laws at 576-77. \textit{Compare} the Minnesota approach with M. WOODROOF, J. FONSECA & A. SQUILLANTE, \textit{supra} note 5, § 3:2.

9. Requiring a person to prove future financial responsibility after failure to satisfy an automobile accident judgment or after a serious traffic infraction left the victim of the first accident uncompensated if the person causing the accident was not financially responsible. A further problem was that if the person who caused the accident was financially irresponsible there would be little reason for the accident victim to pursue a claim against that person. If no cases were filed there would be no judgment entered against that person, thus negating one of the triggers of the financial responsibility acts. \textit{See} M. WOODROOF, J. FONSECA & A. SQUILLANTE, \textit{supra} note 5, § 3:3.

10. The Safety Responsibility Act of 1945, Act of Apr. 16, 1945, ch. 285, 1945 Minn. Laws 483, was amended in subsequent sessions of the Minnesota Legislature and all but a few sections were repealed by the 1974 No-Fault Act. \textit{See} Act of Apr. 11, 1974, ch. 408, § 33, 1974 Minn. Laws 762, 786.

11. \(\textit{Id.}\) § 5, 1945 Minn. Laws at 485.

12. \(\textit{Id.}\) § 16, 1945 Minn. Laws at 492.
insurance scheme in Minnesota until 1967. At that time the legislature added provisions relating to the cancellation of motor vehicle insurance policies\(^{13}\) and required any automobile liability or motor vehicle liability insurer issuing an automobile or motor vehicle liability policy to include uninsured motorist insurance in the coverage.\(^{14}\) The 1969 legislation and a 1971 amendment also added requirements concerning the offer of certain supplemental coverages. As it existed in 1969, the legislation required insurers to offer accidental death benefits of at least $10,000; indemnity for income and disability loss of at least sixty dollars per week for a period of at least fifty-two consecutive weeks; and medical expense coverage of at least $2,000 for each injured person.\(^{15}\) The 1971 amendment required that underinsured motorist coverage be offered beginning January 1, 1972.\(^{16}\)

With the enactment of the Minnesota No-Fault Automobile Insurance Act in 1974\(^{17}\) much of the existing legislation was repealed,\(^{18}\) although important features of that legislation were

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16. The 1971 amendment added the following language:

   Beginning January 1, 1972, underinsured motorist coverage, whereby subject to the terms and conditions of such coverage the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of an automobile accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon, to the extent of the policy limits on the vehicle of the party recovering or such smaller limits as he may select less the amount paid by the liability insurer of the party recovered against. His insurance company shall be subrogated to any amounts it so pays, and upon payment shall have an assignment of the judgment against the other party to the extent of the money it pays.


18. See Act of Apr. 11, 1974, ch. 408, § 33, 1974 Minn. Laws 762, 786 (repealing mandatory coverages, mandatory offers of supplemental coverage, and Safety Responsibility Act). Minnesota Statutes sections 170.23 (furnishing abstracts of driving records), 170.24 (license suspension for failure to report accident), 170.54 (driver operating motor vehicle with express or implied consent of owner deemed agent of owner), and 170.55 (service of process), were retained.
retained in the No-Fault Act.\textsuperscript{19} In spite of the novelty of the con-


The No-Fault Act overrides much of the Safety Responsibility Act:

Any operator of a motor vehicle or motorcycle who is convicted of a misdemeanor under the terms of this section shall have his driver's license revoked for not more than 12 months. If the operator is also an owner of the motor vehicle or motorcycle, the registration of the motor vehicle or motorcycle shall also be revoked for not more than 12 months. Before reinstatement of a driver's license or registration, the operator shall file with the commissioner of public safety the written certificate of an insurance carrier authorized to do business in this state stating that security has been provided by the operator as required by section 65B.48.

Subd. 4a. The commissioner of public safety may revoke the registration of any motor vehicle or motorcycle, and may suspend the driver's license of any operator, without preliminary hearing upon a showing by department records, including accident reports required to be submitted by section 169.09, or other sufficient evidence that security required by section 65B.48 has not been provided and maintained. Before reinstatement of the registration, there shall be filed with the commissioner of public safety the written certificate of an insurance carrier authorized to do business in the state stating that security has been provided as required by section 65B.48. The commissioner of public safety may require the certificate of insurance provided to satisfy this subdivision to be certified by the insurance carrier to be noncancelable for a period not to exceed one year. The commissioner of public safety may also require a certificate of insurance to be filed with respect to all vehicles required to be insured under section 65B.48 and owned by any person whose driving privileges have been suspended or revoked as provided in this section before reinstating the person's driver's license.

Subd. 5. When a nonresident's operating privilege is suspended pursuant to this section, the commissioner of public safety or his designee shall transmit a copy of the record of the action to the official in charge of the issuance of licenses in the state in which the nonresident resides.

Subd. 6. Upon receipt of notification that the operating privilege of a resident of this state has been suspended or revoked in any other state pursuant to a law providing for its suspension or revocation for failure to deposit security for the payment of judgments arising out of a motor vehicle or motorcycle accident, or failure to provide security covering a motor vehicle or motorcycle if required by the laws of that state, the commissioner of public safety shall suspend the operator's license of the resident until he furnishes evidence of compliance with the laws of this state and if applicable the laws of the other state.

\textbf{MINN. STAT.} § 65B.67(4)-(6) (1980). Section 65B.68 gives the commissioner of public safety power to perform the duties imposed on him by the No-Fault Act. The commissioner has the power to adopt rules to implement and provide effective administration of the provisions requiring security and governing termination of security, as well as to provide by rule that motor vehicles owned by certain persons may not be registered in Minne-
cepts and terminology of the no-fault scheme it is important to understand that at least some of the no-fault legislation has definite roots in past automobile insurance legislation.

**B. A Brief Overview of the No-Fault Act**

To understand the more detailed discussion of the Act that follows, a brief background and explanation of the Act must be provided. There were three major changes made by the Act. First, it created a new form of first party insurance: basic economic loss insurance. Second, the Act made insurance compulsory, meaning that as a condition to registration of an automobile the owner must show that a plan of reparation security complying with the Act has been provided. Finally, the Act imposes certain limitations, or thresholds, on the right to sue for damages in a tort ac-

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sota unless satisfactory evidence is furnished that security has been provided as required by the No-Fault Act. Rules have been adopted governing registration requirements. See 11 M.C.A.R. §§ 1.4051-1.4062 (adopted Dec. 26, 1975), as amended by 5 Minn. St. Reg. 669-70 (1980) (adopting proposals made Nov. 12, 1979, 4 Minn. St. Reg. 757-58 (1979)).

The portions of the Safety Responsibility Act relating to terms and conditions of residual liability insurance coverage, although repealed, were preserved in the No-Fault Act:

(3) Every plan of reparation security shall be subject to the following provisions which need not be contained therein:

(a) The liability of the reparation obligor with respect to the residual liability coverage required by this clause shall become absolute whenever injury or damage occurs; such liability may not be cancelled or annulled by any agreement between the reparation obligor and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

(b) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the reparation obligor to make payment on account of such injury or damage.

(c) The reparation obligor shall have the right to settle any claim covered by the residual liability insurance policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability for the accident out of which such claim arose.

**Minn. Stat. § 65B.49(3)(a)-(c) (1980).**

20. *See Minn. Stat. § 65B.44 (1980).* This section, entitled *Basic Economic Loss Benefits,* requires insurance policies to cover all loss suffered through injury arising out of the maintenance or use of a motor vehicle, subject to any applicable deductibles, exclusions, disqualifications, and other conditions, and shall provide a maximum of $30,000 for loss arising out of the injury of any one person, consisting of:

(a) $20,000 for medical expense loss arising out of injury to any one person; and

(b) A total of $10,000 for income loss, replacement services loss, funeral expense loss, survivor's economic loss, and survivor's replacement services loss arising out of the injury to any one person.

**Id. § 65B.44(1).** Definitions of the types of loss and expenses mentioned in subdivision 1 of section 65B.44 are set out in subdivisions 2 through 8 of the same section.

21. *See id. § 65B.68(2).*
tion. The compulsory first party insurance, coupled with the tort thresholds, give the Minnesota Act the characteristics of what is referred to as a "modified" no-fault plan.

Subject to certain exceptions, the Act is designed to ensure that all individuals who sustain injury arising out of the maintenance or use of a motor vehicle in Minnesota, or in some cases outside Minnesota, will be entitled to receive basic economic loss benefits. To ensure the availability of this coverage, the Act requires all owners of motor vehicles of a type required to be registered, licensed, or which are principally garaged in Minnesota to maintain a plan of reparation security complying with the Act during the period in which operation or use of the motor vehicle is contemplated. Nonresident owners of motor vehicles not required to be registered, licensed, or which are not principally garaged in Minnesota also are subject to the security requirements of the Act, although in a more limited form.

All plans of reparation security must provide coverage for basic economic loss benefits totaling $30,000, consisting of $20,000 in medical expense coverage and $10,000 in coverage for other specified types of economic loss. In addition to basic economic loss insurance, the Act requires that plans of reparation security include residual liability insurance in the amount of $25,000 per person for bodily injury with a $50,000 per accident limit, and $10,000 in coverage for property damage. The Act also requires owners of motor vehicles registered or principally garaged in Minnesota to have uninsured motorist insurance coverage in an amount equal to the residual liability insurance coverage for bodily injury.

In addition to compulsory basic economic loss, residual liability, and uninsured motorist insurance, the Act as initially adopted required reparation obligors to offer insureds additional medical ex-

22. See id. § 65B.51(3).
25. Id. § 65B.46(2).
26. Id. § 65B.48(1).
27. Id.
28. Id. §§ 65B.44(1), 48(1).
29. Id. §§ 65B.48(1), 49(3).
30. Id. § 65B.49(4).
pense coverages, underinsured motorist insurance, and additional residual liability insurance. The offer of additional uninsured motorist insurance coverages was made mandatory in 1977. Initially, reparation obligors also were required to offer basic economic loss benefits to all persons who purchased liability insurance for motorcycles. The mandatory offer provisions were repealed in 1980.

The Act covers persons injured in accidents arising out of the maintenance or use of a motor vehicle in Minnesota, as well as persons injured in another state who are covered by a policy complying with the Act. If an uninsured or underinsured individual is involved in the accident, the injured person may, in addition to basic economic loss benefits, be entitled to receive either uninsured or underinsured motorist benefits.

The source for payment of basic economic loss benefits is established in a priority scheme that sets forth the order in which insurance coverages are to be made available to the injured person. In general, drivers or occupants of business vehicles are covered by the plan of reparation security covering those vehicles. Individuals who are injured by a business vehicle, but who are not drivers or occupants of other involved motor vehicles, will be entitled to recover under the policy covering the business vehicle.

In cases involving private motor vehicles, the usual priority for an injured person will be the plan of security under which he is an insured. If the injured person is not insured, but is a driver or occupant of an insured motor vehicle, the applicable plan of security is that covering the vehicle. Uninsured individuals who are neither drivers nor occupants of an insured motor vehicle recover

31. Act of Apr. 11, 1974, ch. 408, § 9, subd. 6, 1974 Minn. Laws 762, 773 (repealed 1980).
32. Id.
33. Id.
35. See Act of Apr. 11, 1974, ch. 408, § 9, subd. 6, 1974 Minn. Laws 762, 773 (repealed 1980).
38. Id. § 65B.46(2).
39. Id. § 65B.49(4).
40. Id. § 65B.47.
41. Id. § 65B.47(1)-(2).
42. Id. § 65B.47(3).
43. Id. § 65B.47(4)(a).
44. Id. § 65B.47(4)(b).
under the plan of reparation security covering any involved motor vehicle.45

The priority scheme for individuals seeking to recover uninsured or underinsured motorist insurance benefits is not controlled by the Act. The order in which those insurance coverages apply in a given accident is governed by a series of Minnesota Supreme Court decisions.46

If a tort action is anticipated, an injured individual will have to confront the potential limitations of the tort offset and threshold provisions of the Act.47 The offset provision is designed to ensure that an injured individual recovers in tort only for uncompensated loss.48 The tort thresholds, which control the right to recover general damages, require a serious injury before recovery for such damages will be allowed.49 The intent is to reduce the cost of the no-fault system by eliminating litigation expenses that would otherwise be incurred in the resolution of minor tort claims.50

With this brief background in mind, the provisions of the Act can be considered in greater detail. Part II will discuss the right to collect basic economic loss benefits. Part III will discuss the insurance coverages under the Act. Part IV will discuss the source of insurance coverages. Part V will discuss tort actions under the Act.

II. THE RIGHT TO COLLECT BASIC ECONOMIC LOSS BENEFITS

Section 65B.46 is the trigger provision. It defines the cases to which the Act is applicable:

Subdivision 1. If the accident causing injury occurs in this state, every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic economic loss benefits.

Subd. 2. If the accident causing injury occurs outside this state in the United States, United States possessions, or Canada, the following persons and their surviving dependents suf-

45. Id. § 65B.47(4)(c).
47. See MINN. STAT. § 65B.51(3) (1980).
48. See Steenson, supra note 23, at 123.
49. See MINN. STAT. § 65B.42(2) (1980).
50. See id. § 65B.42(4); Steenson, supra note 23, at 111.
ferring loss from injury arising out of maintenance or use of a motor vehicle have a right to basic economic loss benefits:

(1) Insureds, and

(2) the driver and other occupants of a secured vehicle, other than (a) a vehicle which is regularly used in the course of the business of transporting persons or property and which is one of five or more vehicles under common ownership, or (b) a vehicle owned by a government other than this state, its political subdivisions, municipal corporations, or public agencies.

Subd. 3. For the purposes of sections 65B.41 to 65B.71, injuries suffered by a person while on, mounting or alighting from a motorcycle do not arise out of the maintenance or use of a motor vehicle although a motor vehicle is involved in the accident causing the injury.51

The basic requirements for coverage are as follows: (1) an injury; (2) causing loss; (3) arising out of maintenance or use; (4) of a motor vehicle. Each term is defined by the Act.

"Injury" is defined as "bodily harm to a person and death resulting from such harm."52 "Loss" is defined as

economic detriment resulting from the accident causing the injury, consisting only of medical expense, income loss, replacement services loss and, if the injury causes death, funeral expense, survivor's economic loss and survivor's replacement services loss. Noneconomic detriment is not loss; however, economic detriment is loss although caused by pain and suffering or physical or mental impairment.53

"Motor vehicle" is defined as

every vehicle, other than a motorcycle or other vehicle with fewer than four wheels, which (a) is required to be registered pursuant to chapter 168, (b) is designed to be self-propelled by an engine or motor for use primarily upon public roads, highways or streets in the transportation of persons or property, or (c) is a trailer, when connected to or being towed by a motor vehicle.


In Feick v. State Farm Mut. Auto. Ins. Co., 307 N.W.2d 772 (Minn. 1981), the supreme court held that a bicyclist injured in a collision with a motorcycle was not entitled to recover basic economic loss benefits because his injury did not arise out of the maintenance or use of a motor vehicle. The plaintiff's claim against the motorcycle driver and owner was settled for the policy limits. Plaintiff sought to recover basic economic loss benefits under policies issued by State Farm, covering four vehicles owned by plaintiff's father.

52. Id. § 65B.43(11).

53. Id. § 65B.43(7).
vehicle.\textsuperscript{54} The final requirement is that the accident arise out of the maintenance or use of a motor vehicle. "Maintenance or use of a motor vehicle" means

maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.\textsuperscript{55}

Although the definition of "maintenance or use" is intended to control only the availability of basic economic loss benefits, the same term is used in insurance policies to control the availability of other coverages as well.\textsuperscript{56} Therefore, decisions involving liability insurance coverage issues are a possible source of authority for resolving coverage questions involving basic economic loss benefits. In general, the liability insurance decisions construe the term "arising out of the maintenance or use of a motor vehicle" to require that the injury be a natural and reasonable consequence of the use of the vehicle for transportation purposes.\textsuperscript{57} This appears to be synonymous with the requirement in the Act that the injury arise out of the use of the motor vehicle as a motor vehicle.\textsuperscript{58}

\textsuperscript{54} Id. § 65B.43(2).
\textsuperscript{55} Id. § 65B.43(3). This definition was taken verbatim from section 1(a)(6) of the Uniform Motor Vehicle Accident Reparations Act.
\textsuperscript{57} See, e.g., Holm v. Mutual Serv. Cas. Ins. Co., 261 N.W.2d 598 (Minn. 1977) (use of police car to transport policeman to scene of arrest unrelated to policeman’s assault of person arrested); Engeldinger v. State Auto. & Cas. Underwriters, 306 Minn. 202, 236 N.W.2d 596 (1975) (death occurring when decedent negligently was left in insured’s parked car did not arise out of use of motor vehicle); Associated Independent Dealers, Inc. v. Mutual Serv. Ins. Cos., 304 Minn. 179, 229 N.W.2d 516 (1975) (relationship between fire caused by use of acetylene torch and insured van in which oxygen tanks for torch were situated not related to use of van as motor vehicle); cf. National Family Ins. Co. v. Boyer, 269 N.W.2d 10 (Minn. 1978) (cause of action arising after effective date of No-Fault Act; injury occurring when gun held by insured discharged as he was getting out of car did not arise out of use, maintenance, loading or unloading of motor vehicle).
\textsuperscript{58} The comment to section 1(a)(6) of the Uniform Motor Vehicle Reparations Act (UMVARA) states:
The supreme court and federal court decisions that address basic economic loss benefits coverage questions do not distinguish between types of coverage in establishing principles for the resolution of coverage issues. In Haagenson v. National Farmers Union Property & Casualty Co., the plaintiff, along with the driver of a pickup truck, had gone to the scene of an accident to investigate. When plaintiff returned to the pickup truck he slipped while grasping the door handle, slid down a grassy slope, and came into contact with a downed high-voltage line. The court held that the jury's determination that plaintiff was entering the vehicle at the time of the injury was justified, and that the injury arose out of the use of the motor vehicle:

For an injury to "arise out of the use of a motor vehicle," it must be related causally to the employment of the vehicle for transportation purposes. . . . Implicit in the jury's finding that plaintiff was entering into the Gordon truck is a finding that plaintiff was entering with the intention of becoming a passenger for the purpose of proceeding to the farm. This finding meets the requirement that an injury be related causally to the employment of a vehicle for transportation purposes.

The same standard applies in deciding whether injuries sus-

While "use" has a broader meaning than operating or driving a vehicle, the requirement that use of the motor vehicle be "as a motor vehicle" qualifies the term so that both the tort exemption and the availability of basic reparation benefits are more nearly limited to activities whose costs should be allocated to motoring as part of an automobile insurance package. . . .

The indefiniteness of the defined term has produced litigation in cases arising under automobile liability policies. In some cases, in part because of a tendency to construe an ambiguous term against the interests of the companies drafting the policy, and, in part to assure a solvent source of payment to a person injured by an admitted wrongdoer, it is arguable that courts have included accidents too far removed from the general activity of motoring and that a narrower construction of the term would be more consistent with the policy of this Act. Other than specifying that injury arise out of maintenance or use "as a vehicle," it has not been possible to define the general concept more specifically, so borderline cases are left to the courts, as they have been under current automobile insurance policies.

UMVARA § 1(a)(6), Comment.

59. 277 N.W.2d 648 (Minn. 1979).

60. Id. at 652. In addition to Haagenson, the court also decided Tlougan v. Auto-Owners Ins. Co., 310 N.W.2d 116 (Minn. 1981), in which a five-year-old was burned when she lit a match from a book of matches her father had left in the family pickup truck. At the time she and a sibling were waiting for their mother who was going to take them to town. The truck had not been started, although the mother was about to leave the house for purposes of driving the children to town. The court found that the truck was being used for transportation purposes, but that there was an insufficient causal connection between use of the vehicle for transportation purposes and the injury. Id. at 117. The court held that the pickup truck was not an "active accessory" in bringing about the injury. Id.
tained by a person while alighting from a motor vehicle will be covered. In *Perry v. Mutual Automobile Insurance Co.*, decedent was steering an uninsured, inoperable antique automobile that was being towed by a van driven by one of decedent’s sons. Both vehicles were owned by decedent. The vehicle and van were stopped by a police officer who intended to investigate the expired license plates on the antique car. Decedent was told by the police officer to get out of the car. As he was doing so he was shot and killed by the police officer. Although decedent was alighting from the antique car at the time he was shot, the question remained whether there was a sufficient causal connection between the shooting and the use of the insured motor vehicle, the van. The court found that the requisite causal connection existed:

    Norman Perry’s death arose out of a routine traffic stop. The officer’s investigation and directions to Perry were a necessary concomitant of that stop, and would not have occurred had a vehicle not been in use. Further, the reason for the stop related to the use of the van to tow an antique car. It is foreseeable that insured operative vehicles may be used to tow other vehicles, which may not be insured. Also, Norman Perry was alighting from the towed antique car at the time of shooting; he was physically close to the van/antique car unit. Finally, at the time of the accident, the van had its lights on, its motor was still running, and part of the van’s body was on the roadway. All of the facts and the circumstances of this case establish that Perry’s death was sufficiently related to the use of the van.

Thus, the critical factor, whether the coverage issue involves basic economic loss or liability insurance, is whether there is a sufficient causal connection between the injury and the use of a motor vehicle for transportation purposes. This is the type of causal connection required by the Uniform Motor Vehicle Accident Reparation Act (UMVARA), from which the definition of “maintenance or use” in the Minnesota Act was taken.

Although the supreme court’s liability insurance coverage decisions are generally relevant in resolving basic economic loss insurance coverage issues, the court’s decisions involving liability insurance coverage for injuries sustained during the course of loading and unloading a motor vehicle must be read with caution. The definition of “maintenance or use” in the No-Fault Act does

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62. *Id.* at 132 (footnote omitted).
63. *See* note 58 supra.
not include "conduct in the course of loading and unloading the
device unless the conduct occurs while occupying, entering into or
alighting from it." Liability insurance coverage for injuries that
occur during the course of loading and unloading a motor vehicle
is not so restricted.64

By limiting coverage for injuries arising out of the loading and
unloading of a motor vehicle the drafters of UMVARA intended
to avoid some of the more extreme liability insurance decisions in-
volved in loading and unloading of a motor vehicle.65 Therefore,
while the court's decisions concerning injuries occurring during the
course of loading and unloading a motor vehicle remain good law
for liability insurance coverage purposes, they must be read restrictively
with respect to resolving basic economic loss insurance cov-
verage issues.66

64. The court has recognized that use of the term "loading and unloading" expands
the coverage of an automobile liability insurance policy. See National Family Ins. Co. v.
Boyer, 269 N.W.2d 10, 13-14 (Minn. 1978).

65. Compare State Auto. & Cas. Underwriters v. Casualty Underwriters, Inc., 266
Minn. 536, 124 N.W.2d 185 (1963) (injury to woman who fell on trapdoor in sidewalk that
was being opened by employee of cafe to which truck driver was delivering goods from his
truck found within policy covering loading and unloading of truck) with UMVARA
§ 1(a)(6), Comment.

66. The Minnesota Supreme Court acknowledged the limitation in Krupenny v.
West Bend Mut. Ins. Co., 310 N.W.2d 133 (Minn. 1981), in which the plaintiff was in-
jured while making rounds with a garbage truck that automatically lifted up and emptied
dumpsters owned by his employer. The garbage truck had a lever and hook which lifted
and unloaded the dumpster into the back of the truck. The plaintiff and his brother were
standing at the rear of the truck when the hook holding the dumpster bent, permitting the
dumpster to fall on plaintiff. The court held that the injury did not arise out of the main-
tenance or use of a motor vehicle. Because the injury arose out of the "loading and un-
loading" of the truck, it was necessary for plaintiff's injury to occur while he was
"occupying, entering into or alighting from" it. The court held that because plaintiff was
outside the truck, and was not about to enter it, he was not entitled to benefits. Id. at 135.
The comment to section 1(a)(6) of UMVARA provides that "[e]xisting tort liability is not
altered for accidents arising from loading and unloading which are outside of this defini-
tion . . . and coverage for that liability is specifically included in the required tort secu-
ritiy."

Section 10 of the UMVARA sets out the requirements for tort liability insurance
coverage. The comment to section 10 states:

The required tort liability coverage is broader than that applicable to basic
reparation benefits insofar as it includes liability for torts in the course of loading
and unloading the vehicle. . . . Many property-owners' liability policies
broadly exclude tort liability arising from maintenance or use of motor vehicles,
and themselves contain a broad definition of maintenance or use which includes
loading and unloading. Use of the same broad concept for purposes of motor
vehicle tort liability coverage leaves existing tort liability insurance coverages as
they are at present, and will assure that a person with a homeowner's policy and
an automobile liability policy will not be left, unknowingly, with a hole in his
tort liability coverage for injury arising from loading and unloading of motor
vehicles.
III. THE INSURANCE COVERAGE

In addition to basic economic loss benefits, the Act covers residual liability and uninsured motorist insurance. Prior to a 1980 amendment, the Act also required reparation obligors to offer their insureds additional coverages, including uninsured motorist insurance.67

A. Basic Economic Loss Benefits

Section 65B.44, subdivision 1 establishes the limits of coverage for basic economic loss benefits:

Basic economic loss benefits shall provide reimbursement for all loss suffered through injury arising out of the maintenance or use of a motor vehicle, subject to any applicable deductibles, exclusions, disqualifications, and other conditions, and shall provide a maximum of $30,000 for loss arising out of the injury of any one person, consisting of:

(a) $20,000 for medical expense loss arising out of injury to any one person; and

(b) A total of $10,000 for income loss, replacement services loss, funeral expense loss, survivor’s economic loss, and survivor’s replacement services loss arising out of the injury to any person.68

“Loss” consists only of the enumerated types of out-of-pocket loss for which basic economic loss benefits are payable.69 “Noneconomic detriment” consisting of “all dignitary losses suffered by any person as a result of injury arising out of the ownership, maintenance, or use of a motor vehicle including pain and suffering, loss of consortium, and inconvenience” is not loss.70 However, “economic detriment is loss although caused by pain and suffering or physical or mental impairment.”71 The loss must arise out of “injury,” which is defined as “bodily harm to a person and death resulting from such harm.”72

UMVARA § 10, Comment.
68. MINN. STAT. § 65B.44(1) (1980).
69. Id. § 65B.42(7).
70. Id. § 65B.42(8).
71. Id. § 65B.42(7).
72. Id. § 65B.42(11).
1. Medical Expense Benefits

Medical expense benefits are available for all reasonable expenses for necessary medical, surgical, x-ray, optical, dental, chiropractic, and rehabilitative services. 73 Included within these benefits is reimbursement for prosthetic devices, prescription drugs, and necessary ambulance, hospital, extended care, and nursing services. 74 A 1979 amendment made medical expense benefits available for all other reasonable transportation expenses incurred in traveling to receive covered medical services. 75 Reimbursement for hospital room and board costs, except for intensive care, may be limited to the regular daily semiprivate room rate customarily charged by the institution where the injured person is treated. 76

Rehabilitation services are subject to section 65B.45, which covers rehabilitation treatment and occupational retraining. Subdivision 1 of section 65B.45 obligates a reparation obligor to pay for such treatment or retraining if three conditions are met: (1) "the procedure, treatment, or training is reasonable and appropriate for the particular case," (2) "its cost is reasonable in relation to its probable rehabilitative effects," and (3) "it is likely to contribute substantially to medical or occupational rehabilitation." 77

If the rehabilitation is nonmedical, the injured person must notify the reparation obligor of the treatment within sixty days after incurring $1,000 in expenses. 78 If notice is not provided within the specified time the insurer is responsible "only for $1,000 or the expense incurred after the notice is given and within the 60 days before the notice, whichever is greater, unless failure to give timely notice is the result of excusable neglect." 79

Subdivision 3 of section 65B.45 establishes the procedures to be followed if there is a dispute over whether a proposed rehabilitation program meets the criteria of subdivision 1. If the reparation obligor is notified by the injured person of a proposed specified procedure or treatment for rehabilitation or rehabilitative occupational training, and there is not a prompt acceptance of responsibility for the cost by the reparation obligor, the injured person has

73. Id. § 65B.44(2).
74. Id.
75. See Act of May 25, 1979, ch. 221, § 1, 1979 Minn. Laws 464, 465.
77. Id. § 65B.45(1).
78. Id. § 65B.45(2).
79. Id.
two available courses of action. If an action to adjudicate his claim is pending he may make a motion for a determination that the reparation obligor is responsible for the costs of the procedure, treatment, or course of training. If no action is pending, one may be brought in district court. A reparation obligor has the same options available for resolution of its responsibility for the procedure, treatment, or course of training. Any determination that the reparation obligor is not responsible for the cost is not res judicata as to any other proposed rehabilitative procedure or treatment or to the injured persons' right to other benefits under the Act.

Subdivision 3 is not intended to preclude any action by the reparation obligor or the injured person for declaratory relief under any other law of the state, nor does it preclude an action by the injured person to recover basic economic loss benefits.

Subdivision 4 of section 65B.45 applies to situations in which the injured person unreasonably fails to accept a rehabilitative procedure, treatment, or course of occupational training. The comment to the corresponding UMVARA provision states that the section "is comparable to provisions in workmen’s compensation acts imposing sanctions for unreasonable refusal of surgery. The principle is not here limited to surgery, nor to medical treatment, but is broadly applicable to all forms of rehabilitative treatment and occupational training." 80 Subdivision 4 reads as follows:

If an injured person unreasonably refuses to accept a rehabilitative procedure, treatment, or course of occupational training, a reparation obligor may make a motion in an action to adjudicate the injured person's claim, or if no action is pending, may bring an action in the district court, for a determination that future benefits will be reduced or terminated to limit recovery of benefits to an amount equal to benefits that in reasonable probability would be due if the injured person had submitted to the procedure, treatment, or training, and for other reasonable orders. In determining whether an injured person has reasonable ground for refusal to undertake the procedure, treatment, or training, the court shall consider all relevant factors, including the risks to the injured person, the extent of the probable benefit, the place where the procedure, treatment, or training is offered, the extent to which the procedure, treatment, or training is recognized as standard and customary, and whether the imposition of sanctions because of the person's refusal would abridge his right to the free exercise of his

80. UMVARA § 34, Comment.
2. Disability and Income Loss Benefits

Section 65B.44, subdivision 3 governs disability and income loss benefits:

Disability and income loss benefits shall provide compensation for 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the nonfatal injury subject to a maximum of $200 per week. Loss of income includes the costs incurred by a self-employed person to hire substitute employees to perform tasks which are necessary to maintain his income, which he normally performs himself, and which he cannot perform because of his injury.

If the injured person is unemployed at the time of injury and is receiving or is eligible to receive unemployment benefits under chapter 268, but the injured person loses his eligibility for those benefits because of inability to work caused by the injury, disability and income loss benefits shall provide compensation for the lost benefits in an amount equal to the unemployment benefits which otherwise would have been payable, subject to a maximum of $200 per week.

Compensation under this subdivision shall be reduced by any income from substitute work actually performed by the injured person or by income the injured person would have earned in available appropriate substitute work which he was capable of performing but unreasonably failed to undertake.

For the purposes of this section "inability to work" means disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis, for wage or profit, for which he is or may by training become reasonably qualified. If the injured person returns to his employment and is unable by reason of his injury to work continuously, compensation for lost income shall be reduced by the income received while he is actually able to work.82

Subdivision 3 provides that an injured person is entitled to receive basic economic loss benefits for loss of income, the cost of hiring substitute employees to perpetuate income, and the loss of unemployment benefits.83 Benefits are limited to eighty-five per-

82. Id. § 65B.44(3).
83. Id. A provision covering losses due to the hiring of a substitute to provide for the perpetuation of the insured's income was added in 1977. See Act of May 25, 1977, ch. 266,
cent of the loss, up to $200 per week.\textsuperscript{84}

"Inability to work" is a prerequisite to recovery of benefits. The
definition is less than clear, but a brief look at the legislative his-
tory of the definition provides some insights into the proper inter-
pretation of the term.

The senate version of the Act defined "work loss" as
loss of income the injured person would have received from
work he would have performed if he had not been injured, and
expenses reasonably incurred by him in obtaining substitute
services to avoid part or all of the loss of income, reduced by
any income from substitute work actually performed by him.
Work loss does not include loss of income attributable to the
injured person's unreasonable failure to perform other work or
to engage substitute services of another. "Loss of income" in-
cludes income that would have been lost but for any income
continuation plan providing income to the injured person.\textsuperscript{85}

At the time of the house floor debate the house version provided
that disability and income loss would be payable as follows:

Eighty-five percent of the injured person's loss of present and
future gross income per individual from inability to work prox-
imately caused by the injury subject to a maximum of $200 per
week and only if the person is disabled during the seven days
following the accident causing the injury sustained by the in-
jured. All disability or income loss benefits payable under this
provision shall be paid not less than every two weeks. Compen-
sation for loss of income from work shall be reduced by any
income from substitute work actually performed by the injured
person or by income the injured person would have earned in
available appropriate substitute work which he was capable of
performing but unreasonably failed to undertake.

For the purposes of this section "disability" shall mean disa-
bility which continuously prevents the injured person from en-
gaging in any substantial gainful occupation or employment,
for wage or profit, for which he is or may by training become
reasonably qualified.\textsuperscript{86}

The bill was amended on the house floor to require payment of
benefits "only if the person is disabled for any seven consecutive

\textsuperscript{84} MINN. STAT. § 65B.44(3) (1980).
\textsuperscript{85} 1 MINN. S. JOUR. 1503 (1973).
\textsuperscript{86} 2 MINN. H.R. JOUR. 3504 (1973).
days following the accident.”

When the bill was sent to the conference committee it thus required a disability for “any seven consecutive days” before benefits would be payable. As finally enacted the requirement that the disability continue for any specific period of time was deleted from the bill, leaving only the requirement that the injured person suffer an income loss from inability to work. “Inability to work” was defined as a “disability which continuously prevents the injured person from engaging in any substantial gainful occupation or employment, for wage or profit, for which he is or may by training become reasonably qualified.” In 1977 the definition of “inability to work” was amended to mean “disability which prevents the injured person from engaging in any substantial gainful occupation or employment on a regular basis.” The 1977 amendment also added the following sentence: “If the injured person returns to his employment and is unable by reason of his injury to work continuously, compensation for lost income shall be reduced by the income received while he is actually able to work.”

Although the house rather than the senate version of the disability and income loss provision was the model for section 65B.44, subdivision 3, the degree of disability required by the provision as enacted was substantially less than that required in the initial house version. The net effect of the amendments was to move the disability and income loss provision closer to the senate version.

There is also an inconsistency in the language of subdivision 3. On the one hand, the definition of “inability to work” implies that a long-term, total disability is a prerequisite to the payment of benefits. Yet the same subdivision provides that a person may be disabled but still able to perform substitute work or return to his regular occupation on an irregular basis. This inconsistency, when coupled with the deletion of any requirement that disability be required for any specified period of time, leaves the strong impression that loss of income proximately caused by an accident will be compensable, whether the disability leading to the income loss is short-term or sporadically recurring.

87. Id. at 4644 (1974).
90. Id.
3. Funeral and Burial Expenses

Basic economic loss benefits provide reimbursement for reasonable funeral and burial expenses up to $1,250.\textsuperscript{91} This includes expenses for cremation or delivery under the Uniform Anatomical Gift Act.\textsuperscript{92}

4. Replacement Service and Loss

Replacement service loss benefits reimburse all expenses reasonably incurred by or on behalf of a nonfatally injured person in obtaining usual and necessary substitute services in lieu of those the injured person, but for his injury, would have performed for the direct benefit of himself or his household.\textsuperscript{93} If the injured person normally has the full-time responsibility of providing care and maintenance of a home, with or without children, benefits are paid for the reasonable value of such care and maintenance or the reasonable expenses incurred in obtaining usual and necessary substitute care and maintenance of the home, whichever is greater.\textsuperscript{94}

Benefits are subject to a maximum of fifteen dollars per day.\textsuperscript{95} The date of injury and the first seven days thereafter are excluded in calculating benefits.\textsuperscript{96}

5. Survivors Economic Loss Benefits

Survivors economic loss benefits are payable if the decedent died within one year of the date of an accident causing the injuries which resulted in death.\textsuperscript{97} The benefits, subject to a maximum of $200 per week for all dependents, reimburse dependent survivors for "loss accruing after decedent's death of contributions of money or tangible things of economic value, not including services, that his surviving dependents would have received for their support during their dependency from the decedent had he not suffered

\textsuperscript{91} Minn. Stat. § 65B.44(4) (1980).
\textsuperscript{92} Id.
\textsuperscript{93} Id. § 65B.44(5).
\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. § 65B.44(6). The requirement that death occur within a stated period may be a carryover from the prior automobile insurance law that governed supplemental insurance benefits. See Act of May 27, 1971, ch. 581, § 1, 1971 Minn. Laws 1082, 1082 (repealed 1974) (accidental death benefits for death occurring within 90 days of specified accidents).
the injury causing death.\textsuperscript{98} Payments are to be made to the dependent, except that benefits due to a dependent who is a child or incapacitated person may be paid to the surviving parent or guardian of the dependent.\textsuperscript{99} Payments are terminated if the "recipient ceases to maintain a status which if the decedent were alive would be that of dependency."\textsuperscript{100}

Disputes concerning the existence and extent of dependency are fact questions that require consideration of the support that was regularly received from the decedent.\textsuperscript{101} The Act, however, presumes certain persons to be dependent:

(a) a wife is dependent on a husband with whom she lives at the time of his death; (b) a husband is dependent on a wife with whom he lives at the time of her death; (c) any child while under the age of 18 years, or while over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he is living or from whom he is receiving support regularly at the time of the death of such parent.\textsuperscript{102}

\textbf{6. Survivor's Replacement Services Loss}

Expenses reasonably incurred by surviving dependents, after the date of the decedent's death, in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit are reimbursed by survivor's replacement services loss benefits.\textsuperscript{103} The Act requires that the expenses must first be re-

\textsuperscript{98} MINN. STAT. § 65B.44(6) (1980).

In Miller v. State Farm Mut. Auto. Ins. Co., ___ Mich. ___, 302 N.W.2d 537 (1981), the Michigan Supreme Court had occasion to construe section 3108 of the Michigan No-Fault Insurance Act, which has a definition of survivors' losses equivalent to Minnesota's. The court said:

Nothing in the language of § 3108 suggests that the fund of "tangible things of economic value" is limited to wages. In today's complex economic system, the "tangible things of economic value" which many persons contribute to the support of their dependents include hospital and medical insurance benefits, disability coverage, pensions, investment income, annuity income and other benefits. Had it been the intent of the Legislature to limit survivors' benefits to a sum equal to what eligible dependents would have received from wages and salary alone, it could be expected to have said so. It chose instead the far broader category of "contributions of tangible things of economic value" which, on its face, suggests the inclusion of benefits derived for family support from other and different sources.

\textit{Id.} at ___, 302 N.W.2d at 541.

\textsuperscript{99} MINN. STAT. § 65B.44(6) (1980).

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} \textit{Id.} § 65B.44(7).
duced by "expenses of the survivors avoided by reason of the de-
cendent's death."\textsuperscript{104} Benefits are subject to a maximum of $200 per
week.\textsuperscript{105}

7. \textit{Coordination of Basic Economic Loss Benefits with
    Other Insurance Sources}

Persons entitled to receive basic economic loss benefits because
of injuries sustained in a motor vehicle accident may also be enti-
tled to receive compensation for the same losses through other
sources of insurance benefits. Such persons may be entitled to col-
lect workers' compensation benefits, or they may be covered by
group health insurance, private wage continuation plans, or social
security.

Although one of the stated purposes of the Act is to avoid
double recovery,\textsuperscript{106} the Act provides for only a limited coordina-
tion of basic economic loss benefits with other insurance sources.
Section 65B.61, as amended in 1979 and 1980, controls the coordi-
nation of benefits:

Subdivision 1. Basic economic loss benefits shall be primary
with respect to benefits, except for those paid or payable under
a workers' compensation law or medicare, which any person
receives or is entitled to receive from any other source as a re-
sult of injury arising out of the maintenance or use of a motor
vehicle. Where worker's compensation or medicare benefits
paid or payable are primary, the reparation obligor shall make
an appropriate rebate or reduction in the premiums of the plan
of reparation security. The amount of the rebate or reduction
shall not be less than the amount of the projected reduction in
benefits and claims for which the reparation obligor will be lia-
ble on that class of risks. The projected reduction or rebate in
benefits and claims shall be based upon sound actuarial
principles.

Subd. 2. If benefits are paid or payable under a workers'
compensation law because of the injury, no disability income
loss benefits are payable unless the weekly workers' compensa-
tion disability benefits are less than the weekly disability benefit
as set out in section 65B.44, subdivision 3, in which case the
reparation obligor shall pay to the injured person the amount
that the weekly disability and income loss benefits payable

\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} \S 65B.42(5).
under section 65B.44, subdivision 3, exceeds the weekly workers’ compensation disability benefits.

Subd. 2a. If benefits are paid or payable under a workers’ compensation law because of death, no survivors’ economic loss benefits are payable unless the weekly workers’ compensation dependency allowance is less than the weekly survivors’ economic loss benefit rate as set out in section 65B.44, subdivision 6, in which case the reparation obligor shall pay to the surviving dependents the amount that the weekly survivors’ economic loss benefits payable under section 65B.44, subdivision 6, exceed the weekly workers’ compensation dependency allowances.

Subd. 2b. If medicare benefits are paid or payable because of the injury, any benefits payable under section 65B.44, subdivision 2, are limited to the amount by which the medical expenses exceed the medicare payments.

Subd. 3. Any legal entity, other than a reparation obligor obligated to pay benefits under a plan of reparation security or an insurer or employer obligated to pay benefits under a workers’ compensation law, may coordinate any benefits it is obligated to pay for loss incurred as a result of injury arising out of the maintenance or use of a motor vehicle with basic economic benefits. No entity may coordinate benefits pursuant to this subdivision, unless it provides an appropriately reduced premium rate. The amount of this rate reduction shall be not less than the amount of the projected reduction in benefits and claims for which the entity will be liable on that class of risks, less the additional reasonable expenses incurred to administer the plan coordinating benefits. The projected reduction in benefits and claims shall be based upon sound actuarial principles.107

Basic economic loss benefits are the primary source of payment for economic losses, except to the extent provided for in section 65B.61. Reparation obligors are allowed to coordinate only workers’ compensation and medicare benefits. An appropriate premium reduction reflecting the cost savings due to coordination must be provided.108

The effect of coordination is both to preclude double recovery of

107. Id. § 65B.61.
108. See Wallace v. Tri-State Ins. Co., 302 N.W.2d 337 (Minn. 1980). Wallace arose out of the death of plaintiff’s decedent from injuries sustained in an automobile accident. At the time of the accident decedent was driving one of his father’s three automobiles. The vehicles were insured by Tri-State. Decedent was an insured under the policy coverages. Tri-State paid the no-fault limits under one policy but declined payment under the other coverages on the basis that it was entitled to coordinate basic economic loss benefits.
elements of loss for which both basic economic loss benefits and workers' compensation or medicare benefits are payable, and to place a ceiling on the amount of combined benefits payable for a particular injury. If medicare or workers' compensation medical benefits are paid or payable, medical expense benefits under the Act are limited to the amount by which the medical expenses incurred by the injured person exceed the medicare or workers' compensation benefits.109 Double recovery of losses for which basic

with a group health insurer that had paid virtually all of the medical expenses arising out of the accident. Id. at 338.

The group health insurer was Federated Mutual Insurance Company. Federated, with knowledge of the basic economic loss benefits coverage, paid the medical expenses except for $514.10 and made no attempt to coordinate benefits. After payment of the medical expenses by Federated, Tri-State paid plaintiff $19,999.10 in basic economic loss benefits under its insurance coverage on the vehicle involved in the accident. Tri-State also paid $1,250 in funeral expenses and, in addition, $3,000 in medical payments pursuant to plaintiff's contract with Tri-State. Id.

After Tri-State became aware of Federated's payment it refused further payment on the remaining coverages, even though stacking of those coverages clearly would be permitted under Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978), absent the coordination issue. 302 N.W.2d at 338. Tri-State argued that because Federated had paid all but a small portion of the medical expenses no "actual losses" had been sustained, and that payment by Tri-State under the remaining coverages would result in a double recovery, contrary to the purpose of the No-Fault Act of precluding recovery of "duplicate benefits." Id. at 339-40 & n.1.

The court held that because section 65B.61, subdivision 1 allowed reparation obligors to coordinate only workers' compensation benefits and medicare payments, health insurance payments cannot be coordinated with basic economic loss benefits. Id. at 339. Only legal entities other than reparation obligors are entitled to coordinate health insurance with basic economic loss insurance. Id.; see MINN. STAT. § 65B.61(3) (1980). The court noted that although this results in duplicate recovery, the duplicate recovery is a product of the permissive coordination of benefits by legal entities other than reparation obligors. Id. at 340.

109. On July 9, 1980, the Assistant Commissioner of Insurance sent a letter to all companies licensed to write motor vehicle insurance in Minnesota explaining the impact of the 1980 amendment that made medicare benefits primary. The letter reads, in part, as follows:

**Personal Injury Protection Coverages**

Since Medicare is now primary, a revision to the PIP endorsement or policy will be necessary. Wording similar to that which limits liability when workers compensation is primary is recommended. A major part of the Act is effective August 1, 1980 and as of this date, only a few companies have filed an amendment. If you haven't already done so, you may wish to handle the necessary revision as a top priority project. If you are a member subscriber of a rate service organization, they may file on your behalf. You should check directly with them to make sure what they have done.

**Rates**

Mandatory rate reductions must be filed with this office to coincide with the effective date of the revised form filing. They may be either in the form of a proportionate discount or a fixed dollar amount. The rate reduction and forms filing should be filed together for ease in handling.
economic loss benefits are payable is thus avoided.

When workers' compensation benefits are paid or payable, whether in the form of weekly workers' compensation disability benefits or dependency allowance, basic economic loss benefits are payable only to the extent that the disability and income loss or survivor's economic loss benefits payable under the Act exceed the workers' compensation benefits. The maximum benefits payable for disability and income loss and survivor's economic loss benefits under the Act is $200 per week. A reparation obligor is thus

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Application of Rate Reduction

A rate reduction is applicable to those vehicles where the principal operator is covered by medicare.

Any method which makes insureds, who are eligible for the reduction, aware of the law and provides the means for them to obtain the reduction, will be acceptable to this Division. As an example, you may wish to use the following procedure:

A. Automatically reduce the rates for all principal operators age 65 and older, under the assumption that the vast majority are covered by medicare. The reduction can be eliminated later if it is determined that the insured is not eligible.

B. Notify all insureds, prior to renewal;
   1. that such reductions are available;
   2. who is eligible; and
   3. if eligible, whom to contact (e.g., producer, company).

Once it has been determined who is eligible, rate them accordingly.

C. For new business, a medicare coverage question should be added to the application for rating purposes.

Claims Handling

All claims must be handled according to individual policy provisions. Medicare cannot become primary on any claim until the policy covering the loss has been re-written or endorsed to effect the change. This will ordinarily be the first renewal date after the date which your revision has been approved. New business written on or after the form approval date should have the revised terminology incorporated in the newly issued policy.

Since lifetime reserve days are not renewable, they cannot be used as primary medicare benefits.

A company officer should acknowledge receipt of this letter by signing and returning the attached receipt form.


110. The 1980 revamping of the coordination provision governing workers' compensation benefits and basic economic loss benefits appeared to be a direct reaction to the supreme court's opinion in Record v. Metropolitan Transit Comm'n, 284 N.W.2d 542 (Minn. 1979). At the time Record was decided the coordination provision read as follows:

Subdivision 1. Basic economic loss benefits shall be primary with respect to benefits, except for those paid or payable under a workers' compensation law, which any person receives or is entitled to receive from any other source as a result of injury arising out of the maintenance or use of a motor vehicle.

Subd. 2. Benefits paid or payable under a workers' compensation law because of the injury or death shall be subtracted in computing basic economic loss
obligated to pay basic economic loss benefits only to the extent those benefits exceed the workers’ compensation benefits.


The central question in Record concerned the method of coordinating benefits. The Metropolitan Transit Commission argued that the plaintiff should be limited to a total of $200 per week in combined basic economic loss and workers’ compensation benefits. The court held, however, that the plaintiff’s workers’ compensation disability benefits should be subtracted from his gross weekly wage, with basic economic loss benefits compensating him for eighty-five percent of the remainder, up to $200 per week. 284 N.W.2d at 546.

A secondary question was whether workers’ compensation retraining benefits were to be subtracted from the plaintiff’s gross wage in computing the amount of basic economic loss benefits to be paid. The court held that retraining benefits could be deducted: Allowing MTC to subtract plaintiff’s workers’ compensation retraining benefits more suitably fulfills the intent of the legislature to have the workers’ compensation act and the no-fault act interact to create a uniform and harmonious system of compensation. The total amount of weekly compensation benefits plaintiff would receive if workers’ compensation retraining benefits were not subtracted would be substantially in excess of the amount he earned while working for MTC, a result probably not intended by the legislature. Plaintiff is now receiving $163.29 in weekly workers’ compensation retraining benefits. He is therefore receiving $326.58 weekly in nontaxable income in workers’ compensation benefits. His average weekly wage on the date of his accident, the basis upon which his no-fault and workers’ compensation income loss benefits for total disability was computed, was $281.20, and such wages constituted taxable income. If plaintiff was still working for MTC, his average weekly wage would be $336.48. If workers’ compensation retraining benefits are not subtracted, plaintiff would receive another $100.22 in weekly no-fault income loss benefits under § 65B.44, subd. 3, bringing his weekly total of nontaxable income to $426.80. Such an amount is grossly in excess of plaintiff’s average weekly wage rate and has little relation to the compensation he earned before the accident. We do not believe the legislature intended the two statutes to interact to create such a disproportionate amount of compensation benefits. We therefore hold that workers’ compensation retraining benefits paid or payable under § 176.101, subd. 7, should be subtracted when computing no-fault income loss benefits payable under § 65B.44.

284 N.W.2d at 547 (footnote omitted).

In Griebel v. Tri-State Ins. Co., 311 N.W.2d 156 (Minn. 1981), the supreme court was presented with a unique coordination issue. Griebel sustained a back injury while driving a truck for his employer. During the period of unemployment caused by his injury he received workers’ compensation temporary total disability benefits from Employer Mutual. The payments continued until he received a second injury, a serious fracture of his leg. He was not working at the time. The accident caused no aggravation of his initial injury. Shortly after the second accident Employer Mutual submitted a notice to discontinue workers’ compensation benefits.

Griebel then brought suit against Tri-State, his no-fault insurer, for income loss benefits alleged to be payable due to the second accident. Tri-State impleaded Employer Mutual, claiming a right to set-off should it be found liable for income loss benefits.

The issue was whether Griebel was entitled to receive income loss benefits under the No-Fault Act and if so, whether the no-fault carrier would be entitled to coordinate its payments with workers’ compensation benefits Griebel receives for his first injury. Relying on the remedial nature of both acts, and in absence of explicit legislative guidance, the
Subdivision 3 applies to the coordination of benefits by any legal entity other than reparation obligors. As with the coordination of benefits by a reparation obligor under subdivision 1, the coordinating entity must provide an appropriately reduced premium rate based on the cost savings attributable to coordination.\footnote{Prior to the 1979 amendment, the provision governing the coordination of insurance benefits by entities other than reparation obligors read as follows:}

\footnote{Subd. 3. Any legally constituted entity, other than a reparation obligor obligated to pay benefits under a plan of reparation security or an insurer or employer obligated to pay benefits under a workers’ compensation law, may coordinate any benefits it is obligated to pay for loss incurred as a result of injury arising out of the maintenance or use of a motor vehicle with basic economic loss benefits.

Subd. 4. Notwithstanding subdivision 3, no entity may coordinate benefits unless it provides those persons who purchase benefits from it with an equitable reduction or savings in the direct or indirect cost of the purchased benefits. If the benefits to be coordinated are provided to an individual through a group, program, contract or other arrangement for which another person pays in whole or in part, the entity coordinating benefits shall return to the individual or use for his benefit any reduction or savings in the direct or indirect cost of the benefits.

Act of Apr. 11, 1974, ch. 408, § 21, 1974 Minn. Laws 762, 780-81, as amended by Act of June 4, 1975, ch. 359, § 23, 1975 Minn. Laws 1168, 1189 (current version at Minn. Stat. § 65B.61(3) (1980)). A 1979 amendment to the Act repealed subdivision 4 and added three additional sentences to subdivision 3. The addition reads as follows:

No entity may coordinate benefits pursuant to this subdivision, unless it provides an appropriately reduced premium rate. The amount of this rate reduction shall be not less than the amount of the projected reduction in benefits and claims for which the entity will be liable on that class of risks, less the additional reasonable expenses incurred to administer the plan coordinating benefits. The projected reduction in benefits and claims shall be based upon sound actuarial principles.

Act of May 3, 1979, ch. 57, §§ 1-2, 1979 Minn. Laws 84, 84-85.}

In Kleinwachter v. Time Ins. Co., 302 N.W.2d 647 (Minn. 1981), the supreme court had an opportunity to construe the coordination provisions. In Kleinwachter, the plaintiff and his sons were seriously injured in an automobile accident. The injuries resulted in medical and hospital expenses of over $100,000. All expenses were paid by the plaintiff’s reparation obligor. The plaintiff was also insured under an individual health and accident policy issued by defendant. Upon learning of the no-fault coverage, defendant paid forty-one percent of the expenses covered by its policy, and refunded to plaintiff fifty-nine percent of the premium he paid in 1977, the year in which the accident occurred. Id. at 648. Suit was brought by plaintiff for the remainder. The trial court, on motion for summary judgment, determined that the defendant was entitled to prorate according to its policy provision. The provision reads as follows:

INSURANCE WITH OTHER INSURERS: If there is other valid coverage, not with this Company, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this Company has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages, for such loss, of which this Company had notice bears to the total like amounts
8. The Reparation Obligor's Duty to Respond to Claims

Section 65B.54 provides: "Basic economic loss benefits are pay-
under all valid coverages for such loss, and for the return of such portion of the
premiums paid as shall exceed the pro rata portion for the amount so deter-
mined... Other valid coverage shall include group insurance, automobile no-
fault payments, or other coverage provided by hospital or medical service or-
ganizations or by union welfare plans or employer or employee benefit organiza-
tions subject to regulation by insurance law or by insurance authorities of the
United States.

Id. at 648-49. The policy provision sanctioned by section 62A.04, subdivision 3(4), is in-
cludable in health and accident policies at the option of the insurer:

INSURANCE WITH OTHER INSURERS: If there be other valid coverage,
not with this insurer, providing benefits for the same loss on a provision of service
basis or on an expense incurred basis and of which this insurer has not been
given written notice prior to the occurrence or commencement of loss, the only
liability under any expense incurred coverage of this policy shall be for such
proportion of the loss as the amount which would otherwise have been payable
hereunder plus the total of the like amounts under all such other valid coverages
for the same loss of which this insurer had notice bears to the total like amounts
under all valid coverages for such loss, and for the return of such portion of the
premiums paid as shall exceed the pro-rata portion for the amount so deter-
mined. For the purpose of applying this provision when other coverage is on a
provision of service basis, the "like amount" of such other coverage shall be taken
as the amount which the services rendered would have cost in the absence of
such coverage.

Minn. Stat. § 62A.04, subd. 3(4) (1980). This provision was enacted in 1967. See Act of

The plaintiff argued that this provision was in conflict with subdivision 4 of section
65B.61, the law in effect at the time the claim arose. Plaintiff argued that subdivision 4
applied to individual health and accident policies, precluding reliance by the defendant
on the pro rata provision in section 62A.04, subdivision 3(4). The plaintiff also argued
that coordination would be impermissible under the No-Fault Act because there was no
reduction of the premium charged him prior to the accident and because defendant failed
to file an amendatory rider with the Insurance Division as required by a letter sent in
November 1974 by John Ingrassia, supervisor of the life and health insurance section of
the Insurance Division, to all companies licensed to write accident and health insurance in
Minnesota. The plaintiff also argued that the 1979 amendment of section 65B.61, which
added the last three sentences to subdivision 3 and repealed subdivision 4, established that
the coordination provision as enacted was intended to apply to individual policies and
that the coordination provision in subdivision 4 in fact required a prior reduction of pre-
mium by the insurer desiring to coordinate benefits. 302 N.W.2d at 649. The supreme
court disagreed:

In spite of these ingenious arguments, it seems doubtful that Minn. Stat.
§ 65B.61, subd. 4 (1978) was in fact intended to apply to individual health and
accident policies in view of the language in the second sentence of that provision.
Moreover, although administrative interpretations of the statute would not be
controlling in any event, plaintiff's contention that Ingrassia's letter supports his
interpretation of the provision seems untenable because the content of the letter
appears to be directed only to insurers furnishing group health and accident
policies. A more recent letter from an investigator for the Insurance Division
interprets section 65B.61 as not applicable to individual policies.

In any event, even if it be assumed that Minn. Stat. § 65B.61 (1978) permits
an insurer furnishing an individual health and accident policy to coordinate
benefits, the provision does not require that an insurer do so. See Wallace v. Tri-
State Insurance Co., 302 N.W.2d 337 (Minn. 1980). There is no evidence that the
able monthly as loss accrues.\textsuperscript{112} Loss accrues not when the injury occurs, but when expenses are incurred for which basic economic loss benefits are payable.\textsuperscript{113} Basic economic loss benefits are deemed overdue if not paid within thirty days after receipt by the reparation obligor of “reasonable proof of the fact and amount of loss realized, unless the reparation obligor elects to accumulate claims for periods not exceeding 31 days and pays them within 15 days after the period of accumulation.”\textsuperscript{114} If reasonable proof is furnished as to only part of a claim, but that part totals $100 or more, payment is overdue on that part if not paid within the above time periods.\textsuperscript{115} If payments are not made within the requisite time period, payments will bear simple interest at the rate of fifteen percent per annum.\textsuperscript{116}

If a reparation obligor rejects a claim for benefits, prompt written notice specifying the reason must be given to the claimant.\textsuperscript{117}

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\begin{itemize}
\item legislature intended the option of coordinating benefits, if not exercised, to affect the insurer’s right to prorate under section 62A.04, subd. 3(4) (1980), nor do we find grounds in equity or public policy to invalidate the proration provision. The policy plaintiff purchased contained the provision, and the premium charged for the policy as written, which presumably took it into account, was approved by the Commissioner of Insurance. The provision was expressly authorized by the legislature and has been permitted for a considerable period of time, facts which persuade us that the provision is not inimical to public policy. Plaintiff’s objection that it is somehow unfair to permit defendant to rebate a portion of the premium only after it has chosen to prorate its coverage with that furnished by other insurers does not in our view establish that it is unfair since it is clear that defendant could not know in advance of an event giving rise to the right of proration what its liability would be and how much of the premium it would be required to rebate. We conclude that defendant has discharged its obligation to plaintiff under his policy.
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\item 302 N.W.2d at 649-50.
\item \textsuperscript{112} \textit{Minn. Stat.} \textsection\textsuperscript{65B.54(1)} (1980).
\item \textsuperscript{113} \textit{Id}.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{115} \textit{Id}.
\item \textsuperscript{116} \textit{Id.} \textsection\textsuperscript{65B.54(2)}. A 1979 amendment to this provision increased the interest penalty from 10 to 15 percent. \textit{See Act of May 25, 1979, ch. 190, \textsection\textsuperscript{3}, 1979 Minn. Laws 295, 295 (codified at Minn. Stat. \textsection\textsuperscript{65B.54(2)} (1980)).
\item Refusal to pay basic economic loss benefits, even if the refusal is in bad faith, will not subject the reparation obligor to liability in excess of the interest penalty unless the reparation obligor’s conduct amounts to the commission of an independent tort. \textit{See} Haagenson v. National Farmers Union Property & Cas. Co., 277 N.W.2d 648, 652-53 (Minn. 1979). A malicious breach of contract does not convert a contract action into a tort action. \textit{Id}. at 652.
\item Under the penalty provision a good faith refusal should avoid the penalty. Good faith does not include a unilateral assumption on the part of a reparation obligor that the statute does not require the payment of benefits under certain circumstances. \textit{See} Record v. Metropolitan Transit Comm’n, 284 N.W.2d 542, 548 (Minn. 1979).
\item \textsuperscript{117} \textit{Minn. Stat.} \textsection\textsuperscript{65B.54(5)} (1980).
\end{itemize}
If the reparation obligor rejects the claim for any reason other than that the person is not entitled to the basic economic loss benefits claimed, the written notice must also state that the claimant may file a claim with the assigned claims bureau.\textsuperscript{118} If benefits are available from another source, and that source is coordinated under section 65B.61 of the Act, the reparation obligor must still pay the claim for basic economic loss benefits if the benefits payable under the other source have not been paid to the claimant before the basic economic loss benefits are overdue or the claim is paid.\textsuperscript{119} If the reparation obligor does make payment for those losses it will be entitled to reimbursement from the person obligated to make the payments or from the claimant who actually receives the payments.\textsuperscript{120}

9. Limitations on and Exclusions from Coverage

There are a variety of limitations on and exclusions from coverage in the Act, both explicit and implicit. The priority scheme in section 65B.47,\textsuperscript{121} for example, establishes the appropriate source of coverage for basic economic loss benefits. In doing so it implicitly excludes injured persons from coverage under other potentially applicable sources of coverage. There are also explicit daily, weekly, and dollar limitations on the amount of benefits for each type of economic loss.\textsuperscript{122} In addition to these limitations there are specific limitations on and exclusions from coverage set forth in sections 65B.55 and 65B.58 through 65B.60 of the Act.

Section 65B.55 sets out permissible limitations on the right to claim basic economic loss benefits:

Subdivision 1. A plan of reparation security may prescribe a period of not less than six months after the date of accident within which an insured or any other person entitled to claim basic economic loss benefits, or anyone acting on their behalf, must notify the reparation obligor or its agent, of the accident and the possibility of a claim for economic loss benefits in order

\textsuperscript{118} Id. One of the bases entitling an individual to qualify under the assigned claims plan is that "[a] claim for basic economic loss benefits is rejected by a reparation obligor on some ground other than the person is not entitled to basic economic loss benefits under sections 65B.41 to 65B.71." \textit{Id.} § 65B.64(1)(d) (1980). For a discussion of the assigned claims plan provisions, see note 212 \textit{infra}.

\textsuperscript{119} \textit{Minn. Stat.} § 65B.54(3) (1980).

\textsuperscript{120} Id.

\textsuperscript{121} Id. § 65B.47(1)-(4).

\textsuperscript{122} Id. § 65B.44.
to be eligible for such benefits. Such notice may be given in any reasonable fashion.

Subd. 2. A plan of reparation security may provide that in any instance where a lapse occurs in the period of disability or in the medical treatment of a person with respect to whose injury basic economic loss benefits have been paid and a person subsequently claims additional benefits based upon an alleged recurrence of the injury for which the original claim for benefits was made, the obligor may require reasonable medical proof of such alleged recurrence; provided, that in no event shall the aggregate benefits payable to any person exceed the maximum limits specified in the plan of security, and provided further that such coverages may contain a provision terminating eligibility for benefits after a prescribed period of lapse of disability and medical treatment, which period shall not be less than one year.\footnote{123}

There are no supreme court cases interpreting the notice provision. However, in \textit{Reliance Insurance Co. v. St. Paul Insurance Cos.},\footnote{124} the court had an opportunity to consider a similar notice requirement in a legal malpractice insurance policy. The court held that the policy provision requiring notice "as soon as practicable" after a claim arose did not bar coverage absent proof by the insurance company that it was actually prejudiced by the failure of the insured to promptly submit his claim.\footnote{125}

Subdivision 2 covers situations in which there is a lapse in disability or medical treatment. If there is a recurrence of the injury for which basic economic loss benefits were initially payable, the reparation obligor may require reasonable medical proof of the recurrence. In cases involving recurring injuries the total benefits payable to the injured person are the maximum limits provided in the plan of reparation security. In effect, the recurring injury is

\footnote{123} \textit{Id.} § 65B.55(1)-(2).

\footnote{124} 307 Minn. 338, 239 N.W.2d 922 (1976).

\footnote{125} \textit{Id.} at 341-43, 239 N.W.2d at 924-25. \textit{Reliance} was applied in Assink \textit{v. Allstate Ins. Co.}, No. 739797 (Minn. 4th Dist. Ct. Dec. 15, 1977). The accompanying memorandum stated:

\begin{quote}
There is no legislative purpose underlying the Minnesota legislature's enactment of the No-Fault Act which would be frustrated by our Courts continuing to rely upon the long-settled rule referred to above. Indeed, the traditional rule requiring the showing of actual prejudice on the part of insurers, seems eminently consistent with the manifest purpose of the No-Fault Act to ensure basic compensation for accident victims. As counsel for plaintiff has pointed out, it is difficult to imagine how this purpose could be promoted by allowing an insurer to avoid coverage on grounds of late notice where the insurer has not demonstrated any prejudice resulting from the lack of timely notice.
\end{quote}

\textit{Id.}, slip op. at 1.
not treated as a new injury for purposes of expanding the maximum limits for basic economic loss benefits in the plan of reparation security.

The last portion of subdivision 2 states that eligibility for benefits may be terminated "after a prescribed period of lapse of disability and medical treatment," if the period is not less than one year. Use of the conjunctive "and" in subdivision 2 means that there must be a lapse of both disability and medical treatment. If the injured person suffers from a continuing disability, then the provision would be inapplicable. Such an exclusionary clause in a plan of reparation security should be read narrowly so as not to defeat the stated purposes of the Act: encouragement of rehabilitation and avoidance of economic distress associated with automobile accidents.

The specific exclusions set out in sections 65B.58 through 65B.60 cover motor vehicle conversions, official racing contests, and intentional injuries. Section 65B.58 reads as follows:

A person who converts a motor vehicle is disqualified from basic or optional economic loss benefits, including benefits otherwise due him as a survivor, from any source other than an insurance contract under which the converter is an insured, for injuries arising from maintenance or use of the converted vehicle. If the converter dies from the injuries, his survivors are not entitled to basic or optional economic loss benefits from any source other than an insurance contract under which the converter is a basic economic loss insured. For the purpose of this section, a person is not a converter if he uses the motor vehicle in the good faith belief that he is legally entitled to do so.

Conversion of a motor vehicle has the effect of excluding the converter who sustains injury from basic economic loss benefits under any plan of reparation security other than the plan under which the converter is an insured. The exclusion also extends to the converter's survivors.

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127. See Iverson v. State Farm Mut. Auto. Ins. Co., 295 N.W.2d 573 (Minn. 1980). The Iverson court stated, in voiding the exclusionary clause covering owned but uninsured motor vehicles, that the result is "consistent with our view that policy provisions involving forfeitures should be strictly construed in favor of insureds." Id. at 575.
128. MINN. STAT. § 65B.42(1), (3) (1980).
129. Id. § 65B.58. Although a converter may be excluded from coverage under the priority section, he may be able to qualify for coverage under the assigned claims plan if he is 14 years old or younger. See id. § 65B.64(1)(a).
Section 65B.59 excludes from coverage persons who sustain injury in official racing contests:

A person who is injured in the course of an official racing contest, other than a rally held in whole or in part on public roads, or in practice or preparation therefore is disqualified from basic or optional economic loss benefits. His survivors are not entitled to basic or optional economic loss benefits for loss arising from his death.  

Official racing contests are excluded from the scope of the Act because they entail hazards not associated with the normal operation of motor vehicles.

Section 65B.60 covers intentional injuries:

A person intentionally causing or attempting to cause injury to himself or another person is disqualified from basic or optional economic loss benefits for injury arising from his acts, including benefits otherwise due him as a survivor. If a person dies as a result of intentionally causing or attempting to cause injury to himself, his survivors are not entitled to basic or optional economic loss benefits for loss arising from his death. A person intentionally causes or attempts to cause injury if he acts or fails to act for the purpose of causing injury or with knowledge that injury is substantially certain to follow. A person does not intentionally cause or attempt to cause injury (1) merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of causing injury or (2) if the act or omission causing the injury is for the purpose of averting bodily harm to himself or another person.

A person who sustains injury while causing or attempting to cause injury to himself or another person will be excluded from coverage for basic economic loss benefits. In the event of his death, his survivors will be excluded only if he died while attempting to cause injury to himself. The apparent purpose is to preclude any potential incentive that might exist for an insured to commit suicide.

In addition to the statutory limitations on and exclusions from coverage, insurance policy exclusions must be considered. For the most part policy exclusions mirror the limitations on and exclusions from coverage in the Act. However, when policy exclu-

130. Id. § 65B.59.
131. Id. § 65B.60.
132. See UMVARA § 22, Comment. Section 65B.60 is virtually identical to section 22 of the Uniform Act.
133. For example, the exclusions in the Mutual Service Casualty Insurance Company policy read as follows:
sions deviate from exclusions or limitations in the Act they must be carefully scrutinized to determine if they are consistent with the purposes of the Act.

In Iverson v. State Farm Mutual Automobile Insurance Co., the court considered one such exclusion. The case arose because of State Farm Mutual's denial of basic economic loss benefits to Denise Iverson, who was claiming survivors' benefits because of the death

We do not provide Personal Injury Protection Coverage:

1. For bodily injury to any person whose injuries arise out of the maintenance or use of a motor vehicle;
   a. owned by you, your spouse, your relatives or a minor in the custody of you or a relative; and
   b. which is not your car, a newly acquired motor vehicle or a temporary substitute motor vehicle.

2. For any person who suffers bodily injury while:
   a. attempting to injure himself, herself or any other person. We will pay survivors' benefits unless the person was attempting to injure himself or herself.
   b. participating in or preparing for an official race contest. This does not apply to a rally held on public roads.
   c. occupying a self-propelled vehicle having fewer than 4 wheels and an engine rating over 5 horsepower.
   d. maintaining or using a vehicle located for use as a dwelling or premises.

3. For bodily injury to any person whose injuries arise out of the maintenance or use of a motor vehicle which is:
   a. not your motor vehicle, a newly acquired motor vehicle or a temporary substitute motor vehicle transporting persons or property other than and is being used in the business of transporting school children to school or a school sponsored activity.
   b. furnished by the insured's employer.

4. For bodily injury to any person while:
   a. operating a motor vehicle without reasonable belief of the legal right to do so;
   b. outside Minnesota and occupying a vehicle;
      (i) regularly used in the business of transporting persons or property and part of a fleet of more than four vehicles; or
      (ii) owned by a government other than the State of Minnesota, its political subdivisions, municipal corporations or public agencies.

   This does not apply to:
   a. you, your spouse, your relatives, or
   b. a minor in the custody of you or a relative.

5. For bodily injury to any person:
   a. who has other No-Fault Coverage as a named insured or a self-insured. This does not apply to you.
   b. due to war;
   c. resulting from the conduct of a car business. This does not apply if the injury occurs off the business premises.

Mutual Service Casualty Insurance Company, Car Insurance Policy, Part B: No Fault Coverages, Exclusions (Feb. 1980) (on file at William Mitchell Law Review office). Most of the exclusions in this policy are based specifically on the definitional section of the Act, the priority provision, or the exclusions established in sections 65B.58 to 65B.60 of the Act. See MINN. STAT. §§ 65B.43, .47, .58-.60 (1980).

134. 295 N.W.2d 573 (Minn. 1980).
of her husband in an automobile accident. The decedent owned two automobiles, but only one was insured. Decedent was driving the uninsured vehicle at the time of the accident. The State Farm Mutual policy excluded coverage for bodily injury sustained by any person whose injuries arose out of the ownership, maintenance or use of an owned but uninsured motor vehicle. 135

State Farm Mutual argued that the penalties and exclusions from coverage to which uninsured motor vehicle owners may be subject under the Act evinced a legislative intent to exclude such persons from coverage, and that its exclusionary clause was consistent with that purpose. The Iverson court recognized that the Act contains such penalties and exclusions. In rejecting State Farm Mutual's argument, however, the court chose to emphasize the purpose of the Act to achieve comprehensive indemnity for economic losses incurred in motor vehicle accidents:

We believe . . . even though the legislative intent on this issue is not perfectly clear, that the Act indicates a legislative determination that the compensation objectives of the Act are overriding. Notwithstanding the penalties for failing to insure an owned vehicle, the basic provisions of the Act provide for coverage of economic loss benefits to a person who is an insured under a policy even though that person owns an uninsured vehicle and is injured while operating it in violation of the Act.

Thus, even though we are not free from doubt, we affirm the trial court and hold the State Farm exclusion to be invalid because it conflicts with the basic purpose of the Act. We simply do not believe that the legislature intended to delegate to insurance companies the authority to enforce the mandatory obligation of vehicle owners to obtain insurance by adding, through a contractual provision in its policy, the additional sanction of forfeiture of basic benefits. This result is also consistent with our view that policy provisions involving forfeitures should be strictly construed in favor of insureds. 136

Had the accident occurred while the decedent was a pedestrian or occupant of an uninsured motor vehicle owned by someone else there would have been no question concerning coverage. 137 The court found nothing in the Act that makes coverage for basic economic loss benefits "contingent upon occupancy of an insured ve-

135. Id. at 574.
136. Id. at 575.
137. Id.
Thus, basic economic loss insurance follows the individual rather than the insured vehicle. The court had previously reached this conclusion in a case, relied upon by the Iverson court, that involved uninsured motorist insurance.\textsuperscript{139}

\textbf{B. Residual Liability Insurance}

The Act requires that each plan of reparation security contain residual liability insurance of at least $25,000 for bodily injury to one person in any one accident, $50,000 for bodily injury to two or more persons in any one accident, and $10,000 for property damage in any one accident.\textsuperscript{140} Under residual liability insurance reparation obligors must pay on the insured’s behalf any sums the insured “is legally obligated to pay as damages because of bodily injury and property damage arising out of the ownership, maintenance or use of a motor vehicle.”\textsuperscript{141}

Each plan of reparation security is subject to certain provisions that were carried over to the Act from the Safety Responsibility Act.\textsuperscript{142} First, the reparation obligor has the right to settle any claim covered by residual liability insurance. If the settlement is made in good faith, the amount is deductible from the limits of

\begin{footnotesize}

\textsuperscript{138} Id.

\textsuperscript{139} The Iverson court said:

\begin{quote}
Nothing in the Act purports to make coverage for economic loss benefits contingent upon occupancy of an insured vehicle. Stated differently, nothing in the Act requires a forfeiture of coverage where the injury arises out of the ownership, maintenance, or use of an uninsured vehicle. Because the decedent was an insured under the State Farm policy, the exclusionary clause precluding coverage for economic loss benefits simply because the decedent was operating an uninsured vehicle at the time of the accident is an unwarranted geographic limitation of statutorily required coverage. This reasoning is supported by our previous decisions holding that insurance companies may not deny uninsured motorist coverage to an insured simply because the insured is occupying an owned vehicle which is not insured when an accident with an uninsured motorist occurs. Nygaard v. State Farm Mutual Auto. Ins. Co., 301 Minn. 10, 221 N.W.2d 151 (1974). . . . Nygaard is good authority for invalidating the exclusion in this case.
\end{quote}

\textit{Id.} at 575-76.

Although the Iverson court was concerned only with the clause excluding the named insured from coverage when driving an owned but uninsured motor vehicle, the same conclusion would seem to be applicable to exclusions of relatives injured while using an owned but uninsured motor vehicle. Although a relative would not be deemed an insured if he is a named insured under his own plan of reparation security, see Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978); MINN. STAT. § 65B.43(5) (1980), the definition would not operate to exclude him when he is uninsured.

\textsuperscript{140} MINN. STAT. § 65B.49, subd. 3(1) (1980).

\textsuperscript{141} Id. § 65B.49, subd. 3(2).


\end{footnotesize}
liability for the accident giving rise to the claim. Second, the No-Fault Act provides that satisfaction by the insured of a judgment is not a condition precedent to the reparation obligor’s duty to make payment for damage caused by the insured. Third, the No-Fault Act provides:

The liability of the reparation obligor with respect to the residual liability coverage required by this clause shall become absolute whenever injury or damage occurs; such liability may not be cancelled or annulled by any agreement between the reparation obligor and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

Only one case, decided under the Safety Responsibility Act, has interpreted the absolute liability provision. In *Nimeth v. Felling*, Dairyland Mutual Insurance Company sought to avoid payment under an automobile liability insurance policy issued to its insured, Felling, because Felling failed to report to Dairyland the purchase of a substitute motor vehicle, as required by the policy. The supreme court held that because of the absolute liability provision coverage could not be avoided.

C. Uninsured or Hit-and-Run Motor Vehicle Coverage

Prior to passage of the Act no automobile liability insurance policy could be issued in Minnesota without uninsured motorist coverage. This requirement is continued in the Act. The minimum required coverage is $25,000 for injury to or death of one

144. *Id.* § 65B.49(3)(b).
145. *Id.* § 65B.49(3)(a).
147. *Id.* at 463, 165 N.W.2d at 239. Although *Nimeth* is the only case specifically addressing the application of the absolute liability provision in Minnesota, in other jurisdictions similar provisions have substantially restricted the insurer’s policy defenses:

Under the absolute liability section nothing done before or after the accident by the insured or insurer, singly or jointly, can be utilized to avoid the insurer’s liability to an injured third person. Such matters, for example, as the insured’s fraud in procuring the policy, failure to give notice of an accident or to forward suit papers, omission to notify the insurer of the acquisition of a replacement vehicle, misrepresentations concerning the facts of the accident, or refusal to cooperate in the defense of an action are immaterial in an injured party’s action against the policy.

person in any accident and, subject to that limitation, $50,000 for bodily injury to or death of two or more persons in any one accident.\textsuperscript{148} The coverage is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of injury."\textsuperscript{149}

"Uninsured motor vehicle" is defined as "any motor vehicle or motorcycle for which a plan of reparation security meeting the requirements of sections 65B.41 to 65B.71 is not in effect."\textsuperscript{150}

The Act provides that "[n]o recovery shall be permitted under the uninsured motor vehicle provisions of this section for basic economic loss benefits paid or payable, or which would be payable but for any applicable deductible."\textsuperscript{151} Uninsured motor vehicle insurance thus compensates losses not covered by basic economic loss insurance.

\section*{D. The Mandatory Offers}

Prior to repeal of the requirement in 1980, the Act required reparation obligors to offer certain optional coverages to insureds:

(a) Medical expense benefits subject to a maximum payment of $10,000;

(b) Medical expense benefits subject to a maximum payment of $20,000;

(c) Residual bodily liability coverage of not less than $25,000 for damages for injury to one person in any one accident arising out of the maintenance or use of a motor vehicle, subject to a limitation of $30,000 for damages arising out of any one accident;

(d) Basic economic loss benefits to all persons purchasing lia-

\begin{footnotesize}
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\item \textsuperscript{148} Minn. Stat. § 65B.49, subd. 4(1) (1980).
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Id. § 65B.49(3). In DiLuzio v. Home Mut. Ins. Co., 289 N.W.2d 749 (Minn. 1980), the court considered whether "uninsured motor vehicle" applied to a vehicle legally insured, but where the policy limits had been exhausted by previous claimants. The court held that it did not. See id. at 751.
\item Originally, the No-Fault Act did not include motorcycles in the definition of "uninsured motor vehicle," an omission remedied by amendment in 1977. See Act of May 25, 1977, ch. 266, § 2, 1977 Minn. Laws 437, 437-38 (codified at Minn. Stat. § 65B.49(3) (1980)). In Gudvangen v. Austin Mut. Ins. Co., 284 N.W.2d 813 (Minn. 1978), aff'd on rehearing, 284 N.W.2d 817 (1979), appeal dismissed, 444 U.S. 1062 (1980), the court utilized what the legislature labeled a "clarifying amendment" to find that the statute included uninsured motorcycles, even though the case arose prior to the passage of the amendment. See 284 N.W.2d at 816-17.
\item \textsuperscript{151} Minn. Stat. § 65B.49(4) (1980).
\end{itemize}
\end{footnotesize}
bility coverage for injuries arising out of the maintenance or use of a motorcycle;

(e) Underinsured motorist coverage offered in an amount at least equal to the insured's residual liability limits and also at lower limits which the insured may select, whereby the reparation obligor agrees to pay damages the insured is legally entitled to recover on account of a motor vehicle accident but which are uncompensated because the total damages exceed the residual bodily injury liability limit of the owner of the other vehicle. . . .

(f) Uninsured motorist coverage in addition to the minimum limits specified in subdivision 4, so as to provide total limits of uninsured motorist coverage equal to the residual bodily injury liability limits of the policy, or smaller limits as the insured may select. This coverage may be offered in combination with the coverage under clause (e). 152

A recurrent problem with the mandatory offers involves the burden of proof and standards to be applied in deciding whether an offer of the coverages has been made. In Holman v. All Nation Insurance Co. 153 the supreme court held that the insurer bears the burden of proof on the issue. 154 The court, however, did not require that offers be made or rejected in writing. 155 Although the court did not specify the exact nature of a satisfactory offer, its reference to a pre-no-fault case, Jacobson v. Illinois Farmers Insurance Co., 156 justifies the conclusion that commercially acceptable methods such as mass mailings may suffice. 157 That conclusion is borne out by the court's summary affirmance of the district courts' orders in Carlsen v. American Family Mutual Insurance Co. 158 and Prestegord v. State Farm Mutual Automobile Insurance Co. 159

153. 288 N.W.2d 244 (Minn. 1980).
154. See id. at 248.
155. See id. at 249.
156. 264 N.W.2d 804 (Minn. 1978). Jacobson involved optional underinsured motorist coverage requirements that existed prior to the No-Fault Act. Rather than requiring a mandatory offer, the law required only that insurers "make available" to their insureds certain supplemental coverages. See Act of May 24, 1969, ch. 13, § 2, 1969 Minn. Laws 1272, 1273 (repealed 1974).
157. In Jacobson, the insurer's practice of notifying customers of optional coverage by inserting "stuffers" in the envelopes that contained premium notices was held by the court to be a commercially reasonable method. See 264 N.W.2d at 808.
159. No. 432547 (Minn. 2d Dist. Ct. Oct. 31, 1979), sum. affd, No. 50752, Finance and
In 1980 the legislature, in apparent reaction to the perceived problems created by Holman, repealed the mandatory offer provision.\footnote{160}

IV. THE SOURCE OF INSURANCE COVERAGE

Although the Act covers residual liability and uninsured motorist insurance as well as basic economic loss insurance, the Act varies in the guidance it gives for determining the appropriate source of those coverages. The priority provision in section 65B.47 provides detailed guidance for determining the appropriate source for the collection of basic economic loss benefits, and accordingly, the scope of coverage that plans of reparation security must by law provide.

Little statutory guidance is provided, however, for determining the appropriate source and scope of residual liability and uninsured motorist insurance coverages. In considering the three types

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\footnote{Commerce, Oct. 24, 1980, at 16, col. 2 (Minn. Oct. 14, 1980). In the district court, Judge Gingold held that State Farm's offer was sufficient. The offer consisted both of a mailing setting out the available coverages, with a representative premium rate, as well as an offer made by State Farm's agent.}

\footnote{Both Carlsen and Prestegard were decided in the district court prior to the supreme court's decision in Holman. The courts applied Jacobson in determining the sufficiency of the offer, not Holman. The supreme court's summary affirmances of the district court cases, however, are some indication that commercially acceptable methods of offering the coverages will be sufficient. In any case fact questions concerning the sufficiency of the offer may arise. No clear standard has yet emerged for resolution of the problem. The court's recent decision in Kuchenmeister v. Illinois Farmers Ins. Co., 310 N.W.2d 86 (Minn. 1981) reinforces this conclusion. The insurer stated at the bottom of the insured's premium renewal notices only that underinsured motorist insurance was available. The supreme court found that the message was vague at best. It did not explain underinsured motorist insurance and did not explain how it differed from uninsured motorist insurance. Although it was an offer the court found that it was not a meaningful offer. \textit{Id.} at 88.}

\footnote{160 See note 152 supra.}

A bill introduced by Senators Davies, Johnson, Spear, Bernhagen, and Ashbach on January 15, 1981, would reintroduce uninsured motorist insurance:

No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, whereby the reparation obligor agrees to pay the insured the damages the insured is legally entitled to recover on account of a motor vehicle accident but which are uncompensated because the total damages exceed the available residual bodily injury liability limit of the owner of the other vehicle, but only to the extent that the limits selected by the insured for his own residual liability limits exceed the available residual bodily injury liability coverage of the owner of the other vehicle. The reparation obligor is subrogated as to any amounts it pays pursuant to this coverage and upon payment has an assignment of the judgment, if any, against the other person to the extent of the amount it pays.

of coverage it is necessary at the outset to determine the appropriate source of coverage. In addition, because of the possibility that more than one source of insurance coverage may exist, it is necessary to consider which source or sources of coverage will be applicable when there are overlapping insurance coverages.

A. Residual Liability Insurance

The only provision in the Act relating to the scope of residual liability insurance is section 65B.49, subdivision 3:

Under residual liability insurance the reparation obligor shall be liable to pay, on behalf of the insured, sums which the insured is legally obligated to pay as damages because of bodily injury and property damage arising out of the ownership, maintenance or use of a motor vehicle if the injury or damage occurs within this state, the United States of America, its territories or possessions, or Canada. A reparation obligor shall also be liable to pay sums which another reparation obligor is entitled to recover under the indemnity provisions of section 65B.53, subdivision 1.161

The statute does not define the persons covered by residual liability insurance, unlike section 170.40 of the Safety Responsibility Act, now repealed, which provided that the owner’s policy of liability insurance

insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles . . . .162

The foregoing coverage requirement was consistent with the consent provision of the Safety Responsibility Act, which provides that “[w]henever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.”163 The consent provision of the Safety Responsibility Act was retained when the No-Fault Act was passed. In spite of the omission of language similar to section 170.40, it seems clear that the mandated coverage would be the same as

161. MINN. STAT. § 65B.49, subd. 3(2) (1980).
163. MINN. STAT. § 170.54 (1980).
under prior law. This conclusion is supported by reference to the provision of the No-Fault Act covering motorcyclists, in which the specific language from the Safety Responsibility Act requiring coverage for the motorcyclist or a person using the motorcycle with his permission is adopted.\textsuperscript{164}

In any event, all private motor vehicle policies contain language that provides coverage for people who use an insured’s motor vehicle with consent as well as insureds using other motor vehicles.\textsuperscript{165} Coverage provisions will, of course, vary depending on the type of vehicle involved in the accident.

Because of the possibility that an individual may be covered under more than one plan of reparation security,\textsuperscript{166} it must be de-

\textsuperscript{164} The statute states:

Every owner of a motorcycle registered or required to be registered in this state or operated in this state by him or with his permission shall provide and maintain security for the payment of tort liabilities arising out of the maintenance or use of the motorcycle in this state. Security may be provided by a contract of liability insurance complying with section 65B.49, subdivision 3, or by qualifying as a self insurer in the manner provided in subdivision 3.

\textit{Id.} § 65B.48(5).

\textsuperscript{165} This language, for example, is drawn from a Milbank Mutual Insurance Company policy, Part A—Liability Coverage:

“Covered person” as used in this Part means:

1. You or any family member for the ownership maintenance or use of any auto or trailer.

2. Any person using your covered auto.

3. For your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

4. For any auto or trailer, other than your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of you or any family member for whom coverage is afforded under this Part. This provision applies only if the person or organization does not own or hire the auto or trailer.


\textsuperscript{166} There are several combinations of concurrent coverage that could arise:

(1) the omnibus coverage of an auto owner’s personal automobile liability policy and the non-owned automobile coverage of the driver’s automobile liability policy;

(2) the temporary substitute or non-owned automobile coverage of the driver’s personal automobile liability policy and the omnibus or leased car coverage under a garage liability policy;

(3) an employee’s personal automobile policy, and his employer’s comprehensive general liability policy covering business use of the employee’s automobile;

(4) two concurrent liability policies on the same automobile;

(5) a lessor’s policy with provisions as to leased vehicles and a lessee’s policy with provisions as to hired vehicles;

(6) a driver’s non-owned automobile coverage of his personal automobile liability policy while using a leased vehicle and the omnibus coverage provided by the lessor;

(7) a comprehensive general liability policy covering an employee who is assisting in loading or unloading a motor vehicle and a motor vehicle liability policy.
terminated which plan applies and, if more than one plan does apply, how the overlapping coverages will be treated. Generally, policies will contain clauses that limit or exclude coverage when other insurance is available.\textsuperscript{167} There are three primary types of clauses. Excess clauses provide that if other insurance is available to the insured, coverage under the policy applies only after the other insurance coverages are exhausted.\textsuperscript{168} Escape clauses provide that if other insurance is available there will be no coverage under the policy.\textsuperscript{169} Under a pro rata clause liability is restricted to the proportion that the policy limits bear to the total applicable limits of all available insurance.\textsuperscript{170}

When more than one automobile insurance policy is involved there may be a conflict in the “other insurance” clauses of the policies involved. In such cases the conflict must be resolved to determine whether there will be coverage under all policies and, if so, what the order of priority for payment will be.

Although a variety of approaches to the problem have been used by the courts,\textsuperscript{171} the Minnesota approach traditionally has required an examination of “the total policy insuring intent, as determined by the primary policy risks upon which each policy’s premiums were based and as determined by the primary function of each policy.”\textsuperscript{172}

The approach is summarized and illustrated in \textit{Federal Insurance Co. v. Prestemon},\textsuperscript{173} a declaratory judgment action brought to determine the liability insurance obligations of two insurers. The case arose out of an accident that occurred while Federal’s insured was driving a motor vehicle loaned to him by a garage insured by Guaranty Security Insurance Company. Guaranty argued that it could not be held liable under its policy because of an endorsement that provided coverage “‘only if no other valid and collectible automobile insurance, either primary or excess . . . is available to such person.’”\textsuperscript{174} The conflicting clause in Federal’s policy of-

\begin{itemize}
\item 168. \textit{See} Kurtock, \textit{supra} note 166, at 48-49.
\item 169. \textit{Id.} at 49-53.
\item 170. \textit{Id.} at 47-48.
\item 173. 278 Minn. 218, 153 N.W.2d 429 (1967).
\item 174. \textit{See id.} at 227, 153 N.W.2d at 435.
\end{itemize}
ferred its insured only excess coverage when operating a "temporary substitute automobile."\footnote{175}

The supreme court stated that the general rule is that when one policy contains an "excess insurance" clause and the other a "no insurance" (escape) clause, the conflict is resolved by imposing liability on the insurer with the escape clause.\footnote{176} The rationale is that the policy with the excess insurance clause does not constitute other valid and collectible insurance so far as the "no liability" clause of the other policy is concerned.\footnote{177}

However, in determining which policy would provide primary coverage the court set forth several factors to be considered:

(1) Which company by its policy intended to cover "business operations"? (2) Which company specifically described the accident-involved vehicle in its policy? (3) Which premium is reflective of the greater contemplated exposure? (4) Which company insured the particular risk as an "incident" of its object, and which policy appears to cover the particular car and the risks inherent in using the car for contemplated "business operations" uses?\footnote{178}

Applying these factors the court held that Guaranty, the insurer of the vehicle involved in the accident, would be the primary insurer and that the escape clause in Guaranty's policy would therefore be "legally ineffective to exculpate it from the liability primarily insured by it."\footnote{179} Federal, which insured the driver, was held to be an excess insurer because the operation of the loaned vehicle was "ancillary" to the primary coverage of the operation of the customer's vehicle.\footnote{180}

\textit{Prestemon} involved only one type of policy conflict. The supreme court has on numerous occasions resolved other types of policy conflicts.\footnote{181} The Minnesota approach to the resolution of overlap-
ping coverage problems makes it difficult, as the supreme court has acknowledged, to develop a set of rules that will mechanically resolve conflicting coverage problems. 182 The general rules noted by the court in Prestemon provide some guidance, but the court has stated that they are general propositions to be considered with other factors "in the totality of insurable circumstances." 183

If an individual is covered as a named insured or is an insured under two or more policies covering two or more motor vehicles, the insured will not be entitled to coverage equal to the policy limits of all policies under which he is an insured. 184 Liability insurance coverage is specifically related to the insured vehicle, whether that vehicle or a replacement or substitute vehicle is involved, 185 and a specific premium is charged for that coverage. The coverage is thus vehicle-based. 186 Because liability insurance follows the vehicle rather than the person, stacking of coverages is precluded. 187

B. Uninsured or Hit-and-Run Motor Vehicle Coverage

Uninsured or hit-and-run motor vehicle coverage is the third type of compulsory coverage required by the Act. Section 65B.49, subdivision 4 sets out the coverage requirements. Coverage must be provided "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of injury." 188 The supreme court has noted that "[t]he vexing

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182. See Sathre v. Brewer, 289 Minn. 424, 184 N.W.2d 668 (1971). The Sathre court stated: "There is no talismanic rule for resolving this perennial problem of determining coverage of policies applicable to the same insured, vehicle, or loss situation. Until the insurance industry establishes a more practicable method for determining these issues, courts must labor to achieve an equitable result in individual situations." Id. at 428-29, 184 N.W.2d at 671.
183. See id. at 431, 184 N.W.2d at 672.
185. A replacement or substitute vehicle is one that has been "acquired as a replacement" and "actually substituted for" the vehicle described in the policy. See Austin Mut. Ins. Co. v. Modern Serv. Ins. Co., 255 N.W.2d 224, 225 (Minn. 1977); Dike v. American Family Mut. Ins. Co., 284 Minn. 412, 416, 170 N.W.2d 563, 566 (1969).
problem with this broad statutory language is that the class of persons to be protected by mandatory uninsured motorist coverage is not clearly defined."\textsuperscript{189} Determining who is covered by uninsured motorist insurance requires a consideration of insurance policy language, statutory mandates, and judicial constructions of the uninsured motorist insurance statutory requirements.

The standard policy provision for uninsured motorist coverage reads as follows:

\textit{"Covered person"} as used in this Part means:

1. You or any family member.
2. Any other person occupying your covered auto.
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.\textsuperscript{190}

Although the coverage seems to be clear, problems can arise in situations in which the policy language deviates from the statutory requirements or from the coverage in other parts of the policy. In \textit{Gudvangen v. Austin Mutual Insurance Co.},\textsuperscript{191} the supreme court took the position that the Act was not intended to make changes in the law concerning uninsured motorist protection. In \textit{Gudvangen} the plaintiff requested a declaration that the uninsured motorist provision of his automobile liability insurance policy provided coverage for his minor daughter who was a passenger on a nonowned, uninsured motorcycle involved in a collision with an automobile. The supreme court construed the automobile insurance policy as excluding from uninsured motorist coverage injuries sustained on an uninsured motorcycle. The issue then became whether the statute required insurance coverage for accidents involving uninsured motorcycles. At the time the injury occurred the uninsured motorist provision embodied in the Act did not require uninsured motorist insurance coverage for injuries arising out of the maintenance or use of an uninsured motorcycle. The legislature subsequently adopted a clarifying amendment that included motorcycles in the definition of uninsured motor vehicle.\textsuperscript{192} Because the legislature stated that the inclusion of motorcycles was a "clarification," the

\begin{footnotesize}
\begin{itemize}
  \item 190. This language is taken from Part C of a Milbank Mutual Insurance Company policy (on file at William Mitchell Law Review office).
  \item 191. 284 N.W.2d 813 (Minn. 1978), aff'd on rehearing, 284 N.W.2d 817 (1979), appeal dismissed, 444 U.S. 1062 (1980).
  \item 192. \textit{See} Act of May 25, 1977, ch. 266, § 2, 1977 Minn. Laws 437, 438 (current version at MINN. STAT. § 65B.49, subd. 4(3) (1980)).
\end{itemize}
\end{footnotesize}
court concluded on rehearing that the limited definition of motor vehicle in the Act was not intended to apply to uninsured motorist coverage. 193

In the opinion on rehearing in *Cudvangen* the court made the following statement:

By way of further explanation for our earlier decision, we think it clear that in adopting the concept of no-fault insurance into the Minnesota statutes, the legislature intended no change in the law insofar as uninsured motorist insurance protection is concerned. The statutes dealing will [sic] uninsured motorist insurance were intended to be incorporated intact. Since decisions of this court prior to no fault, cited in the main opinion, make it clear that the protection of the uninsured motorist statutes applied to persons and not vehicles, appellant would be covered. 194

*Cudvangen* thus establishes that the Act made no changes in uninsured motorist law as it existed prior to the adoption of the Act. Aside from construing the uninsured motorist insurance provision of the Act to extend uninsured motorist insurance coverage to cases involving uninsured motorcycles, even though the statute as it read at the time the injury arose did not provide for such coverage, the court also made clear that past decisions holding that uninsured motorist insurance follows the person rather than the vehicle are still good law.

The supreme court also construed the term "persons insured thereunder" in the uninsured motorist subdivision in *Kaysen v. Federal Insurance Co.*, 195 a consolidated appeal with *Distel v. Mutual Service Casualty Insurance Co.* 196 *Kaysen* involved a claim by the administrator of the estate of David and Patricia Distel against Federal for a declaratory judgment that he was entitled to recover uninsured motorist insurance benefits under a general liability insurance policy issued by Federal to Mars Industries, Inc., Mr. Distel's employer. Mr. Distel, as an executive officer of Mars, was an insured under the comprehensive liability insurance portion of the policy, but he was not an insured under the uninsured motorist portion. Following a Michigan decision, *Roach v. Central Mutual Insurance Co.*, 197 the court found that Mr. Distel was covered under

193. See 284 N.W.2d at 817.
194. Id.
195. 268 N.W.2d 920 (Minn. 1978).
196. Id.
the uninsured motorist provisions of the policy:

We believe the reasoning of the Roach decision is eminently sound. By requiring that every plan of reparation security issued in Minnesota include uninsured motorist coverage, the legislature no doubt intended that the scope of this important remedial measure be coextensive with the other coverage afforded in each plan of reparation security. If insurers are allowed to designate a separate and smaller category of persons insured under insured motorist coverage, then the broad-based protection which the legislature intended to require could be contractually restricted at the whim of insurers. For this reason, we conclude that the most sensible reading of the phrase “persons insured thereunder” requires that uninsured motorist coverage be extended to all persons insured under any “plan of reparation security,” defined in Minn. St. 65B.48, subd. 1, issued in Minnesota.

In the present case, Mr. Distel was unquestionably an insured under the comprehensive liability portion of the Mars Industries “plan of reparation security.” In accordance with our interpretation of Minn. St. 65B.49, subd. 4(1), Mr. Distel should also have been covered by the uninsured motorist provisions of that policy. Since he was not covered by the terms of those provisions, the policy language contravenes the mandate of 65B.49, subd. 4(1), and the required coverage must be inserted by operation of law.198

Kayseren establishes that uninsured motorist protection must be coextensive with the coverage afforded to insureds under the residual liability portion of the automobile insurance policy.

A second problem with uninsured motorist insurance concerns overlapping insurance coverages. The problem is similar to that involved in sorting out overlapping residual liability insurance coverages. Because uninsured motorist insurance follows the person rather than the vehicle, however, it is possible to stack uninsured motorist insurance coverages. The critical issue then becomes the order of stacking overlapping coverages.

The stacking issue was resolved by the Minnesota Supreme Court in Van Tassel v. Horace Mann Insurance Co.199 In Van Tassel, plaintiffs sought to recover under each of four insurance policies issued by Horace Mann on four vehicles owned by plaintiffs. Each policy contained $10,000 uninsured motorist insurance coverage

198. 268 N.W.2d at 924-25.
199. 296 Minn. 181, 207 N.W.2d 348 (1973).
per person. A separate semiannual premium was paid for the coverage on each policy. Each policy contained excess and pro rata clauses. Horace Mann argued that the pro rata clauses limited its liability to the limits of a single policy, rather than the combined limits of all policies.

After noting that the statutory requirements made the offer of uninsured motorist insurance mandatory and required each policy to contain uninsured motorist insurance in the amount of $10,000 for bodily injury to or death of one person in any one accident, the court decided that stacking should be allowed:

It seems to us that, in spite of the attempt by the insurer to limit its liability to one policy or to the amount recoverable under one policy, the fact that the legislature required an uninsured-motorist provision in all policies, added to the fact that a premium has been collected on each of the policies involved, should result in the policy holder’s receiving what he paid for in each policy, up to the full amount of his damages. It is true that such holding results in permissible recovery exceeding what he would have received if the uninsured motorist had been insured for the minimum amount required under our Safety Responsibility Act. But if the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that for which it collected a premium.200

Although Van Tassel involved only a construction of the pro rata clauses of the policies, other conflicts are possible. It seems clear from Van Tassel, however, that irrespective of the nature of the conflict among “other insurance” clauses, those clauses will be voided to the extent that they would permit a reduction of the coverage in each policy below the coverage mandated by statute.

The critical question in uninsured motorist cases, therefore, is the order of stacking of the applicable uninsured motorist insurance coverages. The uninsured motorist insurance cases track the residual liability insurance cases in resolving overlapping coverage problems. As summarized by the supreme court in Integrity Mutual Insurance Co. v. State Automobile & Casualty Underwriters Insurance Co.:201

The nub of the Minnesota doctrine is that coverages of a given risk shall be “stacked” for payment in the order of their

200. Id. at 187, 207 N.W.2d at 351-52.
201. 307 Minn. 173, 239 N.W.2d 445 (1976).
closeness to the risk. That is, the insurer whose coverage was effected for the primary purpose of insuring that risk will be liable first for payment, and the insurer whose coverage of the risk was the most incidental to the basic purpose of its insuring intent will be liable last. If two coverages contemplate the risk equally, then the two companies providing those coverages will prorate the liability between themselves on the basis of their respective limits of liability.202

*Integrity Mutual* was a declaratory judgment action to determine the rights of two insurance companies with respect to claims for uninsured motorists' coverage arising out of the death of Kenneth Rechtzigel, who was killed in an automobile accident involving an uninsured motor vehicle. Kenneth Rechtzigel owned three automobiles that were insured by Integrity Mutual. Integrity's policy provided coverage on each of the three vehicles in the amount of $50,000 per person for bodily injury caused by uninsured motorists.

At the time of the accident Kenneth was driving an automobile owned by his father, Anton Rechtzigel. Anton Rechtzigel owned two automobiles that were insured by State Auto. Coverage was provided on each vehicle in the amount of $50,000 per person for bodily injury. The policy provided coverage for his relatives and anyone occupying the insured vehicles. Kenneth was therefore an insured under his father's policies as well as his own.

Damages due to Kenneth's death were determined by arbitration to be $171,082.47. The amount of damages made the order of stacking critical.

The court found that the first $50,000 in damages should be paid by State Auto from the coverage on the vehicle driven by Kenneth.203 Because the State Auto policy specifically covered the insured's relatives riding in the insured vehicle the court found that it specifically contemplated the injury to Kenneth while riding in his father's vehicle and, "importantly for this case, it does so more directly than do any of the other four coverages."204

The court found the coverages on the three automobiles owned by Kenneth were next closest to the risk. The policies covering those vehicles did not contemplate the risk as directly as the policy covering the vehicle Kenneth was driving but they did so more

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202. *Id.* at 175-76, 239 N.W.2d at 447.
203. *Id.* at 178, 239 N.W.2d at 448.
204. *Id.* at 179, 239 N.W.2d at 448.
directly than the coverage on the second, uninvolved automobile owned by Anton Rechtzigel.\textsuperscript{205} The coverage on that automobile "most incidentally covered the risk."\textsuperscript{206}

As with residual liability insurance, the standards developed by the supreme court do not provide for easy resolution of overlapping coverage problems. The difficulty in applying the \textit{Integrity Mutual} standard is illustrated by \textit{Hennekens v. All Nation Insurance Co.}\textsuperscript{207} The plaintiff, Debra Hennekens, brought a declaratory judgment action to determine the uninsured motorist insurance obligations of two companies, All Nation and Mutual Service Casualty Insurance Company. The plaintiff was injured while riding in an automobile driven by Duane Hennekens, whom she later married, and owned by her father, Gerald Burch. The vehicle in which she was riding was one of five motor vehicles owned by her father. Her father, a Wisconsin resident, had insured all five vehicles with Mutual Service. Each policy carried uninsured motorist insurance in the amount of $15,000 bodily injury per person and $30,000 per accident. The driver of the vehicle, Duane Hennekens, a Minnesota resident, owned a motor vehicle insured by All Nation. The All Nation policy carried uninsured motorist insurance coverage in the amount of $25,000 bodily injury per person and $50,000 per accident. The plaintiff's damages were in excess of $15,000.

Each of the insurance policies contained identical excess and pro rata insurance clauses. All Nation argued that because the policy provisions were identical there was no conflict and therefore the Mutual Service policies should provide the sole coverage for the plaintiff's injuries.

The supreme court applied the approach established in \textit{Integrity Mutual}, but distinguished that case on its facts:

The stacking priority in \textit{Integrity Mutual}, was essentially based upon the deceased driver's familial relationship with the insured and the existence of his own liability insurance coverage, leading the court to determine that the insuring intent was best satisfied by a finding that the coverage provided in connection with the vehicle involved in the collision was primary. The three coverages of the deceased driver's automobiles provided protection to him while he operated another vehicle and did

\textsuperscript{205} \textit{Id.} at 179, 239 N.W.2d at 449.

\textsuperscript{206} \textit{See id.}

\textsuperscript{207} 295 N.W.2d 84 (Minn. 1980).
not contemplate the specific risk as directly as that provided for the accident-causing instrumentality.

In the instant case, there is no dispute that the policy issued by Mutual Service to Gerald Burch providing coverage with respect to the vehicle involved in the collision was correctly found to provide primary coverage to the extent of its $15,000 policy limits. Coverage for any damages ultimately to be awarded to the plaintiff in excess of that $15,000 was contemplated by the remaining policies issued both to Burch and Duane Hennekens, but a determination as to the order of their application rests upon a determination as to which policy more directly and which incidentally contemplated the specific risk.

Although the question is not free from doubt, this court is of the view that the district court was correct in concluding that once the coverage for the specific instrumentality is exhausted, the next most closely connected coverage is that provided by All Nation. That policy contemplated that its insured Hennekens' operation of a vehicle would render that vehicle an "insured vehicle" and its occupant an additional insured. A more direct connection to the risk is found in the coverage providing protection for the operation of the accident-causing instrumentality than in that providing protection for other vehicles owned by Gerald Burch. Additionally, the insuring intent is furthered by this construction. 208

Decisions such as Integrity Mutual should be fully preserved under the Act, a conclusion implicit in the court's decision in Hennekens and explicit in Gudvangen. In interpreting the Act in Gudvangen, the court made clear that the legislature intended no change in uninsured motorist law when it passed the Act. Therefore, neither the more limited definition of "motor vehicle" and "insured" 209 in the Act nor the priority scheme 210 in section 65B.47 should interfere with the uninsured motorist stacking decisions of the court. 211

208. Id. at 87.
209. See Minn. Stat. § 65B.43(5) (1980) (to be "insured," person not named on policy must be living with named insured and be a spouse, relative, or minor in the custody of the named insured).
210. See id. § 65B.47.
211. 284 N.W.2d 813 (Minn. 1978), aff'd on rehearing, 284 N.W.2d 817 (1979), appeal dismissed, 444 U.S. 1062 (1980).
C. Basic Economic Loss Benefits

The appropriate source of recovery for basic economic loss benefits is controlled by a priority scheme set out in section 65B.47.212

212. There may be no applicable plan of reparation security at the relevant priority level. In recognition of this fact, the legislature created a gap-closing device—the assigned claims plan—designed to ensure that individuals who are not covered under a plan of reparation security will be entitled to coverage for their economic loss, if they satisfy the conditions for coverage. Section 65B.63 provides for the creation of the assigned claims plan and the method of the plan's operation:

Subdivision 1. Reparation obligors providing basic economic loss insurance in this state may organize and maintain, subject to approval and regulation by the commissioner, an assigned claims bureau and an assigned claims plan, and adopt rules for their operation and for the assessment of costs on a fair and equitable basis consistent with sections 65B.41 to 65B.71.

Subd. 2. The assigned claims bureau shall promptly assign each claim and notify the claimant of the identity and address of the assignee-obligor of the claim. Claims shall be assigned so as to minimize inconvenience to claimants. The assignee thereafter has rights and obligations as if he had issued a policy of basic economic loss insurance complying with sections 65B.41 to 65B.71 applicable to the injury or, in case of financial inability of a reparation obligor to perform its obligations, as if the assignee had written the applicable reparation insurance, undertaken the self-insurance, or lawfully obligated itself to pay basic economic loss benefits.

Minn. Stat. § 65B.63(1)-(2) (1980).

Section 65B.64 controls participation in the assigned claims plan:

Subdivision 1. A person entitled to basic economic loss benefits because of injury covered by sections 65B.41 to 65B.71 may obtain basic economic loss benefits through the assigned claims plan or bureau established pursuant to section 65B.63 and in accordance with the provisions for making assigned claims provided in sections 65B.41 to 65B.71, if:

(a) The person is 14 years old or younger and basic economic loss benefits are not applicable to his injury because of section 65B.58;

(b) Basic economic loss benefits are not applicable to the injury for some reason other than those specified in sections 65B.58, 65B.59, or 65B.60;

(c) The plan of reparation security applicable to the injury cannot be identified; or

(d) A claim for basic economic loss benefits is rejected by a reparation obligor on some ground other than the person is not entitled to basic economic loss benefits under sections 65B.41 to 65B.71.

Id. § 65B.64(1).

To qualify for coverage, then, one of the conditions set forth in section 65B.64(1) must be satisfied. Although converters would be excluded from coverage, an exception is made for a converter who is 14 years old or younger and who is not entitled to coverage because of the exclusion in section 65B.58.

The second means of qualifying applies when basic economic loss benefits are inapplicable for some reason other than the exclusions set out in sections 65B.58 to 65B.60, covering exclusions for converted motor vehicles, official races, and intentional injuries. If an injured individual is not covered by a plan of reparation security due to one of these exclusions, he will be denied participation in the assigned claims plan. Individuals to whom no plan of reparation security is applicable for some reason other than these exclusions will be covered. The Uniform Motor Vehicle Accident Reparations Act (UMVARA), which has a similar assigned claims provision, provides:
The priorities that will apply depend on the type of vehicle in-

This paragraph would be applicable, for example, where a person was injured in an accident in the enacting State involving a motor vehicle in which he was a passenger, and neither he nor the owner had insurance. It would also be applicable when a pedestrian who is not a basic reparation insured was struck by an uninsured vehicle in the enacting State.

UMVARA § 18, Comment.

The third method of qualifying, when the "plan of reparation security applicable to the injury cannot be identified," Minn. Stat. § 65B.64(1)(c) (1980), includes cases in which it cannot be shown that there is no plan of reparation security, but that even though a plan may exist, it cannot be identified. UMVARA § 18, Comment. This method of qualifying includes situations such as those involving a hit-and-run driver. See id.

The fourth method of qualifying applies when a claim for basic economic loss benefits is rejected by a reparation obligor "on some ground other than that the person is not entitled to basic economic loss benefits." Minn. Stat. § 65B.64(1)(d) (1980). According to the Uniform Act, this covers situations "where an insurer refuses to pay basic reparation benefits on the ground that they are due from another source or where an out-of-State liability insurer denies that it can constitutionally be subjected to the requirement that it pay basic reparation benefits . . . ." UMVARA § 18, Comment.

Although an individual may initially qualify for coverage under the assigned claims plan there is one potential exclusion from the plan that must be considered. Subdivision 3 of section 65B.64, as originally enacted, provided:

A person shall not be entitled to basic economic loss benefits through the assigned claims plan with respect to injury which was sustained if at the time of such injury the injured person was the owner of a private passenger motor vehicle for which security is required under this act and he failed to have such security in effect. Persons claiming benefits as a result of injury to members of the owner's household shall also be disqualified from benefits if those members knew or reasonably should have known that security covering the vehicle was not provided as required by this act.

Act of Apr. 11, 1974, ch. 408, § 24, 1974 Minn. Laws 762, 781-82 (current version at Minn. Stat. § 65B.64(3) (1980)).

This exclusion was the subject of a consolidated supreme court decision, Kaysen v. Federal Ins. Co., 268 N.W.2d 920 (Minn. 1978). One of the actions in Kaysen arose out of the deaths of David and Patricia Distel, who were killed by an uninsured hit-and-run vehicle while walking along a road after abandoning an automobile owned by Mars Industries, Inc., Mr. Distel's employer. The Distels owned their own automobile, but failed to maintain uninsured motorist coverage required by section 65B.49, subdivision 4(2). The Distels were survived by their three minor children. The case involved a claim by the guardian of the children against Mutual Service, the company assigned the claim, to recover survivor's basic economic loss benefits. Id. at 922. The issue, as framed by the supreme court, was "whether it is the knowledge of the 'persons claiming benefits' or the knowledge of the injured 'member' as to the failure to insure the vehicle that precludes recovery under the assigned claims plan." Id. at 926.

The supreme court held that the statute was intended only to bar claims by persons who knew or should have known the owner's car was uninsured. Such situations arise, for example, where a spouse claims benefits for the other spouse's injury, or where a parent claims benefits for expenses paid due to his child's injuries sustained while the child was operating his own uninsured car. Under this interpretation . . . a person may recover if he has no reason to know of the failure to insure and he has no opportunity to correct the deficiency. On the other hand, a person who knew or should have known of the failure to insure is barred from recovery under the assigned claims plan. Because there is no evidence that the Distel children either knew or should.
volved in the accident and on whether the injured person is an insured within the meaning of the Act.

have known of their deceased parents' insurance status, and they were obviously, because of their ages, not in a position to remedy the deficiency, the decision of the district court . . . [allowing recovery] is affirmed.

Id. at 927.

Subdivision 3 was amended in 1979 to read as follows:

A person shall not be entitled to basic economic loss benefits through the assigned claims plan with respect to injury which was sustained if at the time of such injury the injured person was the owner of a private passenger motor vehicle for which security is required under sections 65B.41 to 65B.71 and he failed to have such security in effect. Members of the owner's household other than minor children shall also be disqualified from benefits through the assigned claims plan.


Only the last sentence of subdivision 3, as initially enacted, is changed. The injured owner of an uninsured vehicle will still be barred from recovering for his own injuries. The remaining question concerns the right of a member of the owner's household to recover benefits as a result of injury to himself or to recover survivor's benefits because of the death of the owner. Prior to the amendment, the second sentence, as construed by the supreme court in Kayser, made the right of members of the owner's household to recover basic economic loss benefits contingent on the knowledge of the person claiming benefits. Thus, a member of the owner's household who knew or should have known that the owner's vehicle was uninsured and was in a position to rectify the insurance deficiency would be barred from recovery. This construction would apply whether the member was claiming benefits as a result of injury to the owner or to himself. One potential construction of the "clarifying amendment" is that it simply was intended to codify the court's decision in Kayser.

The deviation of the amendatory language from the language in Kayser, however, argues against that conclusion. A more plausible construction is that in cases involving injury to motor vehicle owners, members of the household will be precluded from recovering benefits unless they are minor children. Under this construction, family members other than minor children will always be precluded from recovering survivor's benefits because of the death of the owner, whereas minor children will always be allowed to recover survivor's benefits. However, because the last sentence says nothing about the family member's claim for benefits as a result of injury to himself, the family member will always be entitled to recover benefits for his own injuries.

This is a more plausible construction because it gives effect to the specific language in the 1979 amendment, but it does cause curious results. It establishes a per se rule that always precludes a family member from recovering survivor's benefits as a result of the death of a motor vehicle owner, and always allows the family member to recover basic economic loss benefits for his own injuries, or survivor's benefits because of the death of any other family member other than the owner. A family member would be precluded from recovering survivor's benefits because of the owner's death, regardless of the status of the family member, even if he is dependent by reason of physical or mental limitation, and irrespective of whether he knew the motor vehicle was uninsured or could have influenced the decision not to insure the motor vehicle.

Allowing a family member to recover benefits for his own injuries or for the death of
The priorities for persons injured in accidents involving business vehicles are set out in the first three subdivisions of section 65B.47:

Subdivision 1. In case of injury to the driver or other occupant of a motor vehicle other than a commuter van, or other than a vehicle being used to transport children to school or to a school sponsored activity, if the accident causing the injury occurs while the vehicle is being used in the business of transporting persons or property, the security for the payment of basic economic loss benefits is the security covering the vehicle or, if none, the security under which the injured person is an insured.

Subd. 2. In case of injury to an employee, or to his spouse or other relative residing in the same household, if the accident causing the injury occurs while the injured person is driving or occupying a motor vehicle other than a commuter van furnished by the employer, the security for payment of basic economic loss benefits is the security covering the vehicle or, if none, the security under which the injured person is an insured.

Subd. 3. In the case of any other person whose injury arises from the maintenance or use of a motor vehicle described in subdivision 1 or 2 who is not a driver or occupant of another involved motor vehicle, the security for the payment of basic economic loss benefits is the security covering the vehicle, or if none, the security under which the injured person is an insured.213

Subdivision 4 establishes the priorities for cases not involving business vehicles:

(a) The security for payment of basic economic loss benefits applicable to injury to an insured is the security under which the injured person is an insured.

(b) The security for payment of basic economic loss benefits applicable to injury to the driver or other occupant of an involved motor vehicle who is not an insured is the security covering that vehicle.

213. MINN. STAT. § 65B.47(1)-(3) (1980).
(c) The security for payment of basic economic loss benefits applicable to injury to a person not otherwise covered who is not the driver or other occupant of an involved motor vehicle is the security covering any involved motor vehicle. An unoccupied parked vehicle is not an involved motor vehicle unless it was parked so as to cause unreasonable risk of injury.\textsuperscript{214}

Subdivision 5 states that if two or more obligations to pay basic economic loss benefits are applicable to an injury under these priorities, benefits are payable only once.\textsuperscript{215}

The priority scheme is predicated on the assumption that a plan of reparation security may not be available at the primary level.\textsuperscript{216} Accordingly, the Act establishes backup priorities that apply when basic economic loss benefits are unavailable at the primary level, either because the injured person is not an insured or because the motor vehicle he is driving or riding in is uninsured.

The priority scheme ensures that in most situations involving private motor vehicle accidents an injured person will recover basic economic loss benefits from his own reparation obligor. When business vehicles are involved, however, the priorities are altered so that the primary obligation to pay basic economic loss benefits falls on the owner of the vehicle. The rationale is that loss arising from accidents involving business vehicles should be placed on the owners of those vehicles as a cost of doing business.\textsuperscript{217}

Under subdivision 1 of section 65B.47, if the injury is to the “driver or other occupant of a motor vehicle . . . [and] if the accident occurs while the vehicle is being used in the business of transporting persons or property, the security for payment of basic economic loss benefits is the security covering the vehicle.”\textsuperscript{218} As examples, this includes drivers of delivery vehicles, buses or taxicabs, and passengers in those vehicles.\textsuperscript{219} If the vehicle is not insured the injured person should make his claim under the plan of reparation security under which he is an insured.\textsuperscript{220}

Subdivision 2 controls claims arising out of injuries connected with the use of “a motor vehicle . . . furnished by the em-

\textsuperscript{214} Id. § 65B.47(4).
\textsuperscript{215} Id. § 65B.47(5).
\textsuperscript{216} See UMVARA § 4, Comment.
\textsuperscript{218} MINN. STAT. § 65B.47(1) (1980).
\textsuperscript{219} See UMVARA § 4, Comment.
\textsuperscript{220} MINN. STAT. § 65B.47(3) (1980).
ployer."\textsuperscript{221} It covers "injury to an employee, or to his spouse or other relative residing in the same household, if the accident causing the injury occurs while the injured person is driving or occupying a motor vehicle" described in subdivision 2.\textsuperscript{222} The definition of covered individuals is narrower in scope than the definition of "insured" in section 65B.43, subdivision 5;\textsuperscript{223} it limits recovery to the spouse or other relative residing in the same household. The comment to the priority provision of the Uniform Motor Vehicle Accident Reparations Act (UMVARA) reasons that "[t]he simpler definitions of the family unit used here will make it somewhat easier for the reparation obligor providing security for the employer-furnished vehicle to determine the scope of its obligation to members of the employee's family."\textsuperscript{224}

Subdivision 3 is the final provision governing priorities for business vehicles. If an individual is not covered as a driver or occupant of one of the vehicles described in subdivision 2, or is not a driver or occupant of another involved motor vehicle, the appropriate source of benefits is the plan of reparation security covering the business vehicle.\textsuperscript{225} Subdivision 3 covers situations such as those involving a pedestrian or bicyclist injured by one of the vehicles described in subdivisions 1 and 2 of section 65B.47.\textsuperscript{226}

Individuals who are not covered under subdivisions 1 through 3 will drop to the priorities in subdivision 4. For example, a passenger in or driver of an uninsured taxi would drop to subdivision 4(a), claiming basic economic loss benefits under the plan of reparation security under which he is an insured. The same would be true for a passenger in a vehicle described in subdivision 2 who is not a "spouse or other relative residing in the same household."

Under subdivision 4 the first priority is the plan of reparation security under which the injured person is an insured.\textsuperscript{227} The second priority, for injured persons who are not insureds, is the security covering the vehicle they are driving or occupying.\textsuperscript{228} The third priority, for injured persons who are neither insureds nor

\textsuperscript{221} Id. § 65B.47(2).
\textsuperscript{222} Id.
\textsuperscript{223} The definition of "insured" includes a spouse or other relative of a named insured, and a "minor in the custody of a named insured or of a relative residing in the same household with a named insured." Id. § 65B.43(5).
\textsuperscript{224} UMVARA § 4, Comment.
\textsuperscript{225} See MINN. STAT. § 65B.47(3) (1980).
\textsuperscript{226} Id.
\textsuperscript{227} Id. § 65B.47(4)(a).
\textsuperscript{228} Id. § 65B.47(4)(b).
drivers or occupants of an involved motor vehicle, is the security covering any involved motor vehicle.\textsuperscript{229}

Problems may arise under the priority scheme when more than one priority appears to apply or when an injured person is an insured under more than one plan of reparation security. As with uninsured motorist insurance,\textsuperscript{230} the issue in such cases is whether basic economic loss benefits may be stacked.

The principles that govern stacking were established by the supreme court in two cases consolidated for appeal, \textit{Wasche v. Milbank Mutual Insurance Co.}\textsuperscript{231} and \textit{Bock v. Mutual Service Casualty Insurance Co.}\textsuperscript{232} In the first case Crescentia Wasche was injured while vacationing in California, in a collision between two California automobiles. She was a passenger in one of the vehicles. As a result of the accident her medical expenses were in excess of $60,000. Upon her subsequent death her funeral expenses were $1,966.

At the time of the accident Crescentia Wasche resided with her daughter-in-law, Delores, in Minnesota. Delores owned two automobiles, both insured as required by the Act. Each policy provided the basic economic loss coverage required by the Act, including $20,000 in medical expense coverage and $1,250 for funeral expenses.\textsuperscript{233}

In the \textit{Bock} case, Clark Bock sustained serious injuries while driving a pickup truck he owned. His medical expenses exceeded $20,000. At the time of the accident he owned two motor vehicles, including the pickup. Each was insured as required by the Act. Clark's father, who lived with Clark and his wife, also owned an automobile insured under his own name. Each of the three policies provided for basic economic loss benefits in the amount of $20,000 for medical expenses and $10,000 for other basic economic loss.\textsuperscript{234}

The insurance companies in the case argued that section 65B.44, which sets out the benefit levels required by the Act, was a ceiling on benefits, and that stacking of basic economic loss benefits would

\textsuperscript{229} \textit{Id.} \S 65B.47(4)(c).
\textsuperscript{230} \textit{See} notes 199-211 supra and accompanying text.
\textsuperscript{231} 268 N.W.2d 913 (Minn. 1978). For an excellent analysis of \textit{Wasche} and of the stacking issue in general, see \textit{Comment, Stacking of Basic Economic Loss Benefits Under the Minnesota No-Fault Automobile Insurance Act}, 5 WM. MITCHELL L. REV. 421 (1979).
\textsuperscript{232} 268 N.W.2d 913 (Minn. 1978).
\textsuperscript{233} \textit{Id.} at 915.
\textsuperscript{234} \textit{Id.}
therefore be prohibited. 235 The supreme court disagreed, finding that section 65B.44 only defines the basic unit of required basic economic loss coverage and that it is not therefore a ceiling on total benefits collectible. 236

The argument was also made that section 65B.47, subdivision 5 of the Act limited recovery. That section provides:

If two or more obligations to pay basic economic loss benefits are applicable to an injury under the priorities set out in this section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible, but he is thereafter entitled to recover contribution pro rata for the basic economic loss benefits paid and the costs of processing the claim. . . . 237

Subdivision 5 was drawn from UMVARA. 238 Under UMVARA there are dollar, daily, and weekly limitations on benefits, as in the Minnesota Act. 239 Unlike the Minnesota Act, however, there are no ceilings on the total benefits that may be paid. There is, therefore, no need to stack coverages under UMVARA. Because UMVARA does not address the stacking issue, the court found that it provided no authority for limiting stacking under the Minnesota Act. 240 The court concluded that subdivision 5 "is nothing more than a standard pro rata clause commonly contained in insurance policies to prevent double recovery and pro rate losses when more than one insurer is involved." 241

In holding that stacking of basic economic loss benefits would be allowed, the court relied heavily on its uninsured motorist stacking decisions:

Both uninsured-motorist coverage and basic economic loss benefits protect persons, not vehicles; the injured person ordinarily looks to his own policies or those covering him as an insured whether or not associated with the particular vehicle involved in the collision. . . . Both uninsured-motorist and no-fault coverages are compulsory. Under the statute, a vehicle owner is compelled to maintain a plan of reparation security for each of his vehicles in the state . . . and he must pay separate premiums to provide both uninsured-motorist and no-fault coverages.

235. Id. at 917.
236. Id.
238. See UMVARA § 4(d).
240. 268 N.W.2d at 917-18.
241. Id. at 918.
on every policy. . . . Absent an express statutory prohibition of stacking in the no-fault context, insurers offer no compelling reason to deny stacking of compulsory basic economic loss coverages while stacking of uninsured-motorist coverages is recognized and permitted.

Against the background of our holdings stacking uninsured-motorist coverages, we believe that, had the legislature intended that stacking could now be prohibited under the no-fault act in either the uninsured-motorist or the no-fault context, it would have so provided. This it did not do. While the legislative intent is not free from doubt, we hold that under the present statute the injured persons shall be allowed to recover basic economic loss benefits under each no-fault coverage applicable to him as an insured to the extent of actual losses up to the stacked policy limits of all policies applicable on a single priority level.242

The court held that policy clauses purporting to restrict stacking of benefits for which separate premiums had been paid were void as against the public policy established in its uninsured motorist insurance decisions and in the Act.243

As applied to the facts, the court held that the basic economic loss benefits in the two policies under which Crescentia Wasche was an insured could be stacked, and that Clark Bock could stack the basic economic loss benefits in the policies covering the motor vehicles he owned.244 The court refused to allow stacking of the benefits in his father’s policy, however, because of the restrictive definition of “insured” in the Act.245 That definition excludes a relative who resides in the same household as a named insured if the relative is insured by name under another plan of reparation security.246 Because Clark Bock was a named insured under the policies covering the motor vehicles he owned, he could not be an “insured” under the policy covering his father’s vehicle.247

According to Wasche and Bock, stacking of basic economic loss benefits is allowed to the extent of the actual loss sustained, but only if the injured person is an insured under each plan of repara-

242. Id. at 918-19 (citations and footnotes omitted).
243. Id. at 920.
244. See id. at 919.
245. See id. at 916-17 n.4.
tion security he seeks to stack. Stacking is further limited to a single priority level. Unlike the law applied in uninsured motorist insurance cases, no "inter-priority stacking" of coverages is permitted.248

Subsequent to Wasche the court determined that the stacking principles established in that case apply to nonresidents injured in Minnesota. The court has, however, made clear its intent to limit stacking in accordance with the principles set out in Wasche and Bock.249

248. The "closeness to the risk" concept of stacking applied in Integrity Mut. Ins. Co. v. State Auto. & Cas. Underwriters Ins. Co., 307 Minn. 173, 239 N.W.2d 445 (1976) would justify interpriority stacking. For example, assume that A and B own motor vehicles insured as required by the No-Fault Act, and that A is injured while riding in B's automobile when the vehicle is struck by a car driven by an uninsured motorist. A would be a covered person under B's policy. See note 190 supra and accompanying text. Under Integrity Mutual, the policy closest to the risk would be the policy covering B's vehicle. A thus would be entitled to recover uninsured motorist insurance from B's policy first. A's own policy would provide the secondary coverage. See 307 Minn. at 175-76, 239 N.W.2d at 447.

In contrast, if A's claim was solely for basic economic loss benefits, the first priority would be the policy under which he is an insured. See Minn. Stat. § 65B.47(4)(a) (1980). He would therefore collect basic economic loss benefits under his own policy. The second priority would be the policy covering the motor vehicle in which he was riding. See id. § 65B.47(4)(b). However, because the court in Wasche said that basic economic loss coverages could be stacked only on a single priority level, interpriority stacking would be precluded. See Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 918 (Minn. 1978).

The result is difficult to justify once the concept of stacking is accepted in the basic economic loss benefits context. In distinguishing the priority provision in UMVARA from the more limited benefits of the Minnesota Act, the court in Wasche argued for allowing stacking on as broad a basis as in uninsured motorist insurance cases. See 268 N.W.2d at 919; Comment, supra note 231, at 457-58.

249. Since Wasche was decided the supreme court has consistently adhered to the basic principles established in that case. In Petty v. Allstate Ins. Co., 290 N.W.2d 763 (Minn. 1980), the court gave the stacking principle extraterritorial effect. The Pettys, residents of California, owned two motor vehicles insured with Allstate. The Pettys drove one of the vehicles to Minnesota. At the time of the accident giving rise to their claim for basic economic loss benefits, Mr. Petty was driving an automobile owned by his daughter, a Minnesota resident. The controlling priority for the payment of basic economic loss benefits was the policy under which the Pettys were insured. Because they owned two motor vehicles insured by Allstate they were insureds under both policies. Allstate acknowledged its obligation under the Act to provide nonresidents with the security required by the Act, but disputed the Pettys' right to stack basic economic loss benefits under both policies. Id. at 764-65.

Companies such as Allstate, licensed to write motor vehicle accident reparation and liability insurance in Minnesota, have a statutory obligation to provide basic economic loss benefit coverages to nonresidents, notwithstanding contrary provisions in the insurance policy. See Minn. Stat. § 65B.50(2) (1980). The supreme court concluded that because of this statutory obligation, "Allstate has contracted to allow nonresident insureds
D. The Optional Coverages

Prior to a 1980 amendment to the Act, reparation obligors were required to offer to their insureds certain optional insurance coverages, including underinsured motorist insurance and additional operating insured vehicles in Minnesota to stack their policies regardless of contrary provisions in the policies.” 290 N.W.2d at 766.

Subsequent to Pett, the court decided three additional stacking cases. Two of the cases, Koons v. National Family Ins. Co., 301 N.W.2d 550 (Minn. 1981) and Weiss v. Farmers Ins. Group, 302 N.W.2d 353 (Minn. 1981), involved interpriority stacking.

In Koons the plaintiff's daughter was injured when she fell from a trailer being towed by a pickup truck and was hit by a motor vehicle about to overtake the pickup truck. Plaintiff recovered basic economic loss benefits from her own insurer and sought recovery against the insurers of the driver of the pickup truck and the driver of the vehicle that struck her daughter. In effect, the plaintiff sought to stack basic economic loss coverages on all three priority levels in subdivision 4 of section 65B.47. The Koons court reiterated its holding in Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 919 (Minn. 1978): “[U]nder the present statute the injured person shall be allowed to recover basic economic loss benefits under each no-fault coverage applicable to him as an insured to the extent of actual losses up to the stacked policy limits of all policies applicable on a single priority level.” 301 N.W.2d at 553 (emphasis added by Koons court). The Koons court found that because of these restrictions, Wasche was inapplicable and stacking would not be permitted:

The Wasche decision clearly indicated that no-fault benefits cover the person and not the vehicles. . . . Benefits are stacked because the policyholder is paying on more than one policy for protection of persons insured under those policies. The statute mandates that such personal coverage be purchased for each vehicle owned or principally garaged in the state. . . . The risk being insured by each policy issued to an insured party is principally the risk of injury to himself or covered members of his household. The number of vehicles owned or policies issued does not increase the risk. The carrier or carriers are adequately compensated for providing no-fault coverage under each policy. The premiums paid to insurers for each policy containing no-fault benefits separately reflect the risk to the insured party. To deny stacking of basic economic loss benefits to an injured insured results in an unearned premium for each policy the injured insured has paid for but under which the injured insured has not received no-fault benefits.

The same analysis is not applicable to the present case. Stacy Koons does not qualify as an insured under either of respondents' policies. The risk insured against by respondents was principally the risk of injury to their own insureds. No premiums were paid to the respondents that reflected the risk of injury to Stacy or other third parties who qualified as insureds under other no-fault policies. It follows that the respondents will not have accumulated unearned premiums if stacking is denied in this case because the premiums charged did not reflect the risk of injury to persons insured under other policies. To conclude otherwise would, in effect, constitute a finding that no-fault benefits could be used to extend the residual liability coverage provided through respondents' policies without the necessity of proving fault. Such an expansion of the residual liability coverage of respondents' policies would be contrary to the legislature's express intention as evidenced by its enactment of a limited no-fault statute.

Id. at 553-54 (citations omitted) (emphasis in original).

In Weiss, the plaintiff, a pedestrian, was hit by a motor vehicle insured by defendant. The driver owned a second vehicle that was also insured by defendant. The plaintiff was not an insured under any plan of reparation security. The applicable priority under subdivision 4(c) of section 65B.47 was the plan of reparation security covering the vehicle that hit her. The supreme court adhered again to Wasche's limiting principles, holding that
medical expense benefits.\textsuperscript{250} In Holman \textit{v. All Nation Insurance Co.},\textsuperscript{251} the supreme court held that these optional coverages could be stacked.

Holman was seriously injured while riding as a passenger in his own motor vehicle. He owned two motor vehicles, both of which were insured in a single policy issued by All Nation.\textsuperscript{252} The vehicles were insured with the minimum coverages required by the Act.\textsuperscript{253} Because it was established that the mandatory offers required by the Act had not been made to Holman, the court im-

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\textsuperscript{251} 288 N.W.2d 244 (Minn. 1980).

\textsuperscript{252} \textit{Id.} at 246-47.

\textsuperscript{253} \textit{Id.} at 247.
plied those coverages as a matter of law.\textsuperscript{254} All Nation argued that even if the coverages were implied by law, stacking of those coverages should not be permitted.\textsuperscript{255} The court determined that the stacking principles of Wasche were equally applicable to the mandatory offers because “once the supplemental coverages have been offered and accepted, the insurer may not, under Minnesota law, refuse to ‘write them up’ and provide them to its insured.”\textsuperscript{256} At that point the coverage becomes binding in the same sense as the compulsory coverages under the Act.

The remaining question in Holman was the order of stacking. The court, following Integrity Mutual,\textsuperscript{257} determined that “first-party coverages will be stacked in order of their closeness to the risk, to the amount of damages.”\textsuperscript{258} The order of stacking was not critical to Holman’s claim, however, because he was an “insured” under the single policy covering both motor vehicles. Nonetheless, in cases involving underinsured motorist insurance Integrity Mutual seems to provide the appropriate standard for resolving overlapping underinsured motorist insurance coverage issues. The similarity in the functions of uninsured and underinsured motorist insurance as well as in the policy language defining the class of covered persons under those coverages\textsuperscript{259} justifies the court’s conclusion that Integrity Mutual will apply in underinsured motorist cases.

The court, however, also appeared to hold that Integrity Mutual applies to optional medical expense benefits. Because the optional medical expense benefits are additional basic economic loss benefits, the no-fault stacking decisions would be more appropriately applied. Stacking of all policy coverages under which the injured

\textsuperscript{254} Id. at 249-50.

\textsuperscript{255} Id. at 251.

\textsuperscript{256} Id.


\textsuperscript{258} 288 N.W.2d 244, 251 (Minn. 1980).

\textsuperscript{259} Part D—Underinsured Motorists Coverage of the Milbank Mutual policy defines a “covered person” as follows:

1. \textit{You} or any \textit{family member}.

2. Any other person while \textit{occupying your covered auto}.

3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

person is an insured would then be permitted, but inter-priority stacking would not.

The 1980 repeal of the Act’s mandatory offer provisions260 eliminates stacking because the optional coverages no longer have to be offered. If those coverages are not purchased they cannot be implied by law, as in Holman, thus eliminating the possibility that the coverages can be stacked.261

V. Torte Actions and the No-Fault Act

The right to recover damages in a tort action arising out of the maintenance or use of a motor vehicle is controlled in several ways by the Act. To understand the no-fault limitations on the right to recover damages in a tort action two stated policies in the Act must be kept in mind. First, one of the primary purposes of the Act is to prevent double recovery of damages for which basic economic loss benefits are payable.262 Second, the Act is intended to eliminate litigation over minor personal injury claims.263

Depending on the injured person’s cause of action and the type of damage for which suit is brought, different rules apply to tort claims. Generally, the right to recover in tort for loss, economic or otherwise, is limited by either the offset provision in section 65B.51264 or the subrogation provisions in section 65B.53.265 The right to recover for other than economic loss is governed by the tort threshold provision, which eliminates recovery for losses such as pain and suffering unless certain types of injuries have been sustained266 or more than $4,000 in medical expenses has been incurred.267 The tort thresholds control only recovery for noneconomic detriment268 and have no impact on the recovery of economic loss. Recovery for economic loss is governed solely by subdivisions 1 and 2 of section 65B.51.269

260. See note 250 supra.
263. See id. § 65B.42(2).
264. Id. § 65B.51(1).
265. Id. § 65B.53(2)-(3).
266. See id. § 65B.51(3)(b).
267. See id. § 65B.51(3)(a).
268. See id. § 65B.51(3). Noneconomic detriment “means all dignitary losses suffered by any person as a result of injury arising out of the ownership, maintenance, or use of a motor vehicle including pain and suffering, loss of consortium, and inconvenience.” Id. § 65B.43(8).
269. See id. § 65B.51(1)-(2).
A. Economic Loss

Section 65B.51, subdivision 1 provides:

With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to 65B.71, there shall be deducted from any recovery the value of basic or optional economic loss benefits paid or payable or which will be payable in the future, or which would be payable but for any applicable deductible.270

Subdivision 1 applies whether the injured person sues for economic loss or noneconomic detriment. For the offset provision to apply there must be (1) a negligence action, (2) accruing as a result of injury arising out of the operation, ownership, maintenance, or use of a motor vehicle, (3) with respect to which security has been provided as required by sections 65B.41 to 65B.71 of the Act.271 If one of these conditions is not satisfied the remaining means of limiting double recovery in a tort action are the subrogation provisions set out in section 65B.53 of the Act.272

To illustrate the operation of the offset section, assume that an injured individual is out of work for ten weeks, and that her wage loss is $400 per week. Assume also that she proves in a negligence lawsuit against the defendant wage loss of $4,000 and pain and suffering in the amount of $6,000. The total tort judgment is for $10,000. From that figure would be deducted the basic economic loss benefits she received. Because she would have received disability and income loss benefits in the amount of $200 per week for ten weeks, totaling $2,000, that amount would be deducted from the tort judgment of $10,000, leaving her with an award of $8,000, representing uncompensated economic loss and noneconomic detriment. The offset provision thus ensures that the injured individual will not be entitled to recover in the tort action losses for which she was compensated through payment of basic economic loss benefits. Conversely, the offset provision also ensures that the injured individual will recover damages for losses for which no basic economic loss benefits are payable.

Subdivision 2 serves to reinforce the right of an injured individ-

270. Id. § 65B.51(1).
271. Id.
272. Id. § 65B.53(2)-(3).
ual to recover for losses for which no basic economic loss benefits have been paid:

A person may bring a negligence action for economic loss not paid or payable by a reparation obligor because of daily or weekly dollar limitations of section 65B.44, the seven-day services exclusion of section 65B.44, the limitations of benefits contained in section 65B.44, subdivision 1, or an exclusion from coverage by sections 65B.58 to 65B.60.\textsuperscript{273}

The list in subdivision 2, however, does not include all limitations on and exclusions from coverage.\textsuperscript{274} While it may not be constitutionally mandated that a tort action be available for all uncompensated economic loss,\textsuperscript{275} the peculiar structure of subdivision 2, which guarantees the right to recover for economic loss uncompensated by reason of some limitations and exclusions but not others, must be construed to permit recovery of all uncompensated economic loss to avoid the potential constitutional problems that would otherwise arise.\textsuperscript{276} Taken together, subdivisions 1 and 2 ensure that an injured individual, without regard to the tort thresholds, will be entitled to recover for any uncompensated economic loss. The reason the loss is not covered by basic economic loss benefits should be irrelevant.

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\textsuperscript{273} Id. § 65B.51(2).
\textsuperscript{274} For a discussion of the exclusions, see Steenson, supra note 23, at 118-22.
\textsuperscript{276} See Gjerde v. Serpico, No. 89574 (Minn. 1st Dist. Ct. Aug. 19, 1980). The case involved the issue of whether an injured person could recover in tort for economic loss even though she was uninsured as required by the No-Fault Act. Judge Mansur noted the constitutional problems that would arise if the No-Fault Act were not construed so as to permit recovery for all uncompensated economic loss:

Constitutional problems would arise if the Act allowed recovery for only some elements of uncompensated economic loss, or by only some persons excluded under the Act. Thus constitutional problems would arise if subdivision 2 is read as restricting recovery to economic loss which is uncompensated by reason of the limitations and exclusions mentioned in the subdivision. It should be noted, however, that the Legislature used permissive terms, \textit{MAY} bring, rather than restrictive terms, may \textit{only} bring, in drafting subdivision 2. It therefore appears that the Legislature intended recovery for all uncompensated economic loss and not merely for economic loss which is uncompensated by reason of the limitations and exclusions mentioned in Subdivision 2. The limitations and exclusions omitted from Subdivision 2 would appear to be an oversight in light of the apparent lack of purpose for making such a distinction.

\textit{Id.} at 4 (emphasis in original). Judge Mansur held that the plaintiff was entitled to recover for the economic loss she sustained, even though if properly insured she would have been covered by basic economic loss benefits and would not have been entitled to recover in tort for the losses for which benefits would have been received. See id. For a discussion of this problem, see Steenson, supra note 23.
\end{flushright}
The offset provision of subdivision 1 also must be viewed in light of two recent supreme court decisions construing that provision, *Haugen v. Town of Waltham* and *Parr v. Cloutier*. When subdivision 1 was enacted it provided only for the offset of "basic or optional economic loss benefits paid or payable." In 1977 the provision was amended to require an offset for "basic or optional economic loss benefits paid or payable or which will be payable in the future." In *Haugen* the supreme court held the offset provision unconstitutional because it required the offset of "future basic or optional basic economic loss benefits."

Although *Haugen* arose prior to the 1977 amendment, the court, in light of the fact that the amendment was labeled a clarifying amendment by the legislature, construed the statute to require an offset of future basic economic loss benefits. The court's primary concern with the offset provision was that deduction of the projected basic economic loss benefits received by the plaintiff would in no way be binding on the plaintiff's insurer, requiring the plaintiff to seek an additional remedy against the insurer should the insurer dispute the legitimacy of a claim for basic or optional economic loss benefits in a post-tort litigation claim for such benefits. The court found that the offset provision violated article 1, section 8 of the Minnesota Constitution because it did not provide "a certain remedy in the laws" that "completely" allowed a person to obtain justice, and because it required a litigant to resort to a series of remedies, rather than the single remedy contemplated by the constitution. Thus, pending a legislative resolution of the problem, only accrued basic or optional basic economic losses may be deducted from a tort recovery. The clear impact is that an injured person will be entitled to a double recovery of economic losses when those losses arise after the conclusion of the tort litigation.

The second decision affecting the offset provision is *Parr v. Cloutier*. 

277. 292 N.W.2d 737 (Minn. 1980).
278. 297 N.W.2d 136 (Minn. 1980).
279. See Act of Apr. 11, 1974, ch. 408, § 11, 1974 Minn. Laws 762, 774 (amended 1977) (current version at MINN. STAT. § 65B.51(1) (1980)).
281. 292 N.W.2d at 740-41.
282. Id. at 739-40.
283. Id. at 740.
284. Id.
in which the court considered the relationship between the No-Fault Act and the comparative negligence statutes. Suit was brought by a wife and husband for injuries sustained by the wife in an automobile accident. She was found to be forty percent and the defendants sixty percent negligent. Plaintiffs' verdict was reduced by her percentage of negligence. Upon application of the defendants the court further reduced the verdict by $2,894.24, the amount of basic economic loss benefits paid by plaintiffs' reparation obligor. On appeal plaintiffs argued that reduction of the judgment by the basic economic loss benefits paid by plaintiffs' reparation obligor should be in proportion to the jury's apportionment of negligence. In effect, they argued that because they were entitled to recover only sixty percent of the damages assessed, only sixty percent of the basic economic loss benefits paid should have been deducted from their tort recovery. The supreme court disagreed:

That statute [section 65B.51, subdivision 1] contemplates the reduction of the judgment by an amount representing the value of all economic loss benefits paid or payable and is not drafted in terms which would support the interpretation urged by the plaintiffs. Additionally, the construction proposed by the plaintiffs would appear to frustrate one of the stated purposes of the Minnesota No-Fault Automobile Insurance Act, i.e., the coordination of benefits to avoid duplicate recovery.

There are a number of problems with the court's interpretation of the offset provision. It is difficult to perceive how the construction urged by the plaintiffs would in any way entitle them to double recovery. A hypothetical will illustrate the point. Assume that a plaintiff has received $5,000 in basic economic loss benefits and that in a lawsuit against the defendant the plaintiff proves damages in the amount of $10,000, consisting of $5,000 in economic loss and $5,000 in pain and suffering. Also assume that the plaintiff and defendant are each fifty percent at fault. The plaintiff's tort recovery would be fifty percent of the $10,000, or $5,000. If the tort recovery is further reduced by an amount equal to the basic economic loss benefits paid, the plaintiff's recovery will be zero.

The alternative is to apply the plaintiff's percentage of fault

285. 297 N.W.2d 138 (Minn. 1980).
286. Id. at 139.
287. Id. at 140.
288. Id.
equally to the damages awarded for economic loss and for noneconomic detriment, with only the damages awarded for economic loss subject to the offset. If the plaintiff’s percentage of fault is applied equally to each type of loss, the plaintiff would be entitled to $2,500 for pain and suffering. The remaining $2,500, which represents the damages awarded for economic loss, reduced by plaintiff’s percentage of fault, would be available for the offset.

Under the alternative approach the plaintiff receives a larger tort recovery than if the jury’s verdict were reduced by the basic economic loss benefits paid without differentiation between economic loss and noneconomic detriment. Denominating this as a double recovery, however, implies that the plaintiff is receiving excessive compensation for losses for which he was already compensated through the payment of basic economic loss benefits. The $2,500 the plaintiff would recover in the tort action does not in fact constitute a double payment of economic loss; rather it is payment for noneconomic detriment, a type of loss for which no basic economic loss benefits are payable.

If the function of the offset provision is, like subrogation, to reduce the plaintiff’s recovery by the amount of basic economic loss benefits paid but only to the extent necessary to avoid double recovery, then the second alternative should be followed. Following the method established in Parr does considerably more than prevent double recovery of economic loss. It invades that portion of the tort recovery for which no basic economic loss benefits are payable.

The problem can arise not only in a case in which the tort recovery is insufficient to cover the plaintiff’s damages and the offset because of plaintiff’s fault, but also in a case in which the plaintiff’s tort recovery is limited because of low liability insurance limits purchased by a defendant. Assume, for example, that a plaintiff has received $25,000 in basic economic loss benefits and subsequently obtains a tort recovery against the defendant for $50,000, consisting of $25,000 in economic loss and $25,000 in noneconomic detriment. Also assume that the defendant is insured only to the minimum amount required by the Act. Under this hypothetical the plaintiff’s tort recovery would be only $25,000, the amount of the defendant’s liability insurance limits. If the offset is applied without limitation the entire $25,000 in basic economic loss benefits received by the plaintiff would be deducted from the tort recovery, leaving the plaintiff with nothing.
If the case were treated as a subrogation claim, however, subrogation would not be allowed until the plaintiff had been fully compensated for losses not covered by the payment of basic economic loss benefits.\textsuperscript{289} Accordingly, the full $25,000 would be paid to the plaintiff and there would be no subrogation.\textsuperscript{290} The principle should be the same when it is the offset provision that applies rather than subrogation, since both serve the same function of limiting the plaintiff's recovery in a tort action to prevent a double recovery of economic loss.

The principle should not be altered when the tort recovery is insufficient to both compensate the plaintiff and satisfy the offset requirement because the plaintiff is at fault in causing his own injuries. The principle, however, must accommodate the comparative fault statute, which requires a reduction of the tort recovery. The result that fully accommodates both the No-Fault Act and the comparative fault statute is to allow the plaintiff his damages for noneconomic detriment and uncompensated economic loss, reduced by his percentage of fault. The interests of the No-Fault Act and the comparative fault statute are thus fully accommodated.

\textbf{B. Noneconomic Detriment}

The tort thresholds apply to claims for noneconomic detriment. Noneconomic detriment includes "pain and suffering, loss of consortium, and inconvenience."\textsuperscript{291} The tort thresholds apply only to actions described in section 65B.51, subdivision 1. That subdivision requires (1) a negligence cause of action, (2) accruing as a result of injury arising out of the operation, ownership, maintenance, or use of a motor vehicle, (3) with respect to which security has been provided as required by the Act. If any of these conditions are unsatisfied the tort thresholds in subdivision 3 of section 65B.51 will be inapplicable. For example, there is no limitation on the right to recover under intentional tort or strict liability theories, because the tort thresholds by definition apply only to negligence actions. Actions against automobile manufacturers would not be controlled by the tort thresholds because the manufacturer's liability arises out of the production of an automobile.


\textsuperscript{290} See Steenson, supra note 23, at 131; note 289 supra.

\textsuperscript{291} MINN. STAT. § 65B.43(8) (1980).
Likewise, a civil damage act claim against a dram shop would not be subject to the tort threshold provisions because the dram shop’s liability arises out of the illegal sale of intoxicating liquor, not the maintenance or use of a motor vehicle. These points are reinforced by subdivisions 4 and 5 of section 65B.51:

Subd. 4. Nothing in this section shall impair or limit the liability of a person in the business of manufacturing, distributing, retailing, repairing, servicing or maintaining motor vehicles arising from a defect in a motor vehicle caused or not corrected by an act or omission in manufacture, inspection, repair, servicing or maintenance of a vehicle in the course of his business.

Subd. 5. Nothing in this section shall impair or limit tort liability or limit the damages recoverable from any person for negligent acts or omissions other than those committed in the operation, ownership, maintenance, or use of a motor vehicle.292

The final condition of section 65B.51, subdivision 1 is that the defendant’s motor vehicle be secured as required by the Act. The quid pro quo for procuring the insurance required by the Act is the limited tort immunity granted by the tort thresholds. If the security has not been provided, the defendant is not entitled to that immunity. This is made explicit in the penalty provision in section 65B.67, subdivision 1, which provides that “[e]very owner of a motor vehicle or motorcycle for which security has not been provided as required by section 65B.48, shall not by the provisions of this chapter be relieved of tort liability arising out of the operation, ownership, maintenance or use of the motor vehicle or motorcycle.”293

Two additional points should be made before discussing the specific thresholds. First, the tort thresholds are not jurisdictional requirements,294 but rather are limitations on the right to recover damages.295 Second, the tort thresholds are not affirmative defenses, but rather are part of the plaintiff’s case. Accordingly, the plaintiff bears the burden of proving that one of the tort thresholds has been met as a condition to recovering damages for noneconomic detriment.296

There are two types of tort thresholds, medical expense and de-

292. Id. § 65B.51(4)-(5).
293. Id. § 65B.67(l).
scriptive tort thresholds. The Act originally contained a $2,000 medical expense threshold. The threshold was increased to $4,000 by a 1978 amendment. To meet the threshold the injured person must prove that the sum of the following exceeds $4,000:

(1) Reasonable medical expense benefits paid, payable or payable but for any applicable deductible, plus

(2) The value of free medical or surgical care or ordinary and necessary nursing services performed by a relative of the injured person or a member of his household, plus

(3) The amount by which the value of reimbursable medical services or products exceeds the amount of benefit paid, payable, or payable but for an applicable deductible for those services or products if the injured person was charged less than the average reasonable amount charged in this state for similar services or products, minus

(4) The amount of medical expense benefits paid, payable, or payable but for an applicable deductible for diagnostic X-rays and for a procedure or treatment for rehabilitation and not for remedial purposes or a course of rehabilitative occupational training.

The first step in the calculation requires the addition of three separate components. The first is "reasonable medical expense benefits paid, payable or payable but for any applicable deductible." The medical expenses are subject to a reasonableness requirement. The statute considers only the benefits "payable or payable but for any applicable deductible." It therefore precludes consideration of future medical expenses in computing the tort threshold. Deductibles are excluded from the computation.

The second and third components are designed to equalize the medical expense determination by taking into consideration the value of free medical or surgical care or services performed by a member of the injured person's household, and the amount by which the value of reimbursable products and services exceeds the

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300. "Payable" appears to refer to accrued, not future, medical expense benefits. The Act provides that "[b]asic economic loss benefits are payable monthly as loss accrues. Loss accrues not when injury occurs, but as income loss, replacement services loss, survivor's economic loss, survivor's replacement services loss, or medical or funeral expense is incurred." Id. at 65B.54(1).
amount of benefits paid if the injured person was charged less than the average amount paid in Minnesota for similar products or services. If the purpose of the tort threshold is to measure the seriousness of an injury by the amount of medical expenses incurred, it is more equitable to look to the value of the services and products provided rather than to the actual cost.301

From the sum of parts one through three must be deducted "medical expense benefits paid, payable, or payable but for an applicable deductible for diagnostic X-rays and for a procedure or treatment for rehabilitation and not for remedial purposes or a course of rehabilitative occupational training." The reason for deducting diagnostic X-rays from the medical expense computation is, apparently, to remove any incentive to reach for the tort threshold by resort to easily inflated expenses. The same reason seems to apply to the exclusion for nonoccupational or nonremedial rehabilitation expenses.

It is not entirely clear from the statute what types of rehabilitation expenses are to be excluded, but the best estimate is that the statute excludes from consideration rehabilitation expenses other than expenses incurred for physical or medical therapy or expenses incurred for occupational rehabilitation. Excluded expenses, therefore, are those incurred for rehabilitation programs or treatments that are designed to enable an individual to better adjust to his physical limitation, but that do not fall into the category of medical therapy or occupational retraining.302

If the injured person is unable to meet the medical expense threshold, one of the descriptive thresholds will have to be met to justify recovery for noneconomic detriment. The descriptive thresholds consist of the following: "(1) permanent disfigurement; (2) permanent injury; (3) death; or (4) disability for 60 days or more."303

One question concerning the permanent injury and disfigurement thresholds is the degree of seriousness of injury or disfigurement the injured person must sustain. In light of one of the stated purposes of the Act, "to prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury,"304 it

301. See Steenson, supra note 23, at 141-43.
302. See id. at 143-44.
304. Id. § 65B.42(2) (emphasis added).
is arguable that any permanent injury or disfigurement must be serious. The statement of statutory purpose, however, does not define the tort thresholds. Rather, the tort thresholds give content to the statement of purpose. By definition, the types of injuries set forth in the tort thresholds are the types of “serious” injuries that will justify a recovery of general damages. This construction is reinforced by the legislative history of the Act, which shows that all modifying words such as “serious” or “significant” were deleted from the permanent injury and disfigurement thresholds.305

In light of the legislative history of the tort thresholds any definition of “permanent injury” and “permanent disfigurement” should not incorporate modifying terms that are inconsistent with that history.306 Aside from the definitions of the terms, it will usually be a question of fact whether the thresholds are met.307

The third threshold, death, is self-explanatory. The fourth, disability of sixty days or more, requires only cumulative, not consecutive, disability.308 For tort threshold purposes, disability is defined as “the inability to engage in substantially all of the injured person’s usual and customary daily activities.”309

305. See Steenson, supra note 23, at 147-51.

306. Further definition of the terms is possible. Disfigurement has been defined as “that which impairs or injures the beauty, symmetry, or appearance of a person or thing; which renders unsightly, misshapen, or imperfect, or deforms in some manner.” Steenson, supra note 23, at 150 (citing Superior Mining Co. v. Industrial Comm’n, 309 Ill. 339, 340, 141 N.E. 165, 166 (1923)). The definition has been used in various legal contexts. See, e.g., Allison v. State, 157 Ind. App. 277, 281, 299 N.E.2d 618, 621 (1973) (criminal law definition in aggravated assault and battery statute); Duncan v. Beck, 553 S.W.2d 476, 478 (Ky. Ct. App. 1977) (no-fault); Falcone v. Branker, 135 N.J. Super. 137, 147, 342 A.2d 875, 879 (Super. Ct. Law Div. 1975) (no-fault); St. Laurent v. Kaiser Aluminum & Chem. Corp., 113 R.I. 10, 13, 316 A.2d 504, 506 (1974) (workers’ compensation).

“Disfigurement” has also been defined as an “observable impairment of the natural appearance of a person.” Arkin v. Industrial Comm’n, 143 Colo. 463, 472, 358 P.2d 879, 884 (1961). A similar definition has been suggested as an alternative to the more cumbersome definition from Superior Mining. See J. SCHWEBEL, NO FAULT AND COMPARATIVE FAULT UPDATE 48 (Minn. Trial Law. Ass’n, Continuing Legal Educ.) (“disfigurement is an impairment of the natural appearance of a person”).

Although a number of Minnesota cases deal with the problem of permanent injuries, there is no specific definition for that term in the Minnesota cases. See Steenson, supra note 23, at 145-47 & nn.181-82. Permanency must be established by a fair preponderance of the evidence. It must be established that the injury is reasonably certain to continue for the remainder of the plaintiff’s life. See id.


308. See Steenson, supra note 23, at 151.

C. Subrogation

Subrogation performs a twofold function in the Act. It prevents double recovery by an injured person of losses for which insurance benefits have been paid, and it serves to shift losses initially paid by the injured person’s reparation obligor either to another reparation obligor or to a third party who is a noncontributor to the no-fault system in Minnesota.

The right of subrogation is granted to reparation obligors who pay or are obligated to pay basic or optional economic loss benefits.\textsuperscript{310} Prior to 1980 it also attached upon payment of underinsured motorist insurance benefits.\textsuperscript{311} Less clear is whether the right of subrogation applies to the payment of uninsured motorist insurance benefits.\textsuperscript{312}

The Act originally provided for subrogation in virtually all cases in which basic or optional economic loss benefits were paid, including cases to which the offset provision in section 65B.51, subdivision 1 applied.\textsuperscript{313} Because by definition the types of cases to which subdivision 1 applies fall within a closed system that covers only negligence causes of action arising out of the ownership, oper-

\textsuperscript{310} See id. § 65B.53(2)-(3).
\textsuperscript{311} See Act of Apr. 11, 1974, ch. 408, § 9, 1974 Minn. Laws 762, 773-74 (repealed 1980); notes 319-20 infra and accompanying text.
\textsuperscript{312} Minn. Stat. § 65B.49(4) (1980), which covers uninsured or hit-and-run motor vehicles, does not specifically grant a right of subrogation.
\textsuperscript{313} As enacted the provision stated:
To the extent permitted by section 11 [65B.51], subdivision 1, a reparation obligor paying or obligated to pay basic or optional economic loss benefits shall be subrogated to the extent of benefits paid or payable to any cause of action to recover damages for economic loss which the person to whom the basic or optional economic loss benefits were paid or payable has brought under the terms of section 11, subdivision 3 of this act against another person whose negligence was the direct and proximate cause of the injury for which the basic economic loss benefits were paid or payable.

The last sentence of the offset provision, as enacted, stated:
This subdivision shall not bar subrogation and indemnity recoveries under section 13 [65B.53], subdivisions 1 and 2, if the injury had the consequences described in subdivision 3, and a civil action has been commenced in the manner prescribed in applicable laws or rules of civil procedure to recover damages for noneconomic detriment.

The right of subrogation, as it existed in subdivision 1, was confined to cases in which a civil action had been commenced and the plaintiff had met one of the tort thresholds. See Pfeffer v. State Auto. & Cas. Underwriters Ins. Co., 292 N.W.2d 743 (Minn. 1980) (construction of the subrogation provision prior to repeal).
ation, maintenance, or use of a motor vehicle, with respect to which the required security has been provided, it is arguably unnecessary to use the device of subrogation to readjust losses among reparation obligors responsible for the payment of basic or optional economic loss benefits.

The essential question is whether use of subrogation in such cases is worth the expense involved, particularly when the offset provision would achieve roughly the same result, except that it would work in favor of the defendant's rather than the plaintiff's reparation obligor. The legislature apparently decided that the offset provision would suffice to perform the readjustment function when it repealed the right of subrogation in subdivision 1 cases in 1976.

As the Act currently stands, the subrogation and offset provisions are complementary, but mutually exclusive. Subrogation does not apply in situations to which the offset provision of section 65B.51, subdivision 1 applies. The right of subrogation is thus limited to situations not involving negligence causes of action, or actions in which the defendant's liability does not arise out of the maintenance or use of a motor vehicle:

Subd. 2. A reparation obligor paying or obligated to pay basic or optional economic loss benefits is subrogated to the claim for the recovery of damages for economic loss that the person to whom the basic or optional economic loss benefits were paid or payable has against another person whose negligence in another state was the direct and proximate cause of the injury for which the basic economic loss benefits were paid or payable. This right of subrogation exists only to the extent that basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the loss.

Subd. 3. A reparation obligor paying or obligated to pay basic economic loss benefits is subrogated to a claim based on an intentional tort, strict or statutory liability, or negligence other than negligence in the maintenance, use, or operation of a motor vehicle. This right of subrogation exists only to the extent that basic economic loss benefits are paid or payable and only to the extent that recovery on the claim absent subrogation.

tion would produce a duplication of benefits or reimbursement of the same loss.\textsuperscript{316}

Subrogation shifts losses from the no-fault system to noncontributors to the system.

Subdivisions 2 and 3 of section 65B.53 also place limits on the right of subrogation. Subrogation exists only to the extent of basic or optional economic loss benefits paid or payable, and only to the extent necessary to prevent a double recovery of losses for which such benefits are paid or payable. Therefore, if the damages awarded in the tort action are insufficient to compensate the plaintiff for elements of loss for which no basic or optional economic loss benefits have been paid or are payable, the reparation obligor will not be entitled to subrogation.\textsuperscript{317}

As originally passed the Act made no provision for sharing of attorneys' fees and costs, an omission remedied by a 1977 amendment to the Act:

\textit{Notwithstanding any law to the contrary in any action brought for the recovery of damages allegedly caused by the negligent operation, ownership, maintenance or use of a motor vehicle or motorcycle where the right of subrogation is claimed or may be claimed under this section, or in any counterclaim to such an action, the right of an insurer to be subrogated to all or a portion of the claim of an insured, whether the right to subrogation arises from contract, statute, or any other source, shall be enforceable against the insured only if the insurer, upon demand by the insured, agrees to pay a share of the attorney fees and costs incurred to prosecute the claim, in such proportion as the insurer's subrogated interest in the claim bears to any eventual recovery on the claim.}\textsuperscript{318}

The right of subrogation is not confined to cases involving the payment of basic economic loss benefits. It also extends to underinsured motorist insurance payments: "The reparation obligor is subrogated to any amounts it pays and upon payment has an assignment of the judgment if any against the other person to the extent of the money it pays."\textsuperscript{319} With the repeal of the requirement that underinsured motorist insurance be offered to insureds,

\textsuperscript{316} \textit{Minn. Stat. § 65B.53(2)-(3) (1980)}.

\textsuperscript{317} \textit{See Pfeffer \textit{v. State Auto. & Cas. Underwriters Ins. Co.}, 292 N.W.2d 743 (Minn. 1980). In \textit{Pfeffer}, the supreme court reached this conclusion in a case involving the now-repealed subrogation provision. \textit{See id.} at 749.}

\textsuperscript{318} \textit{Act of May 20, 1977, ch. 188, § 1, 1977 \textit{Minn. Laws} 311, 311 (codified at \textit{Minn. Stat. § 65B.53(5) (1980)})}.

\textsuperscript{319} \textit{Act of Apr. 11, 1974, ch. 408, § 9, 1974 \textit{Minn. Laws} 762, 773-74 (repealed 1980).}
the statutory right of subrogation also was removed. However, if underinsured motorist insurance is offered and purchased, subrogation, if provided in the insurance policy, should be permitted, given the absence of any reason for limiting subrogation.

The Act is silent on the right of a reparation obligor to subrogation upon the payment of uninsured motorist insurance. On the one hand, section 65B.53, subdivision 6 provides in part that "[n]o reparation obligor shall contract for a right of reimbursement or subrogation greater than or in addition to those permitted by this chapter." Because the Act does not specifically provide for subrogation rights upon payment of uninsured motorist insurance, one may conclude that the restrictive language of subdivision 6 precludes subrogation.

On the other hand, the court stated in Gudvangen v. Austin Mutual Insurance Co. that the legislature did not intend to alter previous law as to uninsured motorist insurance. Prior to passage of the Act subrogation rights were provided for in such cases:

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

Although Gudvangen did not specifically involve the subrogation issue, it did illustrate the problems created by the juxtaposition of the old uninsured motorist law and the Act. Gudvangen strengthens the inference that omission of the subrogation provision from the Act was simply an oversight.

The necessity of using subrogation to eliminate double recovery previously was recognized by the supreme court in the context of an uninsured motorist subrogation claim. The intent to elimi-

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322. 284 N.W.2d 813 (Minn. 1978), aff'd on rehearing, 284 N.W.2d 817 (1979), appeal dismissed, 444 U.S. 1062 (1980).
323. 284 N.W.2d at 817.
nate double recovery is specifically recognized in the Act.\textsuperscript{326} The only way to avoid double recovery in uninsured motorist insurance cases is to infer a legislative intent to allow subrogation upon the payment of uninsured motorist insurance benefits.

\section*{D. Indemnity}

Subrogation serves to reallocate losses from the no-fault system to noncontributors to the system. The Act also provides a limited right of indemnity designed to reallocate losses among reparation obligors. The function of indemnity in the Act is to shift economic losses to the reparation obligors of commercial vehicles. Its use is justified because of the need to maintain the distribution of costs and insurance premiums that existed under the tort liability insurance system prior to the adoption of no-fault automobile insurance.\textsuperscript{327}

The right of indemnity exists only when negligent operation, maintenance, or use of the commercial vehicle has caused loss necessitating payment of basic or optional economic loss benefits by the injured person's reparation obligor:

A reparation obligor paying or obligated to pay basic or optional economic loss benefits is entitled to indemnity subject to the limits of the applicable residual liability coverage from a reparation obligor providing residual liability coverage on a commercial vehicle of more than 5,500 pounds curb weight if negligence in the operation, maintenance or use of the commercial vehicle was the direct and proximate cause of the injury for which basic economic loss benefits were paid or payable to the extent that the insured would have been liable for damages but for the deduction provisions of section 65B.51, subdivision 1.\textsuperscript{328}

The right of indemnity exists independently of the insured's tort action for damages. It exists "to the extent that the insured would have been liable for damages but for the deduction provisions of section 65B.51, subdivision 1."\textsuperscript{329} In other words, the right of indemnity is limited by the right of offset exercised by the insured as

\begin{itemize}
\item \textsuperscript{326} See Minn. Stat. § 65B.42(5) (1980).
\item \textsuperscript{327} See National Indem. Co. v. Mutual Serv. Cas. Co., 311 N.W.2d 856, 858 (Minn. 1981) (upholding constitutionality of indemnity provision); Minnesota Automobile Liability Study Comm'n Report to the 1973 Legislature 85-86 (1973); cf. UMVARA §§ 38-39, Comments (equitable reallocation among insurers of commercial and private vehicles is necessary).
\item \textsuperscript{328} Minn. Stat. § 65B.53(1) (1980).
\item \textsuperscript{329} Id.
\end{itemize}
a defendant or potential defendant in a tort action. Because the offset requires a deduction from any tort recovery of basic or optional economic loss benefits paid or payable by the injured person’s reparation obligor, indemnity exists only to the extent of the offset. If the offset provision does not reduce the tort recovery as, for example, in a case in which the tort recovery is sufficient only to compensate the injured person for losses for which no basic economic loss benefits are paid, the right of indemnity will not apply.

Comparative fault principles apply to the right of indemnity. If the injured person was also at fault in causing the accident, the indemnity claim will be reduced by his percentage of fault.330

Finally, the right of indemnity is “enforceable only through mandatory good-faith and binding arbitration procedures established by rule of the commissioner of insurance.”331

VI. CONCLUSION

The Minnesota No-Fault Automobile Insurance Act is a modified no-fault system. It creates a new form of first party insurance, basic economic loss insurance, and makes the insurance compulsory for automobile owners. The Act also imposes limitations on the right to recover damages in a tort action. Much of the Act is devoted to establishing the right of injured persons to collect basic economic loss benefits and the duties of reparation obligors to provide those benefits. The Act also includes uninsured or hit-and-run motor vehicle insurance and residual liability insurance.

Since its passage the Act has been amended in almost every session of the legislature and has been the subject of a number of supreme court decisions. While many of the uncertainties in the Act have been resolved, it is obvious that the process of adjusting and refining the Act will be ongoing.

There are a number of potential problems that must be considered in tracing a problem through the Act: (1) was there an accident arising out of the maintenance or use of a motor vehicle? (2) was an injury sustained that resulted in loss for which basic economic loss benefits are payable? (3) is the injured person covered under an applicable plan of reparation security? (4) are there any applicable exclusions from coverage? (5) are there other insurance benefits available; do those benefits have to be coordinated with

330. See id. § 65B.53(4).
331. Id.
basic economic loss benefits? (6) if a tort action is contemplated are the tort threshold provisions applicable; if they are can they be satisfied? (7) does the reparation obligor have subrogation rights to consider?

The goal of this Article has been to provide a brief overview of the Act by directing the reader to the relevant statutory provisions and supreme court decisions governing these and other issues. It is a starting point for understanding the complex problems that arise under the No-Fault Act.