Subrogation and Indemnity Rights Under the Minnesota No-Fault Automobile Insurance Act
SUBROGATION AND INDEMNITY RIGHTS UNDER THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT

Since 1971, Minnesota and twenty-three other states have adopted no-fault automobile insurance acts in response to the growing ineffectiveness of the fault-based compensation system in dealing with losses which arise out of motor vehicle accidents. Despite the no-fault label, however, many of the acts, including the Minnesota Act, have retained subrogation and indemnity rights for insurers and therefore have retained the fault determination within the no-fault system. This Note analyzes the effect of subrogation and indemnity rights on the Minnesota Act and suggests an alternative approach to compensate accident victims without resort to the fault determination.

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I. INTRODUCTION

The advent of the twentieth century brought with it such things as mass production, the automobile, and the automobile accident. For nearly seven decades, claims arising out of these automobile accidents were dealt with in the same manner, by recourse to the fault-based tort compensation system. By the 1960's, the ineffectiveness of the fault-based compensation system was apparent.¹ Four major problem areas were identifiable. First, proving who was at fault was an immense, if not impossible, task.² Second, delays in compensating the injured party had become characteristic of the system and served to aggravate the suffering of those injured in automobile accidents.³ Third, an ever-increasing slice of the insurance dollar was going for costs of administration and litigation, not to the injured party.⁴ Finally, when the insurance proceeds were paid to the injured party, the amount of compensation received often bore no relation to the severity of the injury suffered.⁵

In search of a solution to problems arising out of the automobile accident, twenty-four states have adopted no-fault automobile accident reparation systems.⁶ The no-fault system promises prompt payment to

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2. Witnesses are inherently inaccurate, often due to the split-second nature of the accident. When accidents are hit-and-run, the responsible party may not even be identified. When identifiable, the responsible party may be financially irresponsible with no insurance and with insufficient assets to satisfy any claim held by the injured party. See National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the Comm. on Commerce, 93d Cong., 1st Sess. 181-82 (1973).
3. Before litigation or settlement, there are extensive investigations to attempt to establish fault. Long periods of negotiation may follow. Due to the ever-increasing number of traffic accidents, court congestion is heavy with delays of up to three years common before compensation is either received or denied. See R. Keeton & J. O'Connell, supra note 1, at 1-2.
4. Less than one-half of every dollar is paid as compensation to the injured parties. Thirty percent of insurance costs is attributable to litigation expenses and another thirty percent goes to sales costs and other insurance company overhead. See No-Fault Motor Vehicle Insurance: Hearings on H.R. Con. Res. 241 Before the Subcomm. on Commerce & Finance of the Comm. on Interstate & Foreign Commerce, 92d Cong., 1st Sess. 1205 (1971).
5. Although absence of fault is theoretically a prerequisite to recovery, insurance companies are acutely aware of the probability of a jury ignoring the judge’s instruction on fault. The result has been generous settlement of small and often unmeritorious claims in an effort by the insurance companies to avoid litigation in the courts. See R. Keeton & J. O'Connell, supra note 1, at 2. With the larger, more serious claims, delaying tactics are utilized to force the injured party to settle. Pressing needs for medical treatment and for everyday living expenses often force the severely injured individual to settle for an amount far less than would be full compensation for injuries sustained. See id. at 2, 37-38.
every injured party in an automobile accident for out-of-pocket losses, without regard to which party was at fault.7

7. The typical no-fault reparation plan entitles an individual to first-party benefits from the no-fault insurer whenever personal injury is sustained in an accident arising out of the maintenance or use of a motor vehicle. Negligence and fault are largely immaterial, at least in regard to the payment of initial benefits to the injured party. In exchange for the payment of these benefits, the injured party forfeits the common law right to sue the other party involved in the accident for compensation. This forfeiture normally is limited to a specified dollar amount, above which the injured party retains a common law right to sue for losses which are not compensated under the no-fault reparation plan.

The philosophy behind the no-fault system is a belief in the wisdom of providing the most efficient, dignified, and certain form of financial and medical benefits for the victims of vehicular accidents. Because insurance coverage is mandatory for the vehicle owner, most accident losses can be paid from within the system. Thus, the system which causes the injury pays for the losses incurred. The injured party is neither forced to rely on public assistance nor left out in the cold. The burden of the losses is borne by the system that is responsible for those losses rather than by the public in general.
The Minnesota No-Fault Automobile Insurance Act was adopted by the Minnesota Legislature in 1974. The purposes of the Act are clear. The new compensation system is intended to relieve the severe economic distress suffered by uncompensated automobile accident victims, but at the same time prevent overcompensation of those individuals suffering injuries in the accident. In addition, recovery from two sources for the same injuries by an injured party is to be avoided. Moreover, injured parties are encouraged to seek medical and rehabilitative treatment by speedy administration of justice.

This Note considers two important and closely related aspects of the Minnesota Act: rights of subrogation and indemnity granted an insurer to claims arising out of an automobile accident. Affording subrogation and indemnity rights has created uncertainties in the administration and functioning of the new compensation system, as well as raising public policy questions concerning the true character of the system and its "no-fault" label. The operation of subrogation and indemnity rights under a fault-based system will be analyzed first, followed by a discussion of their application in and effect on a no-fault system. A close look will be taken at subrogation and indemnity rights under the Minnesota Act.

Finally, questions of where the Minnesota No-Fault Automobile Insurance Act is going, and where it should be going, will be explored.

II. SUBROGATION AND INDEMNITY UNDER A FAULT-BASED COMPENSATION SYSTEM

To analyze the effect of subrogation and indemnity on the functioning of the Minnesota No-Fault Automobile Insurance Act, their effect on

11. See id. § 65B.42(2).
12. See id. § 65B.42(5).
13. See id. § 65B.42(3)-(4).
14. For a comprehensive analysis of the effect of the tort thresholds on the functioning of the Minnesota No-Fault Automobile Insurance Act, see Steenson, No-Fault in a Fault Context: Tort Actions and Section 65B.51 of the Minnesota No-Fault Automobile Insurance Act, 2 WM. MITCHELL L. REV. 109 (1976). For a general discussion of the no-fault acts in each state, see I. Schermer, AUTOMOBILE LIABILITY INSURANCE, NO-FAULT INSURANCE, UNINSURED MOTORISTS, COMPULSORY COVERAGE (rev. ed. 1975). Compensation for property damages has been left largely within the fault-based system by the state legislatures. It will not be analyzed in this Note.
15. See notes 19-33 infra and accompanying text.
16. See notes 34-60 infra and accompanying text.
17. See notes 61-162 infra and accompanying text.
18. See notes 163-222 infra and accompanying text.
and relation to the fault-based compensation system must first be determined.

The rights of subrogation and indemnity are independent and distinct legal concepts. Indemnity is essentially equitable in nature and rests upon the proposition that when one is compelled to discharge a duty or pay a debt which in justice another ought to discharge or pay, the former should be entitled to restitution from the latter. Indemnity is a right independent of the insured's right to bring suit against the third party; the insurer may assert its indemnity right against a third party in its own name, without regard to any actions taken by its insured. In the


A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

20. See, e.g., MINN. STAT. § 65B.53(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 5, 1977 Minn. Laws 439. Under that provision, the vehicle insurer will have a right to recover basic economic loss benefits paid to its insured from the insurer of a commercial vehicle, the driver of which was the at-fault party in an accident. See note 85 infra. The injured insured, however, has no right to recover those basic economic loss benefits from the insurer of the at-fault party. See MINN. STAT. § 65B.51(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 4, 1977 Minn. Laws 438. On the other hand, had the accident occurred outside Minnesota in a state which has retained the fault compensation system, the insured would have a right to recover those basic economic loss benefits. The insurer would have both a subrogation right, see MINN. STAT. § 65B.53(2) (1976), and the indemnity right referred to above if all other circumstances remained the same.

21. Because the right inures directly to the insurer entitled to indemnity, that insurer may bring the action against the third party in its own name without regard to any action already taken or to be taken by its insured. American Mut. Liab. Ins. Co. v. Reed Cleaners, 265 Minn. 503, 509, 122 N.W.2d 178, 182 (1963). The indemnity right thus may have a dual appeal to the insurer. The claim may be prosecuted on the insurer's terms and will not be subject to settlements effected by the insured, doctrines of res judicata or collateral estoppel, or the like. For example, in American Mutual, the insurer attempted to exercise an alleged right of indemnity on a workers' compensation claim. The liability for compensation benefits by the employer, whom American Mutual insured, had accrued more than six years earlier. Therefore, if American Mutual could only claim a subrogation right, the statute of limitations would bar the suit. If an independent indemnity right existed, however, the statute would not have started running until payment had actually been made which was less than six years prior to the suit at hand. In denying American Mutual's claim, the court discussed the distinction between the two rights, citing from a previous court decision:

The provisions of the act subrogating the employer to the rights of the employee against third persons negligently or otherwise causing injury to him, create no new right of action in either; such provisions serve only to place the employer
automobile accident context, an insurer, having paid out benefits to its insured, thus is entitled to reimbursement from the at-fault third party for those benefits.22

A right of subrogation arises where the insured originally has a right to seek damages from the third party.23 Upon compensating its insured for all or part of the losses incurred, the insurer acquires any rights of the insured to recover that portion of the claim from the third party.24 Unlike the indemnity right, the subrogation right is not an independent one. Because the insurer has compensated the insured for losses caused by the third party, the insurer is entitled to exercise rights once held by its insured.25 The scope of the subrogation right to which the insurer is entitled depends on the individual case. Where the insured has been fully compensated for all losses suffered in the accident, the insurer will possess subrogation rights to the full claim against the at-fault third party.26 On the other hand, if the insured has remaining losses which

who pays the compensation in the first instance in the position of the employe in respect to the remedies held against the third person. The employer thereby acquires such rights and such rights only as were at the time vested in the employe; nothing more, and nothing less.

22. The right of indemnity, under the fault-based compensation system, was of little value to the insurer in instances where its subrogation rights also could be invoked. Because the injured insured possessed full tort rights against the at-fault third party, the insurer often could invoke its subrogation rights in conjunction with litigation between the insured and the third party, thereby saving time, money, and effort for both the insurer and the insured. Through the use of subrogation, all claims could be resolved in one court suit where all parties to the accident and their insurers were present.


24. A suggested definition of subrogation is that "[i]t is a legal fiction through which one who, not as a volunteer or in his own wrong and where there are no outstanding and superior equities, pays the debt of another, is substituted to all the rights and remedies of the other, and the debt is treated in equity as still existing for his benefit." Home Owners' Loan Corp. v. Sears, Roebuck & Co., 123 Conn. 232, 238, 193 A. 769, 772 (1937) (quoting First Taxing Dist. v. Gregory, 97 Conn. 639, 642, 188 A. 96, 97 (1922) (citation omitted)).


26. The insurer exercising a right of subrogation is substituted only to that portion of its insured's claim that it has satisfied through payment of insurance proceeds. Therefore, where the insurer has compensated its insured only for medical expenses incurred, the insured retains the remaining claims against the at-fault third party for noneconomic detriment, property damage, and any other losses arising out of the accident in question. For example, Minn. Stat. § 65B.53(3) (1976) grants the no-fault insurer a right of subrogation to claims of its insured based on intentional torts, on strict or non-no-fault statutory liability, or on negligence other than negligence in the maintenance, use, or operation of a motor vehicle. This right is limited, however, in that it exists "only to the extent that basic economic loss benefits are paid or payable." Id. Any judgment awarded the insured where the insurer has exercised its subrogation right will therefore be split between the
have not been compensated by insurance, then the insurer will be entitled only to a lien against the insured’s judgment against the at-fault third party to the extent compensation is paid by the insurer to the insured. 27

The rights of subrogation and indemnity serve a variety of functions at common law. The exercise of either right places the burden of financial loss on the members of society who are at fault, that is, on those who bear the legal responsibility for the injury. 28 The party primarily responsible for the losses incurred or injuries suffered is not thereby unjustly enriched by the discharge of that responsibility by another party. 29 In addition, a subrogation right prevents excessive or double recovery, reimbursing the insurer with judgment proceeds which might otherwise bring a windfall to the insured. 30

The right of subrogation, and to a limited extent of indemnity, frees an insurer to pay benefits to its insured which may or may not ultimately be its responsibility to pay. 31 Without such rights, insurers would understandably be reluctant to pay benefits to their insureds until a determination of liability has been made. With the rights of subrogation and indemnity, however, the insurer can reimburse its insured and recover from the third party if the third party is ultimately determined to be at fault.

Subrogation and indemnity rights are important, then, to the effective functioning of a fault-based compensation system. 32 The existence of such rights allows insurers to compensate their insureds prior to any

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27. See note 26 supra.
29. If the insurer is entitled to recover from the wrongdoer by way of subrogation, the net result is that the insurer is only secondarily liable and the wrongdoer is primarily liable, although with respect to the insured, the insurer is of course primarily liable on its contract.
30. See R. Horn, supra note 23, at 25.
31. See R. Horn, supra note 23, at 5.
32. The Minnesota Automobile Liability Study Commission in its report to the Minnesota Legislature in 1973 recommended the retention of the fault-based system, although it recommended strengthening the add-on no-fault statute that Minnesota had already adopted. The Commission therefore found retention of subrogation rights paramount as is evidenced from the following excerpt from the Commission's report:

The “Commission” and the “O’Neill” Plans grant the first party insurer the rights of subrogation and reimbursement, so that it may recover the benefits paid out on a first-party basis to the victim from the liability carrier of the tortfeasor in all cases where the victim’s injury resulted from negligence. Such a provision would preserve insurance rate variability based on the accident-causing characteristics of the driver, and would distribute losses among insureds on the basis of their likelihood to be negligent or to cause losses.

litigation of the fault question. Through the exercise of subrogation and indemnity rights, the losses arising out of an automobile accident can be shifted onto the party who bears the legal responsibility for the injuries suffered. Additionally, the shifting of such losses allows insurers to base premiums on the injury-causing capacity of the insured as a driver, a basic tenet of the fault-based compensation system. The rights of subrogation and indemnity are designed, therefore, to secure an equitable distribution of premium costs, shifting the burden of the loss onto the at-fault party.

III. SUBROGATION AND INDEMNITY UNDER A NO-FAULT COMPENSATION SYSTEM

Twenty-four states have adopted automobile accident reparation plans which provide some form of first-party coverage to insureds. All have been characterized as no-fault plans, yet most ultimately fix responsibility for the accident on the at-fault party or that party’s insurer.

No two no-fault plans are identical, but they can be grouped into three basic categories. A plan which is properly characterized as an “add-on” plan provides first-party benefits to an insured but places no restriction on the insured’s right to sue in tort. At the other end of the spectrum, the “pure” no-fault plan, while also providing first-party benefits, prohibits any tort action against the third party for losses up to a specified dollar amount, referred to as the “tort threshold.”

33. Id. Guido Calabresi explains the rate-making process of insurance companies as follows:

Groups are divided into risk categories. Premiums differ according to the presumed accident-proneness of each category, i.e. according to predicted accident costs and according to whether the accident costs are likely to occur early or late. People are generally invited to spread their losses only among those who are thought to be roughly as accident prone as they. As a result, private insurance charges some groups much more than others.


34. For a listing of the states which have enacted no-fault reparation plans, see note 6 supra.

35. The term “first party benefits” may be used interchangeably with “basic economic loss benefits.” Whichever term is used, the benefits commonly reimburse an injured party, or the heirs of a decedent, for medical expenses, income loss, replacement services loss, funeral expenses, survivor’s replacement services loss, and survivor’s economic loss arising out of the injury.

36. The following eight states have enacted add-on statutes: Arkansas, Delaware, Maryland, Oregon, South Carolina, South Dakota, Texas, and Virginia. For a citation to the statutes, see note 6 supra.

37. The following sixteen states have pure or modified plans: Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Pennsylvania, and Utah. The statutes as enacted, however, do not fall readily into either category. For a citation to the statutes, see note 6 supra.

38. The no-fault concept also alters the pattern of recovery for noneconomic loss. No
third type of no-fault plan is a hybrid of the add-on and pure no-fault concepts. It retains a modified fault determination, even below the tort threshold, by affording the insurer either a right of subrogation, indemnity, or both. The insurer then may recover from the third party or the third party's insurer, depending on the provision in the statute, the amount of first party benefits paid, even though the insured may have no corresponding right to bring suit against the third party for those benefits.

A. Modification of the Pure No-Fault Concept by the Use of Subrogation and Indemnity

Under a pure no-fault insurance plan, first-party insurance is compulsory, requiring payment of basic economic loss benefits to the insured as loss accrues. Payments are made without regard to fault, in
exchange for a tort liability exemption of a specified dollar amount.\textsuperscript{44}\textsuperscript{44} Recovery of general damages in cases involving only minor injury to the insured is prohibited.\textsuperscript{45}\textsuperscript{45} The insured cannot institute a tort action for basic economic loss benefits paid and in turn cannot be sued for those same benefits should the insured be the party who would be at fault in a common law tort action.\textsuperscript{46}\textsuperscript{46} This tort exemption is comprehensive, pro-

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  \item parties have no tort exemption under the plan and an injured party may otherwise obtain full tort recovery for injuries sustained. Any basic economic loss benefits recovered by the insured in such an instance are subtracted from the net loss payments which the insurer is otherwise responsible to pay its insured. \textit{See id.}
  
  Provision is made for full tort recovery against other than basic protection insureds so as not to place an unfair burden on those covered by and paying for no-fault benefits. Otherwise, increased premiums to the insured would result while affording an exemption from tort liability to those not covered by the no-fault plan. Subtraction of overlapping benefits is preferable to subrogation provisions because they avoid the expense of subrogation proceedings and leave the control of the tort claim with the insured. Provision is thus made to prevent double recovery, thereby reducing the cost of basic protection to the insured public. \textit{id.} at 404.

  Indemnity is afforded an insurer in two instances. The right arises when an insurer is dealing either with a third party who intentionally causes injury or with a converter who causes injury through use of the converted vehicle. \textit{See id.} at 317 (Motor Vehicle Basic Protection Insurance Act § 2.8(a)). Reimbursement extends to the full cost outlay of the insurer including reasonable and necessary costs of processing the claim along with attorney’s fees, again to prevent basic protection insureds from footing the bill.

  The insurer will be afforded an additional right of indemnity against the third party or the third party’s insurer who had notice of a right of reimbursement existing in the insurer but who nonetheless paid the judgment or settlement to the insured without a joint payee provision or the consent of the insurer. \textit{See id.} (Motor Vehicle Basic Protection Insurance Act § 2.8(b)). The right exists to the extent of reimbursement to which the insurer is entitled but cannot collect from its insured. For example, Insurance Company 1 insures A who is injured in an automobile accident. B, also involved in the accident, is at fault and is uninsured. A therefore retains full common law rights against B. Before A obtains any judgment against B, A is fully compensated for injuries suffered by its insurer, Insurance Company 1. Later, B, who knows of Insurance Company 1’s right to reimbursement, pays A the full judgment which A obtained after receiving compensation from its insurer. A then leaves town and cannot be located. Since Insurance Company 1 is entitled to reimbursement from A for at least part of the judgment recovered from B, Insurance Company 1 may seek indemnification for that amount from B. B had notice of A’s right of reimbursement and is liable for Insurance Company 1’s losses.

  Affording the insurer reimbursement and indemnity rights under these circumstances does not defeat the concept of a pure no-fault system. The common law reparation system developed to settle fault-based accident claims. The rights are afforded under the Basic Protection Plan only where there has been an intentional wrongful act by a third party or where there has been negligence or fault unrelated to the accident itself. Pure no-fault plans are intended to correct the imbalances of a system where accidents which occur are basically unavoidable, happening for lack of due care but not because of any conscious wrongdoing on the part of the parties involved in the accident.

44. \textit{See id.} at 274-77.
45. \textit{See id.}
46. \textit{See id.}
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hibiting any action by the insurer against the at-fault party, as well as prohibiting action by the insured. 47

The inclusion of subrogation and indemnity rights within the no-fault system, however, modifies the tort exemption so it is no longer absolute. Under the common law, the right of indemnity is based on a derivative liability. The insurer pays its insured for an injury which is the primary obligation of a third party. On the theory that the third party should be responsible for primary obligations, the insurer is entitled to indemnification from the third party. 48 Payments of basic economic loss benefits under a no-fault plan, however, are the responsibility of the insurer of the injured party, not the responsibility of a third party, regardless of which party was at fault. 49 The insurer under the insurance contract promises to pay the insured directly for any injury which the insured sustains, and thus incurs a primary obligation. Consequently, the insurer has no common law right of indemnity.

The right of an insurer to be indemnified by the at-fault third party has been retained statutorily, however, in many of the present no-fault statutes, despite the fact that the insurer's liability is now primary and not derivative. Retention of the indemnification concept has been achieved in several different ways. Where the insured is excluded from tort recovery against the third party, the insurer in some states has been granted the right of indemnity against the third party if the third party would otherwise be liable but for the tort exemption. 50 Other states have further limited the indemnification right by restricting the insurer's recourse only against the insurer of the third party and not against the third party directly. 51 The right of indemnity has been retained statutorily in other states only where a commercial vehicle was involved in the accident. 52

The indemnity rights provided under the various no-fault plans cover

47. See id.
48. See notes 19-22 supra and accompanying text.
49. See R. KeeTen & J. O'Connell, supra note 1, at 274.
50. See Colo. Rev. Stat. Ann. § 10-4-713(2) (1973) (insurer of private passenger vehicle afforded indemnity right against owner, user, operator, or any other person or organization legally responsible for the acts or omissions of such person); Nev. Rev. Stat. § 698.290(2)(a) (1975) (indemnity right against at-fault third party granted insurer to extent insurer has paid basic economic loss).
51. N.Y. Ins. Law § 674 (McKinney Cum. Supp. 1976) (insurer entitled to indemnification from insurer of at-fault third party only through submission of claim to mandatory arbitration); Ore. Rev. Stat. § 743.825 (1975) (insurer of at-fault third party required to reimburse insurer who has paid basic economic loss benefits to its insured); Utah Code Ann. § 31-41-11(1) (1974) (insurer entitled to reimbursement from insurer of at-fault third party, with liability to be decided by mandatory, binding arbitration).
a broad spectrum. In some states the right is a fairly extensive one,53 in others the right has been severely restricted.54 Wherever statutory indemnity is granted, however restricted it may be, the at-fault party must ultimately be determined. This must be done to establish which insurer discharged a duty that the law has determined should be the responsibility of another. In the automobile accident context, the lawmakers, by including a right of indemnity, have determined that the party who caused the accident, or that party's insurer, shall be held responsible for all losses and injuries arising out of the accident in question. Thus, the expensive and slow process of determining which party was at fault must occur. Rights of indemnity, then, are granted to insurers to prevent third parties and their insurers from escaping a responsibility which, but for the no-fault plan, would be theirs.

Subrogation rights also have been retained in many no-fault statutes. Achieving an equitable distribution of losses, a major purpose of the no-fault concept, is frustrated when an insured is allowed to recover first from an insurer and later from the at-fault third party for those same losses.55 By permitting the insurer a right of subrogation, the possibility of a windfall double recovery is virtually eliminated.56

The elimination of the possibility of double recovery by an insured can be accomplished by means other than through subrogation. Three possible alternatives to subrogation exist. Some no-fault plans require subtraction of basic economic loss benefits received by an insured from the total tort judgment awarded that insured in a common law action aris-

55. See generally R. Keeton & J. O'Connell, supra note 1, at 256-72.
56. See, e.g., Ga. Code Ann. § 56-3405b(d)(1) (1977) (subrogation right permitted insurer, to extent of benefits provided, only after insured has been fully compensated for all economic and noneconomic losses arising out of accident); Mass. Gen. Laws Ann. ch. 90, § 34M (West Cum. Supp. 1977) (insurer entitled to subrogation right only to extent of benefits paid); Minn. Stat. § 65B.53(2)-(3) (1976) ("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 same loss."); cf. Haw. Rev. Stat. § 294-7 (Supp. 1975) (subrogation right granted for 50% of basic economic loss benefits paid).

Exercise of the subrogation right granted an insurer under a no-fault plan also reallocates losses to the at-fault party or the at-fault party's insurer. The insurer recovers sums of money which it has paid to its insured. In the no-fault context, such sums are the first-party basic economic loss benefits which are paid, at least initially, without regard to fault in the accident out of which the losses arose. To recover such monies, the insurer in its subrogation claim must prove that the third party was at fault and therefore should be held responsible for the losses arising therefrom. As with the exercise of an indemnity right, fault must be determined so the responsible party can be identified.
ing out of the automobile accident. In other states, the injured party cannot introduce evidence of any losses incurred by that party which have been reimbursed by the insurer. The damage issue in the tort action against the third party, therefore, is a limited one; the injured insured may recover only general damages, such as pain and suffering, loss of consortium, and loss of earning capacity. A third method of preventing double recovery affixes a lien in favor of the insurer on any tort recovery secured by the insured to the extent of basic economic loss benefits paid. Such a provision allows the insured to exercise full control over the litigation but eliminates the possibility of any double recovery.

The subrogation right and the three alternatives outlined above all achieve their major purpose: elimination of double recovery by the insured. The ramifications of each alternative, however, differ drastically. No-fault plans which afford a right of subrogation to the insurer, or affix a lien in favor of the insurer on any tort judgment awarded an insured, serve to reallocate the losses back upon the at-fault party. Despite the no-fault label, a fault determination is necessary to reallocate the losses upon the at-fault party. The other alternatives preclude recovery of basic economic loss benefits by either the insured or the insurer from the at-fault party. The result is that there is no reallocation of losses, and, at least as to the basic economic loss benefits paid initially, there need not be a fault determination.

In conclusion, subrogation and indemnity rights fulfill the same purpose in a no-fault compensation system as they did in a fault-based compensation system. Double recovery by an insured is prevented through the exercise of a subrogation right by the insurer. Exercise of an indemnity right shifts the losses arising out of the automobile accident to the at-fault party or to that party's insurer. Together, they preserve the essential fault characteristics of the fault-based compensation system.

57. See Fla. Stat. Ann. § 627.736(3) (West Cum. Supp. 1976) (no right by insurer or insured to recover for injuries for which basic economic loss benefits have been paid or are payable); Minn. Stat. § 65B.51(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 4, 1977 Minn. Laws 438 (basic economic loss benefits paid or to be paid to an insured deducted from judgment award in negligence action against at-fault third party).


59. Limitation of the damage issue also keeps the loss figure lower and hopefully makes small pain and suffering claims less attractive to pursue because those claims become economically less worthwhile. See R. Keeton & J. O'Connell, supra note 1, at 274-76.

IV. SUBROGATION AND INDEMNITY UNDER THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT

Minnesota enacted a plan of no-fault automobile insurance, effective January 1, 1975, during its annual legislative session in 1974. Adopted after long debate and compromise, the resulting statute was an amalgamation of various proposals, but may be categorized as a modified no-fault plan. This statute replaced a fault-based compensation system, which required insurance companies to offer supplementary first party coverage to their insureds. That coverage was essentially the same as an add-on no-fault plan, except that under Minnesota law the coverage was optional rather than mandatory.

A. The Rights of Subrogation and Indemnity in General

The significance and impact of subrogation and indemnity rights on a no-fault insurance plan are nowhere better illustrated than in the Minnesota law. Since its adoption on April 11, 1974, the statute's

62. Numerous proposals were considered and utilized in formulating the final legislative enactment. The original bill introduced in the senate was the UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT (hereinafter UMVARA). See notes 205-22 infra and accompanying text. Various amendments were submitted and many adopted which drew from the Keeton and O'Connell plan, see note 43 supra, and from proposals for retaining and strengthening the existing fault-based system made in MINNESOTA AUTOMOBILE LIABILITY STUDY COMM'N, REPORT TO THE 1973 LEGISLATURE 16-27 (1973). See also 3 MINN. H.R. JOUR. 4643-46 (1974); 1 MINN. S. JOUR. 1726-27 (1973).
63. The plan finally adopted, although a compromise, turned out to be one of the stronger no-fault acts to have been passed to date. Tort thresholds, below which suits for general damages are prohibited, are set at $2,000, see Minn. Stat. § 65B.51(3)(a) (1976), coverage for basic economic loss benefits is mandatory to $30,000, see id. § 65B.44(1), and insurance companies are required to offer additional optional coverage to their insureds, see id. § 65B.49(6), as amended by Act of May 25, 1977, ch. 266, § 3, 1977 Minn. Laws 438, as amended by Act of May 26, 1977, ch. 276, § 3, 1977 Minn. Laws 476. The Commission's proposal to require arbitration for all tort claims under $5,000 was originally adopted, see Minnesota No-Fault Automobile Insurance Act, ch. 408, § 12, 1974 Minn. Laws 776 (repealed 1975), but has since been altered to make the mechanism available but not mandatory. See Minn. Stat. § 65B.525 (1976).
65. Supplementary first-party coverage included uninsured motorist coverage which was mandatory for private passenger vehicles. See Act of May 23, 1969, ch. 630, 1969 Minn. Laws 1087 (amending Minn. Stat. § 72A.149 (1967), current version at Minn. Stat. § 65B.49(4) (1976), as amended by Act of May 25, 1977, ch. 266, § 2, 1977 Minn. Laws 437). Also offered were $10,000 in accidental death benefits for the named insured, see Act of May 24, 1969, ch. 713, § 3, 1969 Minn. Laws 1273 (repealed 1974), wage loss indemnity of $60 per week payable for up to a period of one year, see id., and underinsured motorist coverage with limits equal to those of the liability coverage. See Act of May 27, 1971, ch. 581, 1971 Minn. Laws 1082 (repealed 1974).
67. The subrogation and indemnity provisions of the Act were also a product of a
Subrogation and indemnity provisions have undergone major revision twice, in 1976 and again in 1977. The revisions have come in an apparent attempt to bring the Act more into line with the purposes of no-fault and to correct inaccuracies and close loopholes in the Act's compromise plan which was negotiated when the two houses proposed and passed widely differing plans. The proposal of the House of Representatives, passed January 31, 1974, see 3 MINN. H.R. JOUR. 4653 (1974), allowed an insurer direct subrogation to any claims held by its insured against a third party operating a motor vehicle without security under the plan, against a third party where the injury caused was the result of an intentional tort, or where there was a cause of action based on strict or statutory liability. The right afforded was to the extent of benefits paid by the insurer and only to prevent double recovery.

In situations where an insured would be liable in tort, but for the tort exemptions provided by the Act, the other insurer was afforded a right of indemnity against the insurer of the at-fault party. Reimbursement under the House plan would have been for whichever of the following amounts was less: basic economic loss benefits paid out by the insurer entitled to reimbursement, the liability limits of the insurance policy of the at-fault party, or the amount of damages for which the at-fault party would be liable in a tort action. Determination of which insurer was entitled to reimbursement and in what amount was subject to mandatory, good faith, binding, interinsurer arbitration.

The Senate plan, passed May 9, 1973, adopted virtually intact the UMVARA proposal, see notes 205-22 infra and accompanying text, including the exact reimbursement, subrogation and indemnity provisions and the loss allocation system which makes the UMVARA plan revolutionary. See 2 MINN. S. JOUR. 2525-29 (1973). Had this been adopted, Minnesota's reparation system for automobile accidents would have been moved far beyond any no-fault act adopted by a state, completely rejecting the fault concept as a method of allocating loss.


70. The legislature included within the Minnesota No-Fault Automobile Insurance Act a purpose clause to aid in the interpretation of individual sections of the Act in a manner consistent with the overriding purposes for which the plan was adopted. MINN. STAT. § 65B.42 (1976) states:

The detrimental impact of automobile accidents on uncompensated injured persons, upon the orderly and efficient administration of justice in this state, and in various other ways requires that Laws 1974, Chapter 408 be adopted to effect the following purposes:

(1) To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident;

(2) 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;

(3) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment;

(4) To speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to
provisions. Rights of subrogation and indemnity are closely intertwined under the Act and their overall impact cannot be accurately determined without considering the two together. Initially, however, for purposes of simplicity, the status of subrogation and indemnity under the Act from January 1, 1975 to the present will be considered separately.

1. The Right of Subrogation

The Minnesota No-Fault Automobile Insurance Act,71 as originally adopted, granted a right of subrogation to an insurer in any civil action instituted by its insured arising out of an automobile accident.72 The subrogation right existed only to the extent of basic economic loss benefits paid by the insurer. In any action against the at-fault third party, the insured could recover general damages and the insurer could recover the basic economic loss benefits which it had previously paid to its insured. However, if the insurer failed to exercise its right of subrogation, the insured could not recover the basic economic loss benefits from the at-fault third party.73 The subrogation right granted under the statute differed, therefore, from the common law right of subrogation. The right under the statute was essentially a hybrid of the common law rights of subrogation and indemnity. Only the insurer could recover the basic economic loss benefits from the at-fault third party, but the insurer had to wait for the insured to commence a civil action against the third party before it could do so. In addition, a subrogation right was provided an insurer when its insured had a claim based on an intentional tort or on strict or non-no-fault statutory liability, to the extent of benefits paid and only to prevent double recovery by its insured.74

The right of subrogation upon institution of a civil action for general damages, however, was eliminated by the legislature in 1976.75 Today, subrogation rights are granted an insurer when its insured is involved

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74. See Minnesota No-Fault Automobile Insurance Act, ch. 408, § 22, 1974 Minn. Laws 781 (current version at MINN. STAT. § 65B.53(3) (1976)).

in an accident occurring out-of-state, to the extent of basic economic loss benefits paid, and, again, only to prevent double recovery. The insurer now has a right of subrogation, for example, where the accident occurs in a non-no-fault state or in a no-fault state allowing tort recovery for basic economic loss benefits once the threshold requirements have been met. The 1976 amendments also retained the right of subrogation when an insured's claim is based upon an intentional tort or on strict or non-no-fault statutory liability. Additionally, a loophole in the Act was closed by further granting the insurer a subrogation right where its insured has a claim based on negligence other than negligence arising out of the maintenance, use, or operation of a motor vehicle.

2. The Right of Indemnity

A right of indemnity was statutorily retained under the original Minnesota Act. The right was granted the insurer only when a commercial vehicle was involved in the accident. There was no requirement that the commercial vehicle be driven by the at-fault party in the accident, only that a commercial vehicle be involved. Once involvement of a commercial vehicle was established, an insurer was entitled to indemnification from any third party's insurer, if that third party would have

76. See id. Subdivision 2 of section 65B.53 now reads:

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 same loss.

MINN. STAT. § 65B.53(2) (1976).


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 would produce a duplication of benefits or reimbursement of the same loss.

MINN. STAT. § 65B.53(3) (1976).


80. See id.
been liable but for the tort exemption authorized by the Act.81 Fault was determined and indemnification was granted exclusively through mandatory, good faith, binding, interinsurer arbitration.82

Under the 1976 amendments, the right to indemnification afforded an insurer when an accident involved a commercial vehicle remained the same as under the original law.83 In 1977, however, the legislature significantly narrowed the scope of the indemnity right granted insurers under the Minnesota Act.84 As the statute reads today, a right of indemnity is available only against the insurer of the commercial vehicle involved in the accident, if the party driving the commercial vehicle is found to be the at-fault party.85 The indemnity right is no longer available to all insurers merely upon the involvement of a commercial vehicle in the accident.

3. Special Problems with Section 65B.51, Subdivision 1

Until August 1, 1977, one glaring problem with the subrogation and indemnity provisions of the Act existed. On their face, the subrogation and indemnity rights were forthright and clear. A severe limitation on the full right of indemnity and the limited right of subrogation afforded an insurer, however, arose from the last sentence of section 65B.51, subdivision 1, which read:86

This subdivision shall not bar subrogation and indemnity recoveries under section 13 [Minn. Stat. § 65B.53], subdivisions 1 and 2, if the injury had the consequences described in subdivision 3 [of exceeding the tort thresholds] 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.

81. See id.
82. See Minnesota No-Fault Automobile Insurance Act, ch. 408, § 13, 1974 Minn. Laws 777 (renumbered as Minn. Stat. § 65B.53(4) (1976)).
85. See id. Subdivision 1 of section 65B.53 now reads:

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 if negligence in the operation, maintenance or use of the commercial vehicle was the direct and proximate cause of the injury for which the 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.

Id.
Read literally, the sentence required that the tort thresholds be met and a civil action for general damages be commenced before the insurer was entitled to any of the subrogation and indemnity rights available to the insurer under section 65B.53, subdivisions 1 and 2 of the Act. Such a requirement severely limited the insurers' rights to reimbursement for benefits paid, because the tort thresholds are designed to eliminate as much court litigation as possible, and therefore a civil action often would not be commenced.

The problems created by this limitation were immediately apparent. The sentence may have denied a right of subrogation and allowed double recovery, for example, in an out-of-state accident, if the accident was a minor one, or if the insured settled with the at-fault third party without instituting suit. The Minnesota insured already would have recovered basic economic loss benefits from insurance proceeds. Because no civil action had been commenced where a settlement had been reached or because the tort thresholds had not been met where the accident was a minor one, the insurer would have no subrogation rights and would not be entitled to the second round of benefits recovered by its insured.

More severe in result was the effect of the sentence on the insurer's right of indemnity. With the right of indemnity contingent upon institution of a civil action, and with litigation discouraged, the insurer's right of indemnity was extremely limited. Only where severe injury was suffered would the insurer be assured of recovering any of the basic economic loss benefits which it had paid. Settlement by an insured without instituting a civil action raised the further possibility of cutting off the insurer from whatever right of indemnity remained, because settlement could occur where the tort thresholds had been met and

87. See R. Keeton & J. O'Connell, supra note 1, at 274-77. In discussing the rationale behind the tort exemptions provided in their Basic Protection Plan, Keeton and O'Connell write:

The tort exemption is also important because it serves to preclude litigation over negligence in a great mass of cases of less severe injury. If the damages in a claim based on negligence could not possibly exceed either $5,000 for pain and suffering or $10,000 for other damages, it would be futile for the victim to assert a claim based on negligence. His remedy would be entirely under basic protection coverage. On the other hand, if the victim could establish liability based on negligence and damages in excess of either of these limits, his tort claim would be available to him if he wished to assert it. The exemption drastically reduces the number of cases in which the expense of litigation and preparation for the prospect of litigation will be incurred, since the percentage of injuries so severe as to escape applicability of the tort exemption is small. The effect on both court congestion and the administrative overhead of an automobile claims system will be distinctly beneficial.

Id. at 275.

88. See id.
where the insurer thus would otherwise be granted the indemnity right. 89 The 1977 amendments eliminated the interpretive problems arising out of the sentence. 90 That sentence was repealed, thereby removing any explicit or implicit restriction on the rights of subrogation and indemnity afforded under section 65B.53 of the Act. 91 Today, the insurers’ rights are fairly straightforward. For accidents arising on or after August 1, 1977, an insurer will possess a right of indemnity against the insurer of any commercial vehicle whose driver was the at-fault party in the accident. Such indemnity right will be subject to mandatory, binding, good faith, interinsurer arbitration which will be available without regard to actions taken or not taken by the insured. 92 Subrogation rights are granted an insurer only to the extent that there would otherwise be double recovery by the insured involved in accidents arising out of the state 93 and those rights can be exercised only if the insurer agrees to bear its proportionate share of attorney’s fees and court costs. 94 Where the insured has a claim based on an intentional tort, on

89. The construction of the sentence has importance although it was repealed during the 1977 legislative session. See note 91 infra and accompanying text. The sentence will still have application in accidents occurring prior to the effective date of the amendments, August 1, 1977. The fact that the sentence remained a part of section 65B.51(1) after the 1976 amendments, appears to have been a legislative oversight. No reason existed to afford a right of indemnity which is limited by requiring the institution of a civil action. The concept is foreign to the development of the principle of indemnity, which has always been an independent right and has not been derivative of another’s right to bring suit.

Secondly, legislative intent militates against affording the sentence its apparent effect. Reference to section 65B.51(1) is dropped from the out-of-state subrogation provision, MINN. STAT. § 65B.53(2) (1976), under the 1976 amendment with the apparent purpose being allowance of subrogation whenever the insured has an out-of-state tort claim. This is the only logical construction of that provision since the concern here is to prevent double recovery by the insured. One of the other purposes of the Act, elimination of court congestion, is not applicable here. The court congestion of the other state probably is not a concern of the Minnesota Legislature.

At most then, the last sentence of section 65B.51(1) applies to the right of indemnity afforded an insurer in section 65B.53(1). Since any other reading is inconsistent with the overall purposes of the Act, it is arguable that the sentence has been retained to make it clear that the insurer has an independent right to indemnification under subdivision 1 of section 65B.53 even where suit has been instituted by its insured against the third party. This is a necessary interpretation because the 1976 legislature saw fit to repeal the subdivision affording a right of subrogation to the insurer in all instances where its insured was allowed under the Act to bring a tort action against the third party. To repeal the express provision allowing subrogation and then turn around and limit the insurer’s right to indemnification, in effect, to subrogation on an insured’s claim would be wholly inconsistent.

90. See notes 86-89 supra and accompanying text.

91. See Act of May 25, 1977, ch. 266, § 4, 1977 Minn. Laws 438 (amending MINN. STAT. § 65B.51(1)).

92. See MINN. STAT. § 65B.53(4) (1976); notes 103-18 infra and accompanying text.

93. See MINN. STAT. § 65B.53(2) (1976).

94. See notes 100-02 infra and accompanying text.
negligence other than negligence arising out of the maintenance, use, or operation of a motor vehicle, or a claim based on strict or non-no-fault statutory liability, the insurer will also have a subrogation right to the extent that double recovery might otherwise occur.95

B. Enforcement of Subrogation and Indemnity Rights

The enforcement of subrogation and indemnity rights may present special problems to an insurer. Generally, however, subrogation rights will be enforced in concert with additional claims held by the insured in a civil tort action and indemnity rights will be enforced through arbitration proceedings. The problems created by enforcement of either of these rights are examined below.

1. Enforcement of Subrogation Rights

Subrogation rights held by an insurer under the Act generally will be enforced in a civil action before the courts.96 Whether the action is brought in the name of the insurer or in the name of the insured will depend on the real party in interest rules found in the Minnesota Rules of Civil Procedure.97 Under the rules, if the insured retains some interest in the cause of action against a third party for which an insurer has a subrogation right, the suit against the third party may be brought in the insured’s name.98 However, where the insured’s loss is fully covered by the no-fault coverage, the insurer, in exercising its subrogation right, is the real party in interest and must bring the suit against the third party in its own name, not in the name of its insured.99

An additional amendment to the Act in 1977 resolved the question of which party, the insurer or the insured, was responsible for attorney’s fees where the insurer sought to exercise a right of subrogation. The Act as originally adopted left the question unanswered. In 1977, the legislature added subdivision 8 to section 65B.53.100 Effective May 21, 1977, that subdivision provides that a subrogation right held by an insurer shall be enforceable only if the insurer, upon the request of its insured, agrees to pay a share of the attorney’s fees and costs incurred in the action.101 The share agreed to must be in proportion to the insurer’s interest in the claim and any eventual recovery thereon.102

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95. MINN. STAT. § 65B.53(3) (1976).
96. For a general discussion of the methods utilized by insurers to enforce subrogation rights, see 16 G. COUCH, supra note 23, §§ 61:26-:35.
97. MINN. R. CIV. P. 17.01 (1977).
98. See Blair v. Espeland, 231 Minn. 444, 446, 43 N.W.2d 274, 276 (1950).
99. See id.
100. See Act of May 20, 1977, ch. 188, § 2, 1977 Minn. Laws 311 (to be codified as MINN. STAT. § 65B.53(8)).
101. See id.
102. See id.
2. Enforcement of Indemnity Rights

The right of indemnity is enforceable only through arbitration. The responsibility for establishing an arbitration procedure through which an insurer could exercise a right of indemnity under the Act fell to the Minnesota Commissioner of Insurance.\textsuperscript{103} Such rules and regulations were proposed on July 25, 1977 and should be effective by the spring of 1978.\textsuperscript{104}

Pursuant to subdivision 4 of Minnesota Statutes section 65B.53, the Insurance Division of the Minnesota Department of Commerce established an Arbitration Committee with jurisdiction over all compulsory arbitration claims arising under the Act.\textsuperscript{105} The committee, appointed by the Committee on Insurance Arbitration, will be composed of representatives of insurance companies doing business in the state.\textsuperscript{106} Members will be selected on the basis of experience and will serve without compensation.\textsuperscript{107} To prevent bias and any appearance of impropriety, no member of the committee may serve as an arbitrator on a panel hearing a case in which a direct interest is held by that member's insurance company.\textsuperscript{108}

Under the proposed rules, an insurer may commence an arbitration proceeding by filing an "Arbitration Notice" with the Secretary of the Arbitration Committee and by serving notice upon the insurer against whom the indemnity claim is made.\textsuperscript{109} The proceeding itself is designed to be relatively informal,\textsuperscript{110} although formal answers to claims may be filed\textsuperscript{111} and the arbitration panel, selected from the Arbitration Committee members, may request briefs on the law involved.\textsuperscript{112} Witnesses also may be called upon to appear before the panel if the opposing insurance company is so notified in advance of the arbitration hearing.\textsuperscript{113} In addition, legal counsel, or other representative of the insurers, may appear at the hearing.\textsuperscript{114} All arbitration proceedings are subject to the rules of comparative negligence.\textsuperscript{115}

\textsuperscript{103} See MINN. STAT. § 65B.53(4) (1976).
\textsuperscript{104} Before the proposed rules become finalized, the procedures for adoption of administrative rules, contained in MINN. STAT. §§ 15.0412-.0417 (1976), must be satisfied. It is anticipated that this will occur in early 1978.
\textsuperscript{105} See 4 M.C.A.R. § 1, Ins. 184 (proposed 1977).
\textsuperscript{106} See id. Ins. 182(i).
\textsuperscript{107} See id. Ins. 182(i)(1).
\textsuperscript{108} See id. Ins. 182(i)(2).
\textsuperscript{109} See id. Ins. 186(a).
\textsuperscript{110} See id. Ins. 187(f).
\textsuperscript{111} See id. Ins. 186(c)-(d).
\textsuperscript{112} See id. Ins. 187(g).
\textsuperscript{113} See id. Ins. 187(h).
\textsuperscript{114} Id. Ins. 187(i).
\textsuperscript{115} See MINN. STAT. § 65B.53(4) (1976).
The arbitration panel’s decision on issues of fact or law is final, and binding, subject only to specific qualifications set forth in the rules. A decision may be vacated upon motion to district court on the following grounds: (1) the decision was procured by corruption, fraud, or other undue means; (2) there was partiality or corruption on the part of the arbitrators, or any one of them; (3) the arbitrators were guilty of misconduct in refusing postponement, in refusing to hear evidence material to the controversy, or in other matters whereby the rights of the party were prejudiced; (4) the panel exceeded its powers, or executed them so imperfectly that a mutual, final, and definite decision was not made; or (5) the decision is contrary to law and evidence. The rules also provide that modifications of decisions may be made by the district court upon the basis of mistake or defects in the form of the award which do not affect the merits of the decision and where such defect could have been disregarded by the panel in reaching its conclusion.

This use of arbitration is seen as an efficient, quick, and relatively inexpensive method of adjudicating indemnity claims. It removes such claims from an already overcrowded court system and the vagaries of a fair but probably unqualified jury. The setting instead is one where the participants are professionals in the field and fault can be determined strictly on the merits. Under such a system there need be no concern that a severely injured party will go uncompensated, for compensation has already taken place. Neither should there be any fear that a slightly injured party will be overcompensated. The dispute is between two insurance companies in an arbitration proceeding which is charged with the task of determining which insurer should bear a loss already fixed in amount.

Thus, a no-fault system retaining indemnity rights subject to arbitration is consistent with the principle of preserving responsibility for negligent driving conduct. Arbitration, therefore, can correct the major problems of the fault-based compensation system, without major interference with the present insurance rating system which bases premium charges upon the injury-causing capacity of the driver. The Minnesota Act achieves this by submitting indemnity claims to the arbitration process; the limited subrogation right granted the insurer need not be placed before the arbitration panel because the court action generally will take place in another state when the accident has arisen out of the state.

C. Remaining Problems

At least three questions remain unanswered concerning the subroga-
tion and indemnity rights of insurers under the Minnesota Act. The Act does not speak to the question of the insurer's remedies when its insured settles with an at-fault third party without instituting a court suit, in derogation of the insurer's subrogation rights. Secondly, the Act does not provide the insurer with a subrogation right against the uninsured motorist to recover basic economic loss benefits which it has paid to its insured. Finally, although the Act provides that workers' compensation benefits paid are to be subtracted from basic economic loss benefits payable to an insured, no suggestion is made as to what remedies the workers' compensation insurer might have against the insurer of the at-fault third party.

1. The Settlement Problem

The Minnesota Act makes no mention of the insurer's subrogation rights in the event that its insured settles with the third party without instituting a civil action. Is the insurer entitled to a portion of the settlement as compensation for the basic economic loss benefits which it has paid its insured? The answer to this question has ramifications on the insurers' subrogation rights in accidents occurring prior to March 25, 1976, when full subrogation rights were granted the insurer in all accidents occurring in Minnesota. The answer also has ramifications on the insurers' rights in claims based on an intentional tort, based on negligence other than negligence arising out of the maintenance, use, or operation of a motor vehicle, or claims based on strict or non-no-fault statutory liability.

119. See notes 122-27 infra and accompanying text.
120. See notes 128-47 infra and accompanying text.
121. See notes 148-62 infra and accompanying text.
122. Prior to March 25, 1976, section 65B.53(2) granted full subrogation rights to the insurer in all accidents occurring in Minnesota. Compare Minnesota No-Fault Automobile Insurance Act, ch. 408, § 13, 1974 Minn. Laws 776 (amended 1976 and 1977) with Act of Mar. 25, 1976, ch. 79, § 1, 1976 Minn. Laws 201 (amended 1977). The subrogation rights of the insurer may not be protected under the present Act, as illustrated in the following hypothetical. An insured settles out of court for $45,000 for injuries arising out of an accident which occurred in December of 1975. No court suit was instituted. The insurer has paid its insured $30,000 in basic economic loss benefits and now seeks to recover that sum from the settlement which its insured has received. Because the insured has already been compensated for injuries suffered in the accident, it is plausible that the settlement amount reflects only general damages suffered by the insured.
123. See MINN. STAT. § 65B.53(3) (1976). Double recovery may occur, for example, under the Civil Damage Act. See MINN. STAT. § 340.95 (1976), as amended by Act of June 2, 1977, ch. 390, § 1, 1977 Minn. Laws 887. For example, an individual involved in an automobile accident with an intoxicated driver may have a claim against a third party who supplied the intoxicated driver with the liquor. Under the provisions of the Minnesota No-Fault Act, the insurer has a subrogation right to any recovery under the Civil Damage Act, see MINN. STAT. § 65B.53(3) (1976), which would result in double recovery by its insured. If settlement is reached without actual court litigation, the insurer may be denied recovery of the basic economic loss benefits which it would otherwise be entitled to receive.
If settlement of any of the above claims is reached without actual court litigation, the insurer, under the present Minnesota Act, may be denied recovery of the basic economic loss benefits which it would otherwise be entitled to receive. Moreover, the insured could recover twice for the basic economic loss benefits mandated under the Act.

This issue presents a basic public policy conflict. Should the insured be allowed to deny the insurer its subrogation right by settling with the third party without protecting the insurer’s rights? On the other hand, where the insurer has failed to protect its rights by reaching an agreement with the insured prior to settlement, should that insurer be allowed to recover part of a settlement which may well have been recovery for noneconomic detriment only, and therefore does not constitute double recovery by the insured?

The solution to this dilemma is not a simple one. The insurer may not include in the insurance contract any provision which would permit the insurer to determine when or whether a civil action will be commenced by the insured. Clearly, this provision indicates a legislative concern that the insured should retain control of all litigation arising out of the accident. Furthermore, because the subrogation right is only granted the insurer to prevent double recovery by the insured, the insurer should

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124. See Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co., 291 Minn. 97, 99-100, 189 N.W.2d 404, 406-07 (1971) (subrogation rights of insurer may be defeated by insured settling with wrongdoer). A Hennepin County District Court has recently concurred in the conclusion that the insurer will have no recourse against an insured or a third party when settlement is reached between that insured and the third party. In Assink v. Allstate Ins. Co., No. 739797 (Minn. 4th Dist. Ct., filed Dec. 15, 1977), the insurer asserted that the insured's settlement and release of General Motors from a claim arising out of an automobile accident prejudiced its right to be subrogated to the insured's claim against General Motors. The court rejected the assertion stating:

- It is clear to this Court however that this argument ignores the clearly articulated provision embodied in the Minnesota No-Fault Act which essentially states that a right of subrogation does not arise until "a civil action has been commenced in the manner prescribed in applicable laws or rules of civil procedure to recover damages for non-economic detriment." MSA 65B.1, subd. 1.

- It is true that there may be lingering problems associated with the time and circumstances under which a reparations obligor's right to subrogation arises. However, there is no showing in this case that plaintiff is being doubly compensated by virtue of a prior settlement with General Motors.

Accordingly, this Court must conclude that plaintiff's settlement against General Motors has not prejudiced the right of subrogation of Allstate since such a subrogation right never existed.

125. MINN. STAT. § 65B.53(6) (1976) reads:

No reparations obligor shall include in its contract any provision which would require a person to commence a negligence action as a condition precedent to the payment of basic economic loss benefits or which permits the reparations obligor to determine whether such an action will be commenced. No reparations obligor shall contract for a right of reimbursement or subrogation greater than or in addition to those permitted by this chapter.

not be able to force litigation of a claim which the insured does not desire to pursue.

So long as subrogation rights are afforded, however, an insured should not be permitted to evade the effect of such rights by reaching a settlement with the at-fault third party. The best solution would be another amendment to the subrogation provisions to clarify the rights of the insurer where settlement is reached without recourse to the courts. Such an amendment probably should require the insured to notify the insurer of the proposed settlement so the insurer might protect its rights to basic economic loss benefits. This requirement would allow the insurer to notify the at-fault third party's insurer of its interest in any settlement. The third party's insurer then could be held accountable for its failure to take the rights of the injured party's insurer into consideration. If the insurer should fail to act upon such notice from its insured, the insured should not be required to reimburse the insurer out of the settlement proceeds.

In absence of an amendment, the responsibility for resolving this dilemma will reside with the courts. This result is unfortunate because the purpose of no-fault is to avoid court litigation wherever possible. Without a clarification, however, insurers and insureds are likely to find themselves pitted against one another in court in a dispute over which party is rightfully entitled to all or part of the proceeds of a settlement. Should this happen, unfortunate as it may be, the best approach by the courts would be an equitable one, deciding each case separately. The determination then could be based on the intent of the parties as to what the settlement was for and whether the insurer had an opportunity to protect its rights prior to the settlement.

2. Subrogation and Indemnity Rights Against the Underinsured and the Uninsured Motorist

Under the Minnesota Act, insurers must offer underinsured motorist

127. Upon receiving notice of the insured's negotiations with the at-fault third party, the insurer, under Minnesota law will be able to protect its interests by notifying the third party of its subrogation right. See Travelers Indem. Co. v. Vaccari, Minn. 245 N.W.2d 844 (1976). In Travelers, the Minnesota Supreme Court granted an insurer the right to enforce its subrogation claim against the third party despite a general release granted the third party by the insured. The insurer had made medical payments to its insured and was entitled to subrogation rights to the insured's claim against the third party. Notice of these rights was given to the third party who ignored the notice and entered into a settlement agreement with the insured. The issue considered by the court was whether the general release executed by the insured extinguished Travelers' subrogation claim. The court concluded that the release did not extinguish the insurer's rights when "settlement is procured by a tortfeasor . . . after notice of the insurer's subrogation claim." Id. at 245 N.W.2d at 847 (emphasis by the court).
coverage to all of their insureds. The underinsured motorist coverage compensates an insured for losses suffered in excess of those compensated either by the basic economic loss benefits or by the residual liability coverage of the at-fault third party. The insurer, after paying for those excess losses, is entitled to exercise a right of subrogation to its insured’s claims against the at-fault third party, to the extent of excess benefits paid.

Insurance against losses caused by the driver of an uninsured motor vehicle is mandatory under the Act. The minimum coverage required includes $50,000 in bodily injury coverage for any accident and $25,000 bodily injury coverage for any individual involved in an accident with an uninsured motor vehicle. An insured may not recover under the uninsured motor vehicle coverage for benefits already compensated by the basic economic loss benefits paid by the insurer.

The penalty provisions of the Act subject an uninsured motorist to full tort liability, thus the tort threshold is inapplicable. Consequently, an insured who is injured in an accident involving an uninsured motorist will be entitled to recover from the uninsured party all losses arising out of the accident, without a deduction for the basic economic loss benefits received from the insurer.

The uninsured motorist coverage will provide additional compensation for losses in excess of those compensated for by the basic economic loss benefits. Generally, the additional losses will arise where injuries are suffered which exceed the $30,000 basic economic loss benefits provided by the Act and where the insured suffers general damages which are not compensated by no-fault insurance.

Unlike the underinsured motorist provision, the Minnesota Act is silent regarding the subrogation and indemnity rights of an insurer against an uninsured motorist who is the at-fault party in an automobile


133. See Minn. Stat. § 65B.49, subd. 4(4) (1976).


accident. If no such rights can be found either in common law or implicitly in the Act itself, then double recovery by the insured for losses arising out of the accident is likely to occur.\(^{137}\)

The insurer apparently will possess full pre-no-fault subrogation and indemnity rights for benefits paid out under uninsured motor vehicle coverage. Uninsured motor vehicle coverage was required prior to the adoption of the Minnesota Act and insurers clearly possessed subrogation and indemnity rights under the prior law.\(^{138}\) Therefore, because the preexisting uninsured motorist statute merely was incorporated into the Act, the insurers’ subrogation and indemnity rights under the preexisting statute apparently remain intact.

The conclusion that the insurer may exercise common law subrogation and indemnity rights is supported by the penalty provisions of the Act. As mentioned earlier, the Act permits a person injured by an uninsured motorist to exercise full common law tort rights against the motorist.\(^{139}\) Consequently, it can be argued that the insurer also retains its full common law subrogation and indemnity rights against the uninsured motorist and hence does not need statutory authorization to exercise those rights.\(^{140}\)

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\(^{137}\) The penalty provisions of the Act subject the uninsured third party to full tort liability. See Minn. Stat. § 65B.67(1) (1976). The insured will thus be entitled to recover for losses which have already been compensated by basic economic loss benefits because the deduction provisions of section 65B.51(1) will not apply. If the insurer must comply with the specific subrogation rights granted in the Act, it will not be able to recover those amounts which constitute double recovery of basic economic loss benefits.

\(^{138}\) Although uninsured motorist insurance was mandatory prior to the adoption of no-fault insurance in the state, see Act of May 23, 1969, ch. 630, 1969 Minn. Laws 1087 (amending Minn. Stat. § 72A.149 (1967), current version at Minn. Stat. § 65B.49(4) (1976), as amended by Act of May 25, 1977, ch. 266, § 2, 1977 Minn. Laws 437), that requirement did not alter the common law tort liability of the uninsured, at-fault third party. The uninsured third party was subject to full tort liability just as the insured, at-fault third party was subject to full tort liability. See Kirouac v. Healey, 104 N.H. 157, 160, 181 A.2d 634, 636 (1962), where the court observed:

Nor is [uninsured motorist insurance] a contract to indemnify the third-party uninsured motorist against liability, for the contract is not for the latter's benefit. His legal liability will be unaffected by any payment made by the insurer, who will then be subrogated to the plaintiff's rights against the uninsured motorist.

\(^{139}\) See note 134 supra and accompanying text.

\(^{140}\) Also supportive of this conclusion is the express subrogation right which the legislature granted an insurer offering underinsured motorist coverage to its insured. See Minn. Stat. § 65B.49(6)(e) (1976), as amended by Act of May 25, 1977, ch. 266, § 3, 1977 Minn. Laws 438, as amended by Act of May 26, 1977, ch. 276, § 3, 1977 Minn. Laws 476. The Act clearly provides that an insurer may not contract with its insured for any rights of subrogation or indemnity which are not otherwise provided by the Act. See Minn. Stat. § 65B.53(6) (1976). Therefore, for the insurer to recover benefits paid under the underinsured motorist coverage, and thus prevent double recovery by the insured, a right of subrogation must be granted statutorily. In contrast, the uninsured motorist, under the penalty provisions of the Act, is subject to full common law tort liability. See Minn. Stat.
Although a common law right of subrogation may be implied as to benefits paid under the uninsured motorist coverage, the result may well be different with regard to the basic economic loss benefits paid by the insurer for injuries caused by an uninsured motorist. The duty to pay basic economic loss benefits is primary and arises solely out of the Minnesota Act; no pre-Act basis for such duty existed. Therefore, no common law subrogation or indemnity rights are available with respect to basic economic loss benefits to the insurer and none are permitted by the Act. Additionally, the general subrogation and indemnity provisions of the Minnesota Act will be of little or no value to the insurer who is dealing with an uninsured motorist. The indemnity right is available only against the insurer of the third party and, by definition, no such insurer exists in an accident caused by the negligence of an uninsured motorist. Furthermore, the general subrogation provision will be available only when the accident with the uninsured motorist occurs out of the state.

The possibility therefore exists that the insured will exercise full common law tort rights against the uninsured motorist, recovering a second time for the injuries and losses which already have been compensated by the basic economic loss benefits paid by the insurer. Such a result is clearly not intended by the Act, because a major purpose of the no-fault scheme is to prevent the double recovery that will occur in this situation. Unfortunately, without a legislative clarification of the insurer's rights, no subrogation or indemnity rights for basic economic loss benefits can be granted without violating the express provisions of the Act.

§ 65B.67(1) (1976). The insurer therefore may exercise subrogation and indemnity rights permitted under the common law.

141. See Minn. Stat. § 65B.61(1) (1976), which provides:
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 source as a result of injury arising out of the maintenance or use of a motor vehicle.

142. See Minn. Stat. § 65B.53(6) (1976), which in effect limits the insurer's remedies against an at-fault third party to those rights specifically enumerated in the Act by prohibiting the insurer from contracting with its insured for any right of subrogation or indemnity which is not granted under the Act.

143. See notes 79-85 supra and accompanying text.


145. See notes 71-78 supra and accompanying text.


147. Although permitting the insurer a subrogation right would violate the express provisions of the Act, the argument might be made that not to do so would so seriously violate the intent of the Act to prevent double recovery by the insured that the courts should grant the insurer a subrogation right to any claim by its insured for basic economic loss benefits. The courts have long recognized their power to read unclear statutes in a manner which accomplishes the intent of the legislature. See, e.g., State ex rel. Patterson
The problem of double recovery in accidents involving an uninsured motorist therefore will not be solved until the legislature amends the Act to grant the insurer a subrogation right against uninsured motorists to the extent of basic economic loss benefits paid.

3. Subrogation Rights of the Workers’ Compensation Insurer Against the No-Fault Compensation Insurer

A difficult interpretive problem arises in situations where a workers’ compensation insurer attempts to exercise subrogation rights against a no-fault insurer.\(^{148}\) An example will serve to illustrate the problem. An employee is injured in an automobile accident during the course of his employment. The injuries are such that the tort threshold limitations of the No-Fault Act are satisfied.\(^{149}\) The workers’ compensation insurer pays benefits to the employee. Those benefits, for the purposes of this example, are the same as basic economic loss benefits under the No-Fault Act. The workers’ compensation insurer then seeks to invoke its subrogation rights against the third party who caused the accident or against that third party’s no-fault insurer. The workers’ compensation insurer relies upon the subrogation provision of the workers’ compensation law, which grants full subrogation rights when the party responsible for the injury is someone other than the employer.\(^{150}\) The at-fault party’s no-fault insurer objects because the Minnesota No-Fault Act does not grant the workers’ compensation insurer any such subrogation rights.\(^{151}\)

Thus, the two laws appear to be in conflict and, absent a legislative clarification, the courts must resolve the conflict through statutory construction.

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\(^{148}\) Bates, 96 Minn. 110, 104 N.W. 709 (1905). Under this power, the court could therefore determine that a subrogation right arises implicitly under the Act where the insured might recover twice for the same loss because the at-fault third party is uninsured and therefore not entitled to the tort exemption provided under the terms of the Act.

\(^{149}\) The interpretive problems in this area generally do not apply to indemnity, since the workers’ compensation law does not permit an indemnity right. See American Mut. Liab. Ins. Co. v. Reed Cleaners, 265 Minn. 503, 508-09, 122 N.W.2d 178, 182 (1963). But see Minn. Stat. § 176.061(7) (1976) (employer has an independent right to recover from at-fault third party for medical payments made by the employer for an employee’s injuries).

\(^{150}\) Minn. Stat. § 65B.51(3) (1976). The significance of this fact is that if the tort threshold limitations are satisfied, the injured party has a tort right against the at-fault party. Without such a tort right, the employer or workers’ compensation insurer would have no right to which they could be subrogated. See notes 23-27 supra and accompanying text.

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The proper resolution of the above problem is not clear. Ideally, both the workers' compensation system and the no-fault system are closed systems; each bears its own losses. However, in both systems the legislature has decided to shift some losses outside of each system. Unfortunately, neither law addresses the problem of which system should bear the loss when the subrogation rights under the workers' compensation law conflict with the provisions of the No-Fault Act. It appears, though, that the apparent intent of the legislature was to require the workers' compensation system to bear the losses when the problem raised above occurs.

Under the No-Fault Act, the legislature specifically provided that where workers' compensation insurance covers an injury arising out of an automobile accident, that insurance is utilized before any no-fault insurance is payable. Consequently, the legislature indicated that where both workers' compensation benefits and no-fault benefits are available for the same basic economic loss, the workers' compensation insurer must compensate the injured party for the loss. It would seem to follow from this that the workers' compensation insurer, after paying those losses, cannot seek reimbursement from the at-fault party's no-fault insurer. To hold otherwise would shift the losses back to the no-fault system, which would be contrary to the apparent intent of the legislature that the workers' compensation system bear such losses. The fact that basic economic loss payments are the primary obligation of the workers' compensation insurer also suggests that such an insurer should not be permitted to recover from the at-fault party or that party's no-fault insurer, since the compensation insurer is not compensating the injured employee for an injury which is the primary responsibility of the no-fault insurer. This argument clearly would preclude an indemnity right against the at-fault party or that party's no-fault insurer, see notes 19-22 supra and accompanying text, and could provide analogous support for precluding a subrogation right as well.

The No-Fault Act shifts losses by granting an indemnity right against the insurer of the commercial vehicle only when the driver of that vehicle is at fault. See id. § 65B.53(1), as amended by Act of May 25, 1977, ch. 266, § 5, 1977 Minn. Laws 439. The Act also shifts losses outside the no-fault system to the extent that workers' compensation benefits are payable prior to no-fault basic economic loss benefits. See Minn. Stat. § 65B.61(1)-(2) (1976). The workers' compensation law, on the other hand, attempts to shift all losses caused by third parties outside of the workers' compensation system by granting both the employer and the workers' compensation insurer full tort rights against the at-fault third party. See id. § 176.061(5), (7).

See id. § 65B.61(1)-(2).

See id.

An argument can be made that the injured employee can collect for basic economic losses against the third party in cases where the employer or workers' compensation insurer has compensated the employee for those losses. This argument is
that pays the injured party for those basic economic losses also should not be able to recover them. This is so because the insurer can have no greater rights by subrogation than would its insured,\textsuperscript{157} the party to whose rights the insurer is subrogated. Consequently, the proper answer to the problem seems to be that the workers' compensation insurer is precluded from exercising its subrogation rights, despite the general subrogation provisions of the workers' compensation law.\textsuperscript{158}

based on the rationale that although the workers' compensation payments are in lieu of basic economic loss benefits under section 65B.61(1), those payments technically are not basic economic loss benefits but rather are workers' compensation benefits. If the payments are not considered to be basic economic loss benefits, then the injured employee could collect such payments from the at-fault party in a tort action. See \textsc{Minn. Stat.} § 65B.51(1) (1976), \textit{as amended by Act of May 25, 1977, ch. 266, § 4}, 1977 Minn. Laws 438. If this argument is accepted, the employer or workers' compensation insurer should be permitted a subrogation right to the employee's claim against the at-fault party, for the same reasons outlined in the text accompanying notes 159-62 \textit{infra}. This argument has appeal, but it seems more realistic to interpret the payments made by the workers' compensation insurer under section 65B.61(1) as being basic economic loss benefits. Basic economic loss payments are defined in the No-Fault Act in relation to the type of loss suffered, not in relation to the type of insurer that makes the payment. See \textsc{Minn. Stat.} §§ 65B.43(10), .44 (1976), \textit{as amended by Act of May 25, 1977, ch. 266, § 1}, 1977 Minn. Laws 437. Consequently, if a workers' compensation insurer compensates the injured party for basic economic loss, those payments should be considered basic economic loss benefits which the insured cannot recover under section 65B.51(1) in a tort action against the at-fault party.

\textsuperscript{157} See notes 23-27 \textit{supra} and accompanying text.

\textsuperscript{158} The above interpretation potentially could create problems for the injured employee. The employer or its workers' compensation insurer could assert that they retain a subrogation right against the at-fault party for any claim the employee has for general damages or noneconomic loss, even though the payments made by the employer or workers' compensation insurer are for basic economic loss. If the employer or workers' compensation insurer succeeded in such an argument, the employee's potential recovery could be significantly reduced. This could happen because the employer's subrogation rights would permit the employer to be reimbursed from the employee's general damages recovery, thus reducing the total amount recovered by the injured employee.

Whether the employer or its workers' compensation insurer could succeed in such an argument is unclear. The No-Fault Act is unique in that it precludes an injured party from collecting from the at-fault party in a tort action any basic economic loss benefits paid or payable under the Act. See \textsc{Minn. Stat.} § 65B.51(1) (1976), \textit{as amended by Act of May 25, 1977, ch. 266, § 4}, 1977 Minn. Laws 438. If the workers' compensation insurer reimburses the employee for basic economic losses yet is subrogated to the employee's claim against the at-fault party for general damages (nonbasic economic loss), then the insurer would be reimbursed from a fund of money designed to compensate the employee for losses different from those compensated by the workers' compensation insurer. This would seem to violate the basic subrogation principle that one only can be subrogated to another's claim for the same losses as were paid to the injured party by the party seeking subrogation. See, \textit{e.g.}, 16 G. \textsc{Couch}, \textit{supra} note 23, § 61:4. This principle suggests that when the workers' compensation insurer compensates the employee for basic economic losses, the insurer has no subrogation right because the insured has no tort right against the at-fault party for such losses. This issue has not been faced by the Minnesota Supreme Court, but the New York courts have considered the issue and have consistently held that the work-
The solution suggested above is not necessarily absolute. The example used to depict the problem contains a critical assumption which, if altered, could change the suggested solution. That assumption is that the workers' compensation benefits paid are the same as basic economic loss benefits under the No-Fault Act. If, however, the workers' compensation insurer pays for losses different from no-fault basic economic loss benefits, or pays an amount in excess of required basic economic loss benefits under the No-Fault Act, then a strong argument can be made that the workers' compensation insurer has a subrogation right for such different or excess payments against the at-fault party and the no-fault insurer. Under the No-Fault Act, the injured party cannot collect, in a common law tort action, basic economic loss benefits received, even if

An argument also can be made that allowing the compensation insurer to recover its basic economic loss payments from the injured employee's recovery from the at-fault party for nonbasic economic loss would be unconstitutional. A Michigan appellate court recently so held, under an analogous statute, reasoning that allowing the insurer such a subrogation right would violate equal protection. See Murray v. Ferris, Mich. App. 253 N.W.2d 365 (1977). The court reasoned that a common law tort right is designed to make the injured party whole, which would not occur if the insurer was allowed a subrogation right against the injured party's recovery for nonbasic economic loss. The court held that such a subrogation right therefore would discriminate among accident victims; some receive full recovery for their injuries since they suffer only economic loss, while others are not fully compensated for their injuries because of the subrogation provision.
the tort threshold has been satisfied.\textsuperscript{159} Under the Act, the workers' compensation insurer has the primary responsibility to pay those benefits.\textsuperscript{160} However, if the workers' compensation insurer pays the injured party for losses different from, or in excess of, basic economic loss benefits required by the No-Fault Act, then the workers' compensation insurer is not paying benefits which are its primary obligation under the No-Fault Act. In addition, the injured party can collect such losses in a common law tort action, assuming the tort threshold has been satisfied. Consequently, if the injured party can collect for such losses, and the workers' compensation insurer has paid the injured party for those losses, there appears to be no valid reason under the No-Fault Act why the workers' compensation insurer should be forbidden from exercising its subrogation rights against the at-fault party or that party's no-fault insurer.\textsuperscript{161} If the workers' compensation insurer were not permitted to exercise its subrogation rights in such a case, the injured party could receive a double recovery, once from the workers' compensation system and once from the no-fault system. This would be inconsistent with both the subrogation provisions of the workers' compensation law and the intent of the No-Fault Act.\textsuperscript{162} Because nothing in the No-Fault Act specifically mandates such a result, the Act should not be interpreted to reach that result.

The resolution of the problems created when the no-fault system and the workers' compensation system collide thus depends upon whether the payments made by the workers' compensation insurer are the equivalent of basic economic loss benefits under the No-Fault Act. To the extent that they are, the workers' compensation insurer should have no subrogation rights against the at-fault party or the no-fault insurer; to the extent that they are not equivalent to basic economic loss benefits, the workers' compensation insurer should be permitted to exercise such subrogation rights.

V. SUBROGATION AND INDEMNITY IN THE NO-FAULT SETTING—IS THE INCLUSION A WISE ONE?

In its short history, the Minnesota No-Fault Automobile Insurance Act has undergone major revisions with respect to its subrogation and indemnity provisions. The changes have revealed a movement toward a pure no-fault system of insurance and a reversal in the attitude of the legislature toward the retention of “fault” within the no-fault system.

\begin{itemize}
  \item \textsuperscript{159} See note 73 supra and accompanying text.
  \item \textsuperscript{160} See note 153 supra and accompanying text.
  \item \textsuperscript{161} See UMVARA § 6, Comment.
  \item \textsuperscript{162} Compare Wandersee v. Brellenthin Chevrolet Co., 258 Minn. 19, 23, 102 N.W.2d 514, 517 (1960) (subrogation provision of workers' compensation law designed to avoid double recovery) with MINN. STAT. § 65B.53(2)-(3) (1976) (No-Fault Act subrogation provisions are to be invoked only to avoid double recovery).
\end{itemize}
The Minnesota Act, it should be remembered, was enacted originally as a compromise of the two houses of the legislature. The original subrogation and indemnity provisions were exceedingly broad and allowed insurers to shift virtually all losses arising out of automobile accidents to the at-fault party, despite the Act's "no-fault" label. The concession of some legislators to adopt the "no-fault" system did not apparently extend as far as to eliminate the fault determination from the system. Confusion over the distinction, if any, between the subrogation and indemnity rights of the insurers led the legislature to amend the Act in 1976. The insurers were limited to exercising subrogation rights to their insured's claims based on intentional torts, on strict or non-no-fault statutory liability, or on negligence other than negligence arising out of the maintenance, use, or operation of a motor vehicle. The fault determination was therefore eliminated from a portion of the compensation system in Minnesota.

In 1977, the indemnity provision was altered to allow indemnity only against the insurer of a commercial vehicle where the driver of that commercial vehicle was the at-fault party in the accident. This change moves the Minnesota Act closely in line with the proposals set forth in the Uniform Motor Vehicle Accident Reparations Act, discussed below. Under the present provisions, losses will be reallocated to the at-fault party only on a highly selective basis, and generally, only in instances where the losses may be passed on to the motoring industry and not borne solely by the unfortunate victims of the motor vehicle accident.

As has been seen, Minnesota has made a policy decision to include limited subrogation and indemnity rights within its statutory no-fault scheme. Although Minnesota and a majority of states with no-fault

163. See note 62 supra and accompanying text.
164. See notes 72-74, 79-82 supra and accompanying text.
165. See notes 75-78 supra and accompanying text.
166. See notes 75-78 supra and accompanying text.
167. See notes 84-85 supra and accompanying text.
168. The Minnesota Act will achieve much the same reallocation of costs under the indemnity provision as does UMVARA under its reallocation provisions. Experience of the insurance industry has shown that over 90% of the damage and injuries suffered in motor vehicle accidents are caused by heavy commercial vehicles. See UMVARA § 38, Comment. UMVARA in its reallocation provisions recognizes this expressly. Reallocation of losses to the insurer of the commercial vehicle is provided under UMVARA's rating classification. Id. The Minnesota Act achieves the same basic result by allowing reallocation of losses only when the driver of a commercial vehicle is the at-fault party in the motor vehicle accident. See MINN. STAT. § 65B.53(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 5, 1977 Minn. Laws 439. The definition of "commercial vehicle" in the Act is based generally on the weight of the vehicle. See MINN. STAT. § 65B.42(12) (1976). Therefore, although based on fault, reallocation generally will be only to the insurers of the same vehicles to which UMVARA's reallocation provisions will shift losses.
169. See notes 205-22 infra and accompanying text.
schemes have retained subrogation and indemnity rights in one form or another, 170 the 1976 and 1977 amendments by the Minnesota Legislature evince a trend toward a pure no-fault plan. 171 The question may then be properly raised, should rights of subrogation and indemnity be retained in a no-fault system?

A. The Proponents’ Side

Proponents give two main reasons for the inclusion of subrogation and indemnity rights in modified no-fault plans such as in Minnesota: deterrence 172 and reallocation of losses. 173 Rates under a fault-based system are based on the injury-causing capacity of the driver, as opposed to the injury-causing capacity of the vehicle. 174 Age, sex, occupation, and health are only a few of the characteristics which are utilized in determining the insurance rates charged an individual in a fault-based system. 175 Because rates are determined by the likelihood of an individual to be involved in an accident and because rates suffer a concomitant increase when a driver is actually involved in an accident, the proponents argue that the driver will therefore be more careful to avoid further rate increases. 176

Secondly, proponents find it imperative that reallocation of losses among insurers be allowed. Under a no-fault plan, benefits must be paid to the insured as loss accrues. 177 Such a system, say the proponents, pays out substantially greater sums of money to insureds, because virtually all of at least the initial losses arising out of the accident are compensated by some form of insurance. 178 If reallocation of losses is not pro-

170. See notes 50-60 supra and accompanying text.
171. Over the short span of the No-Fault Act’s existence, the legislature has narrowed the scope of the subrogation and indemnity rights of the no-fault insurer significantly. See notes 71-85 supra and accompanying text. This narrowing is consistent with the provision of the Act which prevents the insured from recovering basic economic loss benefits from the at-fault third party. See Minn. Stat. § 65B.51(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 4, 1977 Minn. Laws 438. The limitation is also consistent with the pure no-fault concept in that it limits the scope of the fault determination within the Act. Fault need not be determined to the extent that neither the insurer nor the insured has a right to recover the basic economic loss benefits from the at-fault third party.
172. See notes 174-76 infra and accompanying text.
173. See notes 177-79 infra and accompanying text.
175. See id. at 80.
178. See Grello v. Daszykowski, ___ App. Div. 2d ___, ___, 397 N.Y.S.2d 396, 398 (1977) (no-fault law assures that every injured party will be compensated for all economic losses suffered, promptly and without regard to fault).
vided, the at-fault party becomes a favored insured because the losses must be borne by the insurer of the party that suffered the losses,\textsuperscript{179} thus the injured party’s premiums will rise.

Because of these fears, many states have included provisions for subrogation and indemnity in a variety of forms in their no-fault plans. Deterrence can be achieved, it is argued, by allowing indemnification of an insurer after the injured parties have been compensated.\textsuperscript{180} The objective of immediate compensation to all injured parties, which is basic to the no-fault concept, is retained.\textsuperscript{181} The cost of compensating for injury incurred, on the other hand, continues to be based on the injury-causing capacity of the driver. Thus, automobile accidents and the resultant injuries remain a cost to those involved in and causing such accidents.

Other advantages to the modified no-fault plan, beyond immediate compensation of the insured, exist. Most states make insurance mandatory, so, theoretically, every driver and passenger should be covered by a no-fault policy.\textsuperscript{182} The system encourages rehabilitation of the injured party, with prompt payment of out-of-pocket losses and elimination of the right to bring a civil action against a third party in some instances.\textsuperscript{183} Legal skills of counsel or lack thereof, sympathetic or hostile juries, or the need of an injured party to "settle" to avoid financial ruin should no longer play a role in a large percentage of the claims which arise out of automobile accidents. Insurance benefits therefore should be distributed in a more equitable fashion than under the fault-based system.

\section*{B. The Opponents’ Side}

There are, however, disadvantages to the modified no-fault system, and the question remains whether retention of the fault determination has been beneficial. Problems of court congestion experienced under the fault-based system remain.\textsuperscript{184} An insurer promptly paying out basic economic loss benefits must, in many instances, still expend money on

\begin{footnotes}
\item[179] See Hill, supra note 176, at 123.
\item[180] See id.
\item[181] See id.
\item[182] Only four of the twenty-four states which have enacted no-fault compensation systems do not make personal injury protection coverage compulsory. See Ark. Stat. Ann. § 66-4015 (Cum. Supp. 1975) (coverage for basic economic loss benefits is compulsory unless insured rejects such coverage in writing); S.D. Comp. Laws Ann. § 58-23-7 (Supp. 1977) (same); Tex. Ins. Code Ann. art. 5.06-3(a) (Vernon Pamphlet Supp. 1975-1976) (same); Va. Code § 38.1-380.1 (Supp. 1977) (basic economic loss benefit coverage must be offered by the insurer although the insured is not required to purchase such coverage).
\item[183] See notes 43-60 supra and accompanying text.
\item[184] As long as recourse to the courts is allowed, whether the insured or the insurer is pursuing the claim against the at-fault third party or its insurer, court congestion will be a problem which must be solved. See generally R. Keeton & J. O’Connell, supra note 1, at 13-15.
\end{footnotes}
investigation, negotiation, and court costs. These actions must be taken by the insurer not only to secure reimbursement for itself, but as a protective measure against other insurers who may also be seeking reimbursement for basic economic loss benefits paid to their insureds. To a limited degree, arbitration rights will alleviate the problem of court costs and extensive negotiations. The costs of investigation will remain, however, because the insurer will be required to establish that the other insured was at fault in the accident.

The insured, under a modified no-fault system, must still retain full liability coverage and now must pay additional sums for the first-party benefits which are compulsory under the no-fault system. The insured pays for the first-party benefits which are payable as loss accrues, the cost of litigation of the subrogation or indemnity rights held by the insurer, and the liability payments which must be made to the third party or to the third party's insurer if the insured is adjudged to be at fault.

Retention of the fault concept through use of subrogation and indemnity rights shifts the losses which arise out of motor vehicle accidents and thus violates the closed system concept which no-fault plans were originally intended to attain. The closed system is perhaps most effectively utilized in the workers' compensation area. Injuries to employees arising on the job are compensated from wholly within the workers' compensation system. At least as between the employer and employee, the insurance fund is the only recourse; there is no court litigation, no battle over who is responsible for the injuries which have occurred.

186. All states adopting pure or modified no-fault plans require the insured to purchase both personal injury protection coverage and liability coverage. For a listing of states enacting such plans, see note 37 supra.
187. See generally R. KEETON & J. O'CONNELL, supra note 1, at 257-60.
189. See MINN. STAT. § 176.031 (1976). Provision is made under workers' compensation law to shift some losses outside of the workers' compensation system. See MINN. STAT. § 176.061 (1976). Such shifting is allowed, however, only when the losses suffered have not been caused by the employer-employee relationship, that is, have not been caused by the system itself. For instance, if an employee suffers a broken leg from falling from a defective scaffolding while painting a building, that employee will be entitled to recover workers' compensation benefits because the injury occurred within the scope of employment. The manufacturer of the defective scaffolding will still be liable for producing a defective product. When subrogation and indemnity rights are granted under a no-fault plan, shifting of losses outside of the system can occur although the losses arose out of the functioning of the system itself. For example, where broad subrogation rights are granted against the at-fault party, the losses arising out of the motor vehicle accident may be compensated by monies not raised by the automobile insurance system. The insurer in exercising its subrogation right may claim virtually any assets of the at-fault party once it secures a
Ideally, a no-fault automobile insurance plan should achieve the same results as does workers' compensation. However, once a right of subrogation or indemnity is permitted, the system is no longer a closed one. Losses may be and are paid from funds which are not raised solely by insureds and insurers for the purposes of compensating accident victims. Recourse may be had against a variety of individuals, both through their insurance policies and against their personal income and wealth. The litigation and disagreement which the workers' compensation system has effectively avoided is still present. Furthermore, the insurance system does not bear the full responsibility for losses which arise from motor vehicle accidents.

Requiring mandatory interinsurer arbitration of subrogation and indemnity claims eliminates some of the objections to their inclusion within a no-fault plan. Adoption of mandatory interinsurer arbitration to a no-fault plan statutorily limits the rights of subrogation and indemnity which an insurer is granted. All proceedings, which are against the third party's insurer, are in front of an arbitrator who is responsible for determining where fault lies and where responsibility should be placed.

The inclusion of arbitration requirements in the modified no-fault plan, however, is by no means a cure-all. The second round loss-shifting by arbitration between insurers still costs insureds money. Dual coverage for primary basic economic loss benefits and third-party liability coverage must still be maintained. More importantly, the question of the value of retaining the fault concept at all remains. A second question is whether an arbitration panel is any more likely to be better able to fix fault than a jury. The inherent problems of proof still remain.

Not all of the above-outlined problems exist under the Minnesota Act. The Minnesota Act avoids problems of court congestion and the judgment against that party. Therefore, the losses are shifted outside of the no-fault insurance system even though the losses arose out of a motor vehicle accident. The closed system concept is violated without the policy reasons asserted for shifting losses outside of the workers' compensation system.

190. See R. Keeton & J. O'Connell, supra note 1, at 257-60.
191. Reallocation of loss outside of the closed system does not occur where the indemnity right is granted against the at-fault party's insurer. See, e.g., Minn. Stat. § 65B.53(1) (1976), as amended by Act of May 25, 1977, ch. 266, § 5, 1977 Minn. Laws 439.
192. See R. Keeton & J. O'Connell, supra note 1, at 257-60.
193. The Minnesota Act is an excellent example of the conflict. The Act requires an insured to purchase basic economic loss coverage and liability coverage. See Minn. Stat. § 65B.48(1) (1976). The requirement of arbitration obviously does not eliminate the need for dual coverage because the requirement of arbitration does not eliminate the determination of fault; it merely removes the fault determination from the courts. See notes 103-18 supra and accompanying text.
resulting costs of the litigation by granting subrogation rights to the insurer only to prevent double recovery by the insured.\textsuperscript{193} Therefore, because the insured cannot recover basic economic loss benefits in accidents occurring within the state, no subrogation right is necessary and none exists. The limited indemnity right against the insurer of the commercial vehicle whose driver is at fault in the accident also avoids these problems by subjecting all such claims to arbitration.\textsuperscript{194} To the extent that subrogation and indemnity rights are granted, the other problems with modified no-fault plans remain. The insured must purchase both coverage for basic economic loss benefits and liability coverage.\textsuperscript{195} Furthermore, the question of the value of retaining the fault determination, whether it be before an arbitration panel or in court, remains unanswered.

Today more cars and trucks are on the highways than ever,\textsuperscript{196} and the number of deaths resulting from accidents is again on the rise.\textsuperscript{197} In most states, insurance premiums are higher than they have ever been.\textsuperscript{198} The fault-based system has not checked this growth. The modified no-fault systems which are still in their infancy, do not appear to have checked the spiral either.\textsuperscript{199} Drivers’ training courses, stricter penalties for intoxicated drivers, and lower speed limits would appear to have a greater chance of successfully reducing the number of automobile accidents and the resulting injuries.\textsuperscript{200} The purpose of insurance should not be to solve

\textsuperscript{195}. See MINN. STAT. § 65B.53(2)-(3) (1976).
\textsuperscript{196}. See id. § 65B.53(4).
\textsuperscript{197}. See id. § 65B.48(1).
\textsuperscript{199}. The death toll on the nation’s highways climbed steadily from 1943 to 1972 when it reached a high of 56,278 deaths. See NAT’L SAFETY COUNCIL, ACCIDENT FACTS 13 (1976). A sharp decline in the number of deaths occurred between 1972 and 1975. Id. By 1976, however, the number of deaths occurring in traffic accidents had started to climb again. See MOTOR VEHICLE MFRS. ASS’N OF THE U.S., INC., MOTOR VEHICLE FACTS & FIGURES ’77, at 57 (1977). It should be noted, however, that the death rate, that is, the number of deaths per 100,000 population, has declined from a rate of 27.7 in 1969 to a rate of 21.6 in 1975. See id.; NAT’L SAFETY COUNCIL, supra at 13. The United States Department of Transportation attributes at least a portion of the decline in both the number of motor vehicle-related deaths and in the death rate since 1973 to the implementation of the 55 mph speed limit. See NAT’L HIGHWAY TRAFFIC SAFETY ADM’N, U.S. DEP’T OF TRANSP., 55 MPH FACT BOOK 3, 9 (1977).
\textsuperscript{201}. For a general discussion of the impact and effectiveness of the new no-fault systems, see R. Henderson, Report on the Status and Effect of No-Fault Insurance Schemes for Automobile Accidents in the United States (June 26, 1976) (report to Special Committee on UNMVARA of the Nat’l Conference of Commissioners on Uniform State Laws).
\textsuperscript{202}. See generally No-Fault Motor Vehicle Insurance: Hearings on H.R. Res. 241 Before the Subcomm. on Commerce & Finance of the Comm. on Interstate & Foreign
the problem of preventing automobile accidents; it should be to compensate the unfortunate victim of an accident.\textsuperscript{202} No proof exists that the fault concept built into the insurance system has actually deterred negligent driving conduct.\textsuperscript{204}

C. The UMVARA Solution

In 1972, an alternative to both the fault-based system and the modified no-fault plans being utilized by the states was proposed by the National Conference of Commissioners on Uniform State Laws. Called the Uniform Motor Vehicle Accident Reparation Act (UMVARA),\textsuperscript{205} its proposals, like those of the Basic Protection Plan of Robert Keeton and Jeffrey O'Connell,\textsuperscript{206} have had widespread effect on the no-fault plans which have been adopted since 1972.\textsuperscript{207}

Rights of subrogation and indemnity under UMVARA are severely limited. Subrogation is allowed only to the extent that there may be double recovery.\textsuperscript{208} Similar to the Keeton and O'Connell provision, subrogation is included to prevent double recovery in the areas where tort liability remains in effect.\textsuperscript{209} Furthermore, UMVARA expressly prohibits the insurer from directly or indirectly contracting for rights of reimbursement for or subrogation to a claim for general damages.\textsuperscript{210} A right of indemnity is afforded against a person who has converted a motor vehicle involved in the accident, or who is guilty of an intentional tort causing the accident.\textsuperscript{211}
Except for the very limited subrogation and indemnity rights outlined above, the UMVARA plan makes no use of the fault concept. Premium rates are based on the propensity of the vehicle, not the driver, to cause injury. Rates are determined according to statistics. For example, if eighty percent of the damage done in accidents over a year is caused by one-ton trucks, then eighty percent of the benefits are paid by the insurers of those trucks. Each insurer is responsible for the portion of damage caused in the state by all one-ton trucks which is equal to the percentage of one-ton trucks which it insures. Therefore, the actual damage caused by one insurer's vehicles in one year is not determinative. If $1,000,000 in damage is caused by one-ton trucks over the year and an insurer provides coverage for fifty percent of all one-ton trucks in the state, then that insurer must pay $500,000 in benefits during that year. If actual payments made during the year exceed the insurer's responsibility according to these statistics, provision is made for reallocation of losses among the insurers.

Reallocation of losses is important in any system which rejects the fault concept in distributing losses which accrue. Elimination of the fault concept from the reparation system without allowing reallocation

difference between the two acts' provisions is in the manner in which the converter of a motor vehicle is treated. Compare Minn. Stat. § 65B.58 (1976) with UMVARA § 6(c). The Minnesota Act does not give the insurer any rights against the individual responsible for converting a motor vehicle. Instead, the converter is not entitled to basic economic loss benefits for any injuries sustained in the accident. See Minn. Stat. § 65B.58 (1976).

212. See UMVARA § 38(a).
213. See id. § 38(b).
214. See id. § 39, Comment.
215. An example should serve to make the procedure more clear. Insurance Companies 1 and 2 insure private passenger vehicles only. Each company insures 50% of those vehicles in that state. Insurance Company 3, the only other insurance company in the state, insures all other vehicles. According to the statistics compiled by the State Insurance Commissioner, the amount of damage done by private passenger vehicles involved in accidents equals 25% of the damage arising out of vehicular accidents each year in the state. The remaining 75% of damage is caused by all other vehicles. At the end of year one, $1,000,000 in benefits have been paid out to insureds by the three insurance companies. Insurance Companies 1 and 3 have each paid $500,000 in benefits, while Insurance Company 2 has not paid any benefits. According to the Commissioner's statistics, however, Insurance Companies 1 and 2 are each responsible for $125,000, with Insurance Company 3 responsible for the remainder. Consequently, Insurance Company 1 is entitled to reimbursement from the other two insurance companies, with a reimbursement of $125,000 from Insurance Company 2 and $250,000 from Insurance Company 3. By this procedure, losses are reallocated according to the damage caused by the vehicles involved in the accident. The fear that an insurer will not be able to meet claims made does not arise because insurance rates are based on the injury-causing capacity of the vehicle, which is the same basis upon which losses are reallocated. Therefore, the insurer should be able to predict with relatively high accuracy the amount of benefits which it will be responsible for in any given fiscal year. Additionally, the element of chance is removed in that payment of benefits is no longer based upon which drivers are unlucky enough to be involved in a vehicular accident.
of losses among insurers would almost exactly reverse the present distribution of payments made by liability carriers.\textsuperscript{216} An estimated ninety percent of the total compensation payments made under the fault-based system are paid by the liability carriers of heavy commercial vehicles, mainly trucks.\textsuperscript{217} The great majority of those injured in motor vehicle accidents, however, are occupants of private passenger vehicles.\textsuperscript{218} Injuries to those occupants are, on average, far more severe than injuries suffered by the occupants of trucks involved in accidents.\textsuperscript{219} Therefore, the adoption of a pure no-fault plan would mean that no-fault insurers of the private passenger vehicles will pay for the majority of losses.\textsuperscript{220} Reallocation must take place or the heavy commercial vehicle will continue to cause severe injuries to persons involved in accidents with it, but will not pay its fair share for the losses the heavy commercial vehicle is responsible for causing.\textsuperscript{221}

Under the fault-based system, truck drivers commonly paid high insurance rates because at-fault truck drivers caused a substantial portion of the damage occurring in motor vehicle accidents. Conceivably, without reallocation, all the savings achieved by elimination of tort actions arising out of the operation of motor vehicles could accrue to these truck drivers. Although trucks cause significant damage and injury, the damage and injury is generally suffered by the occupants of private passenger vehicles. Premiums for private passenger vehicles would therefore suffer large increases over levels existing under a fault-based system, because their policies will pay for the injuries which they suffer in these accidents, injuries which under the fault-based system would have been allocated primarily to truck drivers. The UMVARA plan, therefore, provides for reallocation of losses and alters the method of determining premium rates. No attempt is made to determine premium rates according to the injury-causing capacity of the drivers. Instead, premiums assessed are based on the injury and damage attributable to the vehicle when it is involved in an accident, without regard to which party was at fault.

UMVARA allocates costs of motor vehicle accidents without regard to fault and without a case-by-case adjustment.\textsuperscript{222} Reliance on the court system is thereby eliminated. The expense of settling many claims, the expense of separate investigations of each accident, and the marshalling of evidence of fault are unnecessary. Losses become a burden of the

\textsuperscript{216} See UMVARA § 38, Comment.
\textsuperscript{217} Id.
\textsuperscript{218} See id.
\textsuperscript{219} Id.
\textsuperscript{220} See id.
\textsuperscript{221} See id.
\textsuperscript{222} See id., Commissioners’ Prefatory Note.
system, a cost of motoring in general which may be passed on through the economic system. Losses are no longer a burden placed primarily upon a select group of individuals who are the unfortunate victims of a motor vehicle accident.

VI. Conclusion

The Minnesota Legislature made great strides in 1976 and 1977 in restricting the subrogation and indemnity rights provided under the Minnesota No-Fault Automobile Insurance Act. These restrictions represent a continuing shift toward complete elimination of the relevance of fault in the no-fault system. The time has come, however, to take the final step and adopt the UMVARA approach, thus removing completely the fault determination under the No-Fault Act. Accident losses then would become a cost to all motor vehicle operators. With virtually no exceptions, motor vehicles which cause most of the damage, regardless of fault, then would be accountable for the damage they cause. Moreover, the additional costs resulting from the need to determine fault in each individual case would be eliminated. Under an UMVARA system, therefore, injured parties could be adequately compensated at a lower cost to both the insurance industry and the motoring public.