

California's Insurance Regulation Revolution: The First Two Years of Proposition 103

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Editor's Note: Issue 26:5 of this law review was devoted to a symposium of views on tort law and no-fault alternatives to auto insurance. Some of the articles in that issue were the result of a panel discussion held at the University of San Diego on the various insurance initiatives on the California ballot in November 1988. In the following article, Professor Sugarman looks at the victorious insurance initiative, Proposition 103, two years after its passage by the California voters.

In November 1988 the voters of California passed Proposition 103, which promised dramatic changes in the way automobile and other insurance policies are regulated, priced and sold in the state. Proposition 103 also promised an immediate and significant reduction in the cost of property and casualty insurance. Put before the voters by a populist consumer group, Proposition 103 drew on the public sentiment that people were paying too much and getting too little for their insurance dollars. It was also seen as a fresh, consumer-oriented reform in a political climate in which the traditionally powerful interests — the insurance industry and the lawyers who represent claimants in accident cases — had produced only legislative impasse. Controversial from the start, in the two years since its adoption Proposition 103 has primarily provided employment for lawyers, actuaries and expert witnesses in the field of insurance. Many of its key provisions have yet to be implemented, and, looking down the road, there is good reason to doubt that any of its substantive goals will be achieved absent additional changes in the law.

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This article first addresses the "torts crisis" and the legislative deadlock from which Proposition 103 and four competing initiatives emerged. Proposition 103's provisions are then discussed, followed by a description of the attempts at implementation over the past two years, and the battles that took place between the Insurance Commissioner, the insurance industry, and supporters of Proposition 103. Finally, because many have now concluded that the central goals of Proposition 103 cannot be achieved without a more fundamental change in the underlying torts system, the article closes with an examination of several reform proposals that have recently been put forward.

I. THE POLITICAL AND ECONOMIC CLIMATE FROM WHICH PROPOSITION 103 EMERGED

A. *The Torts Crisis*

Throughout America during the mid 1980s, there was much talk of a "tort law crisis." Advocates for some insurance companies, physicians, corporations and local governmental units claimed that the personal injury law and liability insurance system was out of control.¹ Suddenly, many enterprises and individuals faced enormous increases (frequently well in excess of one hundred percent) in their liability insurance premiums, and others could not purchase liability insurance at any price. In the face of these problems, the insurance industry and its customers (referred to as the "defense side" of the tort system) formed a loose coalition to lobby for changes in tort law. They hoped that these changes would lead to the return of price stability and readily available liability insurance. Although the focus of the insurance crisis was product liability, medical malpractice and municipal liability insurance, many of the reforms pushed by the defense side would affect all personal injury plaintiffs, including those involved in auto accidents.

These proposed reforms have included: (a) a limit on the amount of money that can be awarded by juries for pain and suffering in personal injury cases; (b) a limit on the amount of contingent fees that plaintiffs' attorneys may charge in personal injury cases; (c) the elimination of joint and several liability, so that in cases of multiple defendants, a single defendant is responsible only for damages in proportion to its share of the fault; (d) the reversal of the collateral source rule so that tort law no longer compensates for losses already

1. U.S. ATTY. GEN. TORT POLICY WORKING GROUP, REPORT ON THE CAUSES, EXTENT AND IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986); *see also* Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329 (1987). *See generally*, LIABILITY: PERSPECTIVES AND POLICY (R. Litan & C. Winston eds. 1988).

covered by basic social insurance and employee benefits; and (e) limitations on punitive damages.

Some consumer advocates and lawyers who represent personal injury victims fiercely opposed limitations on victims' tort rights.² They charged that the insurance crisis was the fault of the insurance industry — either that it was a “manufactured” crisis designed to allow the defense side to achieve certain anti-victim legislative goals, or that, if the crisis was real, it happened because of careless or reckless past underwriting, pricing and investment practices of the industry. Moreover, they began a counter-attack, seeking legislation that would increase the regulation of liability insurers. As the battle heated up,³ many in the insurance industry probably began to regret that this political fight was ever started.

Political battles raged in state legislatures throughout the United States and in Congress, and, as a result, many changes were actually enacted in a large number of jurisdictions.⁴ In California, frustrated with its lack of success in the legislature, the insurance industry and other defense interests successfully promoted a modest initiative that the voters passed in June 1986. Called Proposition 51, this measure limited the liability of so-called “deep pockets” for pain and suffering awards in multiple wrongdoer cases by restricting the scope of a single defendant's responsibility to pay for non-economic losses to that defendant's share of the fault.⁵ This victory in hand, the defense side returned to the legislature asking for more tort reform and threatening more sweeping initiative campaigns. However, the lawyers on the plaintiffs' side and their allies in the legislature dug in their heels and threatened insurance reform initiatives of their own.⁶

The result was an unusual compromise that was forged in September 1987. A modest set of legislative reforms was accompanied by the well-publicized signing of an agreement by the most important

2. See, e.g., Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 GONZ. L. REV. 15 (1986).

3. See generally, STATE OF FLORIDA ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS, FINAL RECOMMENDATIONS AND FINAL-FINDING REPORT ON INSURANCE AND TORT SYSTEMS (1988). Early in this time period, Florida passed a package of laws that both changed tort law and imposed more controls on insurers in that state.

4. See generally, U.S. ATTY. GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS (1987); S. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW 75-99* (1989).

5. Proposition 51 was codified at CAL. CIV. CODE § 1431.2 (West Supp. 1990).

6. Reich, *Insurers, Lawyers Prepare for a New Round of Conflict*, L.A. Times, Nov. 30, 1986, § 1, at 3, col. 3.

lobbying interests involved: the insurance coalition and the California Trial Lawyers Association. This agreement in effect called a truce whereby all the parties agreed for five years to cease pressing for further legal change, either in the legislature or through the initiative process.⁷ However, the truce was short-lived. Soon, several interest groups were circulating initiative petitions dealing with tort law, insurance law or both.

B. *Who Was Behind Proposition 103?*

Groups that were excluded from the "peace treaty" realized that further legislative efforts on their part would likely be unproductive in the short run and turned instead to the initiative process. Followers of consumer advocate Ralph Nader drafted an initiative petition premised on Nader's theory that the country needed sweeping and much tighter insurance regulation, not tort reform.⁸ This petition also included specific provisions ordering dramatic price reductions in auto insurance — well designed to win public support from those more interested in consequences than underlying causes.⁹ This initiative became Proposition 103 which was the only one of five insurance and tort law initiatives on the November 1988 ballot to pass.

Nader, who is based in Washington D.C., has a long-standing national reputation as a liberal reformer.¹⁰ Despised by many in the business community,¹¹ Nader, perhaps because of his own ascetic lifestyle, appears to have the confidence of a large share of the public. Through the years, many Nader followers, with his support and encouragement, have started consumer organizations of their own. One of those groups, based in California and formed in the fall of 1986,¹² calls itself Access to Justice or, sometimes, Voter Revolt to Cut Insurance Rates (or just Voter Revolt). Its leaders supervised the drafting of Proposition 103. The general outlines of this initiative

7. Weintraub, *Lobbyists, Lawyers Cut Deal on Injury Liability*, L.A. Times, Sept. 12, 1987, § 1, at 1, col. 1; see also, Glastris, *Frank Fat's Napkin*, WASH. MONTHLY, Dec. 1987, at 19. The "peace treaty" also sought to make it difficult for those not party to the agreement to place an initiative on the ballot because it included contracts entered into with the state's two leading initiative petition signature gathering organizations designed to limit their ability to work for insurance and tort reform initiatives promoted by others. See Reich, *Lobby Contracts Seen as Barrier to Foes' Ballot Hopes*, L.A. Times, Nov. 12, 1987, § 1, at 3, col. 3.

8. Nader, *The Assault in Injured Victims' Rights*, 64 DEN. U.L. REV. 625 (1988).

9. A mid-1988 poll found that 77% of California motorists believed they spent too much on auto insurance. See *Heat and Hostility*, L.A. Times, July 10, 1988, § 5, at 4, col. 1.

10. See, e.g., Blum, *'Raiders' at 20 Look Forward*, NAT'L L.J., Jan. 8, 1990, at 24.

11. For recent attempts to discredit Nader, see Brimelow & Spencer, *Ralph Nader, Inc.*, FORBES, Sept. 17, 1990, at 117, and Crovitz, *Ralph Nader Is a Bargain for Trial Lawyers at \$1,000 a Table*, Wall Street J., Nov. 14, 1990, § A, at 15, col. 3.

12. Reich, *supra* note 6.

campaign were announced even prior to the "peace treaty," when in June 1987, on the first anniversary of Proposition 51, Nader spoke out against its failure to lower insurance rates significantly.¹³

C. The Competing Initiatives

Learning of the Nader-backed petition, the liability insurance industry decided that it should prepare an initiative petition of its own.¹⁴ It chose an auto no-fault plan as the centerpiece of its proposal. Like the Nader group that gave special attention to auto insurance rates, the industry knew there was great concern among motorists generally about the recent rapid rise in auto insurance costs (said to have increased an average of forty percent in the course of the previous three years).¹⁵ The industry must have concluded that it stood the best chance of winning over the public by convincing voters that its reform plan, which directly attacked the problem of insurance costs rising faster than the cost of living, would most sensibly and genuinely lead to lower rates.

The auto no-fault idea was politically hot in the United States for about ten years between 1965 and 1975, during which time somewhat fewer than half of the states adopted some sort of no-fault plan.¹⁶ This type of reform was initially promoted by law professors as a way to cut auto insurance rates and at the same time expand the proportion of auto accident victims who would be compensated.¹⁷

13. See Wolinsky, *Nader Assails Deep-Pockets Initiative as 'Hoax' on Public*, L.A. Times, June 5, 1987, § 1, at 3, col. 4. For details of an earlier threat to use the initiative process by Access to Justice, see Rosenfield, *Prop. 51 Sets Stage for Fight on Regulating State Insurers*, L.A. Times, Jan. 11, 1987, § 5, at 3, col. 1. For an early report on Proposition 103, see Reich, *Planned Initiative Threatens Trust of Insurers, Lawyers*, L.A. Times, Nov. 19, 1987, § 1, at 3, col. 4. Nader first endorsed the initiative in January 1988. Reich, *Nader Backs 'Voter Revolt' Over Insurance, Takes Swipe at Lawyers*, L.A. Times, Jan. 30, 1988, § 1, at 29, col. 1.

14. For an account of how the five competing initiatives were brought to a vote, written by the leading political consultant to the pro-Proposition 103 forces, see Zimmerman, *Insurance Referendum: \$60 Million War in California*, 247 NATION 449 (1988). For details concerning the early scrambling for backers and signatures by the competing groups, see Reich, *Bid to Qualify 5 Insurance Initiatives Is in High Gear*, L.A. Times, Feb. 15, 1988, § 1, at 3, col. 5.

15. Reich, *Nader's Prop. 103 Wins But Insurance Industry Files Court Challenge*, L.A. Times, Nov. 9, 1988, § 1, at 1, col. 3.

16. See O'Connell & Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, INS. L.J. 129 (1979); U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES (1985) [hereinafter COMPENSATING AUTO ACCIDENT VICTIMS].

17. Most important was R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

These goals could be achieved if most cases could be handled on a first party insurance basis (*i.e.*, you claim from your own insurer) outside the tort system and without the involvement of lawyers. The plan, however, would take away from victims of non-serious auto crashes their right to sue for pain and suffering damages. As it turned out, only New York and Michigan (and arguably one or two other states) adopted no-fault plans that significantly achieved the original objectives. In many of the other states (thanks often to the effective political pressure of the plaintiffs' bar) auto no-fault merely added a small amount of first party protection to the existing scheme. As a result, in some states insurance costs actually increased, in part because victims could use their no-fault benefits to help finance their tort suits.¹⁸

The insurance industry's proposal, Proposition 104,¹⁹ was said to be modeled after New York's auto no-fault plan. Yet, Proposition 104 was unattractive to many of those who generally favor auto no-fault for two main reasons. First, although it would have removed auto accident claims from the tort system as in New York's law, its first party benefits to auto accident victims would have been less generous.²⁰ Apparently, the industry adopted this solution so it could fairly claim that Proposition 104 would lead to substantially reduced auto insurance rates.²¹ However, leading consumer groups could hardly be expected to support a plan with skimpy benefits. Second, Proposition 104 also contained several provisions largely unrelated to auto no-fault that would cement into state law (requiring a two-thirds vote of the legislature to change them) certain existing insurance laws that the industry wanted to keep. These "goodies" re-enforced the view of many that the industry was being greedy. They were included, however, as a direct response to Nader's Proposition 103, which was designed to change these same provisions. The insurance industry was clearly hoping that if both initiatives passed and Proposition 104 gained the most votes, its insurance provisions would

18. COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 16.

19. CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, Nov. 8, 1988, at 102 [hereinafter BALLOT PAMPHLET].

20. For example, Proposition 104 would have provided up to \$10,000 for medical expenses and up to \$15,000 for lost wages. New York, by contrast, provides up to \$50,000 of no-fault benefits, of which up to \$36,000 can be used for income loss. N.Y. INS. LAW § 5102 (McKinney 1985).

21. Indeed, Proposition 104 would have mandated a 20% reduction in certain rates for two years. Currently, about half of the auto insurance payouts in California are for damage to cars, the other half for bodily injury. Only about a third of the bodily injury payouts replace actual dollar losses of the victims. Hence, one goal of no-fault is to shrink sharply the remainder of the existing payouts — those that go for pain and suffering and that duplicates other sources of recovery. It has recently been argued that a strong no-fault plan should cut rates about 17%. See Kittel, *Auto Insurance: Defusing the Bomb; Controlling Cost Increases*, 91 BEST'S REV.: PROPERTY-CASUALTY INSURANCE EDITION 22 (1990).

thereby nullify Proposition 103.²²

Auto no-fault historically had a mixed reception in the auto insurance industry. The November 1988 ballot season was to be no exception. A single auto insurer (Coastal Insurance Company) backed and largely financed a different initiative petition that became Proposition 101.²³ Coastal sought to reduce auto insurance rates by limiting awards for pain and suffering in less serious auto accident cases (often called "whiplash" claims), by restricting claimant attorney's fees in auto accident cases, and by no longer compensating auto accident victims for losses covered by other sources such as social insurance and employee benefits. Coastal was an important participant in the segment of the market that caters to high risk drivers. Its executives apparently concluded that Proposition 101's features would be beneficial to it in ways that Proposition 104 would not.

As Nader's followers were preparing their initiative, other consumer interests and associates of the state's Attorney General (who also felt locked out of the legislative process as a result of the "truce") drafted another insurance regulation package that was of the same general sort as Proposition 103, but less radical in its reach. In order to help assure it a place on the ballot and to find a source of funds to promote it during the campaign, these groups teamed up with the plaintiffs' lawyers. Their joint proposal became Proposition 100.²⁴ The plaintiffs' lawyers made sure that Proposition 100 also contained a provision designed to maintain the traditional tort system and keep no-fault out of the realm of auto accidents (in direct conflict with Proposition 104).²⁵ They also added a provision designed to prevent the future regulation of attorney fees.²⁶ Yet another provision would overturn a recent California Supreme Court decision that limited the rights of auto accident victims to sue a defendant's insurer for punitive and emotional harm damages resulting

22. Regarding passage of conflicting initiatives see CAL. CONST. art. II, § 10(b). See also, *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, No. S012016 (Cal. Super. Ct. Nov. 12, 1990) (LEXIS, Cal. Library) (interpreting that section).

23. BALLOT PAMPHLET, *supra* note 19, at 90. For a description of Coastal's involvement, see Zimmerman, *supra* note 14.

24. See BALLOT PAMPHLET, *supra* note 19, at 86. For a description of the involvement of the Attorney General and the plaintiffs' bar, see Zimmerman, *supra* note 14.

25. Section 15 provided, in part: "It is the will of the People that persons who wrongfully cause damages to others in the ownership or operation of a motor vehicle should be held legally responsible for the full extent of the injuries they cause." BALLOT PAMPHLET, *supra* note 19, at 134.

26. *Id.* at 135.

from an insurer's bad faith conduct of settlement negotiations.²⁷

Playing the same game as their chief rivals, the Attorney General and the trial lawyers hoped that their package would attract more votes than the insurance industry's Proposition 104, so that Proposition 100 would dominate and invalidate Proposition 104 even if the latter also won a majority vote. As part of its appeal, Proposition 100 also promised immediate reductions in auto insurance rates. Instead of a truce, suddenly there was all-out war.²⁸

Indeed, faced with the prospect of Proposition 100, the insurance industry and other defense interests responded with yet another initiative that became Proposition 106.²⁹ Proposition 106 would have sharply limited attorneys' fees in personal injury cases. Once more, the defense side may have hurt itself by appearing to be too greedy. The specifics of Proposition 106 put off many who generally favored the regulation of plaintiff attorneys' fees, but who felt that the restrictions in this initiative were far too stringent as compared, for example, with those governing lawsuits in California in medical malpractice cases.³⁰

Through the spring of 1988 the legislature, the lawyers, and the insurers struggled to reach yet another legislative compromise that would head off the initiative war. Time ran out, however, and suddenly five initiative propositions were slated for the ballot. In spite of the obvious short-run gains either side would achieve if its initiative passed, also of importance is the larger view of these battles between insurers and trial attorneys. Imposing large financial costs on the other side by forcing it to participate in an initiative campaign, if only to maintain its current position, can impact upon that side's ability to mount another initiative campaign in the future or to continue pursuing its regular political agenda in the state legislature through large financial contributions to candidates.³¹

With Nader's endorsement but very little money, Voter Revolt had organized a signature gathering campaign to qualify Proposition

27. Section 13 of Proposition 100 sought to overturn *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), which limited an insured's ability to sue an insurer for bad faith. BALLOT PAMPHLET, *supra* note 19, at 134.

28. For an account of the peace treaty breaking up, see Reich, *Lawyers, Insurers — Truce May Be Fading*, L.A. Times, Dec. 16, 1987, § 1, at 3, col. 1.

29. BALLOT PAMPHLET, *supra* note 19, at 110.

30. Proposition 106 would have limited the contingent fees to 25% of the first \$50,000 recovered, 15% of the next \$50,000 recovered, and 10% of any amount recovered in excess of \$100,000. By contrast, the limits in medical malpractice cases are 40% of the first \$50,000 recovered, 33.3% of the next \$50,000 recovered, 25% of the next \$500,000 recovered, and 15% of any amount recovered in excess of \$600,000. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1990).

31. See generally, Reich, *Insurance Firms' Gifts to Governor, Legislators Told*, L.A. Times, May 17, 1988, § 1, at 3, col. 5; Reich, *Insurance Lobby Study Cites Large Gifts to Politicians by Trial Lawyers*, L.A. Times, June 20, 1987, § 2, at 3, col. 1.

103 for the ballot that critically relied upon a direct mail strategy. Once all the initiatives qualified for the ballot, backers of the proposals other than Proposition 103 spent a great deal of money promoting their initiatives (and opposing the others). In contrast, the backers of Proposition 103 spent relatively little and relied upon putting their side forward in news accounts of the increasingly bitter campaign.³² Proposition 103 was the only winner.³³

D. Who Voted for Proposition 103?

Proposition 103 narrowly passed — by a 51 to 49 percent margin.³⁴ One possible explanation for its passage is that, on balance, Californians bought the Nader faction's negative portrayal of the insurance industry and ideologically agreed with its vision of progressive reform. Also, at some level, no doubt, Nader himself made the key difference. In addition, Proposition 103 was probably helped by the well-publicized fact that the insurance industry spent so much money on this election—money, the other side contended, that could be used to reduce insurance costs instead.³⁵

An alternative view of the election is that many people simply voted with their pocketbooks; supporters hoping that Proposition 103 would result in lower insurance costs. The measure failed in a large majority of California's counties. It passed in a few urban counties in the San Francisco Bay area, where it ran behind Michael Dukakis, the Democratic party's candidate for President. Crucial to its passage was the strong support for Proposition 103 in Los Angeles and Orange Counties, where it ran well ahead of Dukakis. Orange County voters plainly are not generally liberal on most electoral issues, and they strongly backed George Bush over Dukakis. However, they favored Proposition 103. The obvious explanation is that

32. More than \$80 million was finally spent for and against the five initiatives, most of it by the insurance industry (\$63.8 million according to final reports). By contrast, only \$2.9 million was spent by the supporters of Proposition 103, mostly on the direct mail campaign to raise money and gather signatures. Reich, *Insurance Fight Cost Initiative Backers a Total of \$83.9 Million*, L.A. Times, Feb. 7, 1989, § 1, at 3, col. 1.

33. The plaintiff lawyers' Proposition 100 received 41% "yes" votes; the insurance industry's no-fault Proposition 104 received only 25% "yes" votes; Proposition 101 received merely 13% "yes" votes; and Proposition 106 to cut attorneys' fees received 47% "yes" votes. M. EU, STATEMENT OF VOTE NOVEMBER 8, 1988, at ix [hereinafter EU].

34. The margin of victory was less than 250,000 votes out of more than 9 million cast. *Id.*; see also, Reich, *supra* note 15.

35. See Reich, *Judge Rejects Suit to Stop State Farm's No-Fault Deductions*, L.A. Times, Aug. 27, 1988, § 1, at 25, col. 1; Reich, *Insurers Give Hearing to Indicative Campaign; \$17.6 Million Gathered*, L.A. Times, Jul. 30, 1988, § 1, at 23, col. 2.

auto insurance rates in Los Angeles and Orange County are high and voters there expected substantial savings from Proposition 103. By contrast, voters in much of the rest of the state, outside of the San Francisco Bay area, had reason (perhaps good reason as we will soon see) to fear that Proposition 103 would actually lead to increased auto insurance rates for them.³⁶

II. WHAT PROPOSITION 103 INTENDED

Although the main focus of Proposition 103³⁷ was auto insurance, its scope was somewhat broader. Nonetheless, nearly all of the controversy surrounding its adoption and its implementation has concerned auto insurance, and we will start there.

A. Auto Insurance

1. Rate Rollbacks

Proposition 103 commanded a rollback of insurance rates to twenty percent less than they were on November 8, 1987³⁸ (a year prior to the date Proposition 103 was passed). If fully implemented, Proposition 103 would have frozen those rolled-back rates for a year after its passage (until November 8, 1989), unless an insurer could show this would threaten it with insolvency.³⁹ Other things being equal, if 1988-89 rates were only eighty percent of 1987s rates, most people's rates would have been at least twenty five percent less than what they otherwise would have been. This promise of immediate savings must have looked very appealing to many voters, especially those California motorists that were spending several thousand dollars a year on auto insurance.

It is perhaps helpful to note here the theory underlying Proposition 103's rate rollback provision. Simply put, it is that the industry has engaged in noncompetitive price gouging behavior and can well afford sharp rate reductions and still be able to pay all the claims it faces. Obviously, this theory was hotly contested by the industry.

2. Future Rate Regulation

California traditionally has relied primarily upon competition to set auto insurance rates. Even though the Insurance Commissioner

36. M. EU, *supra* note 33 at 7, 40.

37. BALLOT PAMPHLET, *supra* note 19, at 98. Proposition 103 amends and repeals various provisions of law. The most important details of Proposition 103 are contained in section 3 which adds Article 10, commencing with section 1861.01, to Chapter 9 of Part 2 of Division 1 of the California Insurance Code.

38. CAL. INS. CODE § 1861.01(a) (West Supp. 1990).

39. *Id.* § 1861.01(b).

has long had the duty to assure that rates were neither excessive nor inadequate (thereby endangering the ability of beneficiaries to be paid their just claims),⁴⁰ this price control authority was rarely used.⁴¹ Under Proposition 103, prior approval of all proposed rate hikes is required, and more substantial increases require a public hearing.⁴² In short, even though the hundreds of property and casualty insurers doing business in California at the time Proposition 103 was passed⁴³ contended that vigorous competition had yielded relatively lower prices, making auto insurance an unprofitable line for many carriers, the initiative adopted the public utility price regulation approach traditionally used for rate regulation of private gas and electric companies.⁴⁴ The objective of Proposition 103's rate regulation was to protect policy holders from unjustified price increases imposed by an industry that is specially exempted from the reach of the federal antitrust laws⁴⁵ and which, at least in some lines and among some companies, broadly shares cost-relevant actuarial information.

3. Pricing Criteria

Proposition 103's drafters adopted a moralistic approach to the way insureds ought to be classified for pricing purposes and broadly rejected the traditional actuarial categories employed by the industry. The initiative requires that in differentiating premium charges among insureds the following factors should be considered: first, the insured's driving safety record; second, the annual number of miles driven; and third, years of driving experience.⁴⁶ Other rating factors may also be used, if approved by the Insurance Commissioner, but their weight must be less than that given to the three enumerated

40. Proposition 103 re-asserts the broad point by providing that rates may not be "excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter." CAL. INS. CODE § 1861.05(a) (West Supp. 1990).

41. Previously, once the Commissioner found an insurance market competitive, the "excessive" rate inquiry ended. Proposition 103, however, provides in this respect that "no consideration shall be given to the degree of competition." CAL. INS. CODE § 1861.05(a) (West Supp. 1990).

42. *Id.* § 1861.05(b)-(c).

43. Reich, *Some Insurers Tell State They Will Give Partial Rate Rollbacks*, L.A. Times, June 6, 1989, § 1, at 3, col. 5.

44. See Gastel, *Rate Regulation*, INSURANCE INFORMATION INSTITUTE (1990). Several other American states, however, employ some form of prior rate approval. *Id.*

45. *Id.*

46. CAL. INS. CODE § 1861.02(a)(1)-(3) (West Supp. 1990).

factors.⁴⁷ Moreover, to reinforce the importance of one's own driving record, insurers are required, in any event, to offer a "good driver discount" of at least twenty percent to those so defined by Proposition 103.⁴⁸

By contrast, before Proposition 103 the insurers largely decided which criteria to employ in classifying their insureds. The factors employed by insurers included where the insured lives, the driver's age, and the driver's sex (especially in the case of younger, unmarried males who paid higher rates).⁴⁹ As for using the insured's driving safety record to set rates, insurers varied in their practices. Some sharply differentiated among those who had and had not been in accidents or convicted of driving offenses; others made only modest price distinctions based on these criteria; and yet others simply refused to insure certain "high risk" drivers.

Proposition 103's backers were particularly opposed to the industry's territorial rating practices, where the insured's place of residence is considered. For example, drivers in Los Angeles and Orange Counties were, relatively speaking, involved in more auto accidents and filed more auto insurance claims with higher average costs per claim therefore leading to higher rates in those areas.⁵⁰ However, many individuals with clean driving records were resentful that they had to pay higher rates just for living in those areas. Because of this resentment, Proposition 103 seeks to substitute both the "good driver discount" and the heavy weight to be given to an individual's driving record in place of territorial rating. This substitution explains why Los Angeles and Orange County residents with good driving records expected that Proposition 103 would result in even greater rate reductions for them than were promised by the general rate rollback promised to all drivers. Conversely, the insurance industry widely advertised in its anti-Proposition 103 campaign that, other things being equal, the elimination or near-elimination of territorial rating threatened very sharp rate increases for less congested areas where auto accident claims were relatively lower. To those concerns, Proposition 103 supporters could respond, however, that even in low claim counties there still would be the rate rollback and the good driver discount and that these cuts should be greater than the increases due to the end of territorial rating.

As for the other criteria mandated by Proposition 103, the required use of annual miles driven and years of driving experience would together probably allow insurers to continue to impose, indi-

47. *Id.* § 1861.02(a)(4).

48. *Id.* § 1861.02(b).

49. See Gastel, *supra* note 44.

50. See, e.g., George, *Someone is Pushing the L.A. Bubble*, L.A. Times, Dec. 7, 1989, § B, at 7, col. 5.

rectly, substantially higher premiums on younger males, who, as a group, have a relatively high accident-involvement history. Yet, once more, the good driver discount would assure that younger males with clean records would benefit from their past safer conduct.

4. "Redlining" and Non-Renewal Problems

A further concern of the backers of Proposition 103 was that in some urban areas, especially where poor and minority people live, auto insurance at standard rates often seemed impossible to buy, even for those with good driving records. This problem is said to be caused by the practice of "redlining." In its narrowest form it occurs when an insurer draws a "red line" around an entire geographic area on a map and simply refuses to sell within that area.⁵¹ Critics now include in this definition practices such as artificially limiting the number of agents who sell in an area, imposing unjustifiably higher underwriting standards for an area, providing poorer insurance service in an area, and arbitrarily imposing higher prices in an area, all of which, the critics claim, largely amount to the same thing as blatant redlining.⁵²

When insurance is unavailable in the regular (voluntary) market, Californians are, generally speaking, legally assured the right to purchase auto insurance through the "assigned risk" plan. Under the California Automobile Assigned Risk Plan ("CAARP") all the insurers doing business in the state must take a share of those drivers.⁵³ Intended for higher risk drivers (who can expect to face difficulties in finding coverage in the voluntary market), CAARP is also where motorists must turn if they are victims of redlining. Notwithstanding CAARP and despite the formal California requirement that owners of all motor vehicles carry liability insurance, a distressingly high proportion—perhaps 25 percent or more—of motorists statewide are uninsured,⁵⁴ and the proportion is considerably higher in many urban neighborhoods—an astounding 86 percent in certain

51. See PUBLIC ADVOCATES, INC., BROKEN PROMISES: THE THIRTY-THIRD INSURANCE COMMISSIONER'S RECORD ON RED-LINING AND MINORITIES (1990), filed in August 1990 with the Commissioner on behalf of, among others, various named minority and consumer groups [hereinafter BROKEN PROMISES]. See Ingram, *Insurance Chief Accused of Shortchanging the Poor*, San Francisco Chronicle, Aug. 28, 1990, § A, at 6, col. 1.

52. BROKEN PROMISES, *supra* note 51.

53. CAL. INS. CODE §§ 11620-11627 (West 1988); see also CAL. CODE OF REGS. tit. 10, §§ 2400-2499.7 (1990).

54. Ingram, *Law Requiring Proof of Auto Insurance to Expire Tomorrow*, San Francisco Chronicle, Dec. 31, 1990, § A, at 7, col. 1.

poor areas of Los Angeles County.⁵⁵ In any event, motorists with clean records in areas who saw themselves as victims of redlining wanted, not merely access to CAARP (which traditionally provided relatively expensive policies), but rather access to affordable policies in the voluntary market. Moreover, there was probably some fear that insurers would react to the loss of territorial rating mandated by Proposition 103 by, in effect, redlining much or all of Los Angeles and Orange Counties, thereby undermining the initiative's central purpose.

Proposition 103 responds to these concerns by requiring all insurers to offer a policy with a good driver discount to any driver meeting the initiative's requirements, whether or not that driver previously has been insured by the insurer.⁵⁶ The idea, in short, is to assure, on the one hand, that motorists with good records will not be dropped by their current carrier and, on the other hand, that good drivers now outside the voluntary market will truly have access to it on fair terms.

B. Elected Insurance Commissioner

Before Proposition 103 passed, the Insurance Commissioner was appointed by the Governor. In keeping with the populist spirit of the initiative, Proposition 103 provides for the future election of the Commissioner, starting with the November 1990 election.⁵⁷

C. Application to Other Property-Casualty Insurance and Other Provisions

Although most of the attention and fuss about Proposition 103 has focused on personal auto insurance, much of it applies to the property-casualty industry generally. Most importantly, this includes the rate rollback and future rate regulation provisions.⁵⁸ Hence, among other things, Proposition 103 intended to boldly impact the pricing of homeowners' insurance and commercial liability insurance (including medical malpractice and product liability insurance). Proposition 103 also contains several other general provisions, including the repeal of the insurance industry's exemption from the state's an-

55. Opatrny, *State's Time Bomb for Drivers*, San Francisco Examiner, Sept. 9, 1990, § B, at 1, col. 6.

56. CAL. INS. CODE § 1861.02(b) (West Supp. 1990).

57. *Id.* § 12900.

58. The findings and declarations section of Proposition 103 (Section 1) refers to property-casualty insurance generally. The rollback and future rate approval provisions of Proposition 103 add to Chapter 9 of Part 2 of Division 1 of the Insurance Code, which applies to property-casualty insurance generally. See BALLOT PAMPHLET, *supra* note 19, at 99.

titrust laws,⁵⁹ the right of banks to enter the insurance business,⁶⁰ the legalization of group auto and homeowner insurance policies,⁶¹ the end of the ban on insurance agents giving rebates to customers out of the agent's commissions,⁶² and the duty of the Insurance Department to provide price and other comparison shopping information to insurance consumers.⁶³

III. THE BROAD LEGAL CHALLENGE TO PROPOSITION 103 AND ITS REVISION BY THE CALIFORNIA SUPREME COURT

It was clear to those who had paid attention during the campaign that the passage of Proposition 103 would only be the beginning of the battle. The incumbent Insurance Commissioner Roxani Gillespie, a former insurance executive who was assigned the job of implementing the law, had earlier "expressed amazement . . . that any sensible person would consider Proposition 103 to be feasible."⁶⁴ And the industry, which had made clear that it would sue to try to invalidate Proposition 103, went to court within hours after its passage.

Two days after the election, the California Supreme Court temporarily suspended the implementation of Proposition 103.⁶⁵ A month later, although it lifted that suspension on most of the initiative, it continued its stay of the implementation of the required twenty percent rate rollback.⁶⁶ Then on May 4, 1989, the court held that provision unconstitutional. However, rather than striking down the entire initiative, the court instead rewrote the relevant legal standard in a way that, it said, would pass constitutional muster.⁶⁷

59. CAL. INS. CODE § 1861.03(a) (West Supp. 1990). This section specifically applies the portions of the Business and Professions Code regarding contracts and restraint of trade to the business of insurance.

60. Section 7 of Proposition 103 repealed California Insurance Code section 1643, which precluded banks from entering the insurance business. See BALLOT PAMPHLET, *supra* note 19, at 141.

61. CAL. INS. CODE § 1861.12 (West Supp. 1990).

62. Section 7 of Proposition 103 repeals Article 5 (commencing with Section 750) of Chapter 1 of Part 2 of Division 1 of the Insurance Code, which provided that insurance companies could not pay rebates to agents and brokers. See BALLOT PAMPHLET, *supra* note 19, at 142.

63. CAL. INS. CODE § 1861.04 (West Supp. 1990).

64. Reich, *Nader Measure on Insurance Stirs Anxiety and Plaudits*, L.A. Times, Sept. 30, 1988, § 1, at 3, col. 4.

65. Sing, *2 Major Car Insurers Lift Ban on New Policies*, L.A. Times, Nov. 11, 1988, § 1, at 3, col. 1.

66. Muir & Reich, *Prop. 103 Ruling Creates Loophole for Rate Hikes*, L.A. Times, Dec. 9, 1988, § 1, at 1, col. 1.

67. See *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). The court also struck down California Insurance Code section

Under Proposition 103, to obtain an exemption from the rate rollback and freeze, insurers were required to prove to the Commissioner that those rolled-back rates “substantially threatened” them with “insolvency.”⁶⁸ The court decided that this was unconstitutionally “confiscatory” and that the insurers were instead entitled to a “fair and reasonable return” on their equity.⁶⁹ In order to protect those constitutional rights, the court concluded that, during what was supposed to be the rate rollback and freeze period, the insurers could actually increase rates from their November 1988 levels, if needed to assure them a fair return. If subsequent review found those rates excessive, however, the insurers would owe policyholders refunds with interest.⁷⁰ Of course, during the period of dispute the insurers would have the extra money and could earn interest on it themselves.

In crafting this compromise, the court was immediately criticized by Professor Stephen Barnett, who pointed out that the initiative, as rewritten by the court, probably would not have received a majority vote from the public, especially given its slim margin of victory in the first place.⁷¹ Although the court’s opinion suggests otherwise,⁷² Barnett is surely right that at least a few percent of the “yes” voters, and likely a rather large share, were critically motivated by the immediate rate cuts promised in the ballot argument and other promotional efforts on behalf of Proposition 103. Nevertheless, the court concluded that with the modifications the measure should otherwise remain in place. Hence, while the industry’s broad challenge failed, it was provided with new weapons.

IV. IMPLEMENTATION BATTLES⁷³

A. Rate Rollbacks and Future Rate Regulation

1. Rate Rollbacks

In the aftermath of the court’s first decision on Proposition 103, the Insurance Commissioner established a procedure which gave insurers a choice. They could either comply with the initiative’s rate rollback and freeze provisions, or they could file an application for

1861.10(c) enacted by Proposition 103, which sought to create a consumer-advocacy corporation.

68. CAL. INS. CODE § 1861.01(b) (West Supp. 1990).

69. *Calfarm*, 48 Cal. 3d at 820, 826, 771 P.2d at 1255, 1259, 258 Cal. Rptr. at 169, 173.

70. *Id.* at 825, 771 P.2d at 1258, 258 Cal. Rptr. at 172-73.

71. Barnett, *Is This The Will of the People? On Prop. 103, Justices Were Good at Politics, Bad at Law*, L.A. Times, May 16, 1989, § 2, at 7, col. 3.

72. *Calfarm*, 48 Cal. 3d at 822, 771 P.2d at 1256, 258 Cal. Rptr. at 170.

73. For a good review of the first year’s activities after passage of Proposition 103, see Reich, *Prop. 103: An Upheaval On Hold*, L.A. Times, Nov. 8, 1989, § A, at 3, col. 2.

an exemption with the Insurance Commissioner's office, claiming an exemption was required to allow a fair rate of return. In June 1989, Commissioner Gillespie announced that more than 400 insurers, including the 15 largest sellers of personal auto insurance, had applied for such exemptions.⁷⁴ A few companies announced price rollbacks, especially on their commercial lines, but these announcements covered a tiny share of the auto insurance market.⁷⁵ Moreover, since rates in commercial lines had been falling anyway in the past two years (in a modest reversal of the enormous price increases of the mid-1980s), some analysts said that the required rollbacks in those lines meant little or nothing.⁷⁶

Implementation at this point required two quite distinct steps. First, the Commissioner had to determine what would constitute a fair rate of return. Second, she would have to apply that standard to the individual insurers in question. On the first step, she initially announced that 11.2 percent would be the permitted rate of return, but later explained that this was only a "tentative" figure.⁷⁷ She then appointed retired Superior Court Judge William J. Fernandez to serve as an administrative law judge to hold hearings to determine whether 11.2 percent, or some other figure, should be adopted. Also at stake in those hearings were issues concerning just what types of income and expenditure items should be considered in calculating return on equity.

At the hearings, the Insurance Department staff talked about a fair rate of return of between 11.2 and 15 percent, depending upon circumstances.⁷⁸ The industry argued for a sixteen to twenty-one percent rate of return.⁷⁹ Consumer representatives became unhappy with the hearings. Among other things, they complained near the end of the hearings that Fernandez was biased against them because his wife worked for a law firm whose business is primarily that of defending insurance companies. The state Attorney General and others demanded Fernandez' ouster, but the Commissioner declined

74. Reich, *443 Insurers Seek Rollback Exemptions: 15 Top Sellers of Auto Coverage Try to Avoid Prop. 103-Mandated Rate Cuts*, L.A. Times, June 27, 1989, § 1, at 3, col. 2.

75. Reich, *Less Than 1% of Drivers Get Premiums Cut*, L.A. Times, July 30, 1989, § 1, at 3, col. 6.

76. *Id.*

77. Reich, *11.2% Insurer Profit Standard Could Rise*, L.A. Times, Aug. 29, 1989, § 1, at 3, col. 5.

78. Reich, *Guidelines Awaited on Insurance Profits*, L.A. Times, Apr. 6, 1990, § A, at 26, col. 1.

79. *Id.*

to remove Fernandez.⁸⁰

Finally, in May 1990 (a year after the Supreme Court's original decision and after months of hearings), Fernandez issued his opinion.⁸¹ Expressing grave doubts on the sensibility of regulating insurance prices in the way that public utilities are regulated, Fernandez nonetheless proposed that for 1988-89 the rate rollback and freeze required by Proposition 103 would be judged against a standard of whether that would leave the insurer with a 13.2 percent return on all of its applicable lines combined. For the future, Fernandez proposed, insurers should be assured rates of return varying line by line from between 11.2 and 19 percent depending on their circumstances. He also recommended that political contributions, lobbying expenses, and charitable contributions should be excluded from allowable expenditures in deciding what was an insurer's rate of return.⁸²

However, when it came time to rule on Fernandez' recommendations, Gillespie returned to her earlier "tentative" position, declaring that for the rollback year insurers would be entitled only to a 11.2 percent return.⁸³ For the future, she generally adopted Fernandez' proposed 11.2 to 19 percent range. However, whereas Fernandez proposed to allow, for example, insurer executive salaries of any amount, Gillespie determined that various expenses would be allowed only up to a specified cap in determining the company's rate of return. Gillespie also announced that a large number of insurance lines, apart from personal auto insurance, would likely be treated specially and not subject to the general rate of return methodology she was adopting.⁸⁴

Taking the next step, the Commissioner called in five insurers for rollback hearings in which individualized determinations would be made as to what rates they required to obtain the rate of return she had decided to permit.⁸⁵ Several insurers quickly sued to try to block those hearings, but after an initial ruling to the contrary the trial

80. Reich, *Gillespie is Prodded to Remove Hearing Judge*, L.A. Times, Apr. 14, 1990, § A, at 19, col. 1.

81. In the Matters of Various Rate Increase Applications and With Respect to Certain Issues Related to the Control, Review and Approval of Insurance Rates Pursuant to Insurance Code Sections 1861.01(a) and 1861.05 and Related Laws, File No. REB-1002 (Ins. Comm'r May 3, 1990) (proposed decision).

82. Reich, *Standard of Insurance Rollbacks Suggested*, L.A. Times, May 8, 1990, § A, at 3, col. 5.

83. In the Matters of Various Rate Increase Applications and With Respect to Certain Issues Related to the Control, Review and Approval of Insurance Rates Pursuant to Insurance Code Sections 1861.01 (a) and 1861.05 and Related Laws. File No. REB-1002, (Ins. Comm'r June 15, 1990) (decision). For the regulations, see CAL. CODE OF REGS. tit. 10, §§ 2534.1-2639.5 (1990) (Review and Rollback of Insurance Rates).

84. Reich, *Gillespie Rebate Action Draws Sharp Criticism*, L.A. Times, June 14, 1990, § A, at 1, col. 2.

85. *Insurance Rollback Hearings Scheduled*, L.A. Times, June 20, 1990, § A, at 18, col. 1.

court judge hearing the case concluded that the insurers would not be able to challenge the Commissioner's position until they had received specific rollback orders.⁸⁶ Thus, the stage was finally set for hearings on the rollbacks.

The first of the rollback hearings was held (involving two insurers) and, as this article was completed, the parties were awaiting the decisions of the administrative law judge, and then the Commissioner.⁸⁷ In any event, it is clear that once any company is actually ordered to rebate money on the ground that their 1988-89 rates provided more than an 11.2 percent rate of return, that order will once more be challenged in court. Hence the prospect of many consumers actually receiving cash back for the 1988-89 year still seems a long way off, and many now doubt that this will ever occur.

2. Future Rate Regulation

As explained above, proposition 103 also included a provision designed to regulate future rate increases.⁸⁸ In October 1989, knowing (despite the November 1989 deadline) that the system for approving future rate increases would be a while in coming, and in the face of an announced rate increase by Farmers Insurance, one of the larger auto insurers in California, Commissioner Gillespie ordered a freeze on all current auto insurance rates. The price freeze was extended in August 1990, and remains in effect as of this writing.⁸⁹

Once Fernandez finally issued his opinion, Gillespie announced her ruling on the procedures and standards that would govern future rate regulation and set that process in motion.⁹⁰ The first of those prior approval hearings was held in September 1990, and it appears that the process and standards are not too burdensome for the insurers.⁹¹

86. *United Services Automobile Ass'n v. Gillespie*, No. JCCP2419, (Cal. Super. Ct., L.A. County 1990); Reich, *Hearings OK'd on Insurance Rate Rollbacks*, L.A. Times, Aug. 1, 1990, § A, at 3, col. 5.

87. Reich, *Prop. 103 Rate Rollback Hearings Begin*, L.A. Times, Sept. 25, 1990, § A, at 24, col. 4.

88. See *supra* text accompanying note 41.

89. Private Passenger Automobile Rating Factors, CAL. CODE OF REGS., tit. 10, ch. 5, subch. 4.6 (amended by Commissioner's order on October 3, 1989) [hereinafter Rating Factors]. For later details, see Reich, *Ban on Auto Rate Hikes to be Extended*, L.A. Times, Aug. 7, 1990, § A, at 19, col. 1.

90. CAL. CODE OF REGS. tit. 10, §§ 2640.1-2648.5 (1990) (Prior Approval of Property and Casualty Insurance Rates).

91. I base this conclusion on telephone interviews of lawyers involved in the process on behalf of the insurers and with Milo Pearson, Department of Insurance (Nov. 19, 1990).

It is unclear, however, whether the resulting rates will be any less than they would have been without the initiative. Although rate increases will probably be approved by Gillespie before she leaves her job at the end of 1990, because consumer groups and the supporters of Proposition 103 boycotted the prior approval hearings, it is possible that they will seek to block in court any rate increases that are granted.

B. Withdrawing from the California Insurance Market

In addition to the broad legal challenge that followed Proposition 103's passage, some insurers announced they would either completely cease doing business in California or at least temporarily not insure any new customers. The announcement by Travelers Corporation⁹² that it was not renewing its auto or homeowners policies led to a second California Supreme Court decision on Proposition 103. In *Travelers Indemnity Co. v. Gillespie*,⁹³ the Commissioner argued that before withdrawing from the state, Travelers would have to find other carriers for the customers that it would not renew. However, at the end of January 1990, by a 4 to 3 vote, the court ruled otherwise, concluding that Proposition 103 does not prevent an insurer from simply discontinuing its California business.⁹⁴ To the contrary, the court noted that the initiative seems to contemplate the withdrawal of insurers and envisions that, if necessary, the Commissioner could create a joint underwriting authority to deal with the problem.⁹⁵

Formal withdrawal is not the only option, however. While *Travelers* was being decided, independent insurance agents and brokers charged that some insurers had cut the commissions they would pay, thereby discouraging agents from making sales, as a more covert method of leaving the California market.⁹⁶ Yet it remains doubtful whether, in the end, any of the major sellers of auto insurance will choose to leave the very large California market regardless of their right to do so.

C. Territorial Rating and Redlining, Individual Non-Renewal and Unwillingness to Sell, and the Assigned Risk Plan

Starting in June 1989, the Commissioner held several hearings on Proposition 103's pricing criteria that were meant largely to elimi-

92. Sing & Reich, *Travelers Defies Prop. 103 with No-Renewal Notices*, L.A. Times, Dec. 10, 1988, § 1, at 1, col. 5.

93. 50 Cal. 3d 82, 785 P.2d 500, 266 Cal. Rptr. 117 (1990).

94. *Id.* at 94, 785 P.2d at 510, 266 Cal. Rptr. at 124; *see also* Hager, *Insurers May Quit State, Court Rules*, L.A. Times, Jan. 30, 1990, § A, at 1, col. 5.

95. *Travelers Indemnity*, 50 Cal. 3d at 94, 785 P.2d at 510, 266 Cal. Rptr. at 124.

96. Reich, *Agents Angered by Insurers' Cut in Commissions*, L.A. Times, Nov. 10, 1989, § A, at 3, col. 5.

nate the use of territory in setting prices. At those hearings, insurers urged the continued use of territory. Notwithstanding the seemingly plain language of the initiative, Gillespie has been very concerned about ordering changes that could sharply increase the rates of many drivers outside of the Los Angeles county area, something she and the Insurance Department staff believe would follow from the simple elimination of territorial rating.⁹⁷ In any event, on the second anniversary of the enactment of Proposition 103, no firm resolution of this issue has occurred.

The Commissioner has been criticized by representatives of poor people in inner cities who claim that the current territorial-based pricing criterion unfairly discriminate against them.⁹⁸ Some have talked of providing public subsidies to poor inner city residents, but given the state's own budget problems, this is probably not politically viable.⁹⁹ Gillespie has talked about explicitly subsidizing low income drivers who are in the assigned risk plan,¹⁰⁰ but this might still leave the cost too high, causing many to continue to go without coverage. Besides, the issue of which other drivers should pay for that subsidy is highly controversial.

Of course, the burden that good drivers outside of the large urban areas would feel from the end of territorial rating could be at least partly relieved by loading up even more of the costs on those that Proposition 103 defines as "bad drivers" — those with two or more recent convictions for "moving violations."¹⁰¹ However, because this group represents a small share of the motorists — the Department of Motor Vehicles estimates that eighty percent of California motorists qualify as "good drivers" under the initiative's definitions¹⁰² — extremely large increases would have to be imposed on the "bad drivers" to have much of an impact on the rates paid by the others.

In the face of this controversy, in December 1989 the Commissioner issued an initial set of emergency regulations announcing new criteria (or rating factors) on which to base auto insurance pricing.

97. Mims, *103's Yield — A Bitter Taste*, SACRAMENTO BUS. J., May 7, 1990, § 1, at 17.

98. Reich, *Prop. 103 Group Offers Its Own Pricing Plan*, L.A. Times, Dec. 1, 1989, § A, at 33, col. 1; Reich, *Delay Expected in Auto Policy Pricing System*, L.A. Times, Nov. 15, 1989, § A, at 3, col. 5.

99. Reich, *Prop. 103's Crux Persists for Gillespie*, L.A. Times, Nov. 19, 1989, § A, at 3, col. 1.

100. *Id.*

101. CAL. INS. CODE § 1861.02(b)(1) (West Supp. 1990).

102. Mims, *supra* note 97.

ing.¹⁰³ They emphasized (as required by Proposition 103) a driver's safety record, annual miles driven, and years of driving experience. The proposed rating factors would also, among other things, eliminate the use of age, sex and marital status, as well as the traditional territorial rating. Yet the regulations would permit, to a limited extent, partial substitutes for the latter such as the locality's population density, traffic density and litigation rates. Nonetheless, it was widely agreed within the industry that the new approach would have led to major rate increases in some areas. To prevent that, the Commissioner's regulations also would impose a cap on premium rate increases that is tied to the consumer price index.

These regulations were challenged, and in May 1990, then Superior Court Judge Miriam Vogel in Los Angeles decided that they were invalid and ordered the Commissioner to draft another plan.¹⁰⁴ In response, the Commissioner both appealed the decision and adopted revised emergency regulations intended to comply with Judge Vogel's order.¹⁰⁵ Those regulations will also likely force a significant change in the rates many motorists face, but probably a considerably smaller change than the Commissioner's initial regulations would have required. Simply put, the regulations issued pursuant to Judge Vogel's order require the insurers to take Proposition 103's mandatory factors into account first, but (in contrast to the Commissioner's initial regulations) they are only to be given the weight to which they are actuarially entitled. After that, the optional factors may be considered and given their proper actuarial weight. The result, apparently, will be to permit territorial differences to play a role, although not as large a role as they traditionally have played.¹⁰⁶

Starting in September 1990, simultaneously with the first prior rate approval hearings, hearings were held on the participating insurers' new rating plans.¹⁰⁷ Those plans are to be measured against the revised emergency regulations. Subsequently, the Commissioner announced hearings that look toward making those revised regula-

103. Rating Factors, *supra* note 89 (emergency regulations as of December 18, 1989). Reich, *Gillespie Curtails Zip Code Pricing on Car Insurance*, L.A. Times, Dec. 6, 1989, § A, at 1, col. 5; *see also* Reich, *Prop. 103 Rules Shed Little Light on Rates*, L.A. Times, Dec. 11, 1989, § B, at 3, col. 6; Reich, *Agency OKs Guidelines for Pricing of Auto Insurance*, L.A. Times, Dec. 16, 1989, § A, at 35, col. 2.

104. Proposition 103 Implementation Cases, No. JCC 002419 (Cal. Super. Ct. 1990) and Order Granting Preliminary Injunction Motions, filed May 18, 1990. Reich, *Insurance Price Plan Struck Down*, L.A. Times, May 5, 1990, § A, at 27, col. 1.

105. For a discussion and chronology, see 90 Cal. Regulatory Notice Reg., 40-Z, at 1484 (Oct. 5, 1990) [hereinafter Cal. Regulatory Notice Reg.].

106. As compared with Gillespie's initial regulations, those issued in response to Judge Vogel's decision also permit the use of age, gender, and marital status in setting rates. *Id.* The newer regulations also do not include the cost of living cap contained in the initial regulations.

107. Initially only three insurers were involved. Telephone interview with Milo Pearson, Department of Insurance (Nov. 19, 1990).

tions permanent, at least while her appeal to reinstate her initial regulations is pending.¹⁰⁸ As of the second anniversary of Proposition 103, it was unclear whether the Commissioner will, in the end, vigorously press her appeal of Judge Vogel's decision on this issue. In any case, the rating factors issue remains unresolved at this writing and could possibly head down a different path once the newly elected Commissioner takes office.¹⁰⁹

Along with the battle over permissible rating factors, two other related fights were going on. In February 1989, CAARP asked for a 112.3 percent increase in rates in the assigned risk plan which was then covering nearly 800,000 drivers. Although an administrative law judge issued a proposed decision granting the increase, the Commissioner rejected this decision and the rate increase.¹¹⁰ The insurers took the matter to court, but as of November 1990, the question of proper rates for CAARP was also undecided.¹¹¹ The Commissioner had ruled that an "interim increase" of eighty-five percent would be allowed.¹¹² In ongoing hearings on the issue, however, CAARP now seeks a rate hike of more than 160 percent.¹¹³

Turning to the other related issue "good drivers" in "redlined" areas are supposed to be buying insurance in the standard market and obtaining price discounts as well.¹¹⁴ However, this practice frequently does not happen. For one thing, it is estimated that more than half of the motorists currently purchasing auto insurance through CAARP qualify as "good drivers."¹¹⁵ There appear to be two related explanations for this situation. First, some motorists have opted into the assigned risk plan because they have found that the

108. See Cal. Regulatory Notice Reg., *supra* note 105; see also Rating Factors, *supra* note 89.

109. For details of the election, see *infra* text accompanying notes 126-27.

110. In the Matter of the Rate Increase Application of California Automobile Assigned Risk Plan, File No. REB-1001 (Ins. Comm'r Dec. 1989) (decisions of administrative law judge and the Commissioner).

111. For later developments, see Reich, *Assigned-Risk Rates Must Rise, Judge Tells Gillespie*, L.A. Times, Apr. 21, 1990, § A, at 24, col. 1. See also *Allstate Ins. Co. v. Gillespie*, No. C744670 (Cal. Super. Ct. Dec. 19, 1989) (statement of decision, preliminary injunction, and peremptory writ of mandate); *CAARP v. Gillespie*, No. C755745 (Cal. Super. Ct. Apr. 20, 1990) (statement of decision); *CAARP v. Gillespie*, No. C755745 (Cal. Super. Ct. Apr. 27, 1990) (judgment on petition for writ of administrative mandamus).

112. In the Matter of the Rates of the California Automobile Assigned Risk Plan, (Ins. Comm'r Sept. 18, 1990) (interim order setting rates); Reich, *Assigned Risk Rates to Rise Average of 85%*, L.A. Times, Sept. 20, 1990, § A, at 1, col. 2.

113. Reich, *supra* note 112.

114. See *supra* text accompanying notes 51-56.

115. Mims, *supra* note 97.

rates offered there are actually less than the rates available to them in the voluntary market (because the assigned risk rates are currently subsidized and the traditional rating factors employed in the standard market remain in place). Second, other good drivers are in the assigned risk plan unhappily and involuntarily, claiming that they qualify for lower rates in the standard market but cannot find an insurer to sell them a regular policy notwithstanding the provisions of Proposition 103.¹¹⁶

Finding that the Commissioner had ignored a large number of consumer complaints about violations of the rules relating to CAARP requiring insurers to "serve all comers" (at least those who are good drivers), a trial court judge in San Francisco ordered the Insurance Commissioner to act on the complaints and, where appropriate, to prosecute those companies.¹¹⁷ Although the Commissioner appealed this decision, claiming that the handling of public complaints is a matter for her discretion, in March 1990, she ordered insurers to comply with the "take all good drivers" provision of Proposition 103.¹¹⁸ Yet, it is by no means clear that insurers have been complying with the law's requirement.

The main controversy here has been the terms on which insurers must take those who qualify as "good drivers" under the initiative's definitions. Many insurers have refused coverage in their regular company to some of those drivers and have instead only agreed to provide coverage through a separate company that they use when insuring "substandard risks" (and at higher rates). The insurers claim that this procedure is permissible treatment of those who qualify as "good drivers" under the initiative, but who nonetheless do not meet the normal criteria for coverage with the regular company. Others claim this is not permitted by the initiative. Hence, the issue has been tied up in litigation.¹¹⁹ However, it now appears that at least this problem will be resolved. Under their new rating plans, filed by auto insurers with the Commissioner in September and October 1990, many insurers proposed to cover in their regular company all those who are "good drivers" under the initiative (although some are reserving the right to offer even lower rates to "super" good drivers).¹²⁰ Moreover, this outcome is now legally required of

116. See *supra* text accompanying notes 46-56 for a discussion of the factors that lead to this situation.

117. Reich, *Only Lawyers Winning So Far on Prop. 103*, L.A. Times, Dec. 15, 1989, § A, at 3, col. 2.

118. Reich, *Insurance Firms Accused of Ignoring 'All-Comers' Rule on Selling Policies*, L.A. Times, Mar. 3, 1990, § A, at 29, col. 1.

119. *Id.*

120. Telephone interview with Paul Alexander, Esq., counsel to a major insurer involved in the hearings (Oct. 23, 1990).

the insurers pursuant to the recently passed Assembly Bill 2737.¹²¹

In April 1990, CAARP announced that "good drivers" would no longer be eligible for that plan on the ground that Proposition 103 made it no longer necessary for CAARP to accept those drivers who were supposed to be assured access to a policy and a good driver discount with a regular carrier.¹²² By that point membership in the assigned risk plan had grown to more than 1 million, and more than half of them were still "good drivers" under Proposition 103.¹²³ In the ensuing litigation, Judge Vogel, hoping it would eliminate good drivers from the assigned risk plan, approved a solution that requires those seeking coverage under the assigned risk plan to swear under penalty of perjury that they were denied coverage in the voluntary market.¹²⁴ This practice might also serve to identify companies that simply refuse coverage to good drivers in violation of the initiative. It is unclear how effective this procedure has been. However, the interim eighty-five percent rate increase for the assigned risk plan (described above) is likely to be quite effective because it appears largely to eliminate any financial advantage that good drivers have had in seeking coverage in the assigned risk plan.

D. Other Developments or Lack Thereof

So far, there has been no significant entry by banks into the insurance market although some may be selling annuities.¹²⁵ Nor has there developed a practice of having agents rebate a share of their commissions to consumers, which is permitted by Proposition 103. Nor, apparently, have group insurance plans developed in new fields as contemplated by Proposition 103.

As noted above, Insurance Commissioner Gillespie, a Republican, decided not to run for office. The party primary held in the summer of 1990 narrowed the field to a single Democrat and a single Republican who squared off in November 1990. On November 6, 1990 former state Senator John Garamendi, the Democrat, was elected by a comfortable margin.¹²⁶ It is perhaps worth noting that after his se-

121. Lucas, *Deukmejian Signs Butte County Bailout, Good Driver Discount*, San Francisco Chronicle, Sept. 25, 1990, § A, at 9, col. 1.

122. Reich, *Assigned Risk Motorist Policies to be Restricted*, L.A. Times, Apr. 6, 1990, § A, at 3, col. 3; see also Reich, *Gillespie Will Oppose Plan to Limit Assigned Risk Eligibility*, L.A. Times, Apr. 11, 1990, § A, at 3, col. 1.

123. Reich, *Assigned Risk Motorist Policies to be Restricted*, supra note 122.

124. *Gillespie v. CAARP*, No. JCCP2419 (Cal. Super. Ct., L.A. County 1990).

125. L.A. Times, Apr. 9, 1990, § D, at 2, col. 1.

126. Garamendi defeated his opponent by one million votes. See L.A. Times, Nov.

lection as a nominee, Garamendi said that Proposition 103 "needs to be rewritten" and vowed to make the commissioner's office "the nation's best consumer protection agency."¹²⁷

V. ALTERNATIVES

A. *Voter Revolt Again?*

Dismayed by the slow pace of implementation of Proposition 103, in late 1989 Voter Revolt announced that it would try to put a new initiative on the November 1990 ballot.¹²⁸ This proposal would have created a state monopoly to take over the auto insurance field if by September 1991, either rates had not been reduced to twenty percent below November 1987 levels (as Proposition 103 had originally promised) or more than fifteen percent of the state's motorists were uninsured. This plan, said to be based in part on experience in British Columbia, failed to obtain sufficient signatures in the required period to be placed on the ballot. In July 1990, Voter Revolt proclaimed that it would make a second try, which, if successful, would have placed the new initiative on the June 1992 ballot; but later it conceded that this effort also failed.¹²⁹ Given what must be growing public disenchantment with the failure of Proposition 103 to achieve its objectives, perhaps Voter Revolt has lost some of its credibility with the voters.

B. *Auto No-Fault Again?*

Many have concluded that if the price of auto insurance is to come down, it will require a reduction in the underlying costs of the tort-liability insurance system. They believe that simply commanding price reductions, as Proposition 103 did, just will not work, especially now that the California Supreme Court has decided that the insurers are entitled to a fair return on their capital. It has long been clear that, in the right form, an auto no-fault plan can take costs out of the system and thereby pave the way to lower insurance rates.¹³⁰ Therefore, despite the resounding defeat by the voters of Proposition 104 (the insurance industry's no-fault proposal), some have once

8, 1990, § A, at 36, col. 1.

127. Reich & Myers, *A Turn in the Quest for Consumer Relief*, L.A. Times, June 7, 1990, § A, at 3, col. 2.

128. See Reich, *New Insurance Initiative Unveiled*, L.A. Times, Dec. 20, 1989, § A, at 15, col. 1 (article includes an outline of the proposal); see also, Rosenfield, *California's Unfinished Revolution*, L.A. Times, Nov. 8, 1989, § B, at 7, col. 1.

129. For the initial announcement see Reich, *Judge's Action Blocks Car Insurance Rebates*, L.A. Times, July 20, 1990, § A, at 3, col. 4. For the concession, see Reich, *Insurance War Fades, But New Issues Evolving*, L.A. Times, Nov. 25, 1990, § A, at 1, col. 4.

130. COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 16.

more promoted no-fault in the legislature, hoping that the widespread sentiment that something must be done to lower rates will help overcome the opposition of the plaintiffs' lawyers.

Democrat Patrick Johnston, chairperson of the California Assembly's Finance and Insurance Committee, has led this effort ever since the passage of Proposition 103, so far without success. Initially Johnston proposed a generous no-fault plan based on the New York system. In brief, this plan was an improved version of Proposition 104 without special protections for the insurance industry.¹³¹ Although he won the support of leading consumer groups, the bill made little headway in the legislature.

More recently Johnston and Consumer's Union have concentrated their efforts on what has been called a "low-cost no-frills" plan that has also been endorsed by groups representing low income motorists.¹³² Although its sponsors are apparently seeking to shed the "no fault" label, this plan is essentially a modest no-fault scheme — containing moderate first party benefits (less generous than New York's) and eliminating tort claims only in minor injury cases (and hence curtailing victim rights to a lesser degree than New York does). One key argument of the sponsors is that many more California motorists will buy auto insurance if they can acquire this package for \$180 to \$200 a year instead of paying at least \$675 annually for minimum coverage from the assigned risk plan (and with the prospect of much higher costs in the future now that CAARP is poised to increase its rates dramatically). Moreover, Johnston's backers argue that low income people as a class who currently purchase the assigned risk plan policy actually would be better served in terms of protection by the new low-cost no-frills policy.

The plaintiffs' lawyers remain strongly opposed to auto no-fault under any name. Their key supporter is Democratic Assemblyman Willie Brown, the speaker of the Assembly, who is thought by many to be the most politically powerful of all California state legislators.¹³³ As an alternative, Brown first favored a low-cost plan that basically maintains the traditional system. The insurers assert that

131. Shuit, *Panel Approves Insurer-Backed No-Fault Bill*, L.A. Times, Apr. 19, 1989, § 1, at 3, col. 2.

132. Snyder, *Logjam Puts More Uninsured on the Road*, L.A. Times, Aug. 29, 1990, § B, at 7, col. 1; Weintraub, *Car Insurance Bill's Death Is Laid to Brown*, L.A. Times, Jan. 18, 1990, § A, at 3, col. 5; Reich, *Push Starts for No-Frills, No-Fault Car Insurance*, L.A. Times, May 24, 1989, § 1, at 3, col. 5.

133. See Dowie, *The King of Juice*, 11 CALIFORNIA MAGAZINE 77, 85 (1986); Paddock, *A Speaker of Prominence*, 15 STATE LEGISLATURES 22 (1989).

this scheme is simply not financially viable and the Governor has sided with them, vetoing the version that the legislature passed in the fall of 1989.¹³⁴ In 1990, Brown's aides were back with a modified plan.¹³⁵ At an annual cost variously estimated at between \$180 and \$425 a year, good drivers of all income levels could obtain \$15,000 of liability insurance protection for bodily injury (\$30,000 if two or more people were hurt in the same accident) plus \$5000 in liability insurance for property damage. However, the coverage would only apply to economic losses and not to pain and suffering. The tort system would remain in place, but the bill's backers assume that if poorer people purchased the coverage, those they injured would not bother to try to collect more than the insurance provided. At the same time, with the coverage restricted in this way, the price could be lowered to somewhere in the estimated range.

Nonetheless, this proposal has run into criticism. The plaintiffs' lawyers say it is too much like no-fault, the insurers claim it isn't enough no-fault, and Consumer's Union says insurers would have too little incentive to pay deserving claims. Given this opposition, the Governor was also unwilling to lend his support, and the 1990 legislative session ended with no action taken.¹³⁶

C. *Elective No-Fault?*

Professor Jeffrey O'Connell, an early advocate of auto no-fault plans in the United States, has recently proposed a different approach to the auto insurance problem.¹³⁷ Rather than trying to have the legislature adopt a no-fault scheme, the decision should be left to individual motorists. In O'Connell's view, the "elective" no-fault idea has several virtues. First, it sidesteps the political process; the choice to stay with the fault system or shift to no-fault is made in the quiet of the insurance agent's office. Second, it is harder for the plaintiffs' attorneys to oppose; it merely gives consumers a choice. Third, the choice would be exclusive, thus preventing the undesirable outcome that has occurred in many American states in which modest no-fault has been layered in on top of the traditional system.

134. *California Speaker, Governor, Target Auto Reform*, Nat'l Underwriter—Prop. & Casualty, May 7, 1990, at 1 [hereinafter *Auto Reform*].

135. Weintraub, *Accord May Be Near on Good Driver Policy*, L.A. Times, May 23, 1990, § A, at 1, col. 3.

136. *Senate Panel Turns Down Low-Cost Insurance Plan*, United Press International (June 28, 1990) (available on NEXIS). The day after his election incoming Commissioner Giramendi said he wanted to "move away from the focus on no-fault." Reich, *California Elections: Insurance Commissioner*, L.A. Times, Nov. 8, 1990, § A, at 36, col. 1.

137. O'Connell, *No-Fault Auto Insurance: Back By Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993 (1989); O'Connell & Joost, *Giving Motorists A Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986).

Under the elective no-fault scheme, in a two car accident involving two no-fault-electing drivers, both would claim from their own insurers for out-of-pocket economic losses (medical expenses, lost income and the like) on a no-fault basis. In a two car accident involving two fault-electing drivers, they would be able to sue and be sued by each other just as today. In accidents involving fault-electing and no-fault-electing drivers, there would be no lawsuit. No-fault-electing drivers would turn to their no-fault insurers. Fault-electing drivers would turn to a special new clause in their own insurance policies that O'Connell calls "connector" coverage. This connector coverage is very much like the uninsured motorist coverage that most California motorists with insurance already carry. Under this coverage, fault-electing drivers may recover tort-based damages (including pain and suffering) from their own insurers, but only if the other (no-fault-electing) driver was at fault.

While it imposes an extra insurance cost on the fault-electing driver, that driver also saves money because he cannot be sued when he carelessly injures someone electing the no-fault scheme. If it all works out as intended, the result would probably be thought quite fair by most people, and O'Connell has suggested some clever techniques to deal with the claims of potential unfairness that have been raised. He anticipates that, over time, nearly all would choose the no-fault option — not only because it would be cheaper, but also because they would come to believe, as he does, that it provides better protection, even though it would not permit recovery for pain and suffering even in serious injury cases.

Although an elective no-fault bill has been introduced in the California legislature, so far it has won few supporters.¹³⁸ There was a test of the elective no-fault idea in November 1990 in Arizona where an elective no-fault plan was put on the ballot through the initiative process. However, it was badly defeated.¹³⁹ Whether this solution could become politically viable in California remains to be seen.

D. A New Idea

I have recently made an alternative proposal¹⁴⁰ that is in the spirit of Proposition 103 because it would slash auto insurance costs and

138. *Auto Reform*, *supra* note 134.

139. For background, see Gastel, *No-Fault Auto Insurance*, Insurance Information Institute (1990) (available on NEXIS). The Arizona no-fault initiative was voted down by 85% of the voters. See USA Today, Nov. 8, 1990, at 6A.

140. Sugarman, *Foreword: Choosing Among Systems of Auto Insurance for Per-*

because people would be charged according to their miles driven, their driving experience, and their driving conduct. Unlike Proposition 103, this plan would both sharply reduce the underlying costs of the system and, for a very large number of drivers, substantially broaden their coverage in case they are in an auto accident. Moreover, it would essentially solve the problem of uninsured motorists. Whether it could obtain substantial legislative support is another matter, however, because it would do away with lawsuits among motorists, and it would radically change the role played by auto insurers.

Instead of filing lawsuits, auto accident victims would file claims with a newly created public Auto Accident Compensation Corporation ("AACC"). The AACC would compensate auto accident victims after obtaining its revenues from the motoring public in new ways. The AACC's first revenue source would come from an increase in the state gasoline tax. This approach generally makes those who drive more pay more. (At the same time, this gives a deserved reward to those with fuel-efficient cars.) Second, car registration and driving license fees would be increased, and those fees would be adjusted to reflect both past driving conduct and the likelihood that the driver would be in an accident in the future. For example, new drivers and those with traffic citations would be asked to pay more. Third, there would be a tax on new car sales that varied to reflect the accident history of the model in question. This would reward manufacturers and consumers of safer cars. Because these funding sources would be difficult to avoid, the uninsured motorist problem would largely disappear.

Although motorists would face new costs, they would no longer have to buy auto liability insurance covering bodily injury because they could not be sued for injuring others, nor would they have to purchase uninsured motorist insurance because they could claim from the AACC. The savings achieved by motorists who are currently insured should far exceed the new expenses they would face. The most important reason for this is that there would be enormous administrative savings from this plan. Think of the reductions in auto insurance advertising expense, in commissions for insurance agents and brokers, and, most significantly, in lawyers' fees. In addition, there would be many new contributors because those who now fail to purchase insurance would be brought into the scheme, making it not only cheaper for everyone else, but also fairer.

Moreover, if, as in Michigan,¹⁴¹ lawsuits were no longer permitted

sonal Injury, 26 SAN DIEGO L. REV. 977 (1989); see also Sugarman, *How To Slash Car Insurance Costs*, Sacramento Bee, Apr. 1, 1990, Forum, at 1, col. 1.

141. For Michigan details, see Conard, *Coup de Grace for Personal Injury Torts?*, 88 MICH. L. REV. 1557, 1567 n.42 (1990).

for property damage to cars, most people could dispense with separate auto insurance altogether. They would no longer need liability protection for damaging other cars. What protection they needed could easily be built into homeowner's (and renter's) insurance that most people carry. More specifically, people would insure their own cars from damage in the same policy in which they insure their house, their furniture and their other possessions; and to the extent they would remain liable for damage to property other than autos, this exposure could easily be covered by the general liability provision of homeowner's (and renter's) insurance that now protects them from lawsuits for slips and falls on their property and the like. Of course, those without homeowner's (or renter's) insurance could continue to buy a relatively inexpensive, stripped-down, auto policy covering both damage to their own car and non-auto property damage that they might negligently impose on others.

Returning to the AACC, under my proposal auto accident victims would be able to recover all reasonably incurred and otherwise not reimbursed medical expense of up to \$500,000 per person. The AACC would also cover unreimbursed income losses (in both disability and death cases) of up to \$4000 a month (which is more than what 90 percent of Californians earn) for so long as necessary. The AACC would also pay for other reasonably incurred expenditures for rehabilitation, replacement services and the like. It would even be possible to pay moderate sums (up to, say, \$50,000) for pain and suffering to those auto accident victims who suffer a serious disfigurement, a substantial permanent impairment, or who are prevented by the accident from returning to their normal activities for more than three months.

Claimants would recover regardless of who caused their injury, although there would be an exclusion for intentionally self-inflicted injuries and, if this were desired, for an alcohol- or drug-impaired driver whose impairment causes the injury. Unlike the current system, victims would not be blocked from recovery because the other driver was uninsured or could not be proved to be at fault in causing the accident. Those individuals wanting more protection could, of course, purchase it in the private market. Most high earners, however, want greater income loss protection for more than just auto accidents and would purchase instead, as many already do, general disability insurance protection.

There is, of course, some danger that as a public organization the AACC would become politicized or inefficient. However, with care-

ful planning these risks could be minimized. Moreover, to avoid the hiring of state employees to process claims, the AACC could be directed to draw upon the expertise of the private sector by contracting out to insurance companies the claims administration function.¹⁴²

CONCLUSION

Proposition 103 could wind up leaving Californians with little more than a larger bureaucracy in the Department of Insurance. Under this scenario: (1) no significant rate rollbacks occur because most insurers will be able to demonstrate that their rates for 1988-89 did not yield a rate of return above the permitted level; (2) future rate increases will be little different from what they would have been without Proposition 103 because of the 11.2 to 19 percent rates of return that are to be allowed;¹⁴³ (3) one way or another, territorial rating, or some close proxy for it, will remain a key variable in the pricing of auto insurance; and (4) although good drivers may be assured access to policies with standard rates, those rates will be sufficiently high that no significant dent will be made in the number of California motorists without insurance. Indeed, with large price increases in the assigned risk plan, there may well be a sharp upturn in the number of motorists without liability insurance in California, especially because the portion of the mandatory insurance law which requires drivers stopped for traffic violations to show proof of insurance expires at the start of 1991.¹⁴⁴

Yet, even if Proposition 103 ultimately fails to achieve its proponents' goals, perhaps there is now sufficient pressure to contain insurance prices that new legislation (or possibly yet another initiative) will make more fundamental changes of the sort just described in the underlying structure of tort law, the property-casualty industry, or both.

142. There are several plan details still to be worked out, including, for example, the corporate structure and method of selection of directors of the AACC and a mechanism for dealing with the legal liabilities of California motorists who drive in other states.

143. To be sure, because of the Commissioner's auto insurance rate freeze, consumers have enjoyed stable premiums for the first two years since Proposition 103's enactment. This appears to be the initiative's main achievement for consumers. Whether the freeze has also meant, for example, worse service from agents and more aggressive resisting of claims is unclear — but it would not be a surprising result assuming that the freeze has kept rates below market levels. *See, e.g.,* Sugarman, *Why Proposition 103 Will Fail*, San Diego Union, May 14, 1989, § C, at 1, col. 1.

144. For discussions of the potential impact, *see* Ingram, *supra* note 54, and Opatrny, *supra* note 55.