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# New York No-Fault Automobile Insurance Work Loss Benefit Computation — A Comparative Analysis

## I. Introduction

Each year automobile accidents are responsible for a large number of personal injuries.<sup>1</sup> As a result, many injured victims are unable to work and, therefore, lose their income.<sup>2</sup> To address this problem, New York enacted section 671(1)(b)<sup>3</sup> in 1974 as part of the New York Comprehensive Automobile Insurance Reparations Act.<sup>4</sup> This so-called "work loss" provision was intended to compensate victims for the actual loss of earnings caused by disabilities resulting from automobile accidents, without providing victims with a windfall or requiring extensive judicial intermediation.<sup>5</sup>

The New York work loss law is one of the most comprehensive of the twenty-four work loss laws.<sup>6</sup> However, since the New York no-fault system is compulsory<sup>7</sup> and, as such, a condition

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1. See STATE OF NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 3, 4 (1970) [hereinafter cited as REPORT TO GOVERNOR].

2. J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 143-44 (1971). Forty cents of every dollar of compensation stemming from an automobile accident is paid to compensate for lost income. *Id.*

3. N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984). See also *State Farm Mut. Auto. Ins. Co. v. Brooks*, 78 A.D.2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981) (discussing the purpose of the work loss law).

4. Comprehensive Automobile Insurance Reparations Act, ch. 13, 1973 N.Y. Laws 10 (codified as amended at N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1983-1984)).

5. See *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980); see also *State Farm Mut. Auto. Ins. Co. v. Brooks*, 101 Misc. 2d 704, 421 N.Y.S.2d 1010 (Sup. Ct. Monroe County 1979) *rev'd on other grounds*, 78 A.D.2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981).

6. For a list of the 24 state laws, see *infra* note 58.

7. The Motor Vehicle Financial Security Act of 1956, N.Y. VEH. & TRAF. LAW §§ 310-321 (McKinney 1970 & Supp. 1983) supplemented existing legislation, namely the Motor Vehicle Safety Responsibility Act of 1941 N.Y. VEH. & TRAF. LAW §§ 330-368 (McKinney 1970 & Supp. 1983-1984). Section 312 conditions registration of a motor vehicle upon proof of financial security by insurance, bond or deposit of security. In some states such as Virginia and South Dakota, no-fault insurance is not mandatory; a motorist may "add-on" no-fault protection to other liability coverage. Thus, in these states a

precedent to the registration of a motor vehicle,<sup>8</sup> damage awards must be carefully scrutinized. Excessive awards inevitably result in higher premiums, which create a hardship for motorists who are required to purchase such insurance.<sup>9</sup> Alternatively, if damage awards are too small, victims are left without a source from which they may be adequately compensated for their loss.<sup>10</sup>

This Comment recommends changing the New York work loss law in order to accommodate more fully the conflicting no-fault statutory goals of cost efficiency and maximum insurance protection.<sup>11</sup> Part II traces the development of New York's automobile insurance law, including the original formulation of the New York no-fault law and its current work loss provisions. Part III examines how work loss is defined. It describes how no-fault states compute work loss benefits for unemployed, self-employed, and seasonally employed claimants. Each subsection isolates the New York approach to the particular issue, and then evaluates the alternative work loss theories presented in judicial interpretations and New York arbitration decisions. Part IV considers offsets to and deductions from work loss recoveries, focusing on taxation, workers' compensation, and employer-provided wage continuation plans. Part V presents the conflicting theories regarding modifying work loss awards in light of changed circumstances. Finally, Part VI concludes that the New York work loss law is in need of amendment to achieve the no-fault goals of providing an efficient and fair means of compensating auto accident victims.

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victim's right to sue a tortfeasor remains intact. Alternatively, many states, including New York, have compulsory or mandatory no-fault insurance; in these states a victim is restricted in bringing a tort action until damages exceed a certain level or injuries reach a specified degree of severity. See King, *State No-Fault Systems — Attorney's Guide to Statutory Provisions*, 4 PACE L. REV. 297 (1984); Note, *No-Fault Automobile Insurance: An Analysis of the Kansas Automobile Injury Reparations Act*, 20 WASHBURN L.J. 375, 380-82 (1981) [hereinafter cited as *Kansas No-Fault*]. See generally W. ROKES, *NO-FAULT INSURANCE* 127-36 (1971) (discusses "pure" no fault in which all tort liability would be abolished).

8. See King, *supra* note 7, at 354-55.

9. Kurcsics, 49 N.Y.2d at 457, 403 N.E.2d at 162, 426 N.Y.S.2d at 457.

10. See *infra* notes 23-41, 102, and accompanying text.

11. Kurcsics, 49 N.Y.2d at 457, 403 N.E.2d at 162, 426 N.Y.S.2d at 457.

## II. New York's Move from Fault to No-Fault

Before the enactment of no-fault automobile insurance in 1973,<sup>12</sup> New York adhered to the traditional tort liability theory which predicated recovery on fault.<sup>13</sup> Under the traditional theory, a victim had to prove that the alleged tortfeasor was negligent<sup>14</sup> and that he, the victim, was free from contributory negligence.<sup>15</sup> The original purpose of a fault system is to make the wrongdoer pay for his wrongdoings, and thereby shift the loss away from innocent victims.<sup>16</sup>

To guard against liability under the fault system, drivers purchased indemnity insurance.<sup>17</sup> Insurers acted only as indemnifiers. Thus, the insurers' liability arose only when an insured actually paid a judgment.<sup>18</sup> Indemnity insurers were often relieved of liability when a negligent insured was too poor to pay a judgment. Consequently, many victims did not benefit from this kind of insurance.<sup>19</sup> In response to this inequity, many states amended their laws to transform indemnity insurance into liability insurance, which enabled the victim to collect benefits regardless of whether the negligent insured actually paid the judgment.<sup>20</sup>

Before liability insurance was made compulsory, many victims were left without recompense for losses sustained in automobile accidents.<sup>21</sup> This prompted New York to enact financial responsibility laws.<sup>22</sup> These laws forbade drivers who had been in an accident from driving again until they could show that they had adequate insurance coverage to protect potential vic-

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12. Comprehensive Automobile Insurance Reparations Act, ch. 13, 1973 N.Y. Laws 10 (codified as amended at N.Y. INS. LAWS §§ 670-678 (McKinney Supp. 1983-1984)).

13. REPORT TO GOVERNOR, *supra* note 1, at 44.

14. The plaintiff must prove that (1) the defendant had a duty to conform to certain standards of conduct, (2) the defendant failed to conform to the standards required, (3) there was a causal connection between the conduct and the resulting injury, and (4) there was an actual loss or damage to the plaintiff. W. PROSSER, LAW OF TORTS 143 (4th ed. 1971).

15. *Id.* at 416-27.

16. REPORT TO GOVERNOR, *supra* note 1, at 44-45.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 45.

21. *Id.* at 46.

22. *Id.*

tims.<sup>23</sup> These financial security laws did not protect victims who were involved in accidents with drivers who had not yet had an accident.<sup>24</sup> In response to this gap in protection, New York became one of the first states to make liability insurance compulsory in 1960.<sup>25</sup>

Compulsory liability insurance was not a talisman, and the system remained flawed with gaps in insurance protection, which resulted in continued hardship to many victims of automobile accidents.<sup>26</sup> Often minor injuries were overcompensated and serious injuries were undercompensated.<sup>27</sup> In addition, the fault reparation system placed an inordinate strain on New York's judicial resources.<sup>28</sup>

Prompted by the growing inequity and complexity of the "fault" system, and after much debate,<sup>29</sup> New York became the fourteenth state to adopt no-fault legislation.<sup>30</sup> Governor Rocke-

23. *Id.*

24. *Id.*

25. *Id.* See also N.Y. VEH. & TRAF. LAW §§ 309-321 (McKinney 1970 & Supp. 1983-1984). The legislative purpose is defined as follows:

Declaration of purpose. The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts, so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them. The legislature finds and declares that the public interest can best be served in satisfying the insurance requirements of this article by private enterprise operating in a competitive market to provide proof of financial security through the methods prescribed herein.

*Id.* § 310(2) (McKinney 1970).

26. For instance, if an out-of-state uninsured motorist causes an accident in New York State, the injured party might be left without recompense. See REPORT TO GOVERNOR *supra* note 1, at 46-47.

27. *Id.* at 27. See also O'Connell, *Auto Insurance Reform — The Reasons Why*, in FAULT OR NO-FAULT, PROCEEDINGS OF A NATIONAL CONFERENCE ON AUTOMOBILE INSURANCE REFORM 2 (1970).

28. REPORT TO GOVERNOR *supra* note 1, at 19-24.

29. See *Montgomery v. Daniels*, 38 N.Y.2d 41, 49-53, 340 N.E.2d 444, 448-51, 378 N.Y.S.2d 1, 7-11 (1975); see also Special Comm. on Auto. Ins. Legis., *Automobile No-Fault Insurance*, A.B.A., Feb. 1978, at 1-19 (discussing no-fault issues).

30. Thirteen other states had some kind of no-fault law prior to the effective date of the New York law. Connecticut (effective Jan. 1973); Delaware (effective Jan. 1972); Florida (effective Jan. 1972); Kansas (effective Jan. 1974); Maryland (effective Jan. 1973); Massachusetts (effective Jan. 1971); Michigan (effective Oct. 1973); New Jersey (effective Jan. 1973); Oregon (effective Jan. 1972); South Dakota (effective Jan. 1972); Texas (effective Aug. 1973); Utah (effective Jan. 1974); Virginia (effective July 1972).

feller commented that the new system would ensure that every automobile accident victim would receive compensation for substantially all his economic loss, promptly and without regard to fault.<sup>31</sup> He further maintained that the law would eliminate the vast majority of automobile accident lawsuits and would provide premium savings to New York's motorists.<sup>32</sup>

The New York plan is a two-prong modification of the prior system.<sup>33</sup> The first prong requires every owner of a motor vehicle to purchase insurance protection against "basic economic loss,"<sup>34</sup> which is refunded by the insurer without regard to fault.<sup>35</sup> The second prong imposes a limit on tort recoveries<sup>36</sup> by proscribing duplicate tort compensation for "basic economic loss"<sup>37</sup> and by

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31. Governor's Memoranda, Approval of Bills, 1973 N.Y. Laws 2335 (in support of Comprehensive Automobile Insurance Reparations Act, ch. 13, 1973 N.Y. Laws 10 (codified as amended at N.Y. Ins. LAW §§ 670-678 (McKinney Supp. 1983-1984))).

32. *Id.*

33. See *Montgomery*, 38 N.Y.2d at 46-48, 340 N.E.2d at 446-47, 378 N.Y.S.2d at 4-6.

34. The "work loss" provision, together with provisions for medical expenses and miscellaneous out-of-pocket expenses, comprise "basic economic loss" which is at the core of the New York no-fault automobile liability insurance recovery. See also N.Y. Ins. LAW § 671(1) (McKinney Supp. 1983-1984):

1. "Basic economic loss" means, up to fifty thousand dollars per person:

(a) all necessary expenses incurred for: (i) medical, hospital, surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical and occupational therapy and rehabilitation; (iii) any non-medical remedial care and treatment rendered in accordance with a religious method of healing recognized by the laws of this state; and, (iv) any other professional health services; all without limitation as to time, provided that within one year after the date of the accident causing the injury it is ascertainable that further expenses may be incurred as a result of the injury;

(b) loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to one thousand dollars per month for not more than three years from the date of the accident causing the injury; and

(c) all other reasonable and necessary expenses incurred up to twenty-five dollars per day for not more than one year from the date of the accident causing the injury.

35. See N.Y. Ins. LAW § 673 (McKinney Supp. 1983-1984); *Montgomery*, 38 N.Y.2d at 46-47, 340 N.E.2d at 446-47, 378 N.Y.S.2d at 4-5. See also Comment, *New York Adopts No Fault: A Summary and Analysis*, 37 ALB. L. REV. 662, 668 (1973).

36. See *Montgomery*, 38 N.Y.2d at 46-47, 340 N.E.2d at 446, 378 N.Y.S.2d at 4-5. See also N.Y. Ins. LAW § 673 (McKinney Supp. 1983-1984) (abolishes tort cause of action for damages compensable by no-fault coverage).

37. Basic economic loss includes medical expense, lost earnings and out-of-pocket expense resulting from an injury caused by an automobile accident. N.Y. Ins. LAW § 671

eliminating damages for non-economic loss<sup>38</sup> unless the victim suffers "serious injury."<sup>39</sup> Consequently, a victim's only source of recompense is a statutorily created direct action against his own insurer. Traditional actions against third parties may be pursued only in cases of "serious injury"<sup>40</sup> or when the economic loss exceeds the monetary thresholds created by the law.<sup>41</sup>

The work loss aspect of New York's two-prong system provides accident victims with the right to recover benefits for lost income directly from their insurer without resort to a third party action.<sup>42</sup> Furthermore, the law provides several restrictions on recoveries in order to fulfill the statutory purpose of providing maximum benefits at a minimum cost.<sup>43</sup>

### *Summary of New York Work Loss Law*

Section 671(1)(b)<sup>44</sup> defines work loss as those lost earnings an injured person would have earned but for the injury, as well as reasonable and necessary expenses incurred by an injured person in obtaining services in lieu of those he would have performed for income.<sup>45</sup> In addition, work loss benefits shall not ex-

(McKinney Supp. 1983-1984).

38. N.Y. INS. LAW § 673 (McKinney Supp. 1983-1984).

39. *Montgomery*, 38 N.Y.2d at 47-48, 340 N.E.2d at 447, 378 N.Y.S.2d at 5-6.

Serious injury includes death and permanent or significant injury. Nonpermanent injury will be a "serious injury" if the injury substantially impairs the victim's normal daily activities for at least 90 of the 180 days immediately following the accident. *Id.*

40. *Id.* See N.Y. INS. LAW § 671(4) (McKinney Supp. 1983-1984).

41. The victim's third party tort action also remains for economic loss in excess of \$50,000, for medical treatment expenses not ascertainable within one year of injury, for out-of-pocket expenses in excess of \$25 per day, and for work loss in excess of \$1000 per month. See *Montgomery*, 38 N.Y.2d at 47, 48, 340 N.E.2d at 447, 378 N.Y.S.2d at 6.

42. N.Y. INS. LAW § 671(2) (McKinney Supp. 1983-1984).

43. *Id.* See also *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 457, 403 N.E.2d 159, 162, 426 N.Y.S.2d 454, 457 (1980) (discussing the legislative purpose for reducing benefits to account for the nontaxability of work loss benefits). See *infra* text accompanying notes 172-75.

44. N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984). Section 671(1)(b) provides no-fault benefits for

loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to one thousand dollars per month for not more than three years from the date of the accident causing the injury.

*Id.*

45. N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984).

ceed \$1000 per month and shall be provided for thirty-six months from the date of the accident causing the injury.<sup>46</sup>

Although section 671(1)(b) limits recoveries to \$1000 per month,<sup>47</sup> this amount need not be prorated if the period of disability is shorter than one month.<sup>48</sup> Losses are paid as they are incurred and are overdue and subject to substantial interest charges if not paid within thirty days after the claimant submits proof of the loss sustained.<sup>49</sup> If it is clear that an injury will persist beyond the three year limit, an insurer has the option of paying the victim a lump sum in full settlement of all work loss claims.<sup>50</sup>

Before an insurer is required to pay benefits to a victim, the insurer is entitled to adjust the benefits to reflect several statutory offsets and deductions.<sup>51</sup> These adjustments can be broken down into three categories: (1) employer paid benefits which include voluntary payments by an employer<sup>52</sup> as well as payments pursuant to certain wage continuation plans provided by the employer;<sup>53</sup> (2) federal taxation, which includes an automatic twenty percent deduction from the victim's aggregate loss of earnings;<sup>54</sup> and (3) government insurance, which includes state and federal workers' compensation and social security disability laws, and New York State disability benefits.<sup>55</sup>

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46. *Id.*

47. *Id.* Because benefits are reduced by 20% to account for the nontaxability of work loss, an actual loss of \$1250 per month would have to be sustained to result in a \$1000 per month recovery. *Kurcsics*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980).

48. N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(x) (1982).

49. N.Y. INS. LAW § 675(1) (McKinney Supp. 1983-1984). The interest rate is two percent per month. *Id.*

50. N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(xii) (1983). The amount payable can be adjusted to the present value of the future benefits by using a six percent discount factor. *Id.*

51. See N.Y. INS. LAW § 671(2) (McKinney Supp. 1983-1984). See *infra* notes 172-75 and accompanying text. An insurer may only adjust benefits to reflect offsets and deductions that are expressly provided by the work loss statute. N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(i) (1982).

52. See N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(i)(b) (1982).

53. N.Y. INS. LAW § 671(1)(c) (McKinney Supp. 1983-1984). See also *infra* notes 215-36 and accompanying text.

54. N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1983-1984). See also *infra* notes 176-90 and accompanying text.

55. N.Y. INS. LAW § 671(2)(b) (McKinney Supp. 1983-1984). See also *infra* notes

After all adjustments have been completed the maximum work loss recovery cannot exceed \$36,000.<sup>56</sup> Although disputes regarding the computation of benefits will generally be resolved through arbitration, the law does provide for judicial review of arbitration determinations.<sup>57</sup>

### III. Work Loss Computation

As with the New York no-fault law, all twenty-three sister states that presently have no-fault laws provide some form of work loss protection.<sup>58</sup> The coverage varies dramatically from state to state.<sup>59</sup> Often similar claimants living in different states do not receive similar benefits.<sup>60</sup> Discrepancies among recoveries may be attributed largely to the differing degree of importance

191-214 and accompanying text.

56. In addition to a monthly \$1000 maximum, work loss benefits are also subject to a \$50,000 overall basic economic loss maximum. N.Y. INS. LAW § 671(1) (McKinney Supp. 1983-1984). Therefore, if a victim incurs substantial medical expenses, it is quite possible that a victim will not recover the full \$36,000 under his no-fault protection. *Id.* Assuming a victim has \$17,000 in medical expenses, but also would otherwise be able to collect the full \$36,000 in work loss, he will be limited to total benefits of only \$50,000. See *Barnhart v. Branch Motor Lines Inc.*, 107 Misc. 2d 47, 53-54, 433 N.Y.S.2d 370, 373 (Sup. Ct. Broome County 1980). Nevertheless, the victim who is unable to receive full compensation for his damages from his no-fault insurance may seek recompense through traditional tort remedies for losses in excess of statutory limits. See *Montgomery*, 38 N.Y.2d at 47-48, 340 N.E.2d at 447, 378 N.Y.S.2d at 5-6 (1975).

57. N.Y. INS. LAW § 675(2) (McKinney Supp. 1983-1984).

58. *Id.* § 671(1)(b); ARK. STAT. ANN. § 66-4014(b) (1980); COLO. REV. STAT. § 10-4-706(1)(d)(I) (1973); CONN. GEN. STAT. ANN. § 38-319(b) (West Supp. 1983); DEL. CODE ANN. tit. 21 § 2118(a)(2)(a)(2) (1979); D.C. CODE ANN. § 35-2104(d) (Supp. 1983); FLA. STAT. ANN. § 627.736(1)(b) (West Supp. 1983); GA. CODE ANN. § 33-34-4(a)(2)(B) (1982); HAWAII REV. STAT. § 294-2(10)(C) (Supp. 1983); KAN. STAT. ANN. § 40-3103(I) (1981); KY. REV. STAT. ANN. § 304.39-020(5)(b) (Bobbs-Merrill 1981); MD. ANN. CODE art. 48A § 538(c)-(e) (1979); MASS. GEN. LAW ANN. ch. 90, § 34A (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 500.3107(b) (1983); MINN. STAT. ANN. § 65B.44(3) (West Supp. 1984); N.J. STAT. ANN. § 39:6A-4(b) (West Supp. 1984-1985); N.D. CENT. CODE § 26-41-03(21) (Supp. 1983); OR. REV. STAT. § 743.805(b) (1981); Law of July 19, 1974, P.L. 489, No. 176 art. II § 1009.205, *repealed by*, Law of Feb. 12, 1984, No. 1984-11, 1984 Pa. Legis. Serv. 50 (Purdon) [hereinafter cited as Pa. Law, *repealed* 1984]; S.C. CODE ANN. § 56-11-110 (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. § 58-23-8(2) (1978); TEX. REV. CIV. STAT. ANN. art. 5.06-3(b) (Vernon 1981); UTAH CODE ANN. § 31-41-6(1)(b)(i) (Supp. 1983); VA. CODE § 38.1-380.2(B) (Supp. 1984).

59. See *King*, *supra* note 7, at 297-403. For example, the benefits provided by the Massachusetts law cannot exceed \$2000 whereas the Michigan law provides for recoveries which approach \$80,000. *Id.* at 336-37, 340.

60. Recovery often will depend on how a particular state law defines work loss. See *infra* notes 63-72 and accompanying text.

placed by lawmakers on compensating individual victims as opposed to maintaining low insurance premiums for the general public.

### A. *The Unemployed Claimant*

Perhaps the most controversial issue in the area of no-fault work loss is the treatment of claims of the unemployed victim.<sup>61</sup> No issue in this area more plainly depicts the crucial compromises legislators must address in shaping no-fault policy. Legislators have to weigh the potential for hardship to individual claimants who may not be covered with the overall cost efficiency of the no-fault system.<sup>62</sup>

#### 1. *Actual vs. Anticipated Loss — A General Overview*

The majority of no-fault states, including New York, tend to define work loss narrowly.<sup>63</sup> These states limit work loss benefits to work related income that "would have" been actually earned but for the disability, or to individuals who *would have actually* been employed but for their injuries.<sup>64</sup> The *actual loss* theory is

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61. See *infra* notes 63-72 and accompanying text.

62. See *Leonard v. Preferred Risk Ins. Co.*, 247 Ga. 574, 277 S.E.2d 675 (1981) (holding it constitutional, in light of the important no-fault goals, to exclude unemployed workers from collecting no-fault work loss benefits); see also *Gambino v. Royal Globe Ins. Co.*, 86 N.J. 100, 105-07, 429 A.2d 1039, 1042-43 (1981) (noting that although the no-fault law was to be applied equitably, the system could not run efficiently if each litigant's claim would involve substantial judicial intermediation); cf. *Minier v. State Farm Mut. Ins. Co.*, 309 Pa. Super. 53, 56, 454 A.2d 1078, 1079 (1982) (noting that Pennsylvania scheme may provide work loss benefits regardless of the reason for claimant's unemployment).

63. There are two forms which the more restrictive work loss statutes take. The first group limits work loss to that income that "would have" been earned but for the accident, by expressly limiting work loss to that income that was "actually" lost. See *COLO. REV. STAT. § 10-4-706(d)(I)* (1973); *D.C. CODE ANN. § 35-2104(d)(1)(A)* (Supp. 1983); *MASS. GEN. LAWS ANN. ch. 90, § 34A* (West Supp. 1984-1985); *MICH. COMP. LAWS § 500.3107(b)* (1983); *N.Y. INS. LAW § 671(1)(b)* (McKinney Supp. 1983-1984).

The second group limits work loss to those victims who were "income producers" or to those victims who would normally be gainfully employed. See *CONN. GEN. STAT. ANN. § 38-319(b)* (West Supp. 1984); *MD. ANN. CODE art. 48A § 539(a)* (1979); *N.D. CENT. CODE § 26-41-03(21)* (Supp. 1983); *N.J. STAT. ANN. § 39:6A-4(b)* (West Supp. 1984-1985); *OR. REV. STAT. § 743.805(c)* (1983); *S.C. CODE ANN. § 56-11-110* (Law. Co-op. Supp. 1981); *TEX. REV. CIV. STAT. ANN. § 506-3(b)* (1981); *VA. CODE § 38.1-380.1(b)* (Supp. 1984).

64. See *infra* notes 73-79 and accompanying text.

predicated on the notion that the no-fault system would become too expensive, inefficient, and unfair if all losses, regardless of how speculative, were compensated through work loss benefits.<sup>65</sup>

Alternatively, a few states have enacted laws that tend to define work loss broadly.<sup>66</sup> These states often recognize claims that establish only that the victim might or could have anticipated earnings but for his or her injury.<sup>67</sup> The *anticipated loss* theory permits the recognition of claims based on probable lost income, as opposed to actual lost income. States adhering to the anticipated loss theory emphasize the importance of an individual victim's recovery instead of the insurance premium burden that must be shouldered by the general public.<sup>68</sup>

Although courts generally do not expressly refer to a specific theory when construing and applying work loss provisions, the cases indicate that these policy considerations underlie court decisions. For instance, many unemployed claimants fare well in states adhering to the anticipated loss theory.<sup>69</sup> Here courts will often find a basis for compensating work loss even when the claimant has no employment history.<sup>70</sup> The rationale is that

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65. See *Struble v. Detroit Auto. Inter-Ins. Exch.*, 86 Mich. App. 245, 272 N.W.2d 617 (1978); *Gambino*, 86 N.J. at 105-07, 429 A.2d at 1041-43; *State Farm Mut. Ins. Co. v. Brooks*, 78 A.D.2d 456, 459, 435 N.Y.S.2d 419, 421-22 (4th Dep't 1979).

66. HAWAII REV. STAT. § 294-2(7)(C) (1976); KAN. STAT. ANN. § 40-3103(b) (1981); Pa. Law, *repealed* 1984, *supra* note 58.

67. See generally *Hudson v. Uwekoolani*, 65 Hawaii 468, 653 P.2d 783 (1982). The estate of an 11 year old boy was entitled to work loss benefits based on his lost "anticipated future earnings" due to impairment to his earning capacity. *Id.* See also *Marryshow v. Nationwide Mut. Ins. Co.*, 306 Pa. Super. 233, 452 A.2d 530 (1982) (claimant without a work history was not denied work loss). Cf. *Struble v. Detroit Auto. Inter-Ins. Exch.*, 86 Mich. App. 245, 272 N.W.2d 617 (1978).

68. See *Marryshow v. Nationwide Mut. Ins. Co.*, 306 Pa. Super. 233, 452 A.2d 530 (1982); *Struble v. Detroit Auto. Inter-Ins. Exch.*, 86 Mich. App. 245, 272 N.W.2d 617 (1978). The most expansive probable income definitions are provided by the pre-October 1, 1984 Pennsylvania statute. That statute includes probable income formulas for claimants who are regularly employed, seasonably employed, and not employed. Pa. Law, *repealed* 1984, *supra* note 58. The Pennsylvania no-fault law has been amended so that the Pennsylvania work loss definition will be much narrower. See 75 PA. CONS. STAT. § 1712(2) (1984).

69. See *Minier v. State Farm Mut. Auto. Ins. Co.*, 309 Pa. Super. 53, 454 A.2d 1078 (1982) (although the victim had retired, the court granted work loss benefits); *Dorsey v. Harleysville Mut. Ins. Co.*, 285 Pa. Super. 124, 126-27, 426 A.2d 1173, 1174 (1981) (allowing unemployed claimant to recover work loss by averaging income earned in three prior nonconsecutive years in which he was last employed).

70. *Marryshow*, 306 Pa. Super. at 237, 452 A.2d at 532 (girl who had never entered

even claimants without a work history might expect employment affording some minimum level of income.<sup>71</sup> In contrast, courts in states that adhere to the actual loss theory will deny the claims of unemployed victims, reasoning that these victims "would have" earned nothing had they not been injured.<sup>72</sup>

## 2. *Actual Loss States*

There are basically two groups of actual loss statutes. Each type of statute produces a similar result — the work loss claims of the unemployed are generally denied. The reasoning relied upon to deny recovery, however, is somewhat different depending on the type of actual loss statute that is being construed.

Laws within the first category of work loss statutes premise recovery on what a claimant "would have" earned. Thus, since such unemployed claimants would have earned nothing had they not been injured, there is no basis from which to ascertain work loss benefits.<sup>73</sup> In these states, courts have indicated that the basis for computing work loss benefits has been deliberately restricted to those losses that can be readily determined in order to expedite and simplify no-fault litigation. By limiting work loss to income that actually would have been earned, awards may be determined easily with a minimum of judicial intermediation.<sup>74</sup>

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work force was granted work loss benefits).

71. *Id.*

72. See *MacDonald v. State Farm Mut. Ins. Co.*, 350 N.W.2d 233, 236 (Mich. 1984). See also *Brooks*, 78 A.D.2d at 459, 435 N.Y.S.2d at 421-22 (The court refused to permit a work loss recovery where it was proven that the claimant would have been unemployed had he not been injured.).

73. See *Hughes v. Nationwide Mut. Ins. Co.*, 98 Misc. 2d 667, 671, 414 N.Y.S.2d 493, 496 (Sup.Ct. Livingston County 1979). In *Hughes*, the claimant was denied work loss because she was unable to establish an actual loss of earnings. Although the victim regularly worked on her husband's farm she did not draw a salary, and there was no apparent direct loss of profits attributable to her inability to work. Consequently, although she may have worked regularly, she would have earned nothing had she not been injured. *Id.* See also *MacDonald*, 350 N.W.2d at 235-36 (The court stated that actual loss did not include loss of earning capacity. Calculating work loss benefits should not become so complex that prompt relief could not be granted).

74. See *Struble*, 86 Mich. App. at 245, 272 N.W.2d at 621-23; *Brooks*, 78 A.D.2d at 459, 435 N.Y.S.2d at 421-22. An unemployed claimant often can prove only that the accident caused an injury which resulted in reduced earning capacity and thus the only way to determine a basis for computing work loss would be by predicting what the victim might have or could have earned. *Brooks*, 78 A.D. at 459, 435 N.Y.S. 2d at 422; cf *Hud-*

The second category of actual loss statutes limits work loss to claimants who were "income producers" at the time of their injury.<sup>75</sup> Here, the emphasis is not on whether an unemployed claimant can establish a reasonable basis for ascertaining work loss, but rather on whether he would have been an income producer during his period of disability.<sup>76</sup>

The contrasting methods used for defining actual loss affect determination of which claimants will be entitled to work loss benefits. An individual who is temporarily unemployed and seeks work loss from a state in the first group may not be able to establish any basis for what he would have earned,<sup>77</sup> whereas a claimant seeking benefits from a state in the second group may find it easier to establish that he is an income producer although temporarily unemployed.<sup>78</sup> Under either approach, however, a firm commitment of future employment will probably be sufficient to establish a work loss claim.<sup>79</sup>

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son, 653 P.2d at 786-87. Consequently, litigation for work loss benefits could become more subjective and complex, which ultimately could recreate many of the evils sought to be avoided by a no-fault system in the first place. See *Struble*, 86 Mich. App. at 245, 272 N.W.2d at 621-23; see also *Gambino*, 86 N.J. at 105-07, 429 A.2d at 1041-42 (reducing judicial intermediation was a central purpose of the New Jersey no-fault insurance scheme).

75. The New Jersey Supreme Court in *Gambino*, 86 N.J. at 109-10, 429 A.2d at 1043-44, defined "income producer" as one whose normal and prevailing way of life includes being gainfully employed in work that generates income. Moreover, as long as one is meaningfully and concretely engaged in, or committed to, an occupational way of life, he will be deemed to be entitled to work loss benefits. In *Gambino*, the claimant Joseph Gambino had owned and operated a taxi company for 16 years. After receiving his insurance broker's license, Gambino sold his taxi business in November 1975 and arranged to begin employment as an insurance broker on January 15, 1976 at a salary of \$1000 a month. On January 13, 1976, Gambino was seriously injured and was unable to resume work for five months. *Id.* at 103, 429 A.2d at 1040. The court held that Gambino was entitled to work loss benefits. The court stated that while work loss does not cover victims whose unemployment is unrelated to their disability, it was intended to be applied equitably. Thus, a claimant who is injured while in a brief interim between jobs will not lose his "occupational status" and will still be considered an income producer. *Id.* at 109-12, 429 A.2d at 1044-45.

76. See *id.* at 109-10, 429 A.2d 1043-44.

77. *MacDonald*, 350 N.W.2d at 236. See also MICH. COMP. LAWS ANN. § 500.3107a.4 (1983). The Michigan law specifically provides for work loss for the temporarily unemployed by expressly creating a basis for calculating work loss benefits.

78. See *supra* note 75.

79. See *id.* See also 4 N.Y. NO-FAULT ARB. REP., NF-670 (1980); *Slocum v. United Pacific Ins. Co.*, 615 S.W.2d 807 (Tex. Civ. App. 1981) (A firm commitment of future employment may be a sufficient basis for granting work loss benefits); American Inter-

### 3. *Anticipated Loss States*

In contrast to the actual loss states, the work loss laws of the anticipated loss states generally do not require that a victim prove either that he is an income producer<sup>80</sup> or that there is a readily ascertainable basis for computing the loss.<sup>81</sup>

Only a few states provide statutory work loss provisions which espouse the anticipated loss theory.<sup>82</sup> Although these statutes provide most claimants with an opportunity to receive work loss benefits, there is an apparent legislative abhorrence toward this liberal approach as evidenced by the drastic revision of the Pennsylvania law.<sup>83</sup>

Until the February 12, 1984 amendment to the Pennsylvania no-fault law,<sup>84</sup> effective October 1, 1984,<sup>85</sup> Pennsylvania had perhaps the most liberal of the work loss laws.<sup>86</sup> For instance, in

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state Ins. Co. v. Revis, 156 Ga. App. 204, 274 S.E.2d 586 (1980) (The court, while recognizing that employment was a prerequisite to recovery, allowed a claimant to recover based on a firm contract of employment that would have covered the disability period.).

80. See *supra* note 75.

81. See *Minier* 309 Pa. Super. at 59, 454 A.2d at 1080 (indicating that even though it was not clear that retiree would have ever returned to gainful employment, this was no basis to deny work loss); see also *Mattia v. Employers Mut. Co.*, 294 Pa. Super. 577, 583, 440 A.2d 616, 619 (1982) (permitting a victim who had recently opened a flower shop to receive work loss benefits even though her business lost money).

82. See HAWAII REV. STAT. § 294-2(7)(C) (1976); KAN. STAT. ANN. § 40-3103(l) (1981); FLA. STAT. ANN. § 627.736(1)(b) (West Supp. 1984).

83. Pa. Law, *repealed* 1984, *supra* note 58.

84. Law of Feb. 12, 1984, No. 1984-11, § 1712(2), 1984 Pa. Legis. Serv. 51 (Purdon).

85. Law of Feb. 12, 1984, No. 1984-12, § 12(g), 1984 Pa. Legis. Serv. 130 (Purdon).

86. Pa. Law, *repealed* 1984, *supra* note 58. The pre-October 1, 1984 version provided comprehensive work loss definitions. It reads in pertinent part as follows:

(a) Regularly employed. — The work loss of a victim whose income prior to the injury was realized in regular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim sustains loss of income during the accrual period.

(b) Seasonably employed. — The work loss of a victim whose income is realized in irregular increments shall be calculated by:

(1) determining his probable weekly income by dividing his probable annual income by the number of weeks he normally works; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, the victim was unable to perform and would have performed work during accrual period but for the injury.

(c) Not employed. — The work loss of a victim who is not employed when the accident resulting in injury occurs shall be calculated by:

*Marryshow v. Nationwide Mutual Insurance Co.*,<sup>87</sup> the Superior Court of Pennsylvania held that the absence of employment history is not a per se basis for precluding the right to work loss compensation.<sup>88</sup> Relying on the pre-October 1, 1984 work loss provision,<sup>89</sup> the court indicated that the injury in question affected the claimant's expectations to realize income and that, in the absence of a basis for calculating work loss benefits, the court would establish one. Thus a full-time college student who had no history of gainful employment, and who was not seeking employment when she was injured, could recover work loss benefits.<sup>90</sup>

Similarly, the Supreme Court of Hawaii noted that, in the absence of proof of a work history, work loss would be paid if the victim suffered impairment of his earning capacity.<sup>91</sup> In so holding, the court stated that benefits would be computed on the basis of lost future anticipated earnings.<sup>92</sup> This case indi-

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(1) determining his probable weekly income by dividing his probable annual income by fifty-two; and

(2) multiplying that quantity by the number of work weeks, or fraction thereof, if any, the victim would reasonably have been expected to realize income during the accrual period.

*Id.*

The post-October 1, 1984 work loss definition includes limited statutory guidance, providing that:

(2) Income loss benefit. — Includes the following:

(i) Eighty percent of actual loss of gross income.

(ii) Reasonable expenses actually incurred for hiring a substitute to perform self-employment services thereby mitigating loss of gross income or for hiring special help thereby enabling a person to work and mitigate loss of gross income. Income loss does not include loss of expected income for any period following the death of an individual or expenses incurred for services performed following the death of an individual. Income loss shall not commence until five working days have been lost after the date of the accident.

Law of Feb. 12, 1984, No. 1984-11, § 1712, 1984 Pa. Legis. Serv. 50 (Purdon).

87. 306 Pa. Super. 233, 452 A.2d 530 (1982).

88. *Id.* at 237-38, 452 A.2d at 532. In *Marryshow*, the victim was a full-time first year college student. She had no history of gainful employment. Fifteen months after the accident, she decided not to go back to school and unsuccessfully sought work. Nationwide, the victim's insurer, maintained that because the victim had no history of employment, she had not suffered any income loss. The court stated that lack of an employment history alone was not a basis for precluding the right to work loss benefits. *Id.*

89. Pa. Law, repealed 1984, *supra* note 58.

90. See *Marryshow*, 306 Pa. Super. at 235-36, 452 A.2d at 530-32.

91. *Hudson*, 653 P.2d at 786.

92. *Id.*

cates that it is quite likely that an unemployed victim in an anticipated loss state will recover work loss based on a loss of expected income, rather than on a loss of actual income.<sup>93</sup> At least in the case of Pennsylvania, this approach was part of the plan that had proved to be an inefficient means to promote insurance reform.<sup>94</sup>

#### 4. *The New York Approach*

The New York law falls within the actual loss category.<sup>95</sup> The drafters included the language "would have earned" as opposed to "could" or "might" have earned. This connotes an intent to limit recovery to the loss actually realized.<sup>96</sup>

In New York State, an unemployed claimant will generally find it difficult to collect work loss benefits. Although in some cases a claimant may receive work loss benefits in excess of his earnings level on the date of his accident,<sup>97</sup> recoveries are predicated on a showing of "demonstrated future earnings reasonably projected."<sup>98</sup> Several cases, however, have emphasized the need to avoid windfall recoveries.<sup>99</sup> Recent New York arbitration decisions indicate that a New York claimant must show at least that he had a firm commitment of future employment to be assured

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93. See *Marryshow*, 306 Pa. Super. at 237-38, 452 A.2d at 532; see also *Hudson*, 653 P.2d at 786; cf. *Morgan v. State Farm Mut. Auto. Ins. Co.*, 5 Kan. App. 135, 140-41, 613 P.2d 684, 689 (1980). In *Morgan*, the victim did not recover work loss; the court held that a claimant needs something more than a mere hope or wish that employment is forthcoming. *Id.*

94. See Gressen, *No-Fault Law Failed to Boost Efficiency*, Pa. L.J., Sept. 28, 1984, at 3, col. 4.

95. See *supra* notes 73-74.

96. *Brooks*, 78 A.D.2d at 459, 435 N.Y.S.2d at 422.

97. N.Y. ADMIN. CODE tit. 11 § 65.15(n)(2)(ii) (1983). See 4 N.Y. NO-FAULT ARB. REP., NF-624 (1980) (claimant injured after accepting job but prior to commencing employment, allowed work loss benefits based on 40 regular and 10 overtime hours per week); see also 4 N.Y. NO-FAULT ARB. REP., NF-691 (1980) (Even though claimant's income actually increased during his disability, arbitrator allowed him to collect work loss benefits because claimant's disability caused him to cut back his hours.). Cf. 8 N.Y. NO-FAULT ARB. REP., NF-1240 (1984) (Claimant may not recover work loss based on speculative increases in salary.).

98. N.Y. ADMIN. CODE tit. 11 § 65.15(n)(2)(ii) (1982).

99. See *Brooks*, 78 A.D.2d at 459, 435 N.Y.S.2d at 422; see also *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426 N.Y.S.2d 454 (1980) (discussing adjustment of benefits to avoid windfall resulting from tax free status of work loss benefits).

of recovery.<sup>100</sup>

### 5. Analysis

Although the majority of no-fault states, including New York, have statutes that restrict the availability of work loss benefits to unemployed claimants,<sup>101</sup> one must question the fairness of laws that cut off this source of reimbursement to potentially worthy claimants.<sup>102</sup> It is clear that the goal of cost efficiency cannot be attained if all claims, regardless of how speculative, are compensated through no-fault work loss provisions.<sup>103</sup> It is not so apparent, however, that an absolute bar to recovery is the only alternative.

A more equitable scheme might combine aspects of Pennsylvania's pre-October 1, 1984 scheme<sup>104</sup> with the more conservative work loss schemes of other states.<sup>105</sup> The pre-October 1, 1984 Pennsylvania law provides express guidance regarding the formulae to calculate a claimant's loss of probable income.<sup>106</sup>

100. See 4 N.Y. NO-FAULT ARB. REP., NF-670 (1980). The arbitrator allowed work loss benefits for a victim whose job was to commence three days after the accident. *Id.* Cf. N.Y. NO-FAULT ARB. REP. NF-636 (1980). The arbitrator denied the claim of the victim who had an offer of a taxi-driving job but who had no hack license and had just recently lost his driver's license. *Id.* See also 5 N.Y. NO-FAULT ARB. REP., NF-806 (1981) *aff'd by master arbitrator*. A construction worker who merely sought work estimates was denied recovery because his claim was too speculative. *Id.* See also *Slocum v. United Pac. Ins. Co.*, 615 S.W.2d 807 (Tex. Civ. App. 1981) (A person should not be denied work loss benefits when he has accepted a firm offer of employment at a definite time for a definite salary); *American Inter. Ins. Co. of Ga. v. Revis*, 156 Ga. App. 204, 274 S.E.2d 586 (Work loss benefits will not be granted unless the claimant proves that he had at least a firm commitment of future employment.). Without a specific commitment, perhaps the only recovery an unemployed New York claimant should expect is an amount equal to any unemployment benefits he otherwise would have received had his injury not rendered him ineligible. N.Y. ADMIN. CODE tit. 11 § 65.15(n)(2)(iv) (1982).

101. See *supra* notes 73-79 and accompanying text.

102. One court questioned the constitutionality of such a provision in which no-fault coverage was required insurance. See *Rybeck v. Rybeck*, 141 N.J. Super. 481, 499-500, 358 A.2d 828, 838 (1976), *appeal dismissed*, 150 N.J. Super. 151, 375 A.2d 269 (1977).

103. See *Gambino*, 86 N.J. at 105-07, 429 A.2d at 1041-42.

104. Pa. Law, *repealed* 1984, *supra* note 58.

105. See *supra* notes 73-79 and accompanying text.

106. The pre-October 1, 1984 law provided:

"Probable annual income" means, absent a showing that it is or would be some other amount, the following:

(A) twelve times the monthly gross income earned by the victim from work in the month preceding the month in which the accident resulting in injury occurs,

Consequently, less judicial intermediation and speculation will be necessary to compute work loss. Furthermore, if an insurer knows the benefits which are likely to be paid out ahead of time, the need to increase premiums dramatically to cover unexpected losses will be reduced.<sup>107</sup> Thus, although insurers will inevitably have to pay out more if a greater number of claimants are permitted to collect work loss benefits, it is also true that if such pay outs are predictable and actuarially quantifiable, insurance premiums should not rise significantly.<sup>108</sup>

Additionally, in order to reduce the potential for windfall recoveries, a work loss statute may provide a cutoff date for payment of work loss benefits.<sup>109</sup> For instance, a law might exclude all victims who have been unemployed for more than one year without good reason.<sup>110</sup> Thus, claimants who cannot provide an adequate reason for their unemployment will presumably suffer no work loss that is attributable to the disability caused by an automobile accident.

If the New York work loss law were amended to encompass the guidelines as well as the limitations noted above, it might better serve the no-fault goals of maximizing coverage and mini-

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or the average annual income earned by the victim from work during the years, not to exceed three, preceding the year in which the accident resulting in injury occurs, whichever is greater, for a victim regularly employed at the time of the accident;

(B) the average annual gross income earned by the victim from work during the years in which he was employed, not to exceed three, preceding the year in which the accident resulting in injury occurs, for a victim seasonally employed or not employed at the time of the accident; or

(C) the average annual gross income of a production or non-supervisory worker in the private nonfarm economy in the state in which the victim is domiciled for the year in which the accident resulting in injury occurs, for a victim who has not previously earned income from work.

Pa. Law, repealed 1984, *supra* note 58.

107. See Keeton & O'Connell, *After the Accident — Traffic Victims and Insurance Reform in PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS* 101-12 (1967) [hereinafter cited as KEETON-O'CONNELL PLAN].

108. See *id.* (which discusses the underwriting advantages of predictable claims, one of which is the insurer's reduced need to increase premiums to provide for unexpected contingencies).

109. Cf. MICH. COMP. LAWS ANN. § 500.3107a (1983). The Michigan law provides work loss benefits to victims who are temporarily unemployed but it does not indicate at what point a claimant's status as temporarily unemployed ceases. *Id.*

110. Reasons might include: actively seeking employment, prior disability, or actively seeking establishment of business.

mizing costs. Broader statutory guidance is necessary to eliminate speculation, reduce the insurer's risk, and lower insurance premiums. The legislature, however, should be very careful to avoid unnecessary limitations to recovery, because in light of the harsh consequences involved in denying New York no-fault claimants a recovery, these claimants might incur significant hardship.

### B. *The Self-Employed Claimant*

The self-employed claimant presents special problems to courts seeking to compute work loss. Although a self-employed worker is not paid on a salaried basis as is an employee, a self-employed person often draws money from his business on a regular basis. Because a self-employed person's drawings are quite similar to wages or salary, it would be unfair to deny work loss benefits based on lost drawings.<sup>111</sup> In many cases, however, it is hard to determine what a victim's drawings would have been, because a self-employed person often may draw income in accordance with business cycles or personal needs. In such a case, his drawings are not readily ascertainable.<sup>112</sup> Furthermore, the problem becomes more complex when self-employed claimants elect not to draw salaries but instead seek work loss benefits based on lost profits.<sup>113</sup>

#### 1. *Jurisdictional Overview — Lost Drawings*

A self-employed person's lost drawings are often regarded as compensable work loss.<sup>114</sup> One reason for this treatment is that many work loss statutes use the phrase "lost income" or "lost earnings." Some courts have reasoned that this language indi-

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111. See *United States Fidelity & Guar. Co. v. Neighbors*, 421 A.2d 888 (Del. 1980). See also *Nationwide Ins. Co. v. Graham*, 451 A.2d 832 (Del. 1982).

112. *Graham*, 451 A.2d at 835. The claimant, who was a self-employed paper distributor, was denied work loss benefits because drawings fluctuated so drastically that the court could not ascertain a basis upon which to make a work loss award. *Id.*

113. See *Young v. Utica Mut. Ins. Co.*, 107 Misc. 2d 417, 435 N.Y.S.2d 220 (Sup. Ct. Allegany County 1980), modified, 86 A.D.2d 764, 448 N.Y.S.2d 83 (4th Dep't 1982).

114. See *Neighbors*, 421 A.2d at 889; see also *Graham*, 451 A.2d at 835; *Mattia v. Employers Mut. Co.*, 284 Pa. Super. 577, 582-84, 440 A.2d 616, 618-19 (1981); HAWAII REV. STAT. § 294-2(7)(b) (1976); MASS. GEN. LAWS ANN. ch. 90 § 34A (West Supp. 1984-1985); KAN. STAT. ANN. § 40-3103(l) (1981).

cates that work loss benefits should not be confined to employees but should be extended to the self-employed.<sup>115</sup> A self-employed worker who is disabled by an automobile accident and, as a result, is deprived of the salary he regularly draws from his business, is no different from an employee who loses his regular paycheck.<sup>116</sup>

Few states provide statutory guidance for lost self-employment income. Although the laws of Hawaii<sup>117</sup> and Kansas<sup>118</sup> attempt to provide formulae for this calculation, they offer little guidance. These laws merely instruct courts to award benefits monthly in an amount equal to the claimant's average annual earnings divided by twelve.<sup>119</sup> This statutory guidance is of little value other than perhaps to direct the court to award equal monthly benefits as opposed to benefits that reflect sporadic annual drawings.<sup>120</sup>

The Delaware Supreme Court in *United States Fidelity & Guaranty Co. v. Neighbors*<sup>121</sup> has provided perhaps the most instructive guidelines for determining work loss based on lost drawings. In *Neighbors*, the victim was the sole proprietor of a gasoline station who drew income periodically.<sup>122</sup> The court, in holding that the victim was entitled to work loss benefits, indicated that drawings were recoverable only to the extent that

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115. See *Neighbors*, 421 A.2d at 889. See also *Graham*, 451 A.2d at 835. Although some drafters of no-fault laws apparently believed there was a need expressly to include lost self-employment income within the definition of work loss, express language would seem to be unnecessary, unless a statute expressly defined work loss as lost wages from employment. See *Neighbors*, 421 A.2d at 889.

116. *Neighbors*, 421 A.2d at 889. Such a loss would probably qualify as income that "would have" been earned. See *supra* notes 73-74 and accompanying text. Similarly, self-employed persons would likely qualify as "income producers." See *supra* notes 75-76 and accompanying text.

117. See HAWAII REV. STAT. § 294-2(7)(B) (1976).

118. KAN. STAT. ANN. § 40-3103(l)(1) (1981).

119. See HAWAII REV. STAT. § 294-2(7)(B) (1976); KAN. STAT. ANN. § 40-3103(l)(1) (1981).

120. See, e.g., KAN. STAT. ANN. § 40-3103(l) (1981). The only guidance provided by the Kansas statute is as follows: "'Monthly earnings' means: (1) In the case of a regularly employed person or a person regularly self-employed, one-twelfth (1/12) of the annual earnings at the time of injury . . . ." *Id.*

121. 421 A.2d 888 (Del. 1980).

122. *Id.* at 889.

they were: (1) drawn on a consistent basis,<sup>123</sup> (2) predictable,<sup>124</sup> and (3) easily calculable without substantial dispute.<sup>125</sup> The court noted that these three factors could be used to establish a "base minimum draw" which, in turn, could be relied on to determine work loss benefits.<sup>126</sup> In essence, the *Neighbors* guidelines permit recovery of lost drawings that are akin to salary and may be computed readily without speculation or broad judicial discretion.

## 2. Jurisdictional Analysis — Lost Business Profits

Although work loss claims based on lost drawings are generally accepted, there is some disagreement regarding whether lost business profits are work loss at all.<sup>127</sup> Lost profits might be regarded as a lost investment rather than lost work income. Further, lost business profits are more speculative, because they are often variable depending on the particular accounting practice employed.<sup>128</sup>

The problems involved in determining the amount of lost profits have prompted at least one court to advocate a wholesale rejection of work loss claims based on lost business profits.<sup>129</sup> On the other hand, the Kansas Court of Appeals in *Bradley v. Aid Insurance Co.*,<sup>130</sup> observed that when lost profits are dependent on personal labor as opposed to capital investment, they are properly considered as lost earnings.<sup>131</sup> The *Bradley* court, guided by the reasoning of the New Jersey Superior Court in *Zyck v. Hartford Insurance Group*,<sup>132</sup> noted that when overhead

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123. *Id.* at 889-90.

124. *Id.*

125. *Id.* at 890.

126. *Id.* Cf. *Graham*, 451 A.2d at 835 (Where income fluctuates widely throughout the year making a base level of earnings unascertainable, the victim will not collect work loss benefits.).

127. *Neighbors*, 421 A.2d at 889-90. Cf. *Hughes*, 98 Misc. 2d at 672, 414 N.Y.S.2d at 497 (Woman who did not draw a regular salary had no right to work loss benefits.).

128. See *Young v. Utica Mut. Ins. Co.*, 107 Misc. 2d 417, 220 N.Y.S.2d 220 (Sup. Ct. Allegany County 1980). See also *Bradley v. Aid Ins. Co.*, 6 Kan. App. 2d 367, 375-77, 629 P.2d 720, 727-28 (1981).

129. See *Neighbors*, 421 A.2d at 889-90.

130. 6 Kan. App. 2d 367, 629 P.2d 720 (1981).

131. *Id.* at 373-74, 629 P.2d at 725-26.

132. 143 N.J. Super. 580, 364 A.2d 32 (1976), *modified*, 150 N.J. Super. 431, 375 A.2d 1232, *cert. denied*, 75 N.J. 521, 384 A.2d 501 (1977).

is low and income is generated by personal endeavors of the insured (as in the case of a real estate salesman) lost profits were properly equated with lost earnings.<sup>133</sup> Moreover, the *Bradley* court indicated that if this *low overhead, high personal labor* test was used, compensating these work loss claims would be in accordance with "the guiding principle of efficiency implicit in a workable no-fault scheme."<sup>134</sup>

Although it did not explicitly define which lost profits are compensable as work loss, the *Bradley* court implied that taxable income may be an inappropriate guide for computing work loss benefits.<sup>135</sup> The court noted that tax accounting practices are designed to minimize income in order to reduce tax liability, and that a victim might be able to demonstrate lost profits by relying on some less conservative but acceptable accounting practice.<sup>136</sup> The *Bradley* decision did not indicate which accounting principles could be relied on in place of the tax accounting principles. Presumably, depreciation, as well as other tax benefits, tends to overshadow the value of a claimant's personal contributions to the income generation of the business. Therefore, a court must use its discretion in valuing the claimant's personal contribution to the income of the enterprise.

### 3. *The New York Approach — Drawings*

The New York statute does not address the issue of lost self-employment income other than to provide for paying the "reasonable and necessary expenses incurred by . . . [victims] . . . in obtaining services in lieu of those that would have been performed for income."<sup>137</sup> The statute does not address the economic loss incurred by a claimant who does not pay someone else to perform his work, but who has in fact lost income because of his disability. In *Hughes v. Nationwide Mutual Insurance Co.*,<sup>138</sup> a New York court indicated that it may be unfair to

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133. *Bradley*, 6 Kan. App. at 374, 629 P.2d at 726.

134. *Id.*

135. *Id.* at 376-77, 629 P.2d at 727.

136. *See id.* The *Bradley* court indicated that determinations based on business profits would be done on a case by case method. Thus, the court would have discretion given a set of particular facts. *Id.*

137. N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984).

138. 98 Misc. 2d 667, 414 N.Y.S.2d 493 (Sup. Ct. Livingston County 1979).

treat self-employed claimants differently from salaried claimants, when both suffer a similar economic loss.<sup>139</sup> Although *Hughes* dealt with lost business profits as work loss, the same argument can be made when the claimant seeks work loss based on lost drawings.

There is no statutory guidance for computing work loss based on lost drawings; however, the Commissioner of New York State's Insurance Department has provided some guidance. The general rule provided by the Commissioner is that work loss only compensates for "demonstrated future earnings reasonably projected."<sup>140</sup> Therefore, a self-employed claimant is likely to collect work loss based on lost drawings as long as drawings are reasonably ascertainable.

#### 4. *The New York Approach — Lost Business Profits*

In *Young v. Utica Mutual Insurance Co.*,<sup>141</sup> the New York Supreme Court applied the *reasonably ascertainable* criteria to cases involving lost business profits.<sup>142</sup> The *Young* decision illustrates how difficult it can be to define reasonable business profits. In *Young*, a self-employed building contractor, who had reported tax losses in each of the two preceding years, sought work loss benefits.<sup>143</sup> The insurer refused Young's claims on the theory that he had not lost either salary or profits and had not incurred any expense in bringing in someone to perform his work.<sup>144</sup>

The *Young* court rejected the insurer's arguments and concluded that a tax loss did not necessarily indicate that the victim did not have ascertainable "lost earnings" within the meaning of New York's work loss law.<sup>145</sup> The court observed that Young had been able to support his family on the earnings from his business during the past two years, even though the business had sustained a tax loss; thus, it would be unfair to deny Young

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139. See *id.* at 672, 414 N.Y.S.2d at 497.

140. N.Y. ADMIN. CODE tit. 11 § 65.15(n)(2)(ii) (1982).

141. 107 Misc. 2d 417, 435 N.Y.S.2d 220 (Sup. Ct. Allegany County 1980), *modified*, 86 A.D.2d 764, 448 N.Y.S.2d 83 (4th Dep't 1982).

142. See *id.* at 423, 435 N.Y.S.2d at 224.

143. *Id.* at 418, 435 N.Y.S.2d at 220.

144. *Id.*

145. *Id.* at 423, 435 N.Y.S.2d at 223.

work loss benefits.<sup>146</sup> The *Young* court concluded that actual self-employment income was not equal to taxable income.<sup>147</sup> Rather, actual self-employment earnings could be calculated by subtracting from gross business revenues the "mandated items of expense incident to the operation of the business."<sup>148</sup> In essence, the court sought to isolate expenses that were essential to the generation of income for a specific year.<sup>149</sup> The court concluded that certain expenses, for example depreciation, were theoretical non-cash expenses and, as such, are not actual expenses of the business.<sup>150</sup> In addition, expenses incurred as a matter of personal choice, such as interest on long-term indebtedness, were not mandated in the operation of a current year's business.<sup>151</sup> These expenses were either deductions taken solely for tax purposes or expenses incurred to perpetuate future business. Thus, such expenses were in fact *earnings* reinvested.<sup>152</sup> Consequently, the *Young* court found that, despite the claimant's tax loss, work loss benefits could be paid in an amount equal to the total of the expenses that were not "mandated."<sup>153</sup>

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146. *Id.* at 420, 435 N.Y.S.2d at 222.

147. *Id.* at 423, 435 N.Y.S.2d at 223-24.

148. *Id.* "Mandated items of expense" include expenses actually incurred and absolutely necessary to generate income within a specific year. *Id.*

149. *Id.* at 422, 435 N.Y.S.2d at 223.

150. *Id.*

151. *Id.*

152. *Id.* The court reasoned that these expenses were incurred, as a matter of personal choice, to prolong the life of the claimant's business, and were not "mandated" to operate the business within a specific year. *Id.* See also 6 N.Y. NO-FAULT ARB. REP., NF-976 (1982) (A self-employed messenger was permitted to recover work loss benefits based on business expenses that had been incurred but that could not have been terminated in order to avoid loss.).

153. *Young*, 107 Misc. 2d at 422, 435 N.Y.S.2d at 223. The calculation was done as follows:

Depreciation	\$3,735.00
Insurance	1,676.00
Interest	769.00
Vehicle Licenses	108.00
Union Dues	81.00
Total	\$6,369.00

*Id.* On appeal, the court modified the lower court award to reflect the 20% statutory offset, in order to account for nontaxability of work loss benefits. *Young v. Utica Mut. Ins. Co.*, 86 A.D.2d 764, 448 N.Y.S.2d 83 (4th Dep't 1982), *modifying* 107 Misc.2d 417, 435 N.Y.S.2d 220 (Sup. Ct. Allegany County 1980). See also *infra* notes 185-90 and accompanying text.

Although the result in *Young* is equitable, it does not provide a predictable and efficient method for compensating self-employed victims. Aside from the obvious potential for inconsistent application of the *Young* court's "mandated expense" analysis,<sup>154</sup> there is no guarantee that this complex computation will consistently lead to recoveries that substantially compensate a victim for his economic loss. Rather, it is likely that the work loss benefits will be based on some arbitrary number, which no more reflects "actual" earnings than any other amount.<sup>155</sup>

To provide for business losses in a way that is consistent with the no-fault goals of efficiency and fairness, New York's work loss law must be amended to provide a predictable method of calculation. The legislature should provide an express statutory scheme for calculating work loss based on business profits. The provision should define actual loss in a way that could be applied quickly and consistently. The legislature could improve upon the *Young* rule by indicating which expenses are to be regarded as mandated expense items.<sup>156</sup> This approach would facilitate the calculation of profits, reduce arbitrariness, and increase predictability in attempts to determine "demonstrated future earnings reasonably projected."<sup>157</sup>

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154. When the lower court adjusts for depreciation, it is impliedly advocating a cash basis accounting system. Alternatively, when it adjusts taxable income by the amount in prepaid expenses, the court is impliedly using an accrual accounting system. See *Young*, 107 Misc. 2d at 421, 435 N.Y.S.2d at 223.

155. See, e.g., 4 N.Y. NO-FAULT ARB. REP., NF-696 (1980). The arbitrator concluded that gross business income was too great an amount to use as a basis for calculating work loss. Additionally, the arbitrator concluded that net income was too small an amount on which to rely. Instead the arbitrator raised net income by multiplying the expenses deducted from gross income by an undisclosed factor. *Id.*

156. Because the *Young* court defined actual loss in terms of matching income and expenses, the accrual method of accounting would be preferable. The accrual method of accounting is predicated on the matching of income and expenses during a specific time period. D. KIESO & J. WEYGANT, INTERMEDIATE ACCOUNTING 34-35 (3d ed. 1980). Furthermore, since the New York scheme already expressly provides compensation to victims who incur expenses in obtaining services in lieu of those the victim would have performed for income, N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984), it should similarly provide for compensation to victims who sustain economic loss even though they chose not to pay another to do their work.

157. N.Y. ADMIN. CODE tit. 11 § 65.15(n)(2)(ii) (1982).

### C. *The Seasonally Employed Claimant*

The seasonally employed claimant has presented unique problems to no-fault lawmakers. Depending on the victim's particular employment arrangement, a court might find a seasonal employee to be temporarily unemployed, and for that reason not entitled to work loss benefits.<sup>158</sup> A further problem is the potential for a windfall when a seasonal employee collects benefits for a period in which he is ordinarily unemployed.<sup>159</sup>

#### 1. *Jurisdictional Overview*

Although at least two state laws expressly provide for the payment of work loss benefits to seasonally employed victims,<sup>160</sup> it is possible that seasonally employed claimants will recover work loss in states where statutes do not so provide, even if they are unemployed at the time of the accident.<sup>161</sup> Clearly, seasonal employment could be regarded as a firm commitment of future employment.<sup>162</sup> Moreover, it is apparent that if the disability persists through a period of seasonal employment, the victim "would have" had earnings but for the accident.<sup>163</sup>

Most work loss laws do not indicate how to calculate losses for the seasonally employed victim. The Kentucky law<sup>164</sup> provides some guidance, stating that earnings shall be equitably adjusted on an annual basis.<sup>165</sup> This approach, however, creates a potential for a windfall recovery by a claimant.<sup>166</sup> If a victim

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158. See *MacDonald*, 350 N.W.2d at 235-36.

159. See *Armacost v. State Farm Mut. Auto Ins. Co.*, 231 Kan. 276, 280-81, 644 P.2d 403, 406-07 (1982) (McFarland, J., dissenting) (discussing potential for windfall when victim's benefits are not adjusted to account for seasonal unemployment).

160. KY. REV. STAT. ANN. § 304.39-130 (Bobbs-Merrill 1981); Pa. Law, *repealed* 1984, *supra* note 58 (which provided for seasonally employed claimants). See also MICH. COMP. LAWS ANN. § 500.3107a (1983) (temporarily unemployed may collect work loss benefits); HAWAII REV. STAT. § 294-2(7)(C) (1976) (claimant not regularly employed may collect work loss benefits).

161. Cf. *MacDonald*, 350 N.W.2d at 237 (The court notes that seasonal unemployment might be a basis to deny work loss benefits to a claimant).

162. See *supra* note 79 and accompanying text.

163. See *supra* notes 73-74 and accompanying text.

164. KY. REV. STAT. ANN. § 304.39.130 (Bobbs-Merrill 1981).

165. *Id.*

166. See *Armacost*, 231 Kan. at 280-81, 644 P.2d at 406-07 (McFarland, J., dissenting). As noted by Justice McFarland, if a claimant works 10 months a year for \$12,000 and is injured during a period of normal unemployment, the court may be tempted to

works ten months of the year but is injured during the other two months, and receives benefits during those two months based on pro-rated annual earnings, he may realize a windfall if he is able to return to work when his period of usual employment commences.<sup>167</sup> The pre-October 1984 Pennsylvania statute addresses this problem by expressly limiting work loss to compensate only injuries that occur during a period of seasonal employment.<sup>168</sup> Thus, a claimant receives his full salary when he is injured during a period of seasonal employment and nothing presumably if the injury persists during a period of seasonal unemployment.

## 2. *The New York Approach*

The New York State Insurance Department has adopted a method similar to that of the superseded Pennsylvania statute.<sup>169</sup> In New York regardless of when the injury occurs, a seasonally employed claimant is eligible to collect work loss benefits based on his full salary if his disability coincides with a period of seasonal employment.<sup>170</sup> Alternatively, the claimant will receive nothing if his disability coincides with a period of seasonal unemployment.<sup>171</sup> This is the sensible method of handling these work loss claims. Under this method, a victim cannot realize a windfall for fortuitously sustaining injury at a favorable time of the year, and the victim's recovery will be limited to his actual loss.

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assess damages on a full year, that is, \$12,000 divided by 12 months. Thus, the victim might be paid \$14,000 instead of his normal \$12,000. *Id.* at 280-81, 644 P.2d at 406-07; cf. 4 N.Y. NO-FAULT ARB. REP., NF-623 (1980). The arbitrator adjusted the claimant's award to account for seasonal unemployment. *Id.*

167. *Armcast*, 231 Kan. at 280-81, 644 P.2d at 406-07 (McFarland, J., dissenting).

168. Pa. Law, *repealed* 1984, *supra* note 58.

169. See N.Y. ADMIN. CODE tit. 11 § 65.15n(2)(iii) (1982). The regulation provides that "[a]n applicant, whose unemployment was the result of the seasonal nature of the work which the applicant usually performed, shall be entitled to receive payments for loss of earnings from work during the claimed period of disability arising from the accident which coincides with the seasonal period of employment."

170. *Id.*

171. *Id.*

#### IV. Offsets and Deductions to Work Loss Benefit Recoveries

##### A. *The Reason for Offsets and Deductions*

No-fault work loss provisions provide insurers with the right to reduce benefits by allowable offsets and deductions. The insurer is granted this right to avoid a windfall recovery.<sup>172</sup> A victim receives "windfall" benefits if he obtains duplicate benefits for the same loss, or benefits in excess of the loss incurred.<sup>173</sup> Several states, including New York,<sup>174</sup> have enacted provisions that coordinate benefits to avoid waste and duplication in order to prevent increased insurance costs.<sup>175</sup>

##### B. *Taxation*

Work loss benefits are often not taxable. Because earnings are subject to taxation, the tax-free status of work loss recoveries represents an added benefit to the victim.<sup>176</sup> Thus, the insurer is permitted to adjust recoveries in order to avoid windfall recoveries.<sup>177</sup>

##### 1. *Jurisdictional Overview*

Work loss statutes fall into one of four categories with respect to tax adjustment. The first category does not mention any tax adjustments.<sup>178</sup> Thus, it is up to the court to modify work

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172. See W. ROKES, NO-FAULT INSURANCE 195-96 (which discusses issues relating to no-fault benefit offsets and deductions).

173. *Id.* See also *State Farm Mut. Auto. Ins. Co. v. Brooks*, 78 A.D.2d 456, 458-59, 435 N.Y.S.2d 419, 421-22 (4th Dep't 1981) (indicating that drafters of no-fault law sought to avoid windfall recoveries, which could result in high premium burdens, by limiting loss to actual loss incurred).

174. See N.Y. INS. LAW § 671(1)(c)-(2)(b) (McKinney Supp. 1983-1984).

175. See *King*, *supra* note 8 at 297-403 (discussing the offset provisions of the existing no-fault laws); see also KEETON-O'CONNELL PLAN, *supra* note 107 (discussing the need for coordination of collateral insurance sources).

176. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 457, 403 N.E.2d 159, 162, 426 N.Y.S.2d 454, 457 (1980).

177. *Id.* If a victim's gross income is \$100 but his net after tax income is \$80, the victim would be overcompensated for his loss, unless the insurer is allowed to reduce the award to account for this after tax effect. *Id.*

178. See CONN. GEN. STAT. ANN. § 38-319(b) (West Supp. 1983); MD. ANN. CODE § 539(a) (1979); N.J. STAT. ANN. § 39:6A-4(b) (West Supp. 1983-1984); S.C. CODE ANN. § 56-11-110 (Law. Co-op Supp. 1981); S.D. CODIFIED LAWS ANN. § 58-23-8(2) (1978); TEX. REV. CIV. STAT. ANN. § 5.06-3(b) (1981); VA. CODE § 38.1-380.1(b) (Supp. 1984); *cf.* COLO.

loss benefits to avoid a windfall. The second category of statutes permits only a percentage of the victim's income to be considered as the work loss amount.<sup>179</sup> These laws provide for amounts between sixty and eighty-five percent of gross lost income to be considered as work loss.<sup>180</sup> Consequently, there is no need to reduce awards to account for tax benefits.<sup>181</sup> The third category of statutes provides for a reduction of gross loss by a specific percentage.<sup>182</sup> Most states in group three permit the claimant to rebut the presumed tax benefit if, in fact, the benefit is less than the statutory percentage. Only New York regards the offset as an irrebuttable presumption.<sup>183</sup> The fourth category includes only Delaware. That law merely directs courts to adjust benefits to reflect the claimant's tax savings.<sup>184</sup> The amount of the reduction permitted pursuant to this fourth method must be determined through factfinding.

## 2. *The New York Approach*

The New York plan falls within the third group, reducing aggregate loss by twenty percent<sup>185</sup> to account for the non-taxable status of work loss benefits.<sup>186</sup> The reduction is essentially a

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REV. STAT. § 10-4-706(1)(d)(I) (1973) (stating that work loss is to be computed based on 100% of lost income); HAWAII REV. STAT. § 294-2(7)(A) (1976) (stating that work loss computed is to be based on lost income before state and federal income taxes).

179. See ARK. STAT. ANN. § 66-4014(b) (1980); FLA. STAT. ANN. § 627-736(1)(b) (West Supp. 1983); GA. CODE ANN. § 33-34-4(a)(2)(B) (1982); KAN. STAT. ANN. § 40-3103(b)(2) (1981); MASS. GEN. LAWS ANN. ch. 90, § 34A (West Supp. 1984-1985); MINN. STAT. ANN. § 65B.44(3) (West Supp. 1984); N.D. CENT. CODE § 26-41-03(21) (Supp. 1983); OR. REV. STAT. § 743.805(1)(b) (1981); Law of Feb. 12, 1984, No. 1984-11, § 1712, 1984 Pa. Legis. Serv. 50 (Purdon); UTAH CODE ANN. § 31-41-6(1)(b)(i) (Supp. 1983) (If benefits are not includable for the purposes of federal income tax, then 100% of lost income will be considered in computing work loss benefits.).

180. See laws cited *supra* note 179.

181. Any tax saving that might have resulted is eliminated because only a fraction of gross income is considered for work loss computations.

182. See KY. REV. STAT. ANN. § 304.39-120(2) (Bobbs-Merrill 1981); MICH. COMP. LAWS ANN. § 500.3107(b) (1983); N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1983-1984); Pa. Law, *repealed* 1984, *supra* note 58. Note however that the post October 1, 1984 law is in the second category. See Law of Feb. 12, 1984, No. 1984-11, § 1712, 1984 Pa. Legis. Serv. 50 (Purdon).

183. N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1983-1984).

184. DEL. CODE ANN. tit. 21, § 2118(a)(2)(a)(2) (1979).

185. N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1983-1984).

186. See *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 403 N.E.2d 159, 426

conclusive presumption, in that the insured may not prove that his tax benefit was, in fact, less than twenty percent.<sup>187</sup> This adjustment, however, represents a fair estimate of the tax that would have been imposed on the lost earnings recouped by work loss benefits.<sup>188</sup>

Although there may be some circumstances in which the twenty percent figure is unrealistic, it is unlikely that it could cause significant hardship.<sup>189</sup> Legislative action that attempts to account precisely for the tax effect sustained by an individual claimant may be too complex and, as such, counterproductive in light of the statutory goal of promoting an efficient means of settling claims.<sup>190</sup>

### C. *Workers' Compensation*

Since efficient claims settlement requires purging waste and duplication from the system, insurers have been provided with offsets to account for duplicative insurance coverage. In most states no-fault insurance and workers' compensation, or similar government insurance systems, are deemed to be concurrent laws and, as such, may potentially compensate victims twice for the same lost income.<sup>191</sup> If a victim is permitted to collect under both insurance systems, it is likely that the victim will receive a windfall.

#### 1. *Jurisdictional Overview*

Generally, an injured victim may collect both no-fault and workers' compensation benefits.<sup>192</sup> Most work loss laws permit

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N.Y.S.2d 454 (1980).

187. N.Y. INS. LAW § 671(2)(a) (McKinney Supp. 1983-1984).

188. See, e.g., I.R.C. § 1(c) (West 1984) (For instance, a single taxpayer would be in the 18% tax bracket when his income reaches the \$12,000 annual work loss benefit maximum.).

189. Real dollars lost as a result of this offset decrease as income decreases.

190. Extensive judicial intermediation for the purposes of determining the precise tax offset would likely increase the cost of settling claims and thus increase insurance premiums. REPORT TO GOVERNOR, *supra* note 1, at 106-07.

191. See Comment, *New York Adopts No-Fault: A Summary and Analysis*, 37 ALB. L. REV. 662, 692-93 (1973); see also KANSAS NO-FAULT, *supra* note 7, at 399.

192. *Brown v. Boston Old Colony Ins. Co.*, 247 Ga. 287, 275 S.E.2d 651 (1981), *Mathis v. Interstate Motor Freight System*, 408 Mich. 164, 289 N.W.2d 708 (1980), *Comeau v. Safeco Ins. Co. of Am.*, 356 So. 2d 790 (Fla. 1978); *Ryder Truck Lines Inc. v.*

insurers to offset workers' compensation benefits to avoid duplication of benefits.<sup>193</sup> In so doing, the cost of no fault is kept lower than if both the workers' compensation and no-fault insurers were reimbursing the victim one dollar to cover a victim's single dollar of loss.<sup>194</sup>

On the other hand, some state courts have held that those entitled to workers' compensation cannot also collect no-fault benefits.<sup>195</sup> The Massachusetts Supreme Court, in *Flaherty v. Travelers Insurance Co.*,<sup>196</sup> noted that the legislative enactment of no fault did not signal a retreat from the long held workers' compensation exclusivity doctrine.<sup>197</sup> Thus, the workers' compensation system and no-fault system would be treated as if they were mutually exclusive sources of benefits.<sup>198</sup>

Among the states that recognize a victim's right to collect under both systems, there is a difference of opinion concerning how offsets should be calculated. One method advocates subtracting workers' compensation that is recovered or recoverable<sup>199</sup> from the victim's aggregate loss.<sup>200</sup> Under this method, a

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Maiorano, 44 N.Y.2d 364, 376 N.E.2d 1311, 405 N.Y.S.2d 666 (1978).

193. COLO. REV. STAT. § 10-4-707(5) (Supp. 1982); CONN. GEN. STAT. ANN. § 38-333(c) (West Supp. 1982); D.C. CODE ANN. § 35-2110(b)(2) (Supp. 1983); FLA. STAT. ANN. § 627.736(4)(d)(3) (West Supp. 1983-1984); GA. CODE ANN. § 33-34-8(a) (1982); HAWAII REV. STAT. § 294-5(b) (Supp. 1983); KAN. STAT. ANN. § 40-3110(a) (1981); KY. REV. STAT. ANN. § 304.39-120(1) (Bobbs-Merrill 1981); MD. ANN. CODE art. 48A, § 543(d) (1979); MASS. GEN. LAWS ANN. ch. 90, § 34A (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 500.3109(1) (1983); MINN. STAT. ANN. § 65B.61(1) (West Supp. 1984); N.J. STAT. ANN. § 39:6A-6 (West 1975); N.Y. INS. LAW § 671(2)(b) (McKinney Supp. 1983-1984); N.D. CENT. CODE § 26-41-12(1)(b) (1978); OR. REV. STAT. § 743.810(2) (1981); Pa. Law, repealed 1984, *supra* note 58; S.C. CODE ANN. § 56-11-150(D) (Law. Co-op. 1977); UTAH CODE ANN. § 31-41-7(3) (Supp. 1983); *cf.* S.D. CODIFIED LAWS ANN. § 58-23-8(2) (1978); TEX. REV. CIV. STAT. ANN. art. 5.06-3(c) (Vernon 1981) (The South Dakota and Texas laws do not provide for workers' compensation offsets.).

194. *See* Normile v. Allstate Ins. Co., 87 A.D.2d 721, 722, 448 N.Y.S.2d 907, 908 (3d Dep't 1982), *aff'd*, 60 N.Y.2d 1003, 459 N.E.2d 843, 471 N.Y.S.2d 550 (1983). If one assumes that an insurance company bases its insurance rates on the amount of money the company will have to pay its insureds in benefits (average claim cost), it is not unreasonable to conclude that premium rates are distorted when payments of benefits compensate a victim twice for one injury. *See* KEETON-O'CONNELL, *supra* note 107, at 104.

195. *Flaherty v. Travelers Ins. Co.*, 369 Mass. 482, 340 N.E.2d 888 (1976).

196. 369 Mass. 482, 340 N.E.2d 888 (1976).

197. *Id.*, 340 N.E.2d at 891.

198. *Id.*

199. In many circumstances, merely being entitled to workers' compensation benefits triggers a set-off whether or not such benefits are in fact collected. *See* HAWAII REV. STAT. § 294-5(b) (Supp. 1983); COL. REV. STAT. § 10-4-707 (1974); N.Y. ADMIN. CODE tit.

claimant with a large enough loss may collect workers' compensation benefits as well as the maximum work loss benefits.<sup>201</sup> Alternatively, some states calculate workers' compensation offsets by subtracting the amount recovered or recoverable from the no-fault policy limits.<sup>202</sup> With this procedure, once a victim collects a combination of workers' compensation and no-fault benefits, which totals an amount equal to the no-fault policy limits, work loss benefits will no longer be available to the victim.<sup>203</sup>

## 2. *The New York Approach*

The New York Court of Appeals in *Normile v. Allstate Insurance Co.*<sup>204</sup> recently affirmed an appellate division ruling that adjusted work loss benefits by subtracting the amount recovered or recoverable under workers' compensation from the no-fault policy limits.<sup>205</sup> The appellate division in *Normile* indicated that it was the legislature's intent to limit basic economic loss to \$50,000 regardless of whether the \$50,000 was actually paid by the no-fault insurer or the workers' compensation insurer.<sup>206</sup> The court reasoned that the basic economic loss limit of \$50,000

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11 § 65.15(p)(6)(i) (1982). See also *Cady v. Aetna Life and Cas. Co.*, 113 Misc. 2d 1080, 450 N.Y.S.2d 679 (Sup. Ct. Broome County), modified, 96 A.D.2d 967, 466 N.Y.S.2d 850 (3d Dep't 1983), *aff'd in part*, 61 N.Y.2d 594, 463 N.E.2d 1214, 475 N.Y.S.2d 362 (1984). In *Cady*, the workers' compensation insurer paid the employer benefits as a reimbursement for amounts disbursed by the employer to the victim who had been receiving these benefits under an accrued sick leave plan. The appellate division concluded that these amounts could be considered recoverable by the victim and were properly offset against the victim's work loss benefits. *Cady v. Aetna Life and Cas. Co.*, 96 A.D.2d at 969, 466 N.Y.S.2d at 853.

200. The calculation would be as follows: aggregate loss of income minus workers' compensation recovered or recoverable equals loss available for no-fault reimbursement. See *Comeau v. Safeco Ins. Co. of Am.*, 356 So. 2d 790 (Fla. 1978).

201. *Id.*

202. No-fault work loss policy limit minus workers' compensation recovered or recoverable equals work loss benefits available. *Normile v. Allstate Ins. Co.*, 87 A.D.2d 721, 448 N.Y.S.2d 907, *aff'd* 60 N.Y.2d 1003, 459 N.E.2d 842, 471 N.Y.S.2d 550. See also MINN. STAT. ANN. § 65B.61(2)(a) (West Supp. 1984); *Prax v. State Farm Mut. Auto. Ins. Co.*, 322 N.W.2d 752, 753-54 (Minn. 1982).

203. *Normile*, 87 A.D.2d at 722, 448 N.Y.S.2d at 908. See also *Prax*, 322 N.W.2d at 754.

204. 60 N.Y.2d 1003, 459 N.E.2d 842, 471 N.Y.S.2d 550 (1983).

205. *Normile v. Allstate Ins. Co.*, 60 N.Y.2d 1003, 459 N.E.2d 842, 471 N.Y.S.2d 550 (1983), *aff'g*, 87 A.D.2d 721, 448 N.Y.S.2d 907 (3d Dep't 1982).

206. *Normile*, 87 A.D.2d at 722-23, 448 N.Y.S.2d at 908.

played an important role in distinguishing claims that are compensable under the no-fault system from claims that fall outside the no-fault system.<sup>207</sup> It may be inferred from this reasoning that the underlying purpose of no-fault insurance is to provide a source of recovery for the *first* \$50,000 of economic loss. Once a victim has been compensated for the first \$50,000 of his economic loss the state has satisfied its no-fault goals, and the victim must then seek recompense for any excess losses by either bringing a tort action or collecting from a private insurance source.<sup>208</sup>

Judge Cooke, dissenting from the New York Court of Appeals' affirmation of *Normile*, noted that this method of offsetting allows insurers to avoid their primary responsibility, which is to compensate for basic economic loss.<sup>209</sup> Judge Cooke explained that this method may leave innocent persons under compensated.<sup>210</sup> He reasoned that the legislature could not have intended to penalize victims who suffered losses in excess of \$50,000 by reducing their no-fault benefits below \$50,000.<sup>211</sup> Rather, a victim should be entitled to \$50,000 in no-fault protection if the total amount of his damages warrant such a payment.<sup>212</sup>

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207. *Id.*

208. *See id.*

209. *Normile v. Allstate Ins. Co.*, 60 N.Y.2d at 1006, 459 N.E.2d at 844, 471 N.Y.S.2d at 550 (Cooke, J., dissenting).

210. *Id.*

211. *Id.* at 1006, 459 N.E.2d at 844, 471 N.Y.S.2d at 551.

212. *Id.* at 1008, 459 N.E.2d at 845, 471 N.Y.S.2d at 552. Judge Cook illustrated his theory as follows:

The basic theory of plaintiff's approach is quite simple. Recognizing that medical expenses and loss of income, for example, may easily exceed \$50,000, it only requires that collateral-source payments are to be allocated first to the top end, i.e., those damages exceeding \$50,000. This can be illustrated by analogy. An insured's losses are represented by a long, vertical tube that is closed at the bottom. These losses are compensated by payments from the insurer — represented by a heavy, blue liquid — and from collateral sources — represented by a lighter, red liquid. There is only enough blue liquid to reach the \$50,000 mark on the vertical tube. Being "heavier," the insurance company's payments will always sink to the tube's bottom below the collateral-source payments as they both are poured in. Consequently, the insurance company's payments are always allocated to "basic economic loss." If there were claims for \$75,000 and \$25,000 was paid by collateral sources, those payments (the lighter, red liquid) would be "floating" on top of the insurer's payments.

*Id.*

Although Judge Cooke's dissent has support,<sup>213</sup> the majority's approach is clearly preferable in light of the goals of no-fault protection. The no-fault system was not designed to compensate for all losses incurred as a result of an auto accident; instead it was intended to compensate for *substantially all* losses while keeping insurance rates low.<sup>214</sup> Consequently, it seems imprudent to risk higher insurance rates for all motorists in an effort to provide added coverage to a few victims, when these victims may purchase additional insurance from private sources to protect against a catastrophic loss.

#### D. *Employer Provided Wage Continuation Plans*

An important issue, which few no-fault laws address, is accounting for an employer-provided disability or wage continuation plan.<sup>215</sup> Often a disabled employee may be fully compensated by his employer for his disability. Thus, an employee who also collects work loss benefits may be receiving compensation without having suffered any income loss.

##### 1. *Jurisdictional Overview*

A few states, including Florida,<sup>216</sup> Georgia,<sup>217</sup> Maryland,<sup>218</sup> and Massachusetts,<sup>219</sup> expressly require work loss reductions to avoid duplicating payments made under employer-provided wage continuation plans. In addition, the New Jersey Superior Court in *Puzio v. New Jersey Manufacturers Insurance Co.*<sup>220</sup> held that benefits received from an employer-provided disability plan were to be offset against work loss benefits.<sup>221</sup> The court reasoned that this private plan was analogous to government in-

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213. See *Comeau v. Safeco Ins. Co. of Am.*, 356 So. 2d 790 (Fla. 1978).

214. See *supra* note 31 and accompanying text.

215. Wage continuation plans may include an employee's sick days. See *Cady v. Aetna Life and Cas. Co.*, 113 Misc. 2d 1080, 450 N.Y.S.2d 679 (Sup. Ct. Broome County), *modified*, 96 A.D.2d 967, 466 N.Y.S.2d 850 (3d Dep't 1983), *aff'd in part*, 61 N.Y.2d 594, 463 N.E.2d 1214, 475 N.Y.S.2d 362 (1984). Wage continuation plans may also include comprehensive long term disability. See *infra* note 228.

216. FLA. STAT. ANN. § 627.732(d) (West Supp. 1984).

217. GA. CODE ANN. § 33-34-8 (1982).

218. MD. ANN. CODE art. 48A § 540 (1979).

219. MASS. GEN. LAWS ANN. ch. 90, § 34A (West Supp. 1983-1984).

220. 165 N.J. Super. 585, 398 A.2d 934 (1979).

221. *Id.* at 589, 398 A.2d at 936-37.

surance, which normally would be offset against no-fault work loss benefits.<sup>222</sup> Specifically, this plan shared many common features with government insurance such as compulsory participation, governmental supervision, and equalized costs for participants.<sup>223</sup>

In Michigan, insureds are offered reduced premiums for offsetting no-fault coverage with available private benefits.<sup>224</sup> At least one court has held that offsets under this plan are to be subtracted from no-fault policy limits.<sup>225</sup> Because the insured was allowed a rate reduction, it was considered unfair to allow him the maximum work loss protection at a lower rate. If an insured wants protection in excess of the no-fault policy limits, the amount paid, whether to his no-fault carrier or to a private insurer, should reflect this added protection.<sup>226</sup>

## 2. *The New York Approach*

In 1977, the New York work loss law was amended to include an offset for a *qualified* wage continuation plan.<sup>227</sup> Although both qualified and non-qualified wage continuation plans provide employees with sickness or disability benefits when the employee has been injured and is unable to work, future benefits available under a *qualified* plan are not affected by current use.<sup>228</sup> The amendment ensures that an employee will not suffer

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222. *Id.*

223. *See id.*

224. MICH. COMP. LAWS ANN. § 500.3109a (1983).

225. *Zmudczynski v. League Gen. Ins. Co.*, 99 Mich. App. 442, 297 N.W.2d 696 (1980).

226. *Id.* at 445, 297 N.W.2d at 698. Thus, an insured cannot gain additional first party benefits by merely paying the same amount of money to two different insurers. Rather he must pay more to get more coverage. *Id. See also Prax*, 322 N.W.2d at 755 (discussing the effects of equalized costs and work loss benefit offsets and deductions as they relate to workers' compensation insurance).

227. Act of Aug. 11, 1977, ch. 892, 1977 N.Y. Laws 1824, 1831-32 (codified as amended at N.Y. Ins. Law § 5221 (McKinney Supp. 1983-1984)).

228. In an effort to clarify the no-fault law, the New York State Department of Insurance has issued a series of Circular Letters explaining how various wage continuation plans will be regarded. The following excerpt comes from one of these circular letters:

Section 671(1) of the Insurance Law contains a provision that requires insurers to reduce gross loss of earnings from work by benefits paid under what have become known as "qualified wage continuation plans" when calculating no-fault first party benefits payable for loss of earnings.

an offset if his wage continuation benefits deplete with use. For example, under a non-qualified plan, if an employee is given only ten sick days per year,<sup>229</sup> each time he uses a sick day, one of his accrued benefits available for future injuries will be lost. Thus, if the employee collects benefits from his non-qualified wage continuation plan, he may also seek work loss benefits without fear of sustaining an offset. Alternatively, a worker will sustain a reduction in work loss benefits if he is covered by a qualified plan that will not deplete, that remains at its maximum benefit level for future disability or illness.<sup>230</sup>

A worker covered by a qualified plan may receive a no-fault

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In order for a particular wage continuation plan to qualify under the aforementioned provision it must meet *all* of the following three conditions:

1) The applicant must be entitled to receive the same level of wage continuation benefits for a subsequent unrelated accident or illness when he or she returns to work after recovering from the injuries sustained in the motor vehicle accident;

2) benefits for a subsequent unrelated accident must be equal in *both* time and amount to the wage continuation benefits the applicant was entitled to as a result of the injuries suffered in the motor vehicle accident; and

3) wage continuation benefits for a subsequent disability must be *immediately* available, without any requirement that the applicant work a stated period of time before full benefits are restored. If these three conditions are met, the plan probably qualifies.

N.Y. STATE INS. DEP'T, SUPP. NO. 2 (issued Oct. 29, 1982) TO CIRC. LETTER NO. 16 (1981) (emphasis in original).

In applying these criteria to the Bristol Lab Wage Continuation plan, the Insurance Department found that plan to be *non-qualified*. The Department Official noted that there is the possibility that the level of benefits available to compensate for a later unrelated injury will be affected by the amount recoverable for the initial injury since unrelated injuries occurring within a six month period are treated as one disability. See Letter from State of New York Insurance Department to Hanover Insurance Company (Sept. 21, 1981) (available in Pace Law Review office). Moreover, benefits may not be immediately available for subsequent illness or injury. Cf. Letter from State of New York Insurance Department to State Farm Insurance Company (March 5, 1982). This letter concluded that the wage continuation plan of Motorola, Inc. was *qualified*. Two aspects cited as being important were: (1) the total number of days a covered employee is out due to the same or related cause will be considered only one period of disability, and (2) an employee who utilizes coverage pursuant to this policy will not suffer any loss of future rights. *Id.*

229. See, e.g., *Cady*, 113 Misc. 2d at 1082, 450 N.Y.S.2d at 681 (Court did not allow offset to work loss based on employee's wage continuation plan because the victim, although receiving benefits from his employer, was drawing from accrued sick leave and vacation time.). See also N.Y. NO-FAULT ARB. REP., NF-772 (1980) (When employer credited the victim with vacation days, arbitrator did not offset amount recovered against work loss benefits because claimant was "deprived of days that he would otherwise have had as vacation days.").

230. See *supra* note 228.

premium rate adjustment.<sup>231</sup> Adjustments to benefits are calculated by reducing the aggregate loss of income by the amount received under a qualified plan.<sup>232</sup> If a claimant has suffered a loss in income which exceeds his wage continuation benefits, he will be able to collect his wage continuation benefits as well as the maximum work loss benefits.<sup>233</sup>

Although there is little authority explaining why wage continuation and workers' compensation offsets are handled differently,<sup>234</sup> one explanation may be that lawmakers have sought to encourage employer plans in order to relieve some of the burden from the no-fault system. However, the difference in offset methods can lead to inequitable results if two identical victims seek benefits, and the only difference between the two is that one receives workers' compensation and the other receives employer provided benefits.

The New York scheme could avoid such inequities by adopting a policy that all collateral benefits for which premium costs have been equalized are used to reduce no-fault policy limits.<sup>235</sup> In doing so, no insured will be able to pay lower premiums without suffering a corresponding reduction in no-fault protection. This approach is necessary since a compulsory system such as New York's must strive to rid itself of waste and duplication or it will compel motorists to purchase insurance that is unaffordable.<sup>236</sup>

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231. See N.Y. STATE INS. DEF'T CIRC. LETTER NO. 13 (1977) (available in Pace Law Review office).

232. See N.Y. STATE INS. DEF'T CIRC. LETTER NO. 16 (1981) (available in Pace Law Review office). Calculation would be as follows: Aggregate income minus "Wage Continuation Benefits" equals amount available for no-fault benefits. *Id.*

233. See *id.*

234. See *supra* notes 202-03 and accompanying text. Cf. *Prax*, 322 N.W.2d at 754-55. The *Prax* court indicated that when an insured receives a premium rate adjustment to account for wage continuation it would be proper to subtract such amounts from policy limits. *Id.*

235. See *Prax*, 322 N.W.2d at 754-55; see also REPORT TO GOVERNOR, *supra* note 1, at 30-31 (discussing the importance of coordinating collateral sources of insurance and equalizing premium costs). Cf. FLA. STAT. ANN. § 627.7372 (West Supp. 1984) (providing for collateral source offset without rate equalization).

236. See *supra* notes 173-75 and accompanying text.

## V. Modification of No-Fault Awards

Both the insurer and the insured will often have a financial stake in the events that occur after an initial work loss award determination. Since work loss benefits are paid as the loss is incurred,<sup>237</sup> the insurer and the victim may maintain continued contact for several years.<sup>238</sup> It is common for either the victim or the insurer to seek a modification of an award to account for a change in circumstances in order to reflect the actual loss accurately.<sup>239</sup>

### A. Jurisdictional Overview

The only modifying condition expressly provided for in several work loss statutes is the insurer's right to adjust benefits to reflect the victim's unreasonable failure to undertake available substitute work.<sup>240</sup> Such laws force a victim to mitigate damages before a recovery will be permitted.<sup>241</sup>

Some courts have also expressed a willingness to reopen and modify prior awards for other reasons. A Pennsylvania court noted that an award may be amended to account for an increase in the minimum wage rate.<sup>242</sup> The court concluded that an adjustment to work loss benefits might be warranted in order to reflect the victim's loss accurately.<sup>243</sup> In contrast, at least one Michigan court has voiced the concern that modifying awards could "complicate the Legislature's simple plan for speedy payments of benefits."<sup>244</sup> This decision, however, has been overruled

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237. See N.Y. INS. LAW § 675(1) (McKinney Supp. 1983-1984).

238. See *id.* § 671(1)(b). New York work loss benefits may extend 36 months. *Id.*

239. See *Goebel v. Hartford Acc. & Indem. Co.*, 458 A.2d 212 (Pa. Super. 1983). The victim sought to increase work loss benefits because the minimum wage had increased. *Id.* See also *Nawrocki v. Hawkeye Sec. Ins. Co.*, 83 Mich. App. 135, 268 N.W.2d 317 (1978) (Insurer sought to terminate victim's benefits when victim's employer fired the victim because of his disability.).

240. See N.D. CENT. CODE § 26-41-03(21) (Supp. 1983); Pa. Law, *repealed* 1984, *supra* note 58. See also N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(viii) (1982) (noting that claimant may suffer reduced benefits when he refuses to seek reasonable rehabilitative treatment).

241. See *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 365-66 (Del. Super. 1982). An injured victim has a duty to mitigate damages by seeking substitute employment. *Id.*

242. *Goebel v. Hartford Acc. & Indem. Co.*, 458 A.2d 212 (Pa. Super. 1983).

243. *Id.* at 216.

244. *MacDonald v. State Farm Mut. Ins. Co.*, 108 Mich. App. 706, 707, 310 N.W.2d

by the Michigan Supreme Court.<sup>245</sup>

### B. *The New York Approach*

New York courts tend to favor award modification. As noted in *State Farm Mutual Automobile Insurance Co. v. Brooks*,<sup>246</sup> modification is often necessary to limit work loss recoveries to the actual loss sustained.<sup>247</sup> In *Brooks*, the claimant had been injured in an automobile accident on August 24, 1976 and began receiving work loss benefits. On October 3, 1976, Brooks was notified that he would be laid off because of a lack of work for laborers, not because of his injury.<sup>248</sup> The insurer sought to reduce his work loss benefits.<sup>249</sup> The court allowed the modification, reasoning that the initial award no longer reflected the actual loss.<sup>250</sup> Therefore, he would realize a windfall if his benefits reflected a higher level of earnings than he would have been earning had he not been injured.<sup>251</sup> It may be inferred from *Brooks* that a person who loses his job for a reason unrelated to his injury is no different from any other unemployed person because there is no causal link between the injury and the unemployment.<sup>252</sup>

Applying the *Brooks* reasoning the Civil Court of the City of New York in *Herman v. GEICO*,<sup>253</sup> held that a claimant who

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848, 849 (1981), *rev'd*, 419 Mich. 146, 350 N.W.2d 233 (1984).

245. *MacDonald v. State Farm Mut. Ins. Co.*, 419 Mich. 146, 350 N.W.2d at 235, *rev'g* 108 Mich. App. 706, 310 N.W.2d 848 (1981).

246. 78 A.D.2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981).

247. *Id.* at 459, 435 N.Y.S.2d at 422.

248. *Id.* at 457, 435 N.Y.S.2d at 421.

249. *Id.*

250. *See id.* at 459-60, 435 N.Y.S.2d at 422. A claimant may avoid a modification of his work loss benefits if he is able to prove that he would have been able to obtain substitute work. *Id.* at 459, 435 N.Y.S.2d at 422.

*See also* 5 N.Y. NO-FAULT ARB. REP., NF-841 (1981). The arbitrator did not deny a union worker work loss even though his union subsequently went on strike. The claimant was able to establish that he would have been placed in a substitute job with a competitor because of his seniority in the union. *Id. Cf. Erie Ins. Exch. v. Roule*; 279 Pa. Super. 40, 420 A.2d 733 (1980) (Claimant need only prove that injury pulled him out of the work force, not that he would have been able to obtain substitute work during labor strike.).

251. *State Farm Mut. Ins. Co. v. Brooks*, 78 A.D.2d 456, 459-60, 435 N.Y.S.2d 419, 422 (4th Dep't 1979).

252. *See id.*

253. 115 Misc. 2d 146, 454 N.Y.S.2d 199 (Civ. Ct. Queens County 1982).

loses his job because of his disability is entitled to collect work loss benefits until he regains employment.<sup>254</sup> Herman, despite diligent efforts to obtain employment once he regained his health, was unable to find work for nearly four months.<sup>255</sup> In awarding Herman work loss benefits the court stated that it was the injury that caused the loss of earnings and, even though the injury may have healed, it continued to cause a loss of income until the claimant was once again employed.<sup>256</sup>

The rule enunciated in *Herman* does not follow prior administrative rulings that limited work loss to the period of disability despite the fact that a victim remained unemployed for a longer period.<sup>257</sup> The *Herman* rule, however, has been espoused in Michigan<sup>258</sup> and is likely to become the prevailing law if the courts continue to base work loss benefits on the actual loss analysis relied on in the *Brooks* decision.<sup>259</sup> Just as it would be grossly unfair to allow a victim who is laid off to collect work loss benefits when his disability did not actually cause his lost earnings, it would be similarly inequitable to deny a claimant continued work loss benefits when his disability actually was the cause of his lost earnings. In both circumstances, benefits are linked to the loss *actually caused* by the accident.

The *Herman* and *Brooks* decisions suggest that there is a need to consider events after an initial award determination to avoid inequity through modification of the award. But, continued judicial review of work loss determinations might become unduly complicated and defeat the efficiency of the no-fault system. Consequently, modification should be permitted only when the amount in controversy is significant.

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254. *Id.* at 149, 454 N.Y.S.2d at 201.

255. *Id.* at 146, 454 N.Y.S.2d at 200.

256. *Id.* at 149, 454 N.Y.S.2d at 202.

257. N.Y. ADMIN. CODE tit. 11, § 65.15(n)(2)(v) (1982). The *Herman* court apparently disregarded the New York State Insurance Department rule that enables a claimant who is dismissed from his job because of his disability to continue receiving work loss benefits only until the disability is lifted, not until he finds another job. *Id.* Recent arbitration decisions have gone both ways on this issue. See, e.g., 8 N.Y. NO-FAULT ARB. REP., NF-1241 (1984) (Arbitrator cited to and ruled in accordance with the *Herman* decision.); cf. 7 N.Y. NO-FAULT ARB. REP., NF-1116 (1983) (Arbitrator ruled in accordance with Insurance Department rule.).

258. *Nawrocki v. Hawkeye Sec. Ins. Co.*, 83 Mich. App. 135, 268 N.W.2d 317 (1978). See also *Coates v. Michigan Mut. Ins. Co.*, 105 Mich. App. 290, 306 N.W.2d 484 (1981).

259. See *supra* notes 249-52 and accompanying text.

## VI. Conclusion

The Legislature enacted section 671(1)(b)<sup>260</sup> to provide auto accident victims with compensation for actual lost earnings caused by disability resulting from an automobile accident. This work loss law was intended to maximize protection for the victim and minimize the cost of auto insurance.

In reviewing how various claimants fare under the New York work loss law, it is apparent that the statutory goals have yet to be wholly fulfilled. In limiting benefits to actual loss, the law may have unfairly foreclosed all sources of recompense to certain unemployed victims. Moreover, it has failed to provide adequate guidance for measuring the claims of self-employed victims, thereby opening the door to imprecise and speculative determinations. Both problems could be resolved by amendments that define work loss more precisely.

The New York law needs a more consistent policy regarding offsets and deductions. In order to avoid duplicating benefits, all collateral sources of benefits should be taken into account and any adjustment for collateral benefits should be deducted from no-fault policy limits. This treatment of collateral sources would shift the cost of higher levels of insurance coverage to those who can better afford to pay the premiums.

Finally, events that occur after initial work loss determinations and that significantly alter original work loss assessments must be reflected in award modifications. It is critical that each award of work loss benefits be based on accurate estimations of a victim's lost earnings so that motorists will not be unnecessarily burdened with higher insurance costs.

*Kent S. Nevins*

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260. N.Y. INS. LAW § 671(1)(b) (McKinney Supp. 1983-1984).