BRADLEY D. HARVILLE LAW OFFICES PLLC

20 Questions about Kentucky No-Fault

The key to understanding how the legal and medical system works in personal injury cases resulting from motor vehicle accidents in Kentucky.

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FOREWORD

I first prepared *20 Questions about Kentucky No-Fault* in 1995, when I presented a seminar to some adjusters new to Kentucky law at their company's office near Nashville, Tennessee. Over the years this reference has proven far more valuable to me in my practice than it was in getting that particular insurance company to send me a lot of cases (it didn't). I have looked at it time and time again as issues in my cases have come up, and repeatedly I have found that the answers I seek are already contained in this reference, or at least that it will guide me to the answer.

Over time I have also distributed *20 Questions* to any number of my insurance and self-insured clients, who inform me that this information has been very helpful for them as well. You simply cannot understand Kentucky personal injury automobile law without understanding the fundamentals of Kentucky's No-Fault Act and how it affects everything else. Nearly every imaginable aspect of Kentucky personal injury automobile law is rooted somewhere in the provisions of this Act. The purpose of *20 Questions* is to walk the reader through the provisions of the Act in a logical, progressive fashion, so the reader will grasp the basic concepts and see how Kentucky's entire system for handling automobile injury cases is based upon the Act.

A lot has changed since 1995. Dial-up internet and e-mail were new things back then. The internet has allowed people to

become much more sophisticated about researching information than they used to be. The number of lawyer blogs online has become legion. Now, as my practice enters its twenty-first year, I have realized that individuals want and need to know this information as much as insurance companies and adjusters do. Therefore, I have decided to publish *20 Questions* in book form and make it available to everyone who wants to dig into the real meat and potatoes of the Kentucky No-Fault Act.

One warning: This book is a lawyer's book. It isn't just a book about a lawyer telling you what the law says. This book is intended to be an actual legal treatise not only telling you what the law says, but also providing you with supporting citations to the provisions of the Act or reported cases by the Kentucky Supreme Court or Court of Appeals.

DISCLAIMER: I am a lawyer, so of course there has to be a disclaimer. Here it is: By writing this book, I am not in any way the lawyer for anyone reading this book. Nothing in this book is to be construed as legal advice or as creating an attorney-client relationship. Furthermore, as Justice Leibson stated in *Hilen v. Hays,* 673 S.W.2d 713, 717 (Ky. 1984): "The law is not a stagnant pool but a moving stream." That means that nothing in this book necessarily reflects the current state of the law. I have updated this book to the best of my ability up to the time it is going to print, but anything and everything in this book is subject to change at any time. Whenever I have an issue that is found in this book, I always double-check to make sure that the statute I cite hasn't been amended or repealed, or that the case I cite

hasn't been modified or overruled by a more recent decision. Lawyers must always make sure that printed material such as this still reflects the current state of the law on an ongoing basis, and anyone else reading this book must do the same.

Finally, if you are not a lawyer, or even if you are, I repeat: This book is in no way intended to be used and must not be used as a substitute for competent legal advice. You should always seek the advice of a lawyer to advise you of your legal rights.

Bradley D. Harville

January 2014

20 Questions about Kentucky No-Fault

1. WHAT IS KENTUCKY NO-FAULT?

The Kentucky No-Fault Act is found in the Kentucky Revised Statutes, Chapter 304.39 et *seq.* of the Kentucky Insurance Code.[1] It is Kentucky's version of the Uniform Motor Vehicles Reparations Act, and was enacted into law by the Kentucky legislature in 1975. The Act, along with certain other sections of the Insurance Code, requires mandatory coverages in any motor vehicle insurance policy issued in the Commonwealth of Kentucky. Those very few coverages not affected by the Act or other parts of the Code (e.g., medical payments coverage) remain purely contractual. The Act contains a comprehensive set of laws that create the basic system and structure of handling motor vehicle and motor vehicle insurance claims within the Commonwealth of Kentucky.

1 A complete copy of the Act can be found on the Kentucky Legislative Research Commission's website at http://www.lrc.ky.gov/statutes/chapter.aspx?id=38757.

2. WHAT IS MEANT BY "NO-FAULT"?

Let's start out with what "No-Fault" *doesn't* mean. No-Fault does *not* mean that there is no such thing as fault for an accident in Kentucky. No-Fault actually refers to insurance coverage that is payable for certain items of loss or damages that result from a motor vehicle accident, regardless of fault. Several terms are used interchangeably to refer to this type of insurance, such as "No-Fault," "basic reparation benefits" (BRB), and "personal injury protection" (PIP). Many Kentucky cases refer to the benefits as "No-Fault," whereas the statute itself refers to such benefits as "basic reparation benefits," and many insurance policies describe these benefits as "personal injury protection," or "PIP," coverage. Again, all of these terms mean basically the same thing.

Every motor vehicle insurance policy issued by an insurance company in Kentucky is required to provide $10,000 in basic reparation benefits. KRS 304.39-020(2); 304.39-110(1)(c). That means that each such insurance policy must provide up to a minimum of $10,000 in coverage for certain items of loss as a result of a motor vehicle accident.

Even out-of-state policies issued by insurers that are authorized to do business in Kentucky are "deemed" to provide Kentucky No-Fault coverage.[2] KRS 304.39-100(2); *Dairyland*

2 The URL to check whether an out-of-state policy was issued by an insurer that is authorized to do business in Kentucky is http://insurance.ky.gov/Company/Default.aspx.

Ins. Co. v. Assigned Claims Plan, 666 S.W.2d 746 (Ky. 1984); *Stephenson v. State Farm,* 217 S.W.3d 878 (Ky.App. 2007).

Because No-Fault is payable regardless of fault, tort liability for the first $10,000 of items covered by No-Fault is said to be "abolished"; that is, a person injured cannot recover from the responsible party for the first $10,000 of his damages which are covered by No-Fault. KRS 304.39-060(2)(a); *Stone v. Montgomery,* 618 S.W.2d 595 (Ky.App. 1981).

In addition to the basic No-Fault coverage, or "basic reparation benefits," an insured may also purchase optional additional benefits, or "added reparation benefits," in additional units of $10,000 per person, up to a total of added benefits up to the limit of liability coverage, or $40,000, whichever is less. KRS 304.39-140(1).

KRS 304.39-140(4) further provides that, upon request, an insured may purchase BRB coverage with deductibles in the amounts of $250, $500, or $1,000, from all basic reparation benefits "otherwise payable." Thus, the BRB insurer would not pay benefits for the first $250, $500, or $1,000 of benefits "otherwise payable," and the amount of BRB coverage over and above these deductibles would be reduced to $9,750, $9,500, or $9,000, respectively.

3. WHAT IS THE PURPOSE OF NO-FAULT?

The policy and purpose of the Kentucky No-Fault Act is set forth in the opening section, KRS 304.39-010. One of the primary goals of the Act is to promote a system "where motor vehicle accident victims will seek payment for their losses before and, where possible, instead of filing tort actions." *Crenshaw v. Weinberg,* 805 S.W.2d 129, 132 (Ky. 1991). The statute in turn provides accident victims with a longer statute of limitations to later pursue any additional actions for tort liability, so as to give victims more time to pursue claims for No-Fault benefits. *Id*. The Act further seeks "to promote more **liberal** wage loss and medical benefits by allowing claims for intangible loss only when their determination is reasonable and appropriate." KRS 304.39-010(4) (emphasis added). Thus, this section of the Act offers some initial insight that the standards governing processing and payment of No-Fault benefits are weighted heavily in favor of the insured.

4. WHO IS ENTITLED TO NO-FAULT?

"[E]very person suffering loss from injury arising out of maintenance or use of a motor vehicle [in Kentucky] has a right to No-Fault benefits, unless he has rejected the limitation upon his tort rights as provided in KRS 304.060(4)." KRS 304.39-030(1). In addition, if the accident-causing injury occurs outside Kentucky but within the United States, its territories, or Canada, those insured under a contract for No-Fault benefits, as well as the driver and other occupants of an insured vehicle, retain the right to such benefits, unless the vehicle is a fleet vehicle (i.e., one of five or more vehicles under common ownership) or owned by a government other than the Commonwealth of Kentucky. KRS 304.39-030(2).

The first step for any person seeking to claim No-Fault benefits is to contact the No-Fault insurer and request a No-Fault (or PIP) application. The application must be completed to provide the information required by KRS 304.39-280. An example of a blank No-Fault application is shown in the following figure (next two pages):

KENTUCKY NO FAULT

IMPORTANT: A. TO ENABLE US TO DETERMINE IF YOU ARE ENTITLED TO BENEFITS UNDER THE POLICYHOLDER'S INSURANCE CONTRACT, YOU MUST COMPLETE AND SIGN THIS FORM
B. YOU MUST ALSO SIGN THE ATTACHED AUTHORIZATION (S).
C. RETURN PROMPTLY WITH ANY MEDICAL BILLS YOU HAVE RECEIVED TO DATE.

DATE | OUR POLICYHOLDER | DATE OF ACCIDENT | FILE NUMBER

TO: _____
CLAIM DEPARTMENT

_____
NAME OF COMPANY

1. YOUR NAME | HOME PHONE NUMBER | BUSINESS PHONE NUMBER

2. YOUR ADDRESS (NO., STREET, CITY OR TOWN, STATE & ZIP CODE) | DATE OF BIRTH | SOCIAL SECURITY NO.

3. DATE AND TIME OF ACCIDENT A.M. P.M. | PLACE OF ACCIDENT (STREET, CITY OR TOWN AND STATE)

4. BRIEF DESCRIPTION OF ACCIDENT

5. DO YOU OR ANY MEMBER OF YOUR HOUSEHOLD OWN A MOTOR VEHICLE? YES ☐ NO ☐

IF "YES," NAME OF INSURANCE COMPANY _____ POLICY NUMBER _____

WERE YOU THE DRIVER OF THE MOTOR VEHICLE?	YES ☐	NO ☐
WERE YOU A PASSENGER IN THE MOTOR VEHICLE?	YES ☐	NO ☐
WERE YOU A PEDESTRIAN?	YES ☐	NO ☐
WERE YOU A MEMBER OF THE MOTOR VEHICLE OWNER'S HOUSEHOLD?	YES ☐	NO ☐
HAVE YOU REJECTED THE LIMITATIONS ON YOUR RIGHT TO SUE AS PROVIDED BY KENTUCKY NO-FAULT ACT (KRS 304.39)?	YES ☐	NO ☐

6. AS A RESULT OF THIS ACCIDENT, WERE YOU INJURED?
YES ☐ (IF YOUR ANSWER IS "YES", COMPLETE THE REST OF THIS FORM.)
NO ☐ (IF "NO," SIGN HERE AND REURN THIS FORM TO US.)

_____ _____
Signature Date

7. DESCRIBE YOUR INJURY

8. WERE YOU TREATED BY A DOCTOR? YES ☐ NO ☐ | DOCTOR'S NAME AND ADDRESS

9. IF YOU WERE TREATED IN A HOSPITAL, WERE YOU AN IN-PATIENT ☐ OUT-PATIENT ☐ | HOSPITAL'S NAME AND ADDRESS

10. AMOUNT OF MEDICAL BILLS TO DATE $_____
WILL YOU HAVE MORE MEDICAL EXPENSE? YES ☐ NO ☐
AT THE TIME OF YOUR ACCIDENT, WERE YOU IN THE COURSE OF YOUR EMPLOYMENT? YES ☐ NO ☐

11. DID YOU LOSE WAGES OR SALARY AS A RESULT OF YOUR INJURY? YES ☐ NO ☐

IF "YES," AMOUNT LOST TO DATE $_____

WHAT IS YOUR AVERAGE WEEKLY WAGE OR SALARY? $_____

12. IF YOU LOST WAGES:
BEGINNING DATE OF DISABILITY FROM WORK: _____ DATE RETURNED TO WORK _____

1-2003

13. HAVE YOU RECEIVED OR ARE YOU ELIGIBLE FOR BENEFITS UNDER
    1. ANY WORKMEN'S COMPENSATION LAW? YES ☐ NO ☐

       IF "YES," AMOUNT: $_____ PER WEEK ☐ PER MONTH ☐

    2. SOCIAL SECURITY BENEFITS? YES ☐ NO ☐

14. LIST NAMES & ADDRESSES OF YOUR EMPLOYER & OTHER EMPLOYERS FOR 1 YEAR PRIOR TO ACCIDENT DATE. GIVE OCCUPATION & EMPLOYMENT DATES.

EMPLOYER AND ADDRESS	OCCUPATION	FROM	TO
EMPLOYER AND ADDRESS	OCCUPATION	FROM	TO
EMPLOYER AND ADDRESS	OCCUPATION	FROM	TO

I hereby authorize release of medical information, including but not limited to, medical bills and reports, to such persons as the company may deem necessary.

15. AS A RESULT OF YOUR INJURY, HAVE YOU HAD ANY OTHER EXPENSES? YES ☐ NO ☐
    IF "YES", explain:

WARNING

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE CONTAINING ANY MATERIALLY FALSE INFORMATION OR CONCEALS, FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME.

Signature _____ Date _____

DO NOT DETACH

AUTHORIZATION FOR MEDICAL INFORMATION

THIS AUTHORIZATION OR PHOTOCOPY HEREOF WILL AUTHORIZE YOU TO FURNISH ALL INFORMATION YOU MAY HAVE REGARDING MY CONDITION WHILE UNDER YOUR OBSERVATION OR TREATMENT, INCLUDING THE HISTORY OBTAINED, X-RAY PHYSICAL FINDINGS, DIAGNOSIS AND PROGNOSIS. YOU ARE AUTHORIZED TO PROVIDE THIS INFORMATION IN ACCORDANCE WITH THE PERSONAL INJURY PROTECTION BENEFITS (KENTUCKY NO-FAULT) LAW.

Signature _____ Date _____

DO NOT DETACH

AUTHORIZATION FOR WAGE AND SALARY INFORMATION

THIS AUTHORIZATION OR PHOTOCOPY HEREOF WILL AUTHORIZE YOU TO FURNISH ALL INFORMATION YOU MAY HAVE REGARDING MY WAGES OR SALARY WHILE EMPLOYED BY YOU. YOU ARE AUTHORIZED TO PROVIDE THIS INFORMATION IN ACCORDANCE WITH THE PERSONAL INJURY PROTECTION BENEFITS (KENTUCKY NO-FAULT) LAW.

Signature _____ Date _____

MAIL COMPLETED FORM TO:

Note that the applications require executed Medical and Wage Authorizations.

KRS 304.39-210(1) provides that medical expense benefits may be paid by the insurer directly to the person supplying products, services, or accommodations to the claimant. However, KRS 304.39-241, passed in 1998, provides that "an insured may direct the payment of benefits among the different elements of loss, if the direction is provided in writing to the reparation obligor. A reparation obligor shall honor the written direction of benefits provided by an insured on a prospective basis. The insured may also explicitly direct the payment of benefits for related medical expenses already paid arising from a covered loss" for reimbursement to a health insurer, Medicaid, Medicare, or other such subrogation interests.

The effect of KRS 304.39-241 has been that many No-Fault insurers will pay benefits for reimbursement of medical bills directly to the insured if directed to do so in writing, provided that proper medical documentation has been submitted. The passage of KRS 304.39-241 (and simultaneous repeal of KRS 304.39-240) also eliminated any direct right of action by a medical provider against the No-Fault insurer by assignment or otherwise. *Neurodiagnostics, Inc. v. Kentucky Farm Bureau,* 250 S.W.3d 321 (Ky. 2008). Likewise, a medical provider lacks any standing to sue for penalties or interest. *Ericksen v. Kentucky Farm Bureau,* 336 S.W.3d 909 (Ky.App. 2010).

Recently, however, the Kentucky Court of Appeals has rendered an opinion that the insurer may put the provider's name on the check along with the insured's for outstanding medical bills, which essentially eliminates the insured's ability to independently administer these funds. A motion for discretionary review of this opinion,[3] which is not yet final, is currently pending before the Kentucky Supreme Court.

3 *Medlin v. Progressive Direct Insurance Company,* Case No. 2011-CA-002258-MR (rendered April 5, 2013).

5. WHO ISN'T ENTITLED TO NO-FAULT?

The following classes of persons are not entitled to No-Fault benefits unless otherwise noted:

- A person who sustains injury on any motorized vehicle that is excluded from the definition of "motor vehicle" in KRS 304.39-020(7), namely "road rollers, road graders, farm tractors, vehicles on which power shovels are mounted, such other construction equipment customarily used only on the site of construction and which is not practical for the transportation of persons or property upon the highways, such vehicles as travel exclusively upon rails, and such vehicles as are propelled by electrical power obtained from overhead wires while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the said limits of any municipality. Motor vehicle shall not mean moped as defined in this section." This statute has also been interpreted to exclude golf carts (*Kenton County v. Modlin,* 901 S.W.2d 876 (Ky. App. 1995)), ATVs (*Manies v. Croan,* 977 S.W.2d 22 (Ky. App. 1998)), and forklifts (*O'Keefe v. North American Refractories,* 78 S.W.3d 760 (Ky.App. 2002)) from the definition of "motor vehicle."
- Any person who would otherwise be covered under the No-Fault Act who has filed a rejection with the Kentucky Department of Insurance, indicating that he or she does not wish to be subject to the provisions of the Act. KRS

304.39-060(4)&(5). However, KRS 304.39-140(5) allows persons who have rejected their tort limitations under the Act to "buy back" basic and added reparation benefits, if desired.

- A person who sustains injury while occupying his or her own motor vehicle, which he or she was required to insure under the Act, and failed to have insured at the time of the accident causing such injury. KRS 304.39-160(4); e.g., *Bartlett v. Prime Ins. Syndicate,* 156 S.W.3d 299 (Ky.App. 2004).

- A person who converts a motor vehicle is disqualified, except within his or her own insurance contract under which he or she is an insured. KRS 304.39-190; *Preferred Risk v. Ky. Farm Bureau,* 872 S.W.2d 469 (Ky. 1994). The statute does not provide a direct definition of a "converter"; instead, it states that "a person is not a converter if he uses the motor vehicle in the good faith belief that he is legally entitled to do so." KRS 304.39-190. However, "family members" who reside in the insured's household are covered, even if they use a motor vehicle without any good faith belief that they are legally entitled to do so, due to the ambiguity that arises under the policy definition of them as a "covered person." *State Auto. Mut. Ins. Co. v. Elli*s, 700 S.W.2d 801 (Ky.App. 1985). Otherwise, it is generally a jury question as to whether a person uses a motor vehicle in the good faith belief that he or she is legally entitled to do so, and is therefore not a converter. *Stuart v. Capital Enterprise*

Ins. Co., 743 S.W.2d 856 (Ky.App. 1987); *Covington Mutual Ins. Co. v. Hurst,* 656 S.W.2d 742 (Ky.App. 1983).[4]

- Motorcycle operators and passengers, unless optional coverage has been purchased for the motorcycle or by the individual. KRS 304.39-040(3). An owner of a motorcycle may also reject coverage under the No-Fault Act as previously described. This rejection applies, however, solely to the operation of his motorcycle and not to his ownership, operation, or use of any other type of motor vehicle. KRS 304.39-060(9).
- Finally, a person who has been excluded in the policy. KRS 304.39-045, the Named Driver Exclusion, provides that "the insurer and named insured may agree to exclude any member of the household, not a spouse or a dependent from coverage as the operator of an insured vehicle. The names of persons excluded shall be set forth in the policy

4 Moreover, since these cases were decided, Kentucky has adopted the "initial permission rule," which holds that "as long as permission is initially given to a person to use a vehicle, insurance coverage may extend to subsequent vehicle users through the language of the omnibus clause as long as those subsequent users have permission from the initial borrower to use the vehicle. This coverage applies even if the subsequent usage of the vehicle was not contemplated by the parties at the time the initial permission was granted. However, our initial permission rule must be limited: use of a vehicle which amounts to conversion is not covered through the omnibus clause unless the clause specifically allows for such coverage." *Mitchell v. Allstate,* 244 S.W.3d 59, 65 (Ky. 2008).

or in an endorsement that is signed by both parties." Thus, for policies issued on and subsequent to July 13, 1990, (the effective date of the statute) an insurer can exclude any member of the household, aside from his or her spouse or dependent(s), from coverage as the operator of an insured vehicle, provided the policy complies with the requirements of KRS 304.39-045. *Beacon Ins. Co. of America v. State Farm,* 795 S.W.2d 62 (Ky. 1990).

6. ARE THE RULES ANY DIFFERENT FOR PERSONS WHO AREN'T ENTITLED TO NO-FAULT?

Yes. A person who has rejected the application of the No-Fault Act (as described in the previous answer) is not subject to the threshold requirements for filing an action for tort liability for injuries that result from a motor vehicle accident in Kentucky. However, he or she is still subject to the same statute of limitations in KRS 304.39-230(6). *Troxell v. Trammell,* 730 S.W.2d 525 (Ky. 1987).

As for those persons who are otherwise not entitled to No-Fault benefits (i.e., uninsured owners/operators, converters, motorcyclists, and rejecters of the Act who have not purchased coverage), they still have the right to pursue an action for tort liability. But because they have no right to collect for those damages that would have been covered by No-Fault, they cannot collect the first $10,000 of these damages from anyone else who is otherwise liable for their injuries. For example, a motorcyclist who has not purchased or rejected BRB may not recover the first $10,000 of medical expense and wage loss. *Miller v. Barr,* 737 S.W.2d 182 (Ky.App. 1987). Note, however, that KRS 304.39-060(2)(c) provides that tort liability "is not so limited for injury to a person who is not an owner, operator, maintainer or user of a motor vehicle [on the public roadways of the Commonwealth], nor for injury to the passenger of a motorcycle arising out of the maintenance or use of such motorcycle."

7. WHAT ITEMS OF LOSS ARE COVERED BY NO-FAULT?

These items are defined in KRS 304.39-020. "Basic reparation benefits," or No-Fault benefits, are defined as benefits "providing reimbursement for net **loss** suffered through injury arising out of the operation, maintenance or use of a motor vehicle." KRS 304.39-020(2) (emphasis added).

"Loss" is in turn defined as "**accrued** economic loss consisting **only** of **medical expense, work loss, replacement services loss,** and, if injury causes death, **survivor's economic loss and survivor's replacement services loss**." KRS 304.39-020(5) (emphasis added). Thus, this section itemizes all of the kinds of loss for which No-Fault is payable. The word "accrued" is important, as it implies that loss generally must already be sustained in order to qualify for payment; that is, future losses are generally not payable by No-Fault, except where benefits are payable in the event of death. *Wemyss v. Coleman,* 729 S.W.2d 174 (Ky. 1987).

"Medical expense" is defined as "**reasonable** charges **incurred** for **reasonably needed** products, services, and accommodations, including those for medical care, physical rehabilitation, rehabilitative occupational training, and other remedial treatment and care. 'Medical expense' may include non-medical remedial treatment rendered in accordance with a recognized religious method of healing. . . . Medical expense **shall include all healing arts professions licensed by the**

Commonwealth of Kentucky. There shall be a presumption that any medical bill submitted is reasonable." KRS 304.39-020(5)(a) (emphasis added).

In addition, the definition of "medical expense" also states that it includes a total charge of not more than $1,000 per person for funeral, cremation, and burial expenses, even though one would not normally consider such expenses as medical expenses. KRS 304.39-020(5)(a).

"'Work loss' means loss of income from work the injured person **would probably have performed** if he had not been injured, and expenses reasonably incurred by him in obtaining services in lieu of those the injured person would have performed for income, reduced by any income from substitute work actually performed by him." KRS 304.39-020(5)(b) (emphasis added). This definition can include an insured who is unemployed but who, after an accident, is offered a job that he or she cannot perform due to a physician's advice. Under these circumstances, No-Fault benefits for "work loss" may also be payable. *Foster v. Kentucky Farm Bureau Mut. Ins. Co.,* 189 S.W.3d 553 (Ky. 2006).

"'Replacement services loss' means expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the injured person would have performed, not for income but for the benefit of himself or his family, if he had not been injured." KRS 304.39-020(5)(c). Examples of this type of loss for which benefits might be payable might include housekeeping, lawn mowing, child care, etc.

The remaining two types of loss are paid only in the event of death. They are "survivor's economic loss" and "survivor's replacement services loss." These definitions are a little trickier than the other items of loss.

"Survivor's economic loss" is defined as "loss after decedent's death of contributions of things of economic value to his survivors, not including services they would have received from the decedent if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of the decedent's death." KRS 304.39-020(5)(d).

"Survivor's replacement services loss" is defined as "expenses reasonably incurred by survivors after decedent's death in obtaining ordinary and necessary services in lieu of those the decedent would have performed for their benefit if he had not suffered the fatal injury, less expenses of the survivors avoided by reason of the decedent's death and not subtracted in calculating survivor's economic loss." KRS 304.39-020(5)(e).

In *Luttrell v. Wood*, 902 S.W.2d 817 (Ky. 1995), the Kentucky Supreme Court further discussed the meaning of "survivor's replacement services loss" as covering "those services that are associated with the 'ordinary and necessary' tasks of day-to-day life, such as house work, child care," etc. The opinion does not contain a similar discussion of the meaning of "survivor's economic loss," except to say that this type of loss is "tailored to the replacement of income," similar to work loss.

But recall that the definition of "survivor's economic loss" refers to "contributions of **things** of economic value" to survivors, not lost income. KRS 304.39-020(5)(d) (emphasis added). Thus, it is suggested that this type of loss actually refers to tangible assets that the decedent might have contributed to his survivors had he lived, such as a house, a car, utilities, groceries, and so forth, in the nature of economic support, rather than any direct income the deceased might have paid to his or her survivors.

Note also that "survivor's replacement services loss" and "survivor's economic loss," which are payable only in the event of death, are the only types of loss for which No-Fault is payable for prospective loss, as opposed to loss that has already been incurred. *Couty v. Kentucky Farm Bureau,* 608 S.W.2d 370 (Ky. 1980).

KRS 304.39-120(1) provides that No-Fault benefits are *not* payable to the extent that medical expenses and lost wages are covered by workers' compensation. This is because persons injured in a Kentucky motor vehicle accident while engaged in the course and scope of their employment are covered by workers' compensation. Workers' comp is primarily liable for their medical expenses and 66-2/3 percent of their wage loss based on their average weekly wage, but not to exceed the state average weekly wage. KRS 342.020(1); KRS 342.730(1)(a). However, No-Fault benefits may still be payable for the difference between lost wages covered by workers' comp and

the remainder of the injured worker's lost wages that are not covered by workers' comp, typically, at the very least, the remaining one-third of the worker's average weekly wage.

Finally, it is important to note that KRS 304.39-130 limits the maximum weekly basic reparations benefit for work loss, survivor's economic loss, replacement services loss, and survivor's replacement services loss arising from injury to one person to $200, prorated for any lesser period.

8. WHAT IS MEANT BY THE "NO-FAULT THRESHOLD"?

The term "No-Fault threshold" is legal jargon that doesn't actually appear in the statute—it is really a misnomer. The No-Fault threshold actually refers to certain requirements that an injured person must meet in order to make a claim for tort liability—not a claim for No-Fault benefits—for bodily injury as a result of a motor vehicle accident. There is not a threshold requirement for submitting a claim for No-Fault benefits.

Thus, the No-Fault threshold may be more accurately called the "tort liability threshold." The term "No-Fault threshold" probably derives from the fact that this threshold requirement is found in the No-Fault statute, and because one of the criteria that will satisfy the threshold requirement is the amount of No-Fault benefits paid to or on behalf of the injured person for medical expense.

The threshold requirement in KRS 304.39-060(2)(b) states:

> A plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars ($1,000), or the injury or disease

> consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this subsection upon a showing that the medical treatment received has an equivalent value of at least one thousand dollars ($1,000).

The No-Fault threshold generally does not pose a significant obstacle to those seeking to file an injury claim as a result of a motor vehicle accident, given the broad definition of "medical expense," which includes any healing arts profession licensed by the Commonwealth, coupled with the presumption that any such expense is reasonable. This is especially true considering that the statute was enacted in 1975, when medical costs were considerably less than they are today. Moreover, aside from the medical expense requirement (although this is the most common), the threshold may be met in other ways, notably by a showing of "permanent disfigurement" or injury. Scars alone are considered to meet the threshold requirement of permanent disfigurement. *Smith v. Higgins,* 819 S.W.2d 710 (Ky. 1991).

9. WHEN DOES AN INSURANCE COMPANY OWE NO-FAULT?

The obligation to pay No-Fault benefits is not triggered until the insurer receives "reasonable proof of the fact and amount of loss realized." The insured has the burden to furnish the insurer with reasonable proof of loss, and the insurer's initial denial of the insured's claim does not relieve the insured of this obligation. *Automobile Club Insurance Co. v. Lainhart,* 609 S.W.2d 692 (Ky. App. 1980).

The claimant's statement alone does not satisfy the statutory requirement of "reasonable proof of the fact and amount of loss realized." *State Auto Mut. Ins. Co. v. Outlaw,* 575 S.W.2d 489 (Ky. App. 1978). Thus, "reasonable proof of the fact and amount of loss realized" would seem to require some sort of actual documentation that "loss," for purposes of No-Fault payment, has been incurred. Examples of such documentation might include: (1) to prove medical expense, a hospital, medical, or other bill, including some indication of a causal relationship between a motor vehicle accident and the nature of the condition for which treatment was rendered; or (2) to prove work loss, a physician or other provider's disability statement coupled with an employer's statement verifying lost time from work.

If an insured's proof of loss is rejected as insufficient, then KRS 304.39-210(5) requires that the reparations obligor "shall give to the claimant prompt written notice of the rejection, specifying the reason." In the absence of such prompt notice of

the reason for non-payment, the insurance company must be deemed to have waived any question of the sufficiency of the proof of loss for the purpose of determining when an otherwise valid claim becomes "overdue." *State Auto Mutual Ins. Co. v. Outlaw,* 575 S.W.2d 489, 493 (Ky.App. 1978).

An exception to the proof of loss requirement lies in the area of benefits payable in the event of death. The Supreme Court of Kentucky has held that benefits for "survivor's replacement services loss" become payable for such loss of services "which it is reasonably probable would have been rendered in the future." *Couty v. Kentucky Farm Bureau,* 608 S.W.2d 370 (Ky. 1980). This holding would appear equally applicable to "survivor's economic loss." Therefore, where such loss appears reasonably probable, the survivors have sufficiently proven their entitlement to No-Fault benefits, and the insurer becomes obligated to make payment. *Kentucky Farm Bureau v. McQueen,* 700 S.W.2d 73 (Ky.App. 1985). It would still be appropriate, however, for the insurer to require some explanation of the decedent's relationship to his or her survivors to determine the probability of such loss, before becoming obligated to make such payment.

In addition to the foregoing, the insurer has the right to obtain the following information relevant to a claim for No-Fault benefits, as outlined in KRS 304.39-280:

(a) An employer shall furnish a statement of the work record and earnings of an employee upon whose injury the claim is based, covering the period specified by the claimant or the reparation obligor making the request and may include a reasonable period before, and the entire period after, the injury.

(b) The claimant shall deliver to the reparation obligor a copy of every written report, previously or thereafter made, relevant to the claim, and available to him, concerning any medical treatment or examination of a person upon whose injury the claim is based and the names and addresses of the physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and the claimant shall authorize the reparation obligor to inspect and copy relevant records of physicians and of hospitals, clinics, and other medical facilities.

(c) A physician or hospital, clinic, or other medical facility furnishing examinations, services, or accommodations to an injured person in connection with a condition alleged to be connected with an injury upon which a claim is based, upon authorization of the claimant, shall furnish a written report of the history, condition, diagnoses, medical tests, treatment, and dates and cost of treatment of the injured person, and permit inspection and copying of all records and reports as to the history, condition, treatment, and dates and cost of treatment.

Note, however, that the insurer's right to the foregoing information is separate from its obligation to make payment upon receipt of "reasonable proof of the fact and amount of loss realized." For example, once an insurer has received all outstanding medical bills and a completed medical authorization from the injured party, it becomes the insurer's duty to search out medical reports to ascertain that the medical bills are the result of the injury. *Kentucky Farm Bureau v. Roberts,* 603 S.W.2d 498 (Ky.App. 1980).

10. WHEN DOES AN INSURANCE COMPANY *NOT* OWE NO-FAULT?

In addition to those persons who are not entitled to No-Fault, discussed in the answer to question five, a person may not be entitled to No-Fault due to the manner in which the injury takes place.

First of all, recall that "basic reparation benefits" are defined as benefits "providing reimbursement for net loss suffered through injury arising out of the **operation, maintenance or use of a motor vehicle**." KRS 304.39-020(2) (emphasis added). The drafters of the Act declined to provide any further definition of the terms "operation" or "maintenance" as used in this definition, so evidently these terms are considered somewhat self-explanatory.

"Use of a motor vehicle," on the other hand, is further defined as "any utilization of the motor vehicle as a vehicle including occupying, entering into and alighting from it. It does not include (i) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (ii) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it." KRS 304.39-020(6).

Thus, a distinct line of case law authority has developed concerning whether particular conduct is considered "use of a motor vehicle," so as to entitle an injured party to No-Fault benefits.

These cases are as follows:

1. *Interlock Industries v. Rawlings,* 358 S.W.3d 925 (Ky. 2011). Truck driver, while rolling unattached straps from load, was struck and injured by an aluminum bundle that rolled off the trailer held **not covered** under the No-Fault Act.

2. *Fields v. BellSouth Communications,* 91 S.W.3d 571 (Ky. 2012). Woman who tripped over a utility pole guy wire and broke her hip as she took a step back from the driver's side door to enter the car held **covered** under the No-Fault Act.

3. *McCall v. Zurich American Ins. Co.,* 2011-CA-002059-MR (Ky. App. 2011) (opinion unpublished—may not be cited as authority). Truck driver who fell and injured himself while tightening chains with a ratchet on a car transport vehicle held **not entitled** to No-Fault.

4. *Thompson v. Kentucky Farm Bureau,* 901 S.W.2d 874 (Ky. App. 1995). Mechanic injured while working on vehicle **not entitled** to No-Fault.

5. *Link v. State Farm,* Ky. App., 41 K.L.S. 4, p. 6 (4/28/94) (opinion unpublished—may not be cited as authority). Heart attack while driving vehicle **not covered** by No-Fault.

6. *West American Insurance Co. v. Dickerson,* 865 S.W.2d 320 (Ky. 1993). "Alighting" from vehicle **covered** by No-Fault until both feet are "planted firmly on the ground."

7. *Key v. Rager,* 858 S.W.2d 718 (Ky.App. 1993). Injuries from explosion while lighting cigarette with cigarette lighter in passenger seat **covered** by No-Fault.

8. *Ky. Farm Bureau v. Gray,* 814 S.W.2d 928 (Ky.App. 1991). Insured giving stranded motorist a "jump" **entitled** to No-Fault.

9. *Ky. Farm Bur. Mut. Ins. Co. v. Hall,* 807 S.W.2d 854 (Ky.App. 1991). Driver hit by rock thrown from lawn mower **entitled** to No-Fault.

10. *State Farm v. Hudson,* 775 S.W.2d 922 (Ky. 1989). Driver injured while standing on ground and unfastening chain on a log truck **not entitled** to No-Fault.

11. *State Farm v. Rains,* 715 S.W.2d 232 (Ky. 1986). Man hit on back of the head with a baseball bat while entering vehicle **not entitled** to No-Fault.

12. *Goodin v. Overnight Transportation Co.,* 701 S.W.2d 131 (Ky. 1985). Man who stepped in hole in trailer bed while unloading goods inside unlit tractor-trailer **entitled** to No-Fault.

13. *State Farm v. Ky. Farm Bureau,* 671 S.W.2d 258 (Ky.App. 1984). Person injured while attaching tow chain to his disabled vehicle **entitled** to No-Fault.

14. *Commercial Union Assur. Companies v. Howard,* 637 S.W.2d 647 (Ky. 1982). Insured underneath truck repairing suspension system **not entitled** to No-Fault.

In addition to those examples of situations that fail to meet the definition of "operation, maintenance or use of a motor vehicle," injuries may not be covered by No-Fault if the injury is brought about by the person's own intentional conduct. KRS 304.39-200 states:

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

KRS 304.39-060(3) further states that "for purposes of this section and the provisions on reparation obligor's rights of reimbursement, a person does not intentionally cause harm merely because his act or failure to act is intentional or done with his realization that it creates a grave risk of harm."

There are no cases interpreting these sections, indicating that such cases are rare. Under the language of the statute, however, it would appear that injury or death due to a rescue effort would probably not be disqualified from No-Fault, nor would injury or death resulting from driving under the influence of alcohol, whereas injury or death resulting from suicide or attempted suicide clearly would appear to be disqualified.

Note that if an insurer rejects a claim for No-Fault for any reason, the insurer must give to the claimant prompt written notice of the rejection, specifying the reason. If a claim is rejected for a reason other than that the person is not entitled to the benefits claimed, the written notice shall inform the claimant that he may file his claim with the assigned claims bureau and shall give the name and address of the bureau. KRS 304.39-210(5).

11. WHAT ARE THE TIME LIMITS FOR PAYMENT OF NO-FAULT?

Once the insurer receives reasonable proof of the fact and amount realized, benefits are payable within thirty days, unless the insurer elects to accumulate claims for periods not exceeding thirty-one days, in which case benefits are payable within fifteen days thereafter. KRS 304.39-210(1). If reasonable proof is supplied as to only part of a claim, and that part totals $100 or more, that part is overdue if not paid within the above time period. *Id.* The time limits do not apply to benefits withheld at the direction of a secured person pursuant to KRS 304.39-241.

KRS 304.39-245, enacted in 1998 (along with KRS 304.39-241), further gave insurers the right to "request or negotiate a reduction or modification of charges" from health care providers, and if the health care provider agrees to such reduction or modification, then it is prohibited from balance billing the insured. At least one major Kentucky auto insurer routinely subjects such charges to peer review or auditing and issues payment accordingly, and the health care providers tend to routinely accept payment in satisfaction of such charges. However, this process does not alter or extend the time limits for payment upon receipt of "reasonable proof of the fact and amount realized," as set forth in KRS 304.39-210(1).

KRS 304.39-210(4) also gives the no-fault insurer the right to "bring an action to recover benefits which are not payable, but are in fact paid, because of any intentional representation

of a material fact upon which the reparation obligor relies, by the insured or by a person providing an item of medical expense." However, due to the level of money involved in No-Fault payments, and the obvious potential for countersuits, this particular section is seldom if ever invoked, and should be reserved for extraordinary or extreme circumstances.

12. WHAT ARE THE PENALTIES FOR FAILURE TO MAKE REQUIRED PAYMENT UNDER NO-FAULT?

Overdue payments bear interest at the rate of 12 percent per annum, except that if delay was without **reasonable foundation** the rate of interest shall be 18 percent per annum. KRS 304.39-210(2).

In addition, if overdue benefits are recovered in an action against the reparation obligor or paid by the reparation obligor after receipt of notice of the attorney's representation, a reasonable attorney's fee may be awarded by the court if the denial or delay was without **reasonable foundation**. KRS 304.39-220; *Moore v. Roberts*, 684 S.W.2d 276 (Ky. 1982).

There are a few key points that need to be made concerning these penalty statutes.

First, note that the 18 percent interest and attorney's fee penalties may only be assessed if the denial or delay is without **reasonable foundation**. *Shelter Mut. Ins. Co. v. Askew,* 701 S.W.2d 139 (Ky.App. 1985). Otherwise, a claim for overdue payment is limited to the 12 percent interest penalty. But note that if an overdue payment, for which there existed a reasonable foundation for delay, is made, but no additional interest penalty is paid, there would not appear to be any reasonable foundation for denial or delay in payment of the 12 percent interest penalty, for which a claim for the 18 percent interest penalty and attorney's fees may lie.

Second, note that a *bona fide* defense constitutes reasonable foundation for delay. *Automobile Club Insurance Co. v. Lainhart,* 609 S.W.2d 692 (Ky.App. 1980) (e.g., failure to submit adequate proof of claim).

Note further that the 18 percent interest penalty, if delay in payment was without reasonable foundation, is mandatory, whereas the attorney's fee penalty is discretionary. However, in *Moore v. Roberts,* 684 S.W.2d 276 (Ky. 1982) the Court awarded additional attorney's fees for an appeal from a judgment that No-Fault benefits were payable and that delay in payment was without reasonable foundation, even though payment was made prior to the appeal.

The foregoing penalties are the exclusive remedies for violations of those statutes governing payment of No-Fault benefits, and no separate cause of action exists against an insurer under the Kentucky Unfair Claims Settlement Practices Act (KRS 304.12-230) or for "bad faith" as a result of a claim for No-Fault benefits. *Foster v. Ky. Farm Bureau Mut. Ins. Co.,* 189 S.W.3d 553 (Ky. 2006).

13. WHAT ARE THE INSURANCE COMPANY'S RIGHTS IN RESPONSE TO A PENDING CLAIM FOR MEDICAL BENEFITS UNDER NO-FAULT?

KRS 304.39-270 states:

> If the mental or physical condition of a person is material to a claim for past or future basic or added reparation benefits, the reparation obligor may petition the circuit court for an order directing the person to submit to a mental or physical examination by a physician. Upon notice to the person to be examined and all persons having shown an interest, the court may make the order for good cause shown. The order shall specify the time, place, manner, conditions, scope of the examination, and the physician by whom it is to be made.

The Kentucky Court of Appeals has indicated that an insurer has the right to a physician of its choice under this statute. *Shelter Mut. Ins. Co. v. Askew,* 701 S.W.2d 139 (Ky.App. 1985). However, a No-Fault insurer must demonstrate "good cause," which must be more than mere suspicion. A mere affidavit submitted by an insurance adjuster handling the claim is insufficient, thereby suggesting the necessity for peer review by an independent medical examiner. *Miller v. U S F & G,* 909 S.W.2d 339 (Ky.App. 1995).

The purpose of an independent medical examination, of course, would be to obtain a second opinion concerning the medical condition underlying a claim for No-Fault benefits. For example, an examination may seek to establish whether

a prolonged or anticipated course of treatment would appear reasonably necessary within a reasonable degree of medical probability, or whether a prolonged or anticipated work absence would appear to be medically justified.

14. WHO HAS TO PAY NO-FAULT AMONG MULTIPLE NO-FAULT INSURERS?

In determining which insurance company is obligated to pay No-Fault in cases where the insured is covered under more than one policy (e.g., a passenger covered under his or her own auto policy who is injured in a vehicle covered under a separate policy), the security covering the vehicle is always primary. But if the primary insurance company (the reparation obligor) fails to make payment for loss within thirty days, then the injured person shall be entitled to payment under any contract of basic reparation (No-Fault) insurance. KRS 304.39-050(1).

For pedestrians, the security on the vehicle that struck the pedestrian is primary. KRS 304.39-050(1); *State Farm Mut. v. Ky. Farm Bureau Mut.,* 671 S.W.2d 258 (Ky.App. 1984).

If the vehicle is uninsured, then any contract of No-Fault insurance under which the injured person is insured shall apply. KRS 304.39-050(2). If there is no other such contract of insurance, however, then the injured person might still be eligible for No-Fault benefits under the Kentucky Assigned Claims Plan, provided that he or she is not responsible for the vehicle being uninsured (*see* question nineteen concerning the Assigned Claims Plan, *infra*).

15. WHAT IS "STACKING"?

"Stacking" is the practice of taking the policy limits of a particular type of coverage on each vehicle insured under the same policy or multiple policies, and adding all of these limits together to create a higher limit that is equal to the total sum of the limits on each and every vehicle insured under the same policy or multiple policies for that particular type of coverage.

Stacking is permitted for certain types of insurance coverages in Kentucky, provided that the insured seeking to stack is the person who bought and paid for the policy or a member of that person's household. The theory adopted by Kentucky courts appears to be that, because the insured pays a separate premium for certain types of coverages for each vehicle and these coverages are personal to the insured, he or she should be entitled to collect under each and every limit of such coverages for each vehicle for which a premium was paid.

16. CAN YOU STACK NO-FAULT?

No stacking of basic reparation benefits is allowed. KRS 304.39-050(3). But stacking of added reparation benefits is allowed. *State Farm v. Mattox,* 862 S.W.2d 325 (Ky. 1993).

As for other types of insurance, stacking of both uninsured motorists (UM) coverage and underinsured motorists (UIM) coverage is allowed, and anti-stacking exclusions in policies affording such coverages are void, as they are against public policy. *Hamilton v. Allstate Ins. Co.,* 789 S.W.2d 751 (Ky. 1990) (UM coverage, one policy, multiple vehicles); *Chaffin v. Kentucky Farm Bureau Insurance Companies,* 789 S.W.2d 754 (Ky. 1990) (UM coverage, multiple policies); *Allstate Ins. Co. v. Dicke,* 862 S.W.2d 327 (Ky. 1993) (UIM coverage). However, stacking of UM and UIM coverages is not allowed where the insured paid a single premium for coverage and the premium was not based on the number of vehicles covered. *Marcum v. Rice,* 987 S.W.2d 789 (Ky. 1999); *Adkins v. Ky. National Ins. Co.,* 220 S.W.3d 296 (Ky. App. 2007).[5]

Stacking of liability coverages is not allowed, the distinction being that UM and UIM coverages are personal to the insured, whereas liability coverage follows the vehicle. *Butler v. Robinette,* 614 S.W.2d 944 (Ky. 1981).

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5 Not surprisingly, the trend in recent years among Kentucky auto insurers has been to convert their UM/UIM coverages for multiple vehicles into "single premium" policies in order to avoid stacking of these coverages.

17. CAN AN INSURANCE COMPANY THAT HAS PAID NO-FAULT SEEK SUBROGATION?

An insurance company that has paid Kentucky No-Fault can seek to recover its payments by way of subrogation, but with limitations.

KRS 304.39-070(3) permits an insurer that has paid No-Fault (i.e., a reparation obligor) to pursue subrogation against the reparations obligor of a "secured person" (i.e., the responsible party's liability insurer under Kentucky law) in one of two ways: (1) by joining as a party in an action that may be commenced by the person suffering the injury, or (2) by seeking reimbursement via the Kentucky Insurance Arbitration Association (KIAA), established pursuant to KRS 304.39-290.[6] The address, telephone number, and website of the KIAA are as follows (next page):

6 An insurer who arbitrates a claim through the KIAA is subject to the KIAA's Plan of Operation and Arbitration Rules, which are available on the www.kyinsplans.org website. Article 4(E) of the Plan of Operation provides that "no arbitration award shall be made for damages paid or payable by the member reparations obligor as basic benefits for the first $1,000 in the aggregate of loss so paid arising from a single occurrence without regard to the number of persons to whom basic or added reparations benefits were paid or payable." This is the source of the $1,000 deductible that is common knowledge among those who handle Kentucky No-Fault subrogation claims.

Kentucky Insurance Arbitration Association
David Asher, Director
10605 Shelbyville Road, Suite 100
Louisville, KY 40223
(502) 327–0372
www.kyinsplans.org

The insured's personal injury claim takes priority over the insurance company's right of subrogation as to the responsible party's liability insurance. KRS 304.39-140(3). The insurance company may not recover beyond the responsible party's liability insurance. KRS 304.39-070(4). Thus, if the injured person who has received No-Fault benefits settles for the responsible party's primary liability limits, the No-Fault carrier's right of reimbursement is extinguished. This rule even prevents a No-Fault carrier from subrogating against an excess carrier. *State Auto v. Empire,* 808 S.W.2d 805 (Ky.App. 1991).

Aside from KRS 304.39-070(3), an insurer does not have any right to an independent, separate cause of action for subrogation of No-Fault benefits directly against a "secured person" or his or her insurer. *Fireman's Fund v. GEICO,* 635 S.W.2d 475 (Ky. 1982). However, where the responsible party is uninsured, that party acts as his or her own reparation obligor (i.e., insurer), and may be sued directly in an independent, separate action for subrogation. KRS 304.39-310(2); *Travelers v. Bowling,* 806 S.W.2d 40 (Ky.App. 1991). Also, if the responsible party is from out-of-state and is covered by a liability insurance carrier that is

not authorized to do business in Kentucky (and therefore does not provide "security" pursuant to KRS 304.39-110), then the responsible party is not considered to be a "secured person" and is personally responsible for the No-Fault carrier's subrogation. *Schmidt v. Leppert,* 214 S.W.3d 309 (Ky. 2007). An insurer may also pursue No-Fault subrogation against any responsible person or organization other than a "secured person." KRS 304.39-070(4).

The right of subrogation applies to added No-Fault benefits as well as basic No-Fault benefits. *United Serv. v. State Farm,* 784 S.W.2d 786 (Ky.App. 1990).

Note that the attorney for an injured party who negotiates a settlement that results in reimbursement of the No-Fault carrier's subrogation claim, may have a claim for a fee from the No-Fault carrier's recovery if a benefit was conferred upon the carrier by reason of the attorney's involvement. KRS 304.39-070(5); *Meridian Mutual Insurance Co. v. Walker,* 602 S.W.2d 181 (Ky.App. 1980). But where an insurer chooses to arbitrate, a fee is inappropriate. *MFA Ins. v. Carroll,* 687 S.W.2d 553 (Ky. App. 1985).

The statute of limitations on an insurer's No-Fault subrogation claim is five years from date of accident. *Gray v. State Farm Mut. Auto. Ins. Co.,* 605 S.W.2d 775 (Ky.App. 1980). There is no time limit on the right to intervene in an existing lawsuit. *Grange Mut. Cas. Co. v. McDavid,* 664 S.W.2d 931, 935 (Ky. 1984). As for arbitration, Article 4(C) of the KIAA's

Plan of Operation provides that: "A claim may be submitted to arbitration not later than two (2) years after the last basic reparation payment made by any reparation obligor, or two (2) years after the settlement of the last bodily injury claim arising out of the same accident; or if there is no settlement, two (2) years after the expiration of the statute of limitations of the last bodily injury claim arising out of the same accident, whichever later occurs."

18. WHAT IS THE STATUTE OF LIMITATIONS FOR MAKING A CLAIM FOR NO-FAULT BENEFITS?

If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, may be commenced not later than two years after the last payment of benefits. KRS 304.39-230(1).

If no basic or added reparation benefits have been paid to the decedent or his survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by an injured person before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or four years after the last payment of benefits, whichever is earlier. KRS 304.39-230(2).

Note, however, that recovery for No-Fault benefits (when none have been paid) may be had for prior losses only if the losses accrued within two years before application is made or suit is filed (i.e., there is a "two-year look back rule"). *State Automobile Ins. Co. v. Lange,* 697 S.W.2d 167 (Ky.App. 1985).

Moreover, there is no tolling of the statute of limitations to pursue a claim for No-Fault benefits because of a disability. KRS 304.39-230(5); *Jackson v. State Auto,* 837 S.W.2d 496 (Ky. 1992) (minor who failed to file timely claim for No-Fault benefits barred by statute of limitations).

19. WHAT IS THE KENTUCKY ASSIGNED CLAIMS PLAN (KACP)?

The Kentucky Assigned Claims Plan (KACP) is created pursuant to KRS 304.39-170. Pursuant to his authority under this statute, the Commissioner of Insurance is responsible for organizing and maintaining the assigned claims plan, consistent with the stated purpose of the plan.

Recall that under KRS 304.39-030 every person suffering loss from injury arising out of maintenance or use of a motor vehicle in Kentucky has a right to No-Fault benefits, except for those certain classes of persons or injuries otherwise spelled out in the Act. The purpose of the KACP, therefore, is to provide a means for recovery of No-Fault benefits for those persons otherwise entitled to benefits, where no other means of recovery exists.

KRS 304.39-160(1) provides that a person entitled to basic reparation benefits may obtain them through the KACP if:

a. Basic reparation insurance is not applicable to the injury for a reason other than those specified in the provisions on converted vehicles and intentional injuries [e.g., a passenger in an uninsured vehicle];

b. Basic reparation insurance applicable to the injury cannot be identified;

c. Basic reparation insurance applicable to the injury is inadequate to provide the contracted for benefits because

> of financial inability of a reparation obligor to fulfill its obligations [i.e., insolvency]; or
>
> d. A claim for basic reparation benefits is rejected by a reparation obligor for a reason other than that the person is not entitled under this subtitle to the basic reparation benefits claimed [e.g., the insurer asserts a policy defense, albeit impermissible under the No-Fault law].

KRS 304.39-160(4) further states:

> A person who sustains injury while occupying a motor vehicle owned by such person and with respect to which security is required by the provisions on security and who fails to have such security in effect at the time of an accident in this Commonwealth causing such injury, shall not obtain through the assigned claims plan basic reparation benefits, including benefits otherwise due him as a survivor, unless such person's failure to have such security in effect at the time of such accident was solely occasioned by the failure of the reparation obligor of such person to provide the basic reparation benefits required by this subtitle.

In short, an uninsured owner or operator of a motor vehicle who sustains injury in the operation of his or her vehicle will not be entitled to No-Fault benefits through the KACP unless he or she contracted for such coverage and is uninsured solely because of the insurer's failure to fulfill its obligations for reasons other than insolvency.

In practice, the way the KACP works is that any time an otherwise-uninsured person (for purposes of No-Fault) is entitled to benefits under the Plan, the Plan will generally assign that claim to one of five or six major insurers within the Commonwealth of Kentucky, which will pay benefits as if that insurer had No-Fault coverage on that person. Such persons may include those injured in a vehicle covered under an out-of-state policy that is issued by an insurer that is *not* authorized to do business in Kentucky, and there is no other applicable policy of insurance to provide such coverage. However, under the KACP's "Plan of Operation," the Plan is entitled to a credit for any benefits that duplicate those required under the Kentucky No-Fault Act, provided that such benefits have not been denied, such as medical payment coverage (med-pay) benefits under an out-of-state policy. An insurer making payments pursuant to the Plan generally reserves the same rights of subrogation as insurers outside the Plan.

The KACP's address, telephone number, and website are as follows:

Kentucky Assigned Claims Plan
David Asher, Director
10605 Shelbyville Road, Suite 100
Louisville, KY 40223
(502) 327–7105
www.kyinsplans.org

(Note that the KACP's physical location, director, and website are the same as for the KIAA.)

20. WHAT OTHER IMPORTANT AREAS OF KENTUCKY MOTOR VEHICLE LAW ARE COVERED BY THE NO-FAULT ACT?

In addition to the law covering No-Fault benefits, the Kentucky Motor Vehicle Reparations Act contains a number of important laws in related areas. A summary of the most important points follows:

A. LOSS OF USE OF MOTOR VEHICLE

Loss of use of a motor vehicle shall be recognized as an element of damage in any property damage liability claim. It is limited to reasonable and necessary expenses for the time necessary to repair or replace the motor vehicle. KRS 304.39-115. In practice, claims for loss of use do not necessarily require that such expenses be incurred. There can also be considerations as to whether a claim for loss of use should be valued according to the loss of a "like kind" vehicle (e.g., high-end vehicle, commercial truck, etc.).

B. REQUIRED MINIMUM TORT LIABILITY INSURANCE

The requirement of security for payment of tort liabilities under the Act is fulfilled by providing either split liability coverage of $25,000 per person/$50,000 per accident, plus property damage liability of $10,000 per accident; or single limits liability coverage of $60,000 for all damages arising out of bodily injury or property damage as a result of any one accident. KRS 304.39-110.

C. STATUTE OF LIMITATIONS—TORT LIABILITY

An action for tort liability may be commenced not later than two years from the date of (accident) injury or death, or last payment of basic or added reparation benefits, whichever later occurs. KRS 304.39-230(6). "Payment" means the date that the payment is issued, not the date that the payment is negotiated. *Wilder v. Noonchester,* 113 S.W.3d 189 (Ky.App. 2003). Med-pay payments are not the equivalent of No-Fault payments. *Lawson v. Hilton Sanitation, Inc.,* 34 S.W.3d 52 (Ky. 2000). An action is not finally time-barred until the statute of limitations for basic or added reparation benefits has expired. *Crenshaw v. Weinberg,* 805 S.W.2d 129 (Ky. 1991).

D. MOTOR VEHICLE INSURANCE CARD

KRS 304.39-117 requires that every owner of a motor vehicle registered in Kentucky keep a proof-of-insurance card in his or her motor vehicle as evidence that the security required under Kentucky law is in full force and effect, and show the card to a police officer upon request.

E. UNINSURED/UNDERINSURED MOTORISTS COVERAGES

The No-Fault Act does not actually contain the statute requiring that uninsured motorists (UM) coverage be a part of any motor vehicle insurance policy issued in the Commonwealth of Kentucky. This statute is found at KRS 304.20-020, which requires that such coverage be a part of each and every such policy in the same limits for bodily injury or death as set forth

in KRS 304.39-110, provided, however, that the named insured shall have the right to reject such coverage in writing. If rejected, such coverage need not be included in a renewal policy unless requested in writing.

Underinsured motorists (UIM) coverage is contained in the Act at KRS 304.39-320. Unlike UM coverage, UIM coverage is not required to be included in every policy issued in Kentucky, but must be made available upon request. The statute itself does not state what minimum limits are required, although typically the limits are equivalent to the same limits as UM coverage.

UM and UIM coverages are separate coverages from No-Fault coverage. Understanding these coverages and the laws that apply to them is a complicated area that would require a separate booklet, and therefore an in-depth discussion of these coverages is not within the scope of this publication.

F. SET-OFFS

No offset of UIM coverage against liability coverage is permitted under KRS 304.39-320(2). Public policy does not permit a set-off between UM coverage and No-Fault benefits. *State Farm v. Fletcher,* 578 S.W.2d 41 (Ky. 1979).

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ABOUT THE AUTHOR

BRADLEY D. HARVILLE, a native of Lexington, Kentucky, was admitted to practice law in Kentucky in 1985 and in Indiana in 1992. He earned both his undergraduate degree and law degree from the University of Kentucky.

Mr. Harville was an associate with law offices based in Lexington and Louisville, and became a partner with an Indianapolis firm in its New Albany, Indiana office before opening his own office in Louisville in 1993. Although he has lost count, he estimates that he has been involved in approximately 100 jury trials involving auto defense, premises liability, trucking defense, subrogation, and plaintiffs' cases. He has appeared in cases in well over half of Kentucky's 120 counties, as well as several counties in Southern Indiana.

Mr. Harville has broad federal court experience before the Western and Eastern Districts of Kentucky and the Southern District of Indiana. He has also argued cases on appeal before

the Kentucky Court of Appeals, the Kentucky Supreme Court, and the U.S. Court of Appeals for the Sixth Circuit. He has represented insurers, employers, and injured workers in many claims before the Kentucky Department of Workers' Claims and the Indiana Worker's Compensation Board.

Mr. Harville is a member of the Kentucky Bar Association, the Kentucky Defense Counsel, Trucking Insurance Defense Attorneys (TIDA), and Best's Recommended Insurance Attorneys. He has served as a speaker for the Louisville Bar Association Continuing Legal Education programs, and as a guest speaker at the 2ND Annual Commercial Trucking Subrogation Strategies ExecuSummit in Uncasville, Connecticut. He has also completed the forty-hour mediation training course through the Indiana Continuing Legal Education Forum (ICLEF).

Mr. Harville lives in Louisville, where he is happily married to his wife of over thirty years, Mary. They have two sons, a junior in college and a senior in high school.

20 Questions about Kentucky No-Fault

BRADLEY D. HARVILLE has been a practicing attorney throughout the state of Kentucky since 1985. For years he has been educating insurance companies with *20 Questions about Kentucky No-Fault.* Now, for the first time, he has made this essential information available for anyone who has been injured in a Kentucky motor vehicle accident. Kentucky's No-Fault insurance system is the key to understanding how the entire legal and medical system works when it comes to personal injury cases involving motor vehicles in Kentucky.

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