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The 1990 Pennsylvania Auto Insurance Law: An Analysis of "Bad Faith" and the "Limited Tort Option"

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House Bill 121 imposed mandatory rollbacks in automobile insurance premiums ranging anywhere from ten to twenty-two percent, depending on the coverage which is chosen. These cutbacks have a direct effect upon consumers purchasing insurance policies and inurance companies as well. Because of these changes, the 1990 Pennsylvania auto insurance law has been getting headlines in the news.

CONSUMERS COULD BE SAVING MORE ON AUTO INSURANCE, CASEY SAYS.[1]

STATE FARM STOPS WRITING POLICIES FOR NEW CLIENTS.[2]

> Governor Casey today said insurance companies, their agents and others with vested interests in seeing the state's new auto insurance law fail are not giving consumers enough help in making choices that will save them money.
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> . . .
>
> 'But to make the most of their options, people have to know their rights, and that's an area where insurance companies and agents simply haven't been doing a good enough job,' Casey said.[3]

As illustrated by the newspaper clippings above, House Bill 121 has generated a great deal of attention and debate. Perhaps the two most important aspects of House Bill 121 involve the creation of first party "bad faith" and the inclusion of a "limited tort option." Part One of this article will attempt to point out the significance of the introduction of first party "bad faith" into Pennsylvania insurance law, and, more importantly, to define "bad faith" for purposes of insurance recovery. Part Two will attempt to clarify some of the confusion raised in the past few months with regard to the new "limited tort option."

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1. The Pittsburgh Press, B10 (Wednesday, October 3, 1990).
2. The Pittsburgh Press, B6 (Friday, September 14, 1990).
3. *Consumers Could Be Saving More On Auto Insurance, Casey Says*, The Pittsburgh Press, B10 (Wednesday, October 3, 1990).

I. First Party "Bad Faith"

Perhaps the most controversial, as well as complicated, section of House Bill 121 is found in section 3, which contains amendments to Chapter 83 of Title 42. Section 8371 is entitled "Actions on insurance policies" and reads:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.[4]

A. *Sub-Issues To Section 8371*

There are several underlying issues concerning section 8371 that must be addressed before an in depth examination of the statute's effects can be performed.

1. *Scope of Section 8371*

The first issue concerns the scope of section 8371. The title of the section is "Actions on insurance policies." Therefore, although this section is included within changes to the Pennsylvania automobile insurance laws, it would appear to affect actions on *any* type of insurance policy.[5] This interpretation is further supported by the language within the statute which states, "[i]n an action arising under an insurance policy . . ." The language does not specifically target automobile insurance; instead, the section provides a more general scope.

2. *The Impact of the Effective Date of Section 8371*

Questions will also arise as to the impact of the effective date of the statute, which was July 1, 1990.[6] As a general provision, "[n]o

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4. Act 1990-6, HB No 121, 2 Pa Legis Serv 8 (Purdon March 1990), codified at 42 Pa Cons Stat Ann § 8371 (Purdon 1990).

5. John Patrick Lydon, *The New First-Party Bad Faith Statute*, Insurance Bad Faith JPL-1 (Trial Advocacy Foundation of Pennsylvania of the Pennsylvania Trial Lawyers Association 1990). Mr. Lydon notes that section 8371 will apply to any insurance policy whether the risk covered is motor vehicle, fire, property, professional negligence, disability, homeowners, business, life or any other insurance.

6. Section 32(8) of House Bill 121 notes that the "act shall take effect July 1, 1990."

statute shall [be] construed to be retroactive unless clearly and manifestly so intended by the General Assembly."[7] As section 8371 does not provide retroactivity, it will be difficult to argue that the statute should apply to controversies where the insurance action was commenced and the alleged bad faith occurred prior to the July 1, 1990 deadline.

On the other hand, it seems logical that if either the insurance action was commenced or the bad faith occurred *after* the July 1 deadline, then an action based upon section 8371 is possible. The statute is composed of two essential elements.[8] The first element is "an action arising under an insurance policy," in other words, the commencement of an insurance action.[9] The second element is met when a plaintiff can show that "the insurer has acted in bad faith toward the insured."[10] The Supreme Court of Pennsylvania, in *Ludmer v Nernberg*[11] and *Gehris v Commw of Pennsylvania, Dept. of Transp.*[12] held that "the fact that some of the requirements for application of a statute occur prior to the enactment of the statute, does not result in the retroactive application of that statute."[13] Therefore, it would be reasonable to infer that the courts will adhere to their prior practice witnessed in *Ludmer* and *Gehris*, and apply section 8371 if either of its two elements occurred after the July 1, 1990 date.

Obviously, if both elements of section 8371 occur after July 1, 1990, then the statute will apply.

3. Definition of "Action" Within Section 8371

Interpretation of the new law might also raise questions as to the meaning of the word "action" found within the language of section 8371. As a general provision, the word "action" is defined as, "[a]ny suit or proceeding in any court of this Commonwealth."[14] It would seem, therefore, that any civil lawsuit resting its claim upon an insurance action would fall within the scope of the statute.[15]

Act 1990-6 (cited in note 4).

7. 1 Pa Cons Stat Ann § 1926 (Purdon 1972).
8. Lydon, *The New First-Party Bad Faith* at JPL-1-2 (cited in note 5).
9. Id.
10. Id.
11. 520 Pa 238, 553 A2d 924 (1989).
12. 471 Pa 210, 369 A2d 1271 (1977).
13. *Ludmer*, 553 A2d at 926 (quoting *Gehris v Commw of Pennsylvania, Dept. of Transp.*, 471 Pa 210, 369 A2d 1271 (1977)).
14. 1 Pa Cons Stat Ann § 1991 (Purdon 1984).
15. Lydon, *The New First-Party Bad Faith* at JPL-2 (cited in note 5).

The more complicated issues regarding the meaning of the word "action" may surround arbitration actions, and whether or not they fall within the realm of section 8371. It is illogical to assert that the General Assembly did not intend "action" to encompass arbitration proceedings, while at the same time the term would include civil proceedings.[16] This is especially true considering the fact that many arbitration actions involve issues which civil tribunals have jurisdiction over and are, therefore, called upon to resolve.[17] Finally, it would be an unreasonable interpretation of the statute for courts to exclude arbitration actions from the application of section 8371 considering their value and widespread use in Pennsylvania's legal system for the settlement of disputes in insurance actions.

4. Meaning of "Court" Within Section 8371

The final underlying issue which must be addressed before a more in depth analysis of section 8371 may be undertaken concerns the meaning of the word "court" found within the language of the statute. The word is defined as "any one or more of the judges of the court who are authorized by general rule or rule of court . . ."[18] Therefore, it appears that the party designated by the General Assembly to determine if "bad faith" has occurred and, accordingly, to award the appropriate damages is the judge presiding over the action.[19] This point is of vital importance, especially when the focus is turned to the following two particular legal premises, both of which deal with subsection (2) of section 8371 (punitive damages). First, when a factfinder is burdened with the task of determining punitive damages, he is entitled to hear evidence as to the net worth of the insurer.[20] Second, the Supreme Court of Pennsylvania recently held that the amount of punitive damages awarded need not bear any reasonable relation to the amount of compensatory damages awarded.[21] Thus, to first allow a

16. Lydon, *The New First-Party Bad Faith* JPL-3 (cited in note 5).

17. See 42 Pa Cons Stat Ann § 7304 (Purdon 1980) (court proceedings to compel or stay arbitration); 42 Pa Cons Stat Ann § 7305 (Purdon 1980) (appointment of arbitrators by court); 42 Pa Cons Stat Ann § 7313 (Purdon 1980) (confirmation of award by court); 42 Pa Cons Stat Ann § 7314 (Purdon 1980) (vacating of an award by the court).

18. 42 Pa Cons Stat Ann § 102 (Purdon 1980).

19. James R. Ronca, *Detailed Outline of 1990 Motor Vehicle Insurance Amendments*, 8 Pa Auto Insurance Law 3 (Trial Advocacy Foundation of Pennsylvania of the Pennsylvania Trial Lawyers Association 1990).

20. *Feld v Merriam*, 506 Pa 383, 485 A2d 742 (1984).

21. *Kirkbride v Lisbon Contractors, Inc.*, 521 Pa 97, 555 A2d 800 (1989).

jury to hear evidence of an insurance company's net worth and then ask them to award punitive damages which do not necessarily have to bear any relation to actual damages has dangerous possibilities; such an approach could not have been intended by the General Assembly.

B. *"Bad Faith" Within Section 8371*

Section 8371 gives a court the discretion to grant interest, punitive damages, court costs, and attorney's fees to any party who brings an action under an insurance policy, if that party can show "bad faith" on the part of the insurer.[22] Therefore, the obvious issue surrounding section 8371 will concern the meaning of the term "bad faith." Unfortunately, section 8371 fails to provide a definition for "bad faith." Furthermore, there are no current decisions interpreting the meaning of section 8371's "bad faith," nor any other state in the country with a similar statute to provide some guidance. Accordingly, to achieve a better understanding of how the Pennsylvania courts will interpret section 8371, an analysis of the history of first party "bad faith" actions is helpful.

1. History of First Party "Bad Faith"

a. California's creation and Wisconsin's development

In the past two decades, this country's jurisdictions have been exposed to an increasing number of cases involving an action against an insurer for first party bad faith.[23] The first party "bad faith" action has undoubtedly been one of the more controversial tort issues throughout the states. These actions most commonly arise when the insurer is accused of wrongful refusal to pay, wrongful delay in payment, or unconscionable methods in investigating or adjusting losses of an insured.

As one might guess, the first state to recognize first party actions for "bad faith" on the part of an insurer was California. The ground breaking case on this issue was *Gruenberg v Aetna Insurance Company*.[24]

In *Gruenberg*, the plaintiff, Jerome Gruenberg, was the owner of

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22. See note 4 and accompanying text.

23. For the sake of clarity, "first party bad faith" occurs in situations where an insured files an insurance claim with his insurer and the insurer refuses to settle that claim using good faith. "Third party bad faith" occurs where the insurer represents its insured in bad faith in the settlement of a claim between the insured and a third party.

24. 108 Cal Rptr 480, 510 P2d 1032 (1973).

a cocktail lounge and restaurant business in Los Angeles known as the Brass Rail.[25] The premises were insured against fire loss in the aggregate sum of $35,000.00.[26] On November 9, 1969, a fire occurred at the Brass Rail and the establishment was destroyed. Several days later, on November 13, 1969, the plaintiff was charged in a felony complaint with the crimes of arson and defrauding an insurer.

In the meantime, the defendant insurance companies retained a law firm to represent them in the matter of plaintiff's claim of loss. The defendants' law firm issued a letter dated November 25, 1969, demanding that plaintiff appear at their law offices on December 12, 1969, to submit to an examination under oath as was required by the insurance contract. The plaintiff's attorney responded to the letter by requesting that the defendants waive the requirement of the examination of the plaintiff until the plaintiff's criminal difficulties were extinguished.[27] The law firm representing the defendants refused the plaintiff's request. On December 16, 1969, the defendant insurance companies denied liability under their insurance policies because of the plaintiff's failure to submit to the examination.[28]

On January 12, 1970 the criminal charges brought against the plaintiff alleging arson were dropped for lack of probable cause. In response to this event, the plaintiff's attorney advised defendant insurers on January 26, 1970 that the plaintiff was now prepared to submit himself for the examination.[29] However, the insurers reiterated their position that they were refusing liability because the plaintiff failed to appear for the examination at the requisite time.

In response to the insurers' actions, the plaintiff filed a one count complaint alleging that the defendant insurers breached their implied duty of good faith and fair dealing.[30] The plaintiff alleged that, as a result of the "outrageous conduct and bad faith of the defendants," he suffered "severe economic damage," "severe emotional upset and distress," loss of earnings and various special damages.[31] Plaintiff sought both compensatory and punitive damages.

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25. *Gruenberg*, 510 P2d at 1034.
26. Id.
27. Id at 1035.
28. Id.
29. Id.
30. Id at 1036.
31. Id at 1035.

The defendant insurers filed general demurrers to the complaint, which demurrers were sustained with leave to amend. Plaintiff elected to stand on his complaint, and an order of dismissal was entered.[32] An appeal to the Supreme Court of California followed. In determining whether the plaintiff had stated facts sufficient to constitute a cause of action, the supreme court referred to third party "bad faith" insurance actions and noted that violating the insurance contract's implied duty of good faith and fair dealing was tortious conduct. The court stated, "There is an implied covenant of good faith and fair dealing in every contract [including insurance policies] that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."[33] The court instructed that this duty was not one which is mandated by the terms of the policy, but instead, is an obligation imposed by law.[34] The court then applied this logic to first party insurance actions, thereby establishing a new cause of action. In doing so, the court noted that there is no difference between the implied duty of good faith and fair dealing owed by insurers in third party cases and the duty owed by insurers in first party cases. "These are merely two different aspects of the same duty."[35]

In establishing a cause of action for first party "bad faith," the *Gruenberg* court held that economic losses, as well as damages for "mental distress," could be recovered.[36] In permitting the plaintiff to recover such damages, the court followed its earlier decisions in the third party cases, as well as California's general rules of damages in tort.[37]

Note that in this landmark case the *Gruenberg* court never defined or established elements for the first party "bad faith" tort.

Five years after the *Gruenberg* decision, the Supreme Court of Wisconsin, in *Anderson v Continental Insurance Company*,[38] followed California's lead and also adopted the tort of first party "bad faith." In so doing, the Wisconsin court clarified, expanded and firmly established this new tort for the entire nation.

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32. Id at 1036.

33. Id (quoting *Communale v Traders & General Ins. Co.*, 50 Cal2d 654, 328 P2d 198 (1950)).

34. *Gruenberg*, 510 P2d at 1037.

35. Id.

36. Id at 1040-42.

37. Id at 1041.

38. 85 Wis 2d 675, 271 NW2d 368 (1978).

The *Anderson* court was less bashful than the *Gruenberg* court in explicitly separating the tort and contract aspects of a first party "bad faith" action. As the court stated, "[b]y virtue of the relationship between the parties created by the contract, a special duty arises, the breach of which duty is a tort and is unrelated to contract damages."[39] The court took special pains to separate any hint of contract from the first party "bad faith" tort. The court noted:

> We emphasize at this juncture only that the tort of bad faith is not a tortious breach of contract. It is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract.[40]

Through this holding, the *Anderson* court left no doubt that "bad faith" conduct of an insurer in first party negotiations was an intentional tort in and of itself.

Most importantly, the court set out an objective test for determining when compensable "bad faith" on the part of the insurer has occurred. According to the court,

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one. "Bad faith" by definition cannot be unintentional. "Bad faith" is defined as "Deceit; duplicity; insincerity."[41]

Another area of importance which the *Anderson* court addressed, unlike the *Gruenberg* court, is the issue of whether punitive damages may be awarded in first party "bad faith" actions. Again, the court took great care in articulating a clear ruling. The *Anderson* court stated:

> We do not conclude, however, that the proof of a bad faith cause of action necessarily makes punitive damages appropriate. Punitive damages are awarded to punish a wrongdoer and to serve as a deterrent. *Mid-Continent Refrigerator Co. v Straka*, 47 Wis2d 739, 178 NW2d 28 (1970). We pointed out in *Mid-Continent* that punitive damages are to be awarded "only where the wrong was inflicted 'under circumstances of aggravation, insult or cruelty, with vindictiveness or malice.' " *Id.* at 32.[42]

The importance of the *Anderson* decision must be recognized.

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39. *Anderson*, 271 NW2d at 374.

40. Id.

41. Id at 376 (quoting *American Heritage Dictionary of the English Language* 471 (1969)).

42. *Anderson*, 271 NW2d at 379.

Although the *Gruenberg* court started the ball rolling on this particular issue, the *Anderson* court took the bull by the horns, so to speak. The *Anderson* decision clarified any gray areas apparent in California's first party "bad faith" law; most importantly, the court specifically defined "bad faith" and established the requisite elements of the test. After this decision, state jurisdictions were provided with a succinct statement of what constitutes "bad faith." Accordingly, states wasted little time in adopting the first party "bad faith" tort.

b. Other states respond

In the years following the advent of the first party "bad faith" tort, many states followed the logic and language of the *Gruenberg* and *Anderson* decisions.[43] Colorado even expounded upon the *Anderson* definition of "bad faith." Other states embarked upon their own course in dealing with the first party "bad faith" tort. Some of these states formed their own definition or objective standards for "bad faith." North Carolina developed a contract/tort hybrid for first party "bad faith" situations which was quite distinct from the *Gruenberg/Anderson* tort. Others, such as Pennsylvania, explicitly denied the existence of a first party "bad faith" tort.

The Supreme Court of Colorado directly adopted the language and reasoning of the *Anderson* decision in *Travelers Insurance Company v Savio*.[44] In doing so, the *Travelers* court interpreted the two elements of the objective standard set forth in *Anderson*.[45] The first element of the *Anderson* test, unreasonable conduct, "[would] be determined on an objective basis, requiring proof of the standards of conduct in the industry."[46] The second element of the *Anderson* test, reckless disregard that the conduct is unreasonable, was analyzed by the court as follows:

> The second element of the test reflects a reasonable balance between the right of an insurance carrier to reject a non-compensable claim submitted

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43. See *Travelers Ins. Co. v Savio*, 706 P2d 1258 (Colo 1985); *White v Unigard Mutual Ins. Co.*, 112 Idaho 94, 730 P2d 1014 (1986); *Weems v American Security Ins. Co.*, 486 So2d 1222 (Miss 1986); *Corwin Chrysler-Plymouth, Inc. v Westchester Fire Ins. Co.*, 279 NW2d 638 (ND 1979); *Hoskins v Aetna Life Ins. Co.*, 6 Ohio St 3d 272, 452 NE2d 1315 (1983); *Bibeault v Hanover Ins. Co.*, 417 A2d 313 (RI 1980); *Matter of Certification of a Question of Law from the U.S. District Court, District of South Dakota, Western Division*, 399 NW2d 320 (SD 1987); *McCullough v Golden Rule Ins. Co.*, 789 P2d 855 (Wyo 1990). The *McCullough* court provides an excellent state-by-state synopsis of "bad faith" in its many different forms. *McCullough*, 789 P2d at 857, nn.5-7.

44. 706 P2d 1258 (Colo 1985).

45. *Anderson*, 271 NW2d at 376. See also, note 39 and accompanying text.

46. *Travelers*, 706 P2d at 1275.

> by its insured and the obligation of such carrier to investigate and ultimately approve a valid claim of its insured. If an insurer does not know that its denial of or delay in processing a claim filed by its insured is unreasonable, and does not act with reckless disregard of a valid claim, the insurer's conduct would be based upon a permissible, albeit mistaken, belief that the claim is not compensable.[47]

As noted previously, several states adopted the tort of first party "bad faith," but established their own definition or objective standards for "bad faith." For example, the Supreme Court of Ohio, in *Hoskins v Aetna Life Insurance Company*,[48] adopted a definition of "bad faith" which was different from the two element *Anderson* test. The *Hoskins* court elaborated upon the concept of lack of good faith:

> A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.[49]

The Supreme Court of Alabama, in *King v National Foundation Life Insurance Company*,[50] held that the appropriate test for determining bad faith was the objective standard of whether the validity of the denied claim was not "fairly arguable." As the *King* court noted, "If any one of the reasons for denial of coverage is at least 'arguable,' this Court need not look any further."[51] Although it appears that the *King* court made a departure from the *Anderson* court's "fairly debatable" standard, it is not clear what difference there is between these two objective standards. One court has implied, through its interchangeable use of the two objective standards, that there is no difference whatsoever.[52]

The Court of Appeals of North Carolina, in *Dailey v Integon General Insurance Corporation*,[53] also developed a solution to sit-

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47. Id.

48. 6 Ohio St 3d 272, 452 NE2d 1315 (1983).

49. *Hoskins*, 452 NE2d at 1320 (quoting *Slater v Motorists Mutual Ins. Co.*, 174 Ohio St 148, 187 NE2d 45 (1965)).

50. 541 So2d 502 (Ala 1989).

51. *King*, 541 So2d at 505 (quoting *McLaughlin v Alabama Farm Bureau Mutual Casualty Ins. Co.*, 437 So2d 86, 91 (Ala 1983)). The "fairly arguable" standard is a departure from the "fairly debatable" objective standard found within the *Anderson* decision. *Anderson*, 271 NW2d at 376-77.

52. See *McCullough v Golden Rule Ins. Co.*, 789 P2d 855, 860 (Wyo 1990).

53. 75 NC App 387, 331 SE2d 148 (1985). The *Dailey* decision was the culmination of a series of North Carolina appellate court decisions which dealt with this area of the law.

uations where there is "bad faith" on the part of the insurer to its insured. The North Carolina solution, however, is different from the first party "bad faith" tort. Unlike the *Gruenberg* and *Anderson* courts which invented a special tort for these situations, the *Dailey* court formed a hybrid contract/tort action. Traditionally, an insured would avail himself of any improprieties by the insurer through a breach of contract action. Unfortunately, the traditional law of contracts disallowed punitive damages in breach of contract actions.[54] Through the *Dailey* court's new hybrid cause of action, the insured could now recover compensatory damages through a breach of contract action, while recovering punitive damages for the insurer's "bad faith" given the tort overtones of such conduct.

The *Dailey* court explained that, "where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort may itself give rise to a claim for punitive damages."[55] The court added, "Even when sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed."[56] The *Dailey* court then noted that "aggravated conduct" is defined to include, "fraud, malice, gross negligence, insult, . . . wilfully, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights."[57] Apparently, the North Carolina courts have managed to give the insured a weapon to prevent "bad faith" on the part of the insurers, while not offending traditional contract law or requiring the invention of a new tort.

Taking yet another approach, the Supreme Court of Pennsylvania explicitly denied the existence of the tort of first party "bad faith" in *D'Ambrosio v Pennsylvania National Mutual Casualty Insurance Company*.[58] In so doing, the *D'Ambrosio* court rejected the *Gruenberg* decision and the tort created by its holding.[59]

In *D'Ambrosio* the plaintiff, Anthony D'Ambrosio, commenced

See also, *Stanback v Stanback*, 297 NC 181, 254 SE2d 611 (1979); *Payne v N.C. Farm Bureau Mutual Ins. Co.*, 67 NC App 692, 313 SE2d 912 (1984); *Dailey v Integon*, 57 NC App 346, 291 SE2d 331 (1982).

54. *King v Ins. Co. of North America*, 273 NC 396, 159 SE2d 891 (1968).

55. *Dailey*, 331 SE2d at 153-54 (quoting *Newton v Standard Fire Ins. Co.*, 291 NC 105, 111, 229 SE2d 297, 301 (1976)).

56. *Dailey*, 331 SE2d at 154 (quoting *Newton*, 229 SE2d at 301).

57. Id (quoting *Baker v Winslow*, 184 NC 1, 5, 113 SE2d 570, 572 (1922)).

58. 494 Pa 501, 431 A2d 966 (1981).

59. *D'Ambrosio*, 431 A2d at 968-70.

the action by filing a two-count complaint, one in assumpsit and the second in trespass.[60] In the plaintiff's count in assumpsit, he alleged that his motor boat, which was covered by the defendant insurance company, was damaged in a severe storm. The plaintiff claimed the defendant breached the insurance contract by not honoring the claim relating to the damages to the plaintiff's boat. In the plaintiff's count in trespass, the plaintiff alleged that the defendant "summarily denied" the plaintiff's claim for the damages to his boat. Based on this alleged "bad faith" conduct, the plaintiff sought compensatory damages in an amount in excess of $10,000 and punitive damages in an amount in excess of $10,000, plus all costs and attorney's fees.[61]

The defendant filed preliminary objections to the count in trespass, in the nature of a demurrer. The preliminary objections were sustained and the Court of Common Pleas of Delaware County dismissed the count in trespass. After the Superior Court of Pennsylvania affirmed the trial court decision, the supreme court granted an allowance of appeal.

The *D'Ambrosio* court affirmed the lower court decisions, holding there was no need to construct a first party "bad faith" tort. The court stated that such an action was unnecessary because the "Legislature has already made dramatic, sweeping efforts to curb the bad faith conduct."[62] The court concluded by stating:

> Surely it is for the Legislature to announce and implement the Commonwealth's public policy governing the regulation of insurance carriers. In our view, it is equally for the Legislature to determine whether sanctions beyond those created under the Act [Unfair Insurance Practices Act] are required to deter conduct which is less than scrupulous.[63]

2. *Possible Definitions of Pennsylvania's Section 8371 "Bad Faith"*

The *D'Ambrosio* court explained that it was beyond the scope of their responsibilities to implement laws which are matters of public policy. The court reasoned that if the legislature believed the

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60. Id at 967.

61. Id at 968.

62. Id at 969. These dramatic, sweeping efforts can be located within the Unfair Insurance Practices Act, which is found in 40 Pa Stat sections 1171.1 - 1171.15 (Purdon Supp 1990). The court noted that the Unfair Insurance Practices Act contains fifteen "unfair claim settlement or compromise practices," which are set forth in subsection (10) of 40 Pa Stat section 1171.5. *D'Ambrosio*, 431 A2d at 969.

63. Id at 970.

insurance industry required a deterrent to safeguard the interests of the insured, then the legislature should establish standards to provide this protection. Therefore, one can infer that the legislature enacted section 8371 to provide this protection. Unfortunately, the statute is not specific enough to determine how stringently this protection should be applied. To determine the parameters of section 8371, the definition of "bad faith" must be ascertained.

One commentator has suggested that the search for the definition of "bad faith" should start with the third party "bad faith" cases in Pennsylvania.[64] An examination of these third party cases reveals that "an insured may recover from his insurer, regardless of policy limitations, on the ground of negligence, bad faith, or fraud in the insurer's conduct in respect of its responsibility."[65] A recent Superior Court of Pennsylvania decision noted that a decision not to settle "must be a thoroughly honest, intelligent and objective one."[66] These are low standards which are not difficult ones for an insured plaintiff to meet. The *D'Ambrosio* court rejected the objective standard established by the *Gruenberg* and *Anderson* courts. In order to meet that standard, as was noted in *Anderson*, the insured plaintiff was required to prove intent on the part of the insurer.[67] Therefore, it is illogical to predict that the Supreme Court of Pennsylvania will recognize the third party "bad faith," "negligence" or "honesty" standards given that they fall below the "intent" standard which the court has already rejected.

Other commentators have suggested that certain types of conduct giving rise to a claim for section 8371 "bad faith" are set forth within the standards of the Unfair Insurance Practices Act (UIPA).[68] Section 1171.5 of the UIPA designates a number of unfair or deceptive acts. Section 1171.5(a)(10) may be the most pertinent section to this discussion, as it specifies a number of acts which constitute unfair settlement practices.

There are a number of penalties for violating the standards set forth in the Unfair Insurance Practices Act. The Insurance Commissioner may issue an order requiring the person to cease and de-

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64. Lydon, *The New First-Party Bad Faith* at JPL-5 (cited in note 5).

65. *Cowden v Aetna Casualty and Surety Co.*, 389 Pa 459, 134 A2d 223 (1957).

66. See *Shearer v Reed*, 286 Pa Super 188, 428 A2d 635 (1981).

67. *Anderson*, 271 NW2d at 374.

68. 40 Pa Stat §§ 1171.1- 1171.15. (Purdon 1974). See Ronca, *A Detailed Outline* at 16-18 (cited in note 19); Lydon, *The New First-Party Bad Faith* at JPL-6-7 (cited in note 5).

sist from engaging in such practices, or, if appropriate, suspend or revoke the person's license.[69] If an alleged violator fails to comply with a cease and desist order, the Commissioner may seek an injunction in commonwealth court or a court of common pleas of the county in which the violation occurred.[70] Finally, civil penalties may be awarded.[71] The maximum of these penalties is a fine of $5,000.00 for each violation of section 1171.5, and a $10,000.00 fine for a violation of a cease and desist order.[72] An award of punitive damages may be devastating to an insurer defendant. Obviously, the possibility exists that these awards will rise above the level of $50,000.00.[73] Therefore, if a court refers to the Unfair Insurance Practices Act to determine section 8371 "bad faith," the court is using standards which, when violated, only provide for penalties of $5,000 or $10,000 to also determine if punitive damages should be awarded. This interpretation of section 8371 is untenable.

One commentator suggests that the traditional definitions for "bad faith," which were developed by the *Anderson* and *Gruenberg* courts and adopted by other states, may be used to determine the meaning of section 8371.[74] Under this definition, a plaintiff pleading an action based on section 8371 would merely be required to prove that the insurer lacked a reasonable basis for denying the benefits of the insured's policy, and that the insurer had knowledge or reckless disregard of this lack of a reasonable basis.[75]

The idea of Pennsylvania accepting the *Gruenberg* and *Anderson* definition for "bad faith" fails for several reasons. First, the *Gruenberg* decision has already been rejected by the *D'Ambrosio* court. Adoption of the *Gruenberg* decision would mean that section 8371 directly overrules the Supreme Court of Pennsylvania's decision in *D'Ambrosio*. This would be an unintended interpretation of the statute, as it would cause an effect which does not improve or settle the volatile history of Pennsylvania insurance law.

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69. 40 Pa Stat § 1171.9.

70. 40 Pa Stat § 1171.10.

71. 40 Pa Stat § 1171.11.

72. 40 Pa Stat §§ 1171.11(1) and 1171.11(3).

73. The maximum aggregate award of civil penalties available under the Unfair Insurance Practices Act is $50,000.00. 40 Pa Stat § 1171.11(1).

74. Edwin L. Scherlis, *Punitive Damages in Insurance Policy Litigation: Developing Trends (First Party)*, Insurance Bad Faith 6-7 (Trial Advocacy Foundation of Pennsylvania of the Pennsylvania Trial Lawyers Association 1990). Mr. Scherlis suggests this position in accordance with a strict construction of section 8371. Note, however, that Mr. Scherlis is not in full support of this position, as it would create two different standards in Pennsylvania for determining an award of punitive damages.

75. *Anderson*, 271 NW2d at 374.

As the statute is contrary to the holdings of the Pennsylvania courts, the interpretation would further confuse the area of first party "bad faith." Although it is unlikely that the legislature intended to overrule the *D'Ambrosio* decision, anything is possible.

Secondly, and more convincingly, if the Pennsylvania courts apply the *Gruenberg* and *Anderson* definition for "bad faith," they will be applying those landmark decisions incorrectly. The *Anderson* court noted that a plaintiff could receive punitive damages in first party "bad faith" actions. But to do so, the plaintiff must show that the defendant acted with "insult," "cruelty" and "vindictiveness" and not just "bad faith."[76] As noted previously, if a plaintiff who brings an action under section 8371 proves "bad faith," he may be awarded punitive damages. If the *Anderson* definition of "bad faith" is used to prove section 8371 "bad faith," then punitive damages will be awarded for "bad faith" in Pennsylvania's courts at a lower standard than in those states that have actually followed the *Anderson* decision. This is illogical.

Third, as Mr. Scherlis[77] opined, this interpretation of section 8371 will completely cloud Pennsylvania's laws for the awarding of punitive damages. Pennsylvania courts have traditionally awarded punitive damages only "if the conduct was malicious, wanton, reckless, willful, or oppressive."[78] If the *Anderson* definition of "bad faith" is used to define section 8371 "bad faith," a new exception will be carved out of this long standing principle. A Pennsylvanian insured could be awarded punitive damages for proving a standard which is much lower than "malicious, wanton, reckless, willful, or oppressive" conduct. Clearly, the legislature never intended inconsistent standards with respect to punitive damages. Thus, this interpretation is also without merit.

After examining the history of the first party "bad faith" tort and by looking at several possible interpretations of section 8371, it is obvious that many of these views are not compatible with the statute. But, an examination of the history and the interpretations of section 8371 provides one view of the statute which is, arguably, the only logical meaning for that section. This view involves two parts. The first part determines how the statute should be applied. The second part defines "bad faith."

In construing section 8371 strictly, it is obvious that a "bad

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76. Id at 379.

77. See note 74.

78. *Rizzo v Haines*, 520 Pa 484, 555 A2d 58, 69 (1989) (quoting *Chambers v Montgomery*, 411 Pa 339, 192 A2d 355, 358 (1963)).

faith" action under the statute cannot stand alone. The are several reasons for coming to this conclusion. First, the statute is entitled "Actions on insurance policies."[79] Section 8371 is not entitled "Actions for insurer bad faith." The title implies that an action pursuant to section 8371 must be brought in a contract action on the insurance policy. Second, the language of the statute reads, "[i]n an action arising under an insurance policy . . ." This language specifically instructs the insured to bring this action "under" his action against the insurer on the policy. Third, section 8371 specifically designates certain forms of damages which are recoverable. These damages are all exemplary in nature; the statute does not allow for compensatory damages. This makes sense when one remembers that the action should be brought with a contract action on the policy, which, if successful, would provide the appropriate compensatory damages. Also, it is illogical to assert that the legislature would create a new tort which does not allow the plaintiff to recover damages for his actual injuries, but instead, only allows him to recover exemplary damages. Finally, this interpretation would comport with, and not be contrary to, the *D'Ambrosio* decision. The *D'Ambrosio* court rejected the notion that they should judicially create the new tort of first party "bad faith." As a "bad faith" action under section 8371 will not stand on its own, it likewise does not fall into the category of torts that the supreme court rejected.

If section 8371 is given this interpretation it will resemble a tort/remedy hybrid. A "bad faith" claim based on the statute would be plead in a complaint as a cause of action in tort; because the tort cannot stand alone, however, it will merely act as a remedy for exemplary damages. An action under section 8371, in other words, looks like a parasite to an action in contract on the insurance policy.[80]

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79. Act 1990-6 (cited in note 4).

80. Several other states in the country have implemented first party "bad faith" in a similar fashion. These states, like Pennsylvania, have created a tort for first party situations but limited its effect so as not to mirror the *Gruenberg* and *Anderson* tort. Refer to the previously discussed North Carolina decision, *Dailey v Integon General Ins. Corp.*, 75 NC App 387, 331 SE2d 148 (1985), review denied 314 NC 661, 336 SE2d 399. In *Dailey* the Court of Appeals of North Carolina developed a contract/tort hybrid. The tort claim, which had to accompany a contract claim, only allowed punitive damages, while the contract action provided compensatory damages.

In *Christian v American Home Assurance Co.*, 577 P2d 899 (Okla 1977), the Supreme Court of Oklahoma judicially devised a law whose application is quite similar to the application of section 8371. In *Christian* the court held that "an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise

There is one loophole or method for insurers to circumvent this viewpoint which would frustrate the statute and, therefore, must be addressed. If an action under section 8371 is parasitic to an action on the insurance policy, the "bad faith" action can have its legs taken out from under it by a settlement of the insurance policy. For example, a tricky insurer may improperly refuse to settle a claim and act in "bad faith," but when he is threatened with a lawsuit based on section 8371, he can settle the policy claim and end the threat of the "bad faith" suit. Although this appears to be a serious flaw in this interpretation of section 8371, it may not be devastating. For example, the Pennsylvania courts could bypass this problem by simply allowing the insured to reject a full settlement offer, so that the insured could maintain his action in "bad faith" against the insurer.[81]

Section 8371 "bad faith" cannot be defined using the "bad faith" definition developed in the *Anderson* decision and its progeny. As noted previously, if the traditional definition of "bad faith" is used in conjunction with section 8371, then a new, lower standard for rewarding punitive damages will be created. Ultimately, this new exception, which will be carved out of the current punitive damages laws in Pennsylvania, will be an incorrect interpretation and application of the *Anderson* decision. Logically, the idea of using the standards from the Unfair Insurance Practices Act or past Pennsylvania case law dealing with third party "bad faith" actions must also be dismissed. Therefore, a higher and stricter standard of "bad faith" must be established so that section 8371 is given its logical interpretation.

One suggested standard of "bad faith" can be drawn from the *Anderson* decision and its progeny in those courts' discussions relating to punitive damages. The *Anderson* court noted that punitive damages should only be awarded "where the wrong was in-

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to an action in tort for which consequential and, in a proper case, punitive, damages may be sought." *Christian*, 577 P2d at 904. As can be seen by the *Christian* holding, the only damages available under a first party "bad faith" action are exemplary damages. An action in contract for the consequential damages must accompany the "bad faith" claim.

81. If section 8371 is given this interpretation there will most likely be questions as to the statute of limitations. The statute of limitations will rest upon whether section 8371 is treated as a tort or a contract. Any action to recover damages for injuries which is founded on negligent, intentional, or otherwise tortious conduct, or any other action sounding in trespass, including deceit or fraud, must be commenced within two years. 42 Pa Cons Stat Ann § 5524(7) (Purdon 1982). An action upon a contract, obligation or liability founded upon a writing must be commenced within four years. 42 Pa Cons Stat Ann § 5525(8) (Purdon 1982).

flicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice."[82] The Supreme Court of Rhode Island explained:

> In regard to punitive damages, we would point out that the intent necessary to establish the tort of bad faith is not equivalent to the intent that would sustain an award for punitive damages. Punitive damages may only be awarded when an insurer has acted with malice, wantonness, or wilfulness.[83]

Other jurisdictions have likewise addressed the punitive damages issue. For example, the Supreme Court of Wyoming held, "Although we recognize this tort (bad faith), we believe that the awarding of punitive damages for the tort of bad faith should remain consistent in Wyoming law and require wanton or willful misconduct."[84] The Oklahoma first party "bad faith" law, which was previously mentioned, is quite similar to section 8371, and defines "bad faith" as the "malicious, willful and oppressive refusal to pay a valid claim."[85]

Perhaps the best definition for section 8371 "bad faith" is found in the Pennsylvania rulings on awards of punitive damages. As noted previously, the Supreme Court of Pennsylvania held in *Rizzo v Haines*[86] that punitive damages may only be awarded "if the conduct was malicious, wanton, reckless, willful, or oppressive." This standard for punitive damages in Pennsylvania has been consistently applied by the Pennsylvania Courts for decades.[87]

Another area of Pennsylvania law supporting this definition of "bad faith" is the law concerning the awarding of attorney's fees. The Superior Court of Pennsylvania noted that a "court may require a party to pay another participant's counsel fees if the party's conduct in commencing the action was 'arbitrary, vexatious or in bad faith.' "[88] Pennsylvania statutory law notes that a participant may be "awarded counsel fees as a sanction against another

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82. *Anderson*, 271 NW2d at 379.

83. *Bibeault v Hanover Ins. Co.*, 417 A2d 313, 319 (RI 1980).

84. *McCullough v Golden Rule Ins. Co.*, 789 P2d 855, 860-61 (Wyo 1990).

85. *Christian*, 577 P2d at 905.

86. 520 Pa 484, 555 A2d 58, 69 (1989).

87. See *Chambers v Montgomery*, 411 Pa 339, 192 A2d 355 (1963). The standard used in Pennsylvania for rewarding punitive damages is the most appropriate definition for "bad faith" because it is a standard which has been developed and used by the Commonwealth's courts. It makes more sense to allow the courts to use a standard with which they are familiar, instead of adopting another state's definition which is similar in its effect.

88. *Santilo v Robinson*, 383 Pa Super 604, 557 A2d 416, 417 (1989) (quoting *Brenckle v Arblaster*, 320 Pa Super 87, 466 A2d 1075 (1983)).

participant for dilatory, obdurate or vexatious conduct during the pendency of a matter."[89] As one can see, the language from the standard for the awarding of counsel fees is similar in its effect to the standard for the awarding of punitive damages. Both are very high standards which are difficult to meet. Not coincidentally, one of the remedies available in section 8371 is the award of attorney's fees. Therefore, if the punitive damages standard is the standard used to define "bad faith," then section 8371's interpretation and application will remain thoroughly consistent with Pennsylvania law already established.

CONCLUSION

Section 8371, if interpreted correctly, may be one of the solutions to Pennsylvania's history of troubled automobile insurance laws. The statute must not be limited to automobile insurance disputes; rather, the law's scope must extend to all types of insurance. The statute's effective date was July 1, 1990. While the statute is not retroactive, if one of the law's two elements occurs after that date, then the statute should be applied. Obviously, if both elements occur after the July 1 effective date, then the statute will apply.

Section 8371 must include actions which are initiated in arbitration. The statute will not be given its fullest effect if its presence is limited to actual courtroom proceedings. Perhaps most importantly, the concept of "bad faith" and the awarding of damages must be determined by the judge who oversees the proceedings. Section 8371 may not have the effect the legislature intended if it is placed in the hands of a jury.

This new statute cannot stand alone as a cause of action. Section 8371 must act as a parasite and "piggyback" its way into court by way of a contract action on the insurance policy. Because section 8371 is not the first party "bad faith" tort which *Gruenberg* and *Anderson* introduced, the statute - although a cause of action - must only be given the effects of a remedy.

"Bad faith" must not be defined as unreasonable conduct on the part of an insurer in the settlement of an insurance claim having knowledge that this conduct is unreasonable. "Bad faith" must be given a higher and stricter standard. It is suggested that the stan-

89. 42 Pa Cons Stat Ann § 2503(7) (Purdon 1976).

dard used to determine punitive damages should be applied as the definition for section 8371 "bad faith."

C. Christopher Hasson

II. Limited Tort Option

Pursuant to the Motor Vehicle Financial Responsibilities Act,[90] a person injured in an automobile accident is free to pursue any and all damages which he has suffered as a result of that accident. The injured individual is almost immediately entitled to the first party benefits enumerated in section 1712, which include: medical benefits, income loss benefits, accidental death benefits, funeral benefits, and/or any combination thereof. The injured individual is, thereafter, free to bring an action against the tortfeasor to obtain damages for his injuries.

House Bill 121 may potentially cause drastic changes in this system through the introduction of section 1705 to Title 75. Pursuant to this new section, the insured must be given the option to select either "full tort" or "limited tort" coverage. If the insured chooses "full tort" coverage, he may seek compensation for his injuries in a normal manner pursuant to the Motor Vehicle Financial Responsibilities Act. His recovery may include any and all damages which he is entitled to under traditional tort law, including pain and suffering damages. However, if the insured chooses limited tort coverage, he is only free to pursue the economic losses which he has suffered as a consequence of the accident. Pursuant to the limited tort option, the insured waives his right to bring an action for pain and suffering damages and other nonmonetary detriment in exchange for a reduction in his insurance premiums. There are, however, several enumerated exceptions to the rule precluding actions for pain, suffering and other nonmonetary detriment.

This section will analyze the purpose of this new limited tort system and the statutorily enumerated exceptions in an attempt to assist in the application of the new limited tort system.

A. *Full Tort Coverage*

When the full tort option is chosen, the insured is permitted a complete recovery for injuries arising out of the operation of a motor vehicle, including pain and suffering damages.[91] A demonstra-

90. 75 Pa Cons Stat Ann § 1701 et seq (Purdon 1984).

91. 75 Pa Cons Stat Ann § 1705(c) states, "Each person who is bound by the full tort

tion that the defendant was at fault remains a prerequisite to recovery.[92] The determination regarding fault should be made pursuant to applicable tort law.[93] Therefore, section 1705(c) simply permits the insured to retain any and all tort rights which arise out of an automobile accident and to decline participation in the limited tort/no-fault system.[94]

B. *Limited Tort Coverage*

By choosing the limited tort option, the insured agrees to waive his right to bring an action for noneconomic losses (pain and suffering damages),[95] in exchange for a reduction in his automobile insurance premiums.[96] However, this waiver of pain and suffering damages is not absolute. If a serious injury is suffered or one of six enumerated conditions is satisfied, the insured is free to initiate an action for pain, suffering and any other nonmonetary detriment which the accident may have caused.[97] Apparently, therefore, section 1705(d) simply operates as a preliminary threshold which must be satisfied in order to bring an action for pain and suffering

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election remains eligible to seek compensation for the noneconomic loss claimed and economic loss sustained in a motor vehicle accident as the consequence of the fault of another person pursuant to applicable tort law." The term "noneconomic loss" is defined in 75 Pa Cons Stat Ann § 1702 as "pain suffering and other nonmonetary detriment."

92. 75 Pa Cons Stat Ann §1705(c).

93. Id.

94. Note that failure to expressly make a choice between full tort and limited tort coverage will automatically result in full tort coverage. 75 Pa Cons Stat Ann § 1705(a)(1)(E). Therefore, affirmative conduct from the insured is necessary to waive the right to noneconomic losses. Also note that the option chosen by the named insured shall bind each and every member of the named insured's household who is covered by that policy and who is not a named insured under another policy. 75 Pa Cons Stat Ann §§ 1705(b)(1) and (2).

95. See note 91 for a definition of noneconomic losses.

96. 75 Pa Cons Stat Ann § 1705(d).

97. Following is an outline of the basic framework of section 1705(d):

General Rule: Insured may recover only economic damages.

Exceptions to the general rule, which permit the insured to bring an action for noneconomic losses:

1. Where the insured has suffered a serious injury;
2. Where the tortfeasor:
   - was driving under the influence of alcohol or a controlled substance;
   - is operating an out of state vehicle;
   - intentionally caused the insured's injuries;
   - was uninsured;
3. The insured may bring a products liability action seeking noneconomic losses against a person in the business of manufacturing or maintaining motor vehicles;
4. The insured may bring an action for noneconomic damages if he was an occupant of any vehicle other than a private passenger motor vehicle.

damages.

The purpose of the new optional limited tort section must be derived through implication and analogy, because the legislature declined to include any explanatory language in the new section. The basic purpose of all no-fault systems may be summarized generally as follows: first, expediting the compensation of accident victims by removing fault as a predicate to recovery and second, the elimination of litigation over the amount of compensation owed, through the implementation of a statutorily structured scale of damages.[98] The reduction of litigation reduces legal costs for the insurance companies; such savings are then passed on to the insured in the form of lower premiums.

Pennsylvania's new optional limited tort system encompasses only the second of these general purposes. Section 1705(d), by its express language, only imposes a structured scheme of recoverable damages. The language of section 1705(d) does not address the issues regarding expediting the compensation of accident victims; it does not remove fault as a prerequisite to recovery. To the contrary, the express language of section 1705(d) imposes fault as a prerequisite to the recovery of any damages, economic or noneconomic.[99]

Damages are divided into two categories by section 1705(d), economic and noneconomic. When these measures of damages are analyzed, the purpose behind the statute becomes apparent. Noneconomic loss is defined in section 1702 as pain, suffering and other nonmonetary detriment. Any damages not within the scope of this definition must be economic losses. Essentially, economic losses would include all monetary detriment suffered as a result of the accident.[100] Examples of these losses would include hospital and doctors expenses, as well as lost wages. These losses are easily calculated and just as easily verified or confirmed. However, noneconomic losses such as pain and suffering are not subject to easy calculation or verification. The amount of compensation for noneconomic losses, therefore, often leads to dispute, which then leads to litigation. Economic losses do not have these consequences, because they are so easily subject to objective verification.

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98. *Cassidy v McGovern*, 415 Mich 483, 330 NW2d 22, 27 (1982).

99. Section 1705(d) states in part, "Each person who elects the limited tort alternative remains eligible to seek compensation for economic loss sustained in a motor vehicle accident as the consequence of the *fault of another pursuant to applicable tort law* . . ." 75 Pa Cons Stat Ann § 1705(d) (emphasis added).

100. See note 91 to distinguish noneconomic from economic losses.

The effect of section 1705(d) is to preclude claims for noneconomic losses where the injury is not serious.[101] Thus, the purpose of this new limited tort system must necessarily be to reduce the amount of litigation over noneconomic loss issues where the plaintiff is not seriously injured. This reduction would decrease the legal costs of the insurers and permit those insureds who participate in the system to share in this savings through reduced automobile insurance premiums.

Such a rule which denies injured persons a recovery for losses not measurable in dollars seems harsh and unjust. However, the Pennsylvania limited tort system alleviates much of this harshness and injustice. First, and most importantly, the limited tort system is *optional*; that is, one is not forced to choose the limited tort option. In fact, if the insured fails to expressly make a choice, the insured is deemed to have opted for full tort coverage.[102] Next, the injured individual is only precluded from bringing a claim for such damages where the injury is not serious, and where the accident is not within the scope of one of the six other exceptions to the general rule of preclusion.

Viewing the exceptions to the general rule as a whole makes it apparent that the circumstances in which the general rule applies are very limited.[103] First, the drunk driving exception would permit 11.2% of all traffic accident victims to recover noneconomic losses if they had participated in the limited tort system.[104] Second, where the cause of the accident is due to the defective manufacture or design of the car, the insured is free to pursue whatever damages he can recover. Similarly, where the tortfeasor is operating a vehicle registered out of state, or is not adequately insured pursuant to the Financial Responsibility Act,[105] the victim may recover noneconomic losses. And most importantly, the victim is free to pursue noneconomic losses if he has suffered a serious injury. Thus, the victim is only precluded from claiming noneconomic

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101. Also note that there are five other exceptions to the general preclusion of noneconomic claims under section 1705(d). 75 Pa Cons Stat Ann § 1705(d). See note 97.

102. (Emphasis added). See note 94. Note that the named insured's choice will bind all those covered by the policy who are not named insureds under another policy. Thus, those individuals do not technically have a choice; however, those persons in most cases are the named insured's children and, therefore, do not have a choice about much of anything. 75 Pa Cons Stat Ann §§ 1705(b)(1) and (2).

103. See 75 Pa Cons Stat Ann § 1705(d)(1).

104. Commonwealth of Pennsylvania, Department of Transportation, *1989 Accident Statistics*.

105. 75 Pa Cons Stat Ann § 1701 et seq.

losses where he is not seriously injured and the accident was caused by the fault of an individual who is driving a vehicle registered in Pennsylvania and who is adequately insured.

Probably, the most important issue regarding the limited tort system is how the term "serious injury" will be defined, and who will apply the definition. "Serious injury" is defined in section 1702 as "a personal injury resulting in death, serious impairment of body function or permanent serious disfigurement."[106] Arguably, this definition is no more specific or particular than the term "serious injury." While there will be little dispute as to the applicability of the serious injury exception in an action for noneconomic losses of an individual killed in the accident, there will be a plethora of argument as to what injuries constitute "serious impairment of body function" and/or a "permanent serious disfigurement."

Interpretation of the plain meaning of the statutory language seems to be of little help due to the subjective nature of these terms. What may be a serious impairment of body function to one person may be a minor or trivial hinderance to another. For example, even minor damage to the hands of surgeon may preclude him from pursing his career, while the same injury to a lawyer would go unnoticed. Serious disfigurement, similarly, is a concept not easily placed on an objective scale.

The legislative history sheds some light on the meaning these terms were intended to be given. The newly adopted Pennsylvania definition of "serious injury" is a verbatim enactment of the Michigan no-fault threshold language.[107] The similarity is not coincidental: Governor Robert Casey and Representative Richard Hayden are said to have indicated that they were trying to enact the Michigan threshold.[108] During debate on the floor over an initial version

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106. 75 Pa Cons Stat Ann § 1702.

107. See Leonard A. Sloane, *Pennsylvania's Optional Verbal Threshold*, 8 Pennsylvania Automobile Insurance Law 75 (Trial Advocacy Foundation of Pennsylvania, 8th ed (1990).

Pennsylvania:

75 Pa Cons Stat Ann section 1702 defines serious injury, as a "personal injury resulting in *death, serious impairment of body function or permanent serious disfigurement.*" (Emphasis added.)

Michigan:

Mich Comp Laws § 500.3135; Mich Stat Ann § 24.13135 (Callaghan 1973) states in part: "A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered *death, serious impairment of body function, or permanent serious disfigurement.*" (Emphasis added.)

108. Sloane, 8 Pennsylvania Automobile Insurance Law at 73 (cited in note 107).

of this bill containing the Michigan language, Representative Stephen Freind stated,

> What we have just done is passed an optional no-fault which has a verbal threshold, which in fact is the Michigan verbal threshold . . .[109]

Subsequent versions of the bill were modeled after other states' thresholds.[110] However, the final version enacted February 7, 1990 contained a verbatim copy of the Michigan threshold.[111]

Michigan's statute was enacted in 1973; therefore, a substantial body of case law interpreting this threshold language has evolved. An historical review of the development of this concept in Michigan may assist in defining which injuries are within its scope and which are not; it may also further muddy what are already murky waters.

The history of the Michigan threshold can be broken down into three periods: *Advisory Opinion*,[112] *Cassidy*,[113] and *DiFranco*.[114]

1. Advisory Opinion Period (1973-1982)

In *Advisory Opinion Re: Constitutionality of 1972 PA 294*,[115] the Michigan Supreme Court was asked to render an advisory opinion regarding the constitutionality of the newly-enacted Michigan No-Fault Auto Insurance Act (hereinafter referred to as "Advisory Opinion").[116] One of several issues addressed by the court was whether the terms "serious impairment of body function" and "permanent serious disfigurement" provided standards constitutionally sufficient for legal interpretation.[117] The Michigan Supreme Court held that these terms were comparable to many others, in various facets of the law, which both juries and judges interpret every day.[118] The court reasoned that the terms "serious

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109. Id at 74 (cited in note 107) (citing *Legislative Journal- House*, No 42 at 986 (June 13, 1989).

110. Sloane, 8 Pennsylvania Automobile Insurance Law at 74 (cited in note 107).

111. Id (cited in note 107).

112. *Advisory Opinion Re: Constitutionality of 1972 PA 294*, 389 Mich 441, 208 NW2d 469 (1973).

113. *Cassidy v McGovern*, 415 Mich 483, 330 NW2d 22 (1982).

114. *DiFranco v Pickard*, 427 Mich 32, 398 NW2d 896 (1986). Please note that Mr. Sloan divided the history of the Michigan threshold into three periods. See note 107 for the relevant cite.

115. 389 Mich 441, 208 NW2d 469 (1973).

116. See Mich Comp Laws § 500.3135 (1973); Mich Stat Ann § 24.13135 (Callaghan 1973).

117. *Advisory Opinion*, 208 NW2d at 480.

118. Id.

impairment of body function" and "permanent serious disfigurement" were comprised of commonly-used English words, so that their application by juries would be no more difficult or less precise than application of terms such as the "reasonably careful person," "proximate cause," or "willful and wanton misconduct."[119]

Additionally, the *Advisory Opinion* court held that the determination of whether a particular injury constituted a serious impairment of body function or a permanent serious disfigurement was within the exclusive province of the jury and was to be decided on a case-by-case basis.[120] The court may only intervene when the jury's determination transgresses permissible limits, thereby making the determination a matter of law, rather than fact.[121]

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119. Id at 482.

120. Id. More specifically the Michigan Supreme Court stated: "Such findings result from denominated fact questions and thus are within the exclusive province of the triers of fact. Only when interpretation approaches or breaches permissible limits does it become a question of law for the Court. Such questions must be approached on a case by case basis." Id at 480.

121. Id. During the *Advisory Opinion* period, the question of whether the following injuries constituted serious impairments of body functions and/or permanent serious disfigurements were held to be JURY QUESTIONS:

1. Broken arm in a cast for six weeks. *Earls v Herrick*, 107 Mich App 657, 309 NW2d 694 (1981).

2. Injuries to neck, back and shoulders which were treated by doctor immediately after the accident and continued to be treated by doctor through the time of the hearing, where the doctor instructed plaintiff to stay off of feet and where the injured was unable to do housework, lift anything heavy and had headaches twice a week for which pain medication was prescribed. *Pickens v Prince*, 106 Mich App 314, 308 NW2d 178 (1981).

3. Head, neck and leg injuries resulting in constant pain. *Echols v Rule*, 105 Mich App 405, 306 NW2d 530 (1981).

4. Complete breaks of both bones in the lower right leg of a farmer who was required to wear four different casts between August 1975 and March 1976, who then had to use crutches and thereafter a walker; the leg returned to only fifty percent of normal use by time of trial with continued pain, all of which caused the farmer to be incapable of working. *Cassidy v McGovern*, 98 Mich App 100, 296 NW2d 200 (1980).

5. Tendonitis of the bicep tendon in the right arm, where movement was possible but persistent pain occurred in the shoulder. *McKendrick v Petrucci*, 71 Mich App 200, 247 NW2d 349 (1976).

6. The existence of mental or emotional injuries. *Luce v Gerow*, 89 Mich App 546, 280 NW2d 592 (1979).

In the following cases the injuries were determined to constitute SERIOUS IMPAIRMENTS OF BODY FUNCTIONS AND/OR PERMANENT SERIOUS DISFIGUREMENTS:

7. Fractured clavicle, where condition was temporary and prognosis for recovery was excellent; but for duration of convalescence, the plaintiff could not use arm or shoulder. *Burk v Warren*, 105 Mich App 556, 307 NW2d 89 (1981).

8. Spine sprain, pain in arms and legs, muscle spasms, loss of sensation and grip, and depression. *Pohl v Gilbert*, 89 Mich App 176, 280 NW2d 831 (1979).

9. Plaintiff rendered a paraplegic. *Workman v Detroit Automobile Inter-Insurance Ex-*

Under the authority of the Michigan Supreme Court's *Advisory Opinion*,[122] several principles governing the application of the Michigan No-Fault threshold have developed. First, and probably most important, is the standard to determine whether the plaintiff's claim for pain and suffering damages was sufficient to submit to the jury, i.e., the standard for determining whether the plaintiff crossed the summary judgment hurdle. The Michigan Supreme Court briefly addressed this issue in *Advisory Opinion*,[123] where it stated,

> Only when interpretation approaches or breaches permissible limits does it become a question of law for the Court. Such questions must be approached on a case by case basis.[124]

Vitale v Danylak[125] was the first case to determine that this standard had been satisfied and that summary judgment was appropriate. In *Vitale* the Supreme Court of Michigan affirmed the trial court's summary judgment in favor of the defendant, where the plaintiff's sole injury was a stiff neck which lasted only a week and was treated with minimal medication.[126]

Subsequently, it was held that a court, in determining whether

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change, 404 Mich 477, 274 NW2d 373 (1979).

In the following cases the injuries where determined NOT to constitute serious impairments of body functions and/or permanent serious disfigurements:

10. Abrasions, contusions and attendant minor discomforts. *Burk v Warren*, 105 Mich App 556, 307 NW2d 89 (1981).

11. Bruises on legs and knee which did not prevent plaintiff from sitting or standing and disappeared after two weeks, bump on the head which healed in one month, neck and back pains which required no medication and were treated with heating pad only; within one month the plaintiff was working a full shift and performing regular household duties. *Hermann v Haney*, 98 Mich App 445, 296 NW2d 278 (1980).

12. Arm and wrist injury, where the plaintiff did not seek treatment until four weeks later from a chiropractor, who gave plaintiff heat treatment and medication; plaintiff returned to chiropractor at intervals of three to four weeks and sought no other medical treatment. *Brooks v Reed*, 93 Mich App 166, 286 NW2d 81 (1979).

13. Headaches, stiff neck, and knee pains. *Harris v McVickers*, 88 Mich App 508, 276 NW2d 629 (1979).

14. Stiff neck, which was treated with minimal medication and which disappeared within a week. *Vitale v Danylak*, 74 Mich App 615, 254 NW2d 593 (1977).

122. 389 Mich 441, 208 NW2d 469 (1973).

123. *Advisory Opinion*, 208 NW2d at 469.

124. Id at 480.

125. 74 Mich App 615, 254 NW2d 593 (1977).

126. *Vitale*, 254 NW2d at 593. The *Vitale* court stated, "[W]here the legal interpretation of the terms in question 'approaches or breaches permissible limits' the interpretation becomes a question of law for the trial court. While the opinion did not specify where the 'permissible limits' are drawn, this Court is of the opinion that if any class of cases could approach such limitation, the case at bar must be included in that class." Id at 595.

the plaintiff's injuries satisfied the serious impairment threshold, could grant summary judgment only where the plaintiff's injuries were such that no reasonable jury could view the impairment as serious.[127] The Michigan courts identified several factors which were relevant to the determination of whether an injury had satisfied the initial serious impairment threshold.[128] These factors included: extent of the injury, treatment required, duration of disability, extent of residual impairment, and the prognosis for eventual recovery.[129] Thus, in *Hermann v Haney*[130] the Michigan Court of Appeals determined that the plaintiff had not satisfied the initial threshold and, therefore, could not submit her case to a jury where her injuries consisted of only bruises on her legs and knees, and a bump on her head.[131]

In summary, the *Advisory Opinion* period did not define or clarify the statutory threshold language; instead satisfaction of the threshold was to be decided by a jury, based on their common everyday understanding of the term "serious impairment of a body function." Only when reasonable minds could not differ as to the determination of the threshold question could the court make the determination as a matter of law, and thereby prevent a full trial. As the next period suggests, these principles were not etched in stone.

2. *Cassidy Period (1982-1986)*

In *Cassidy v McGovern*[132] the Michigan Supreme Court came full circle from its decision in *Advisory Opinion*,[133] and held that application of the "serious impairment" threshold was a question of statutory interpretation. As such, the question was to be determined by the court, not the jury.[134] Absent a controversy regarding

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127. *Brooks v Reed*, 93 Mich App 166, 286 NW2d 81 (1979).

128. *Hermann v Haney*, 98 Mich App 445, 296 NW2d 278 (1980).

129. *Hermann*, 296 NW2d at 278. See also, *Echols v Rule*, 105 Mich App 405, 306 NW2d 530 (1981), where the court held that there was a jury question as to whether a plaintiff who suffered head, neck and leg injuries with attendant pain was a serious impairment; *Burk v Warren*, 105 Mich App 556, 307 NW2d 89 (1981); *Pickens v Prince*, 106 Mich App 314, 308 NW2d 178 (1981), where it was also held that there was a jury question as to whether the plaintiff's injuries were a serious impairment.

130. *Hermann*, 296 NW2d at 278.

131. Id.

132. 415 Mich 483, 330 NW2d 22 (1982).

133. *Advisory Opinion*, 208 NW2d at 469.

134. *Cassidy*, 330 NW2d at 22. Under the *Cassidy* rule, the following injuries were determined to be SERIOUS IMPAIRMENTS OF BODY FUNCTIONS:

1. Plaintiff, who was previously suffering from "lumbar myositis and lumbosacral strain with

the extent of the injury, therefore, the case is properly a subject for

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a possibility of a herniated invertebral disc," was involved in a minor accident which caused a re-occurrence of lumbar myositis, a possible herniated disc in the low back, cervical myofascitis and high blood pressure resulting from the stress of the re-occurrence of the injuries. The injuries restricted the amount of weight she could lift, and the period of time which she could sit or stand. *Chumley v Chrysler Corporation*, 156 Mich App 474, 401 NW2d 879 (1986).

2. Plaintiff suffered compression fractures of first and second lumbar vertebrae, causing the plaintiff extreme discomfort when he attempted to perform normal activities such as lifting groceries, walking long distances, or standing or lying down for extended periods of time. *Freel v Dehaan*, 155 Mich App 517, 400 NW2d 316 (1986).

3. Plaintiff's loss of memory constitutes loss of important body function and may be a serious impairment depending on the extent. *Shaw v Martin*, 155 Mich App 89, 399 NW2d 450 (1986).

4. Plaintiff's back injury caused her to wear a back brace continuously for five years after the accident, caused her to need medical treatment on a weekly basis, and caused her to be unable to return to work for three and one half years despite her repeated attempts. *Wood v Dart*, 154 Mich App 586, 397 NW2d 843 (1986).

5. Plaintiff suffered six broken ribs causing potential lung complications and additional treatment to avoid such complications. *Esparaza v Manning*, 148 Mich App 371, 384 NW2d 168 (1986).

6. Plaintiff suffered six fractured ribs, fracture of the right clavicle and small toe of right foot. *Range v Gorosh*, 140 Mich App 712, 364 NW2d 686 (1985).

7. Plaintiff suffered a broken clavicle, fractured left leg which required surgery and the insertion of a steel rod in her thigh; submission of this question to the jury was error. *Lahousse v Hess*, 125 Mich App 14, 336 NW2d 219 (1983).

8. Aggravation of the plaintiff's pre-existing back condition, causing acceleration of its deterioration. *Galli v Reutter*, 148 Mich App 313, 384 NW2d 43 (1985).

The following injuries were held INSUFFICIENT to satisfy the serious impairment of body function threshold:

9. Plaintiff suffered bump on the clavicle or collar bone, a chronic grade two acromioclavicular separation of the left shoulder, an atrophied droop to that shoulder, all of which prevented her from returning to work as a waitress until she successfully underwent corrective surgery; the injuries did not interfere, in a significant manner, with the victim's ability to lead a normal life. *Ulery v Coy*, 153 Mich App 551, 396 NW2d 480 (1986).

10. Plaintiff suffering a laceration of the eyelid and a blow to the chest, which caused an irregular electrocardiogram immediately after the accident (the plaintiff's electrocardiogram readings subsequently returned to normal); injuries did not affect the plaintiff's ability to lead a normal life. *Kanaziz v Rounds*, 153 Mich App 180, 395 NW2d 278 (1986).

11. Plaintiff suffered a cervical strain or soft tissue injury in the neck; plaintiff could not demonstrate any objective manifestation of the injury; pain and suffering do not constitute an objective manifestation. *Bennett v Oakley*, 153 Mich App 622, 396 NW2d 451 (1986).

12. Plaintiff suffered two comminuted fractures of the humerus bone causing the plaintiff to be hospitalized for three days and to wear a cast for two and onehalf months; plaintiff was able to return to her normal life within eleven weeks after the accident. *Kroft v Kines*, 154 Mich App 448, 397 NW2d 822 (1986).

13. Plaintiff suffered from neck pain causing her to seek medical treatment, thus limiting her ability to engage in household tasks and certain hobbies such as gardening; pain and suffering do not constitute an objective manifestation of the injury. *Schubot v Thayer*, 156 Mich App 545, 402 NW2d 2 (1986).

14. Plaintiff suffered soreness, stiffness, tenderness in muscles and pain in his back and leg, causing a reduction in the flexibility of his spine to 50% of normal. *Clark v Auto Club Ins. Assoc.*, 150 Mich App 546, 389 NW2d 718 (1986).

summary disposition by the judge.[135] Not surprisingly, during the *Cassidy* period cases generally were disposed of by the judge on a motion for summary judgment,[136] unless there was a question regarding the extent of the plaintiff's injury which would require a jury determination. This drastic departure from the *Advisory Opinion* rule (cases normally being decided by the jury, except those extreme situations where the judge could permissibly make the determination as a matter of law) drastically reduced the number of cases litigated.[137]

Cassidy actually consisted of two cases consolidated for purposes of appeal. In the first, *Cassidy v McGovern*,[138] the plaintiff broke both bones in his leg and spent substantial periods of time in convalescence. After a period of convalescence,[139] the leg was only rehabilitated to fifty percent of its normal use, but astonishingly the

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15. Plaintiff suffered a broken arm restricting the use of the arm for four months. *Farquhar v Owens*, 149 Mich App 208, 385 NW2d 751 (1986).

16. Plaintiff suffered minimal compression fracture of L3 vertebra, the only permanent affects of which were that she could not bend and lift as she once could and might have to take pain medication occasionally. *Walker v Caldwell*, 148 Mich App 827, 385 NW2d 703 (1986).

17. Plaintiff suffered soft tissue injury known as chronic myofascitis, an inflammatory condition of the muscle and connective tissue of the back; injury did not satisfy the objective manifestation requirement. *Cochran v Myers*, 146 Mich App 729, 381 NW2d 800 (1985).

18. Plaintiff suffered from posttraumatic neurosis, resulting in anxiety, nervousness and feelings of anger; not an objectively manifested injury. *Garris v Vanderlaan*, 146 Mich App 619, 381 NW2d 412 (1985).

19. Plaintiff suffered injuries leaving a scar three centimeters long under the left eye. *Nelson v Myers*, 146 Mich App 444, 381 NW2d 407 (1985).

20. Ten percent limitation in the range of neck motion. *Mills v Jolliff*, 147 Mich App 746, 383 NW2d 134 (1985).

21. Dorsal vertebral strain and chronic crania-cervical injury which did not require the plaintiff to miss any work. *Denson v Garrison*, 145 Mich App 516, 378 NW2d 532 (1985).

22. Loosening of four teeth and the fracture of the plaintiff's lateral incisor and lower center incisor. *Shortridge v Daily*, 145 Mich App 547, 387 NW2d 544 (1985).

135. *Cassidy*, 330 NW2d at 22. Cases holding that THERE WAS A JURY QUESTION regarding the extent of the plaintiff's injuries include:

1. Plaintiff suffered head and back injuries; question went to extent of injuries. *Shaw v Martin*, 155 Mich App 89, 399 NW2d 450 (1987).

2. Plaintiff suffered hematoma of his right leg (which required drainage and caused scarring), a cracked bone in the leg, a lower back and hip injury, and various bumps and bruises; question went to plaintiff's ability to walk. *Akim v Slocum*, 153 Mich App 337, 395 NW2d 269 (1986).

3. Plaintiff suffered a back injury causing contracture or spasm of the back muscles; question went to whether the plaintiff's injuries affected her ability to live a normal life. *Harris v Lemicex*, 152 Mich App 149, 393 NW2d 559 (1986).

136. See notes 134 and 135.

137. See *DiFranco v Pickard*, 427 Mich 32, 398 NW2d 896 (1986).

138. 98 Mich App 102, 296 NW2d 200 (1980).

139. *Cassidy*, 296 NW2d at 200.

jury had determined that the plaintiff had not suffered a serious impairment of body function.[140] The Michigan Supreme Court determined that the plaintiff had, nonetheless, satisfied the threshold requirements and was therefore permitted to recover noneconomic damages.[141]

In the companion case, *Hermann v Haney*,[142] the plaintiff had suffered bruises on her legs and a bump on the head.[143] Summary judgment for the defendant was granted by the trial court; the Michigan Supreme Court affirmed.[144]

The court held there were several factors to be taken into account when interpreting the serious impairment threshold. The Michigan Legislature's purpose for precluding the recovery of noneconomic losses was of primary importance to the court's rationale and was identified as one of these factors.[145] The court identified two purposes for the exclusion: first, to prevent the overcompensation of minor injuries, and second, to reduce the excessive litigation of motor vehicle accident cases.[146] Regarding the second, the court stated that,

> if non-economic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory.[147]

The court stated that the second factor for consideration when interpreting the serious impairment threshold was the context in which the threshold was placed. The two other threshold requirements were permanent serious disfigurement and death.[148] The court concluded that the legislature would have been inconsistent in constructing two very high thresholds and one "insignificant obstacle."[149] Obviously, the legislature determined that serious impairment of body function was intended to be of a severity equivalent to death or permanent serious disfigurement.

After these guidelines to interpretation of the serious impairment threshold were set forth, the court addressed the statutory

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140. See *Cassidy v McGovern* in note 121, example 4.
141. *Cassidy*, 330 NW2d 22.
142. *Hermann v Haney*, 98 Mich App 445, 296 NW2d 278 (1980).
143. *Hermann*, 296 NW2d at 278. See *Hermann v Haney* in note 121, example 11.
144. *Hermann*, 296 NW2d at 278.
145. *Cassidy*, 330 NW2d at 22.
146. Id.
147. Id at 28.
148. Id at 22.
149. Id.

language.[150] The "impairment of body function" requirement was defined as an impairment which would interfere with the plaintiff's general ability to live a normal life.[151] Because walking is an important part of normal life, the court determined that the *Cassidy* injury satisfied this standard.[152]

The court also introduced an objectivity requirement into its serious impairment test,[153] concluding that the language used by the legislature, "serious impairment of body function," dictated that the injury be objectively manifested.[154] Thus, pain and suffering alone, regardless of the severity, would be insufficient to establish an objectively manifested impairment.[155] Instead, the injury must affect the functioning of the body. Because the *Cassidy* injury (two broken bones in the right leg) impaired the functioning of the body, namely walking, it satisfied the objectivity requirement.[156]

In measuring the severity of the injury, the court looked to the longevity of the impairment as a factor.[157] Although the injury did not have to be permanent, such a finding would certainly weigh in the decision.[158] Thus, the court determined that the *Cassidy* injury, which included "18 days of hospitalization, seven months of wearing casts during which dizzy spells further affected his mobility, and at least a minor residual effect one and one-half years later . . ." was sufficient to satisfy the threshold.[159] On the other hand, the *Hermann* injury, which impaired the plaintiff for only a relatively short period, was determined not to be serious enough to satisfy this requirement.[160]

In summary, the *Cassidy* court defined a serious impairment as an injury which: (1) effects the plaintiff's ability to live a normal life; (2) is objectively manifested; and (3) is of a severity which is

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150. Id.

151. Id.

152. Id. Note that the Court expressly rejected two alternative interpretations regarding the body function which needed to be impaired. The first would permit recovery where "any body function" was impaired; even impairment of a little finger would satisfy this standard. The second would require impairment of the "total body function," thereby requiring the injury to be life-threatening. Id.

153. Id.

154. Id. The court reached this conclusion without setting forth any reasoning as to why. Id at 30.

155. Id.

156. Id.

157. Id.

158. Id.

159. Id.

160. Id.

consistent with the severity of the other two threshold requirements, death and permanent serious disfigurement. In addition, the court stated that the determination of whether the particular injury satisfied the threshold was a question for the court, not the jury. Through this interpretation, the court believed that the purpose of the threshold was most effectively achieved, because such a reading would eliminate the overpayment of minor injuries and reduce accident litigation. These newly held principles were etched no deeper in stone, however, than were those under the *Advisory Opinion.*

3. *DiFranco Period (1986-present)*

Again, in *DiFranco v Pickard*[161] the Michigan Supreme Court drastically altered its interpretation of the serious impairment threshold, totally departing from the rules previously announced by *Cassidy.*[162] The *DiFranco* court held that the trier of fact should determine whether the plaintiff suffered a serious impairment whenever the evidence would cause reasonable minds to differ.[163] The court further stated that the judge was precluded from making the decision as a matter of law where there was a factual dispute regarding the nature and extent of the plaintiff's injuries, or where reasonable minds could differ as to whether the injury satisfied the threshold.[164] If either of these factors is present, then the judge must leave the determination to the jury.[165] The results of this holding are best illustrated by the court's disposition of the five cases before it.[166] In all five of these cases, the court determined that reasonable minds could differ, and that the case should have been decided by the jury.[167]

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161. 427 Mich 32, 398 NW2d 896 (1986).

162. *Cassidy*, 330 NW2d at 22.

163. *DiFranco*, 398 NW2d at 900. The court took no chances in having its opinion misread; it listed its holdings, in headnote type fashion, at the beginning of the opinion. Id.

164. Id at 901.

165. Id.

166. Five cases were consolidated on appeal: *DiFranco v Pickard*, *Burk v Warren*, *Paupore v Rouse*, *Kucera v Norton*, and *Routley v Dault*. Id.

167. Note that in *DiFranco*, the jury had determined that the plaintiff had not suffered a serious impairment, and the court affirmed; in *Burk*, the court held that the case had properly been submitted to the jury and thus affirmed the jury's determination that the plaintiff had not suffered a serious impairment of body function; in *Paupore*, the court affirmed a jury verdict finding no serious impairment; in *Kucera*, the court re-instated a jury verdict for the plaintiff which had been overturned by a j.n.o.v.; in *Routley*, the court reversed a summary judgment for the defendant, holding that reasonable minds could differ, and, therefore, the jury must make the determination. *DiFranco*, 398 NW2d at 918-25.

The rationale for making the threshold question one for the trier of fact, rather than a question of law for the judge, is based on the court's newly determined purpose of the Michigan No-Fault Act. In examining the Act, the court concluded that "limiting tort liability for noneconomic losses is not an essential feature of no-fault act."[168] The court reasoned, however, that the primary purpose of no-fault acts was to reduce the number of economic loss cases, rather than non-economic loss cases.[169] In addition, the court recognized that this departure from judge to jury would increase the number of non-economic loss cases litigated.[170]

The court made clear that the serious impairment threshold did not apply only to the catastrophically injured.[171] Instead, the threshold was only intended to eliminate claims for pain and suffering arising from minor injuries.[172] In this vein, the "ability to live a normal life" test adopted by *Cassidy* was totally discarded.[173] Under *DiFranco* the impairment need not affect the plaintiff's ability to live a normal life, but could be limited to a single particular body function if the injury was serious enough to impair that function.[174] In effect, the test involved inquiry into which body function had been impaired and how the injury had affected that particular body function.[175] Satisfaction of this test was held to ordinarily necessitate expert medical testimony to establish the existence, extent, and permanency of the impairment.[176]

DiFranco also modified the objectivity requirement announced in *Cassidy*.[177] The objectivity test announced in *Cassidy* evolved,

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168. Id at 908.

169. Id.

170. Id.

171. The court reached this conclusion based on the legislative history underlying the Michigan No-Fault Act. The Michigan Legislature had rejected more stringent thresholds in favor of the serious impairment standard; therefore, they likely did not intend an extremely high threshold. *DiFranco*, 398 NW2d at 904.

172. Id.

173. Id.

174. Id. The court identified several factors to determine whether an injury was serious. The impairment is often expressed in numerical terms, such as a person suffering a seventy-five percent limitation of motion. The length of time the impairment of body function lasts is also a consideration. The treatment required may likewise be relevant. Lastly, a comparison of the plaintiff's activities and abilities before and after the injury is relevant to establish the seriousness of the injury. Id.

175. Id.

176. Id.

177. *DiFranco*, 398 NW2d at 915.

through subsequent cases interpreting *Cassidy*,[178] into a standard which required the injury to be subject to medical *measurement*.[179] This standard distinguished symptoms of injuries from injuries themselves.[180] Pain, regardless of the severity, was held to be a symptom not subject to medical measurement; pain alone, therefore, could never satisfy the objective manifestation requirement.[181] *DiFranco* altered this requirement, holding that any medically *identifiable* injury satisfied the objective manifestation element of the threshold.[182]

In summary, the *DiFranco* court determined that the *Cassidy* rules were too harsh and, therefore, were not effectuating the legislative intent underlying the Michigan no-fault threshold. This intent was not to reduce the number of cases litigated, but was to preclude only those noneconomic cases where the injuries were minor. Thus, the *DiFranco* court placed the threshold determination back in the hands of the jury, and only permitted the judge to make such findings as a matter of law where reasonable minds could not differ as to the conclusion and where there was no factual dispute as to the extent of the injuries. Similarly, the objective manifestation requirement was softened to only require medical identification of the injury, rather than medical measurement. The end product of this change permits many more cases to proceed through a full trial, which, in turn, permits many more plaintiffs to obtain damages for their pain and suffering.[183]

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178. See *Williams v Payne*, 131 Mich App 403, 346 NW2d 564 (1984).

179. *Williams*, 346 NW2d at 568 (emphasis added). Medical measurement, as applied by the court, requires that the injury be subject to verification through some type of medical test. Absent such a verification, the injury is said not to be measurable. Id.

180. Id.

181. Id.

182. *DiFranco*, 398 NW2d at 918.

183. The following cases decided under *DiFranco* presented a serious impairment question FOR THE JURY:

1. Soft tissue injuries to the muscles and ligaments of plaintiff's back, which caused muscle spasms, pain and limited his range of motion; such injuries did not constitute serious impairment. *DiFranco v Pickard*, 427 Mich 32, 398 NW2d 896 (1986).

2. Abrasions, contusions and attendant minor did not constitute a serious impairment. *Burk v Warren*, 105 Mich App 556, 307 NW2d 89 (1981).

SUMMARY JUDGMENT WAS GRANTED in the following cases:

4. Plaintiff with a lumbosacral strain did not sustain serious impairment as matter of law. *Johnston v Thorsby*, 163 Mich App 161, 413 NW2d 696 (1987).

5. A small, hardly discernible tissue scar immediately below plaintiff's lip was not a permanent serious disfigurement as a matter of law. *Petaja v Guck*, 178 Mich App 577, 444 NW2d 209 (1989).

For a more complete list of cases decided under *DiFranco*, see Sloane, 8 Pennsylvania Auto Insurance Law at 87 (cited in note 105).

C. *Proposed Approached For Pennsylvania*

In *Pennsylvania's Optional Verbal Threshold*,[184] the author Mr. Sloane argues that Pennsylvania should adopt *DiFranco* and those cases decided thereunder as the Pennsylvania standard.[185] The rationale of this argument is based on the legislative intent underlying the Pennsylvania Act and the similarity between the Michigan and Pennsylvania threshold language.[186] The basic purpose of the Pennsylvania threshold is said to be a careful balance between the protection of an individual's access to the courts and a reduction in automobile insurance premiums.[187]

The importance of the individual's access to the courts is made evident by various facts. First, a previous version of House Bill 121[188] contained a preamble which set forth the purpose for the threshold. This preamble was subsequently removed before House Bill 121 was enacted. The preamble to House Bill 431 stated that the intent and purpose of the threshold was to eliminate ninety-percent of the bodily injury claims resulting from minor automobile accidents, thereby removing the major cause of the escalation of auto insurance rates.[189] Because this language was deleted, Mr. Sloane reasons that the legislature did not intend to reduce minor automobile accident claims by ninety-percent.[190]

Second, a review of the legislative debate surrounding the question of who should make the threshold determination also reveals that the legislature believed providing access to the courts was important.[191] At various times, proposed amendments to House Bill 121 were introduced which would have clearly designated that the

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184. Sloane, 8 Pennsylvania Auto Insurance Law at 61 (cited in note 107).

185. Id (cited in note 107).

186. See note 19 and accompanying text.

187. Sloane, 8 Pennsylvania Auto Insurance Law at 66 (cited in note 107).

188. House Bill 431, Printer Number 2055 (January 13, 1989).

189. Sloane, 8 Pennsylvania Auto Insurance Law at 67 (cited in note 107). The proposed preamble stated,

> (a) Findings.—The General Assembly hereby finds and declares that:
> * * *
> (5) The major cause for escalating auto insurance rates is the high frequency of small bodily injury claims.
> (6) The establishment of an optional verbal claims threshold in conjunction with mandatory first party benefits will eliminate up to 90% of bodily injury liability claims resulting from minor motor vehicle accidents for those electing the limited tort option. The threshold will serve to reduce the cost of providing auto insurance while providing for adequate protection of injured victims.

Id.

190. Id.

191. Id at 70.

satisfaction of the threshold is a question of law to be determined by the judge.[192] These amendments were either rejected when initially proposed or deleted through subsequent amendments.[193] Similar to the deletion of the proposed preamble, Mr. Sloane reasoned that the legislature's failure to adopt the amendments is clear evidence that a jury was intended to make the threshold determination.[194]

Finally, Mr. Sloane argued that the adoption of the Michigan threshold language evidences an intent on the part of the legislature to have that language interpreted and applied as the Michigan courts have applied it.[195] Because the Michigan courts, namely *DiFranco*, have determined that the threshold question is one for the jury, the Pennsylvania Legislature necessarily intended such a result.[196]

The authors agree that the purpose of this optional threshold is to reduce constantly escalating insurance costs and to balance that objective with the goal of permitting those who have been injured to seek redress for their injuries through the courts. However, obtaining both of these goals would seem pragmatically impossible pursuant to the position taken by Mr. Sloane in *Pennsylvania's Optional Verbal Threshold*.[197]

There are numerous reasons which require the Pennsylvania courts to depart from the path taken by Michigan under *DiFranco* and permit the judge to make the threshold determination. First, a comparison of the Michigan No-Fault Act to the Pennsylvania Limited Tort System reveals vast differences between the operation and the intent of the acts. The Michigan Act is a comprehen-

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192. Id at 69. Senator Scanlon introduced an amendment on December 11, 1989 which stated in part:

> Definitional Section (Serious Injury) - A personal injury resulting in death, serious impairment of body function or permanent serious disfigurement. The *determination of whether an injury constitutes a serious injury shall be a question of law and not a question of fact.*

Id (emphasis added).

Senator Loeper immediately introduced a nullifying amendment which was adopted. Id. Subsequently, Representative Stephen Friend introduced an amendment stating:

> Amend Bill page 18, line 29 by adding after the "period" The *determination of whether an injury constitutes a serious injury shall be a question of law and not a question of fact.*

Id (emphasis added). Similarly, this amendment was defeated. Id.

193. Id at 70.

194. Id.

195. Id at 76.

196. Id.

197. Sloane, 8 Pennsylvania Auto Insurance Law at 61 (cited in note 107).

sive compensation system which eliminates fault as a prerequisite to recovery, statutorily structures any and all potential compensation, economic and noneconomic, and is mandatorily imposed on all Michigan drivers. The Pennsylvania Limited Tort System, however, is an optional system with the sole purpose of precluding certain noneconomic claims. The only similarities between these acts is their common definition of the term "serious injury."

The basis given by the *DiFranco* court for permitting the jury to decide the threshold question was to effectuate the purpose of the Michigan No-Fault system, and to ameliorate the harshness of depriving accident victims an opportunity to receive recovery for noneconomic loss. The *DiFranco* court stated,

> As to the fear that automobile negligence litigation will dramatically increase, modifying this aspect of *Cassidy* will result in more noneconomic loss cases going to trial. However, the pre-Cassidy case law did not require a trial in every case. Moreover, no-fault acts were designed primarily to reduce the number of cases seeking damages for *economic* loss, e.g., wage loss, survivor's loss, and medical expenses. Although section 3135(1) was designed to eliminate lawsuits seeking noneconomic damages for minor injuries, it cannot be said that the Legislature intended to wipe out almost all noneconomic loss cases. The legislative history indicates that less stringent thresholds were adopted as a concession to attorneys performing personal injury work.
>
> To those who argue that permitting more noneconomic loss cases to go to trial will cripple the no-fault system, we note that limiting tort liability for noneconomic losses is not an essential feature of no-fault acts.[198]

The primary purpose of the Michigan No-fault system was determined to be the reduction of economic loss cases, rather than the elimination of noneconomic loss cases. In fact, the reduction of the number of noneconomic loss cases is reasoned to be of very little importance to the Michigan No-Fault Act. In this respect the Pennsylvania system is distinguishable. Section 1075(d) has only one purpose or effect: to reduce the number of noneconomic loss cases. Adoption of the *DiFranco* court's lack of concern over the increase of noneconomic loss cases, therefore, would serve to counteract the purpose of the Pennsylvania rule.[199]

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198. *DiFranco*, 398 NW2d at 908.

199. In fact, permitting the jury to determine if a particular injury is serious may actually encourage litigation in Pennsylvania. The reduced premiums of the limited tort option would encourage participation. However, after reaping the benefits of the low premiums, a non-seriously injured party would always be free to take his case to the jury in the hope that he might be awarded a large recovery. In such a situation, the insured has the best of both worlds: his premiums are lower and he still has a 50/50 chance at recovering pain and suffering damages for any injury.

Similarly, the reduction of legal costs and, in turn, insurance premiums would not be facilitated by permitting the jury to decide each case. This was observed in *Cassidy* when the court stated,

> Regarding the second problem, if non-economic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the costs of continuing litigation . . . could easily threaten the economic viability, or at least the desirability of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of non-economic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault.[200]

This rationale is also applicable to the Pennsylvania threshold: if the non-economic loss claims were always subject to adjudication, then absolutely nothing would be gained by implementation of section 1705. To the contrary, it would add an additional complexity to a traditional negligence case.

Even the express language of section 1705 dictates that the judge make the threshold determination. Section 1705(d) states that "each person who is bound by the limited tort election shall be precluded from maintaining an [*action*] for any noneconomic loss . . ." Necessarily, to maintain an action the threshold must be satisfied. Unless an action can be maintained, the jury cannot even hear the case. The entire action is barred, not simply the recovery.[201]

D. *Proposed Resolution*

The Pennsylvania Legislature clearly had the Michigan threshold standard in mind when it adopted the section 1702 definition of serious injury. Therefore, it would seem reasonable to look to the test that the Michigan courts apply to make threshold determinations. However, it is not reasonable to conclude that our legislature would enact a law which, when applied, defeats its own purpose (i.e., a rule which expressly reduces the number of potential trials but, as applied, actually complicates simple negligence cases and does not reduce, or only nominally reduces, such cases). Also unreasonable is the conclusion that there would be any reduction in legal expenses if the jury were to make the threshold determina-

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200. *Cassidy*, 330 NW2d at 28.

201. The Michigan Act, to the contrary, states that "a person remains subject to tort liability for noneconomic loss . . ." Mich Comp Laws § 500.3135(1973); Mich Stat Ann § 24.13135 (Callaghan 1973). This language only precludes the recovery, not the action itself.

tions; in fact, such a rule would increase legal costs and defeat the purpose of section 1705.

The *DiFranco* threshold test was simply a watered-down version of the *Cassidy* test applied by the jury instead of the judge. The authors conclude that the best and most reasonable solution for Pennsylvania is the application of this watered-down *Cassidy* test by the judge. The proposed test would require a plaintiff to establish that there is: (1) an impairment of a body function, any body function, such that the plaintiff's ordinary or normal use of that body function is prevented; (2) an impairment having consequences on the particular plaintiff which are serious in their nature (severity should be judged based on several factors including: the extent of the impairment, the particular body function impaired, the length of time the impairment lasted - or will last - the treatment required to correct the impairment, and any other relevant factors); and (3) an injury of a medically identifiable nature, such that there is a physical basis for the plaintiff's subjective complaints of pain and suffering. This three-pronged determination should be made by the judge prior to trial. If the judge determines that these three elements are satisfied, then the plaintiff's claim may proceed to trial with no further reference to the serious impairment threshold. If the plaintiff fails to establish these elements, then his claim, so far as it relates to noneconomic damages, should be dismissed. Such a standard would be fair and would also accomplish the purpose of section 1705.

The judiciary's interpretation and application of the exceptions to the limited tort system, in particular the serious injury exception, will either facilitate the success of the limited tort system and permit the achievement of its purpose, or destine it for failure.

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III. Conclusion

The 1990 auto insurance law apparently has the intended effect of saving time and money for all parties involved. The introduction of first party "bad faith" has the intended effect of forcing insurers to deal with the insureds in good faith, thereby expediting the quick resolution of valid insurance claims. Similarly, the limited tort rule is intented to reduce the amount of auto insurance litigation, thereby saving insurers money, which savings can then be passed on to the insureds in the form of lower premiums.

However, be aware that both of these sections are clearly subject

to abuse if not properly interpreted and applied. Such improper interpretation or application would paralyze the Pennsylvania auto insurance industry. This paralysis is evidenced by several Pennsylvania auto insurers' initial refusal to write any new auto insurance policies in response to the new legislation. The analysis set forth in this article is intented to provide a means of interpreting and applying these sections, which means will preclude potential abuses while achieving the desired benefits of House Bill 121.

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