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BILL ANALYSIS

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Senate Bill 352 (as reported with amendment)

Sponsor: Senator Dick Posthumus

Committee: Commerce and Technology

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RATIONALE

In 1972, provisions were added to the Insurance Code to establish a "no-fault" automobile insurance system. A no-fault system is designed to remove tort liability for economic loss, and to limit tort liability for noneconomic loss, that arises from the use or operation of a motor vehicle. Thus, no-fault insurance provides benefits without regard to fault for unlimited medical expenses and limited wage loss.

Under Michigan's no-fault system, a person is subject to tort liability for noneconomic loss only in the event that an injured person died or suffered a "serious impairment of body function" or permanent serious disfigurement. Because the law does not define "serious impairment of body function", the term has received sometimes divergent judicial interpretations. The Michigan Supreme Court addressed the issue in 1982 in Cassidy v McGovern, holding that the determination is one for the trial court, not the jury, and that a "serious impairment of body function" is to be measured by an objective standard that looks at the effect of an injury on the "person's general ability to lead a normal life".

Cassidy did not settle the issue, however: the Court of Appeals subsequently published some 40 opinions on the subject, some of which reached conflicting legal and factual conclusions. In December 1986, the Supreme Court again considered the matter in DiFranco v Pickard, ruling that "serious impairment" is a question for the jury, not the court, and rejecting the "general ability to lead a normal life" test.

Many people now claim that DiFranco will have a detrimental effect on no-fault auto insurance in Michigan. They argue that, under the threshold as interpreted by DiFranco, insurers must not only pay more in claims but also defend more lawsuits, which in turn will raise consumers' premiums. To avoid an imminent rate hike, they contend, the Cassidy "normal life" test should be instituted statutorily, with determination of "serious impairment" being made a matter of law for the court.

CONTENT

Senate Bill 352 would amend the Insurance Code to:

- Provide guidelines for determining whether an injured person suffered "serious impairment of body function" in an action for noneconomic loss caused by the ownership, maintenance, or use of a motor vehicle.
- Require that the determination be a question of law for the court.
- Set a three-year statute of limitations on such an action.

Under the Code's no-fault provisions, "death, serious impairment of body function, or permanent serious disfigurement" is the threshold that must be met in order to recover for noneconomic loss. The bill specifies that a person would not have suffered serious impairment of body function "unless the person has suffered an objectively manifested impairment of an important body function which affects his or her general ability to lead a normal life".

In addition, the bill specifies that it would be the "intent" of the proposed amendatory Act to "rectify the misconstruction" of the Code by the Michigan Supreme Court's 1986 ruling in DiFranco v Pickard (427 Mich 32); to "preserve the purpose and benefits of the no-fault insurance system by encouraging the reduction of tort litigation and of the costs inherent in tort litigation"; and, to "provide clarification and uniformity of application of threshold requirements for recovery of damages for noneconomic loss" under the Code. (For a discussion of DiFranco, see below.)

The bill also would prohibit the commencement of a no-fault action later than three years after the date of the accident that caused the injury (except as provided in the Revised Judicature Act for certain legal "disabilities", e.g., infancy or insanity, that toll the statute of limitations, that is, allow an action to be brought within a certain period of time after the statute has run).

In DiFranco v Pickard, the Supreme Court held that the determination of whether an injury is a serious impairment of body function is a question of fact for a jury to decide, not a question of law for the court, "in those cases where reasonable minds could differ on the answer". The Court also held that the impairment need not be of the entire body function or of an important body function, and that the "general ability to live a normal life" test will no longer be used.

BACKGROUND**History**

The basic feature of no-fault insurance laws is compulsory motor vehicle insurance, which permits the insured to recover benefits directly from his or her insurer, without regard to fault, for certain economic losses sustained as a result of a motor vehicle accident. In Michigan, an injured person may obtain personal injury protection (PIP) benefits for all allowable medical expenses, and wage loss for up to three years, within specified limits. Benefits for survivor's loss also are available for up to three years within certain limits. In addition, the injured person's common-law right to recover damages from the negligent owner or operator

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of the vehicle is limited: tort liability is abolished in Michigan except as to losses intentionally caused, damages for allowable expenses, work loss and survivor's loss not provided under the no-fault law, and damages for noneconomic loss if the injured person suffered a threshold injury; these "bodily injury" losses may be paid by the insurer or may be recovered in a lawsuit against the insurer.

In designing Michigan's no-fault system, the Legislature specified that a person is subject to tort liability for noneconomic loss only in the event that an injured person died, suffered a serious impairment of body function, or suffered permanent serious disfigurement. In adopting this "verbal" threshold, the Legislature rejected other proposed body impairment thresholds, such as a monetary threshold of \$5,000 in medical bills, which would have to be amended periodically to reflect medical cost inflation. The Legislature also rejected a requirement that the impairment of body function be permanent, major, or extensive, or that the body function impaired be a significant one.

According to Insurance Bureau figures, after the enactment of the no-fault law, the number of paid bodily injury claims (for noneconomic loss and excess wage loss) rose steadily, as the courts struggled with applying a consistent definition of "serious impairment of body function". At the same time, paid claims for PIP benefits (economic loss) declined consistently until 1982. After the Supreme Court's ruling in Cassidy, paid bodily injury claims declined, while both paid PIP and paid collision claims rose.

Case Law

Under the Cassidy decision, the Court held that the meaning of "serious impairment of body function" is a matter to be determined by statutory construction, and that "when there is no factual dispute regarding the nature and extent of a plaintiff's injuries, the question of serious impairment of body function shall be decided as a matter of law by the court. Likewise, if there is a factual dispute as to the nature and extent of a plaintiff's injuries, but the dispute is not material to the determination whether plaintiff has suffered a serious impairment of body function, the court shall rule as a matter of law whether the threshold requirement . . . has been met." The Court also ruled that "impairment of body function is better understood as referring to important body functions", and that "the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life".

The Court in DiFranco rejected the Cassidy rulings, and held as follows:

- "The question of whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even where there is no material factual dispute as to the nature and extent of the plaintiff's injuries."
- "The Legislature did not intend to limit recovery of noneconomic damages to the catastrophically injured. The 'serious impairment of body function' threshold is a significant, but not extraordinarily high, obstacle to recovering such damages."
- "The impairment need not be of the entire body function or of an important body function. [The Act] bars recovery of noneconomic damages to those persons who suffered minor injuries, or injuries which did not seriously impair the ability of the body, in whole or in part, to function."

- "The 'serious impairment of body function' threshold contains two inquiries: a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident? b) Was the impairment of body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function."
- "In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious."

FISCAL IMPACT

The bill could result in a small decrease in expenditures for both State and local governments by limiting the circumstances under which a tort action could be brought against the State or local governments for motor vehicle accidents caused by the negligent action of their employees. It is difficult to know precisely the extent to which costs would be reduced, because of the lack of detailed information on the number of suits that would be affected by this bill.

ARGUMENTS

Supporting Argument

There must be a strong limitation on the ability to sue for automobile accident-related injuries if the no-fault system is to be successful and in balance. That is, if premiums are to be kept down, and the payment of economic damages assured, an individual should have to meet a high threshold in order to recover compensation for noneconomic injury, such as pain and suffering, mental anguish, and inconvenience. By dispensing with the more rigorous requirements that stemmed from the 1982 Cassidy decision, the Supreme Court seriously eroded the statutory threshold with the recent DiFranco decision, put the system out of balance, and actually created a hybrid system in which recovery of economic benefits continues to be guaranteed but injured parties can easily sue for noneconomic damages. The more recent decision will exclude from coverage only the most minor injuries. As parties are encouraged to bring suit, and noneconomic injuries are increasingly compensated, premiums not only must keep up with additional payments to insureds, but also must rise simply to meet increased costs of litigation. At the same time, the proportion of total funds available to compensate injured parties will be smaller. This can be illustrated by the experience of AAA of Michigan, for example: with bodily injury liability, court costs and attorney fees comprise a full 32% of premium dollars, leaving only 48% for benefits and 20% for operating expenses. With personal injury protection, on the other hand, only 4% goes toward court costs and attorney fees, leaving 23% for expenses and a full 73% for benefits to injured parties. Since the cost of automobile insurance often constitutes a substantial portion of a family's or individual's budget, it is preferable that the dollars spent be used to pay for the claims of injured persons rather than the costs of litigation.

The recent history of automobile-related negligence suits filed also supports a higher threshold. The Insurance Bureau reports that the number of cases filed fell from approximately 13,000 in 1972, the year before the no-fault

law took effect, to 8,800 in 1976-1977. The numbers started to rise again in 1980, peaking at over 13,000 in 1982-1983, but dropping again after the Cassidy decision. While these cases encompass more than just claims for noneconomic damages for a serious impairment of a body function, a correlation between these figures and the judicial ruling should not be dismissed.

Supporting Argument

Unless the DiFranco ruling is statutorily reversed, that decision will add an average of \$22 per car to consumers' premiums, according to AAA of Michigan estimates, and that increase will come on top of the \$30 average increase already planned by the insurer for next year. Michigan's rates may soon begin to resemble rates in New Jersey, which also has a low threshold as well as the highest automobile insurance rates in the nation. Currently, the average premium paid in Michigan in 1985 was \$407, while New Jersey's was \$607, almost a full 50% higher.

Response: The comparison to New Jersey's rates is superficial, at best: the threshold for recovering noneconomic damages is only one of many elements that determine no-fault premiums.

Supporting Argument

By codifying the Cassidy decision, the bill would limit the number of cases that otherwise will go to trial pursuant to DiFranco. Under the bill, the issue of whether an injured person had suffered a serious impairment of body function would be a question of law for the court, not a question of fact for the jury. The phrase "serious impairment of body function", as Cassidy explained, "is not a term commonly used, for which juries would have a clear sense of the intended meaning", and, if the interpretation of the phrase must generally be submitted to the trier of fact, a trial would usually be necessary, which would thwart the law's design to reduce litigation. The Court also stated that, "... we cannot believe that the Legislature . . . intended that the limits which they created would vary according to the specific jury impaneled or the specific part of the state in which a case was to be tried". As a result of codifying that decision, a significant number of cases could be decided by a summary opinion of the court, instead of being submitted to a full-blown trial. By reducing litigation expenses in this way, the bill would enable a larger proportion of funds to be used for the payment of claims.

Response: Triers of fact are routinely required to pass on equally difficult questions, such as reasonableness, proximate cause, and gross negligence. As the DiFranco opinion points out, "Properly instructed jurors are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether that impairment was serious." Moreover, the pre-Cassidy case law did not require a trial in every case.

Supporting Argument

The bill would shorten insurers' "long tail" on claims, by establishing a flat statute of limitations of three years after the accident on the time during which an injured party must bring a bodily injury suit. This would avoid Michigan's "discovery rule", which allows a claim to be brought many years after an accident when an individual finally discovers his or her injury. As a result, insurers' liability is completely unpredictable.

Response: Insurers have not demonstrated that the long tail results in any actual increase in their costs of doing business. The fact that insurers may be experiencing a difficulty in calculating premiums does not alone justify the denial of benefits to parties who are unable to discover their injury within three years after an accident.

Opposing Argument

The size of a no-fault premium should not be the only factor considered in shaping this State's policy toward compensating injured parties. After reviewing the various options rejected by the Legislature when enacting our no-fault law, the DiFranco court concluded that the Legislature "did not intend to limit recovery only to catastrophically injured persons", and that the serious impairment of body function threshold "is a significant, but not extraordinarily high, obstacle to recovering" noneconomic damages. If that conclusion is in fact faulty, or if public policy is to be revised, perhaps that determination deserves to be based on more than a projected rate increase that amounts to six cents per day per car.

Furthermore, proponents of the bill speak of the system being "out of balance" and the threshold being "lowered" by DiFranco, but the statutory threshold actually is unchanged: a party must have died or suffered a serious impairment of body function or permanent serious disfigurement in order to recover noneconomic damages. It is only the judicial interpretation of that threshold that has changed, and whether the system is or is not in balance is actually a judgment call. Before the law is amended, perhaps it should first be determined exactly what balance the no-fault law was designed to achieve.

Opposing Argument

This bill is an anti-consumer measure. While attempting to save consumers a paltry six cents per day, according to one insurer's estimate, the bill would substantially diminish the benefits available under the no-fault law, by denying insured parties the opportunity to recover fully for their injuries.

Opposing Argument

It is not axiomatic that legislatively overruling the DiFranco decision and codifying Cassidy would reduce litigation. As the Supreme Court pointed out in DiFranco, "The 'general ability to live a normal life' standard has proven to be as difficult to apply as the threshold it was designed to clarify. It is also unclear what types of injuries are 'objectively manifested.'" One also should remember that Cassidy is the decision that spawned approximately 40 Court of Appeals decisions that ultimately led to DiFranco. Further, what constitutes an "important" body function also is an inherently subjective determination.

While it may be true that DiFranco lowered the threshold, the clarity provided by that opinion could actually reduce litigation. After all, a suit is filed when the parties cannot resolve a dispute. By eliminating much of the subjectivity and ambiguity, establishing a clear two-step inquiry into what constitutes serious impairment of a body function, and enumerating the factors to be considered in making that determination, perhaps DiFranco will actually facilitate a meeting of the minds, or at least encourage settlements.

Opposing Argument

Although more cases may be filed after the DiFranco decision, it is not inevitable that more cases will go to trial. DiFranco dictates a jury trial only if reasonable minds could differ regarding whether the plaintiff had sustained a serious impairment of body function. In fact, cases already are being thrown out under DiFranco.

Opposing Argument

Many proponents of the bill who contend that the system is out of balance seem to assume that the no-fault law was based on the premise that savings from limited tort liability were meant to fund the economic benefits the law guarantees, as well as to reduce consumers' premiums. While it is clear that the system was designed to assure the payment of some claims, and to eliminate the inefficiency found in an adversarial system, it is not certain that those benefits were supposed to derive from the tort limitation. As the DiFranco opinion points out, some states' no-fault laws place no restrictions on the ability to recover damages for noneconomic losses.

Opposing Argument

The bill would codify a Supreme Court decision that the Court itself has rejected. After tinkering with the law in 1982, the Court four years later considered the pre-Cassidy and the post-Cassidy systems and concluded that it had made a mistake. In particular, one of its most egregious errors was to revise the statutory threshold itself. That is, instead of simply interpreting the phrase "serious impairment of body function", the Cassidy Court in effect created a new standard: impairment of a serious body function. The Court realized and reversed its mistake in 1986.

Opposing Argument

The "general ability to live a normal life" test may encourage injured parties to malingering in order to demonstrate their inability to return to a normal life, and thus to recover noneconomic damages.

Opposing Argument

A flat three-year statute of limitations would be fundamentally unfair and would function solely to cut off claims for injuries a victim did not and could not know about within that medically brief time. The Michigan Supreme Court has addressed this issue and held that expiration of the statute of limitations before a claimant could reasonably have known he or she had a claim is unconstitutional.

Response: It should be kept in mind that the flat statute of limitations would apply only to suits for noneconomic damages. An injured party's medical expenses would still be recoverable under the no-fault law.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.