House
Legislative
Analysis
Section

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NO-FAULT TORT THRESHOLD

House Bill 4341 (Substitute H-1)
First Analysis (4-26-95)

Sponsor: Rep. Harold S. Voorhees
Committee: Insurance

THE APPARENT PROBLEM:

Under Michigan's no-fault auto insurance system, motorists look to their own insurance policies for benefits (such as medical treatment and lost wages) in case of accidents and injuries and can only sue another motorist in extraordinary circumstances. The promise of no-fault insurance is that by giving up the traditional right to sue, claims will be settled more predictably and without as much dispute and delay, compensation will more closely match losses, and more of the customers' premium dollars will be spent on the payment of claims and less on administration costs and transaction costs, such as legal fees. It is still possible to sue a negligent driver under most no-fault systems when injuries go beyond a certain "threshold", expressed either in a dollar amount or in a "verbal" description.

Michigan's statute contains a verbal threshold for non-economic damages. (Additionally, people can sue for intentionally caused harm; for allowable expenses, work loss, and survivor's loss beyond those covered by no-fault insurance; and for damages to motor vehicles not covered by insurance, up to $400.) Lawsuits are only permitted for non-economic (e.g., "pain and suffering") losses in case of "death, serious impairment of body function, or permanent serious disfigurement." The phrase "serious impairment of body function" has been interpreted twice in decisions of the Michigan Supreme Court, the second decision more or less repudiating the first. In 1982, in what is called the Cassidy decision, the court said basically that whether the "serious impairment of body function" threshold had been met in a given case was a matter of statutory construction for a trial court (i.e., a judge not a jury) to decide. It also said that the phrase referred to "important" body functions. The court also held that an injury should be "objectively manifested" (e.g., by x-ray). The Cassidy court's ruling said the legislature had not intended to raise two significant obstacles to lawsuits (death and permanent serious disfigurement) and one quite insignificant one, and so a restrictive definition of "serious impairment of body function" was appropriate. Nor, the court said, had the legislature intended that the threshold vary jury by jury or community by community.

However, in 1986, in the DiFranco ruling, the court rejected its earlier decision (the membership was not the same). It put the question of whether a person had suffered a serious impairment of body function in the hands of the "trier of fact" (i.e., a jury or judge sitting without a jury) whenever reasonable minds could differ as to the answer. The court said the threshold is "a significant, but not extraordinarily high, obstacle" to recovering damages and that "the impairment need not be of the entire body function or of an important body function", and "need not be permanent." This decision has governed the application of the tort threshold since then. Insurance companies and some others have portrayed this decision as an unwarranted liberalization of the no-fault law that has led to increased litigation and increased costs to the insurance system, thus contributing to higher premiums for insurance consumers. Amendments to the no-fault statute that would return to a tort threshold resembling that provided by the Cassidy ruling were key elements of the two comprehensive reform proposals (which dealt with a great many other issues, as well) defeated at the polls in 1992 and 1994 and have been introduced again, this time standing alone.

THE CONTENT OF THE BILL:

Michigan's no-fault automobile insurance system only permits lawsuits for non-economic losses ("pain and suffering") when a certain threshold of injury has been met. The Insurance Code says that a person remains subject to tort liability for non-economic 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." The expression "serious impairment of body function" is not currently further defined in statute, but its meaning is governed by a state supreme court ruling. House Bill 4341 would put a more restrictive definition in statute by specifying that "serious impairment of body function" means "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The bill also would specify that for a lawsuit for non-economic damages:

-- The issues of whether an injured person had suffered serious impairment of body function or permanent serious disfigurement would be questions of law for the court (i.e., issues for a judge to decide rather than a jury, as now).

-- Damages could not be assessed in favor of a party who was more than 50 percent at fault.

-- Damages could not be assessed in favor of a party who was operating his or her own vehicle at the time of the injury and did not carry required insurance coverage on the vehicle.

The bill also would expand the current "mini-tort" exception to the limitation on lawsuits. Under the no-fault act, a person is liable for damages to a motor vehicle up to $400, to the extent that the damages were not covered by insurance. (This means a person can recover the amount of a deductible, up to $400, from a person who damages his or her motor vehicle.) The bill would raise the amount of damages that can be recovered to $500.

The bill would apply to causes of action for damages filed on or after 120 days after the effective date of the bill.

MCL 500.3135

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the bill would have no fiscal impact on the state. (2-16-95)

ARGUMENTS:

For:

Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits for non-economic ("pain and suffering") damages was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision. This means making the determination of whether the threshold for a lawsuit has been met a question of law for a judge to decide (and not a jury). And it means that the term "serious impairment of body function" would once again refer to "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life" (emphasis added). Together, these provisions will work toward ensuring that the cases that go forward are deserving of a hearing before a jury. The undeserving and frivolous cases will be weeded out.

Other provisions will help to accomplish this as well. The bill would prevent those who are more than 50 percent at fault in an accident from being able to collect damages from other parties. It is an absurdity that a driver who shoulders the majority of the blame for an accident is able to successfully sue others for his or her "pain and suffering." It should be kept in mind that the state moved to a comparative negligence system (where damages are based on share of fault) from a contributory negligence system in 1979, after no-fault was enacted. Under the old system, proponents say, at-fault parties could not collect. It is also unjust that an uninsured driver -- who does not contribute to the no-fault insurance system -- can sue for non-economic damages to be paid out by the insurance company of a person who is contributing to the system. The bill would no longer permit that.

To the extent that these provisions would reduce the number of lawsuits and the amount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for more people. Proponents of this bill say that there was more than a 100 percent increase in insurance lawsuits from 1986 to 1994, the years of the relaxed standards for lawsuits, whereas lawsuits declined by over 40 percent from 1982 to 1986, the years governed by the standards of the prior supreme court decision (to which this bill would return). The combination

of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system; it will become unaffordable to ever more insurance customers.

Several points can be made about the features of this bill, based in part on the reasoning of the 1982 supreme court decision on how the term "serious impairment of body function" should be applied.

-- Putting the determination of whether the threshold has been met into the hands of the judge (as a matter of law) makes sense for several reasons. It will reduce the number of jury trials, which otherwise would be needed to make the determination, and reducing litigation is a goal of no-fault. It will produce more uniformity in decisions by allowing judges to construct the statute rather than juries, which are more likely to vary in attitude based on geography or even one jury to the next. Further, the phrase in question is not commonly used, so juries are not likely to have a clear sense of its meaning. Putting these matters before a judge also reduces defense costs and reduces the stress of being sued for defendants.

-- The expression "serious impairment of body function" must be understood in connection with the other tort thresholds, death and permanent serious disfigurement. These are high standards. It is not sensible to impose two tough barriers to lawsuits and one porous one. The expression cannot be allowed to refer to just any body function nor can it mean all body function or entire body functioning. The middle ground is to require that an important body function be impaired. Further, it should apply to the effect of the impairment on an injured person's general ability to live a normal life and not to injuries that do not have such an impact.

-- There ought to be some objective manifestation of the injuries being claimed in order to determine the basis for the alleged impairment before a plaintiff can present the story of his or her "pain and suffering" to a jury.

Against:

Virtually the same provisions contained in this bill were part of the auto insurance proposals resoundingly defeated at referendum both in 1992 and 1994. The advertising campaign for the 1994 proposal prominently featured the restriction on lawsuits, as well as focusing on the promised 16 percent rate cut. Voters rejected this. Why is it back before the legislature again? Further, the language contained in the bill echoes an earlier interpretation of the statute that was firmly repudiated in 1986 by the Michigan Supreme Court. The court declared that both the requirement that injuries be "objectively manifested" (as that term had been subsequently refined in an appeals court case) and that the injury must interfere with a person's "general ability to live a normal life" constituted "insurmountable" obstacles to recovering non-economic damages. Does it make sense to return to this stringent threshold rejected by both the supreme court and the state's voters? Does it make sense to erect this high barrier to lawsuits, depriving seriously injured auto accident victims of their opportunity to present their case to a jury of peers, particularly since there is no guarantee that any savings to insurance companies will be returned to customers in the form of rate reductions? (What, in fact, are the savings likely to be, given that the cost of these lawsuits is a minor portion of the insurance premium?)

Contrary to the arguments of the insurance companies, the current threshold is a relatively stiff one. Reportedly, Michigan is next to last in bodily injury claims in proportion to property damage. It is one of the most difficult states in which to bring an auto-related lawsuit. Indeed, if there is a lawsuit problem, it is because of the number of suits filed against insurance companies to make them provide the first-party benefits to which policyholders are entitled under their policies. People sometimes have to fight to get these benefits. It should be noted that the language of the tort threshold provisions in the no-fault statute has not changed since the law took effect in 1973. The bill does not, as is sometimes said, restore the original intent of the law. If anything, the 1986 DiFranco decision that this bill would overturn did that. The 1982 Cassidy decision could be called the aberration (contradicting as it did an advisory opinion issued by an earlier supreme court before the no-fault statute took effect).

The following points can be made regarding the elements of the bill.

-- Taking the threshold determination away from juries is unwarranted. It denies plaintiffs the right to present their case to a jury of peers. In the past, a representative of trial judges has opposed this as an ineffective use of judicial resources, as likely to

give rise to more appeals of threshold determinations, and as a potential source of litigation over the constitutionality of this portion of the no-fault law. In the DiFranco case, the state supreme court said, regarding the experience under the Cassidy standards, that the courts "have proven to be no more consistent than juries" in determining the threshold question. The court said that "properly instructed juries 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 the impairment was serious."

-- The requirement that an injury be "objectively manifested" could unfairly penalize accident victims with serious injuries that are not subject to medical measurement. A representative of the Head Injury Alliance has testified that "head injuries often produce real and significant problems that medical science cannot yet objectively measure or confirm." She added, as regards so-called mild brain injuries, "such a standard imposes a higher standard than medical science imposed on itself." Such injuries can lead to memory loss, behavioral problems, inability to concentrate, and loss of inhibition. Sometimes only autopsies confirm diagnoses of mild brain injuries. Seriously injured accident victims will be denied the ability to collect damages for injuries caused by negligent drivers, despite the diagnosis and treatment recommendations of their doctors, under this provision in the bill.

-- Preventing a person more than 50 percent at fault from collecting damages sounds sensible. But it ignores the fact that the determination of fault is not an exact science. Accidents are often not investigated properly or thoroughly. Mistakes are made and often not corrected. If at-fault drivers are to be penalized, the percentage of fault should be much higher (perhaps 80 percent) to eliminate the gray areas. By some estimates, only one-quarter of cases brought now feature drivers 100 percent at fault. The bill's limitation means a person catastrophically injured in an auto accident by a (more or less) equally at-fault driver would be unable to collect non-economic damages. An alternative approach might be to prevent someone who was both more than 50 percent at fault and convicted of drunk driving from being able to sue.

-- Similarly, an uninsured person could not collect. Is it fair that a 20-year-old whose life is ruined by a drunk driver, for example, should be completely foreclosed from collecting damages because he or she did not carry mandatory auto insurance? Many uninsured drivers do not carry insurance because they cannot afford it, not because they want to flout the law.

POSITIONS:

The Insurance Bureau, within the Department of Commerce, supports the bill. (2-15-95)

The Michigan Insurance Federation supports the bill. (4-25-95)

The Michigan Farm Bureau supports the bill (2-13-95)

The Michigan Trial Lawyers Association testified in opposition to the bill. (2-21-95)

The Michigan Consumer Federation is opposed to the bill. (3-25-95)

The Michigan Orthopedic Society is opposed to the bill. (4-25-95)

The Advocacy Organization for Patients and Providers (AOPP) is opposed to the bill. (4-25-95)

A representative of the Michigan Head Injury Alliance testified in opposition to the bill. (2-14-95)

A representative of Mothers Against Drunk Driving (MADD) testified in opposition to the bill. (2-14-95)