
Committee Meeting

of

JOINT COMMITTEE ON AUTOMOBILE INSURANCE REFORM

*“Testimony regarding threshold reforms,
tort liability, litigation, and related issues”*

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: January 26, 1998
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senate President Donald T. DiFrancesco, Co-Chairman
Assembly Speaker Jack Collins, Co-Chairman
Senator John O. Bennett
Senator Gerald Cardinale
Senator Joseph M. Kyrillos
Senator Richard J. Codey
Senator John H. Adler
Assemblyman Paul DiGaetano
Assemblyman E. Scott Garrett
Assemblywoman Clare M. Farragher
Assemblyman Joseph V. Doria Jr.
Assemblyman Joseph Charles Jr.



ALSO PRESENT:

Thomas K. Musick
*Office of Legislative Services
Committee Aide*

Laurine Purola
Barbara S. Hutcheon
*Majority Staff
Committee Aides*

Tom Hastie
Tim Clark
*Democratic Staff
Committee Aides*

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ASSEMBLY SPEAKER JACK COLLINS (Co-Chairman): Good morning, everyone. Now that the Senate President has allowed me to take my seat, I think we can get started.

First off, to our first testifiers, two things: One, thank you very much for coming back, and I particularly mean that, because it leads to my second comment, my apology that due to a death and a memorial service that I had to attend, I could not be here at the last session, though I will receive the transcript and now have the advantage of hearing you. You don't have to go through everything again, surely, but to continue your testimony from the last session.

Even better, you were not up at all, so I'm here to get it all, along with the rest of the Committee members. So with that, gentlemen, we look forward to your comments.

KEVIN J. FREDERICK, ESQ.: Thank you. Good morning, Mr. Speaker, Mr. Senate President, members of the Legislature. My name is Kevin Frederick. I'm an attorney with the State Farm Insurance Companies, and I'm here with Mr. Wayne Dean, our auto claims manager in New Jersey, and we appreciate the opportunity to appear before you today.

As you mentioned, Mr. Dean was scheduled to testify before the Committee last week, so we will be addressing both the issues of claim settlement practices, as well as issues regarding threshold reform.

Last Thursday you heard testimony from Mr. Alex Archimedes, President of Parkway Insurance, and he and members of his claims staff provided some dramatic examples of abuse in the current system. Today we'll provide you with some rather ordinary examples of the problems with the

system, the point being that claims building through the use of PIP benefits in order to meet the verbal threshold is a very common course of events in insurance claims in New Jersey and is not limited to extreme circumstances.

Mr. Wayne Dean is a graduate of Rutgers School of Law and is a chartered property and casualty underwriter. He formerly served as in-house counsel for State Farm's New Jersey operations. For the last 15 years he has worked in State Farm in virtually every area of claims practices, and he is currently State Farm's Auto Claims Manager in New Jersey, managing a team of 600 claims employees in 14 different offices throughout the state.

Mr. Dean.

WAYNE DEAN, ESQ.: Thanks, Kevin.

As Kevin mentioned, I am the Auto Claims Manager for State Farm Indemnity in New Jersey. On behalf of the indemnity company, I'd like to thank you for this opportunity to talk to you a little bit today about the no-fault law, in particular the verbal threshold and its impact on how we handle claims.

I have brought two claim files with me today. They'll be distributed to you. One is a BI liability file, the other a PIP file. But before we look at those, I'd like to take a few minutes to explain, in more general terms, the kinds of problems that we're seeing.

Your intuition as legislators may tell you that it is the nature and the extent of the injuries that people suffer that determines whether the threshold has been breeched. And the message that I want to leave you with today is that, in fact, the opposite is true. It is not the injury that is driving whether the threshold is breeched as much as it is the threshold that is

determining the type of medical treatment that people undergo and the type of diagnostic testing that people undergo. And in our experience that's the way that it is, and it's backwards.

The no-fault law in New Jersey, in particular the threshold, has established a hurdle that a claimant must leap, a target that he must hit. Therefore, when a claimant is inclined to bring a pain and suffering claim, his concerns are no longer limited to "how do I feel." He has to ask himself additional questions. With the threshold in place, he has to consider, for instance, whether he can show objective medical evidence of his injury. So perhaps he undergoes a diagnostic test that he would not otherwise have undergone. With the threshold in place, he must demonstrate a serious impact -- that this injury had a serious impact on his life. So perhaps he stays home from work when he otherwise would not have.

The point, ladies and gentlemen, is that with the threshold, and especially with the threshold set as low as it is and as low as it has been interpreted by our courts, legal considerations have taken the place of medical considerations and questions like "how do I really feel today."

A second message that I'd like to leave with you today is, I'd like you to understand that whenever there is a claim involving a person subject to the verbal threshold, there can be problems for two insurers, not just one insurer. There is a BI liability insurer defending the pain and suffering claim; there is a PIP insurer looking at the medical expenses and lost wages that this claimant is incurring, and the problems that they see are mirror images of each other.

The PIP carrier is seeing things like overutilization of medical services, especially diagnostic testing, in the name of making a nonserious injury appear serious. On the other hand, the liability carrier is looking at pain and suffering claims for injuries that you probably didn't intend to be in this system in the first place.

The first question that I would ask if I were in your shoes is, "Well, who's responsible for this problem," because it's crystal clear, at least to me, from the legislation, that you intended with the legislation to bar pain and suffering claims for injuries that weren't serious. But it's just as clear that the law did not work as intended.

My explanation for the problem, given my experience with the problem, is that the answer lies in the statute's language. It is incredibly ambiguous. Words like or phrases like "significant limitation of use" have no claim meaning, and because they don't, they're subject to interpretation by judges, who sometimes, in our experience, forget the history behind this no-fault legislation and the intent of the verbal threshold, and they allow pain and suffering claims to be heard by arbitrators in some instances, by juries in others, and by both arbitrators and juries in some cases.

SPEAKER COLLINS: Mr. Dean, if I may.

MR. DEAN: Yes.

SPEAKER COLLINS: Is there something wrong with that?

MR. DEAN: There is something wrong with it, Mr. Collins, if the Legislature intended for these claims not to be heard in the first place, yes. And I'll explain in a moment what the problem is.

SPEAKER COLLINS: Okay.

MR. DEAN: If these claims were not intended to be heard--

SENATE PRESIDENT DONALD T. DiFRANCESCO (Co-Chairman):

Wait, let me just stop you for a second, because I was going to ask almost the same question.

When we discussed going to a verbal threshold many, many years ago from a dollar -- you know, the suggestion always was that we have this dollar threshold, and whether it's \$200 or \$300 or \$1000, we will always try to reach it--

MR. DEAN: Right.

PRESIDENT DiFRANCESCO: --with medical claims, and therefore, a verbal threshold would eliminate that incentive, even if it was a so-called weak verbal threshold, because once you qualified to institute litigation to be compensated, you may not be running up the bills to provide a greater amount of compensation than you would do if you were seeking a dollar amount if you had a dollar threshold.

In other words, I've always thought that if we went to a threshold, it would limit the overtreatment, the excessive medical bills, because the person has the ability to sue without reaching a dollar threshold.

MR. DEAN: Okay.

PRESIDENT DiFRANCESCO: So that was my thinking back then. So we went and adopted a verbal threshold, which I guess many people have that, because it's very expensive to have the zero today.

MR. DEAN: Right.

PRESIDENT DiFRANCESCO: And so what I think Speaker Collins said, I would say, too. If you qualify under that verbal threshold for compensation, what's the problem? Why not?

MR. DEAN: Well, here's what I'm suggesting, Mr. DiFrancesco. The people of New Jersey, through their legislators, need to decide exactly what kinds of injuries are suitable fodder for our judicial system. What should be in the system, and what should not be in the system. It seems almost axiomatic today that the fewer cases that are in the system, the more likely that auto insurance rates in this State of New Jersey will decrease.

Now, we have a few years of experience now with the verbal threshold. By the way, the verbal threshold language doesn't exist in a vacuum. It's interpreted by the New Jersey Supreme Court. The leading case is *Oswin vs. Shaw*. It was written several years ago, and it essentially created a two-prong test; the first prong being, you must have objective medical evidence of a qualifying injury.

Well, while I think the Supreme Court's thinking was-- While I think they were thinking good thoughts when they established that prong, it led to bad results, because money, Mr. DiFrancesco, that somebody might have otherwise spent in treating for month after month after month is not simply being spent on something else, and that is, diagnostic testing, some of it familiar to you, some of it developed only since the threshold was enacted. That's where the money is being spent.

PRESIDENT DiFRANCESCO: And that is -- and I know other witnesses have testified to this -- and that's dealing with this portion of the threshold, significant limitation of use of a body function or system.

MR. DEAN: Yes, sir.

PRESIDENT DiFRANCESCO: And also the language that follows that, I assume? The part about not being able to substantially perform all the material acts which constitute your usual and customary daily activities for not less than 90 days or 180 days?

MR. DEAN: That criterion -- that particular criterion is not -- is used but not nearly so often as significant limitation of the use is used.

PRESIDENT DiFRANCESCO: Now, you don't have a problem with the term "a fracture or significant disfigurement" being in the threshold? Is that in the Michigan, also?

MR. DEAN: My only possible response to that, Mr. DiFrancesco, is, if you allow pain and suffering damages for a nondisplaced fracture of the tip of your pinky, your premiums will reflect that.

PRESIDENT DiFRANCESCO: Oh, yes. I know what you mean. You save a lot of money if you just can't sue for any of the stuff, but if you're-- And I know what you mean.

As a matter of fact, Alex used to say, Joe -- Alex used to say, "Well, suppose you're a concert pianist, and you have a fracture of your finger, and that does affect you?" That's an inside thing, but--

There are instances where fractures can be devastating to people and their lives, so I guess that's why it's in there. I was just wondering if you felt that-- I know what you mean, though. If it was from your standpoint, if you want to reduce rates, then you cut out litigation. That's one way of reducing rates, cut out litigation, because we allow litigation for fractures and dismemberment and permanent loss of the use of a body organ, stuff like that.

I mean, if we would cut that out and just kind of limit it even further, we would save money. I understand that part of it.

MR. DEAN: Okay. And all I'm suggesting-- And maybe a more direct answer to your question would be that fracture cases are not nearly so troublesome as the kinds of cases that I'm talking about today. They're not nearly as numerous either.

PRESIDENT DiFRANCESCO: Is that right. I'm sorry, Wayne.

SPEAKER COLLINS: Senator Adler.

SENATOR ADLER: I just want to follow up on one topic you just covered. We talked about, if people weren't spending so much money -- or you weren't spending so much money to deal with the issue of people qualifying and satisfying the verbal threshold, people might be spending more money on actual medical treatment. It would actually go to help them as opposed to help lawsuits. That's, I think, one of the things I thought you said a moment ago. I guess I'd like to know whether or not your numbers show that there's more medical care per person for those that have the verbal threshold as opposed to those who have no threshold, whether the PIP side of that is more expensive for which group of people.

MR. DEAN: And do you know what, Senator Adler, I don't have the answer to that question today. I don't have the answer to that question. I'm telling you -- my answer is based on 15 years of experience in this division and in this State, and what I'm telling you, for instance, is that with the advent of the new lawsuit threshold, the verbal threshold, and especially since the publication of *Oswin*, which explained to the trial bar how this threshold was

to be implemented, we have seen a proliferation, a virtual industry of medical diagnostics that we never saw before.

And one of my cases today talks about tests that I was unfamiliar with only because I stopped handling claims myself shortly after the threshold was enacted in New Jersey. These are tests that have only been developed since the verbal threshold came into the state.

What I'm suggesting to you is that the cumulative experience that I personally have and the cumulative feedback that I get from 600 employees in the State of New Jersey is that we are spending more money on diagnostics than we ever did before.

SENATOR ADLER: But you're telling me that anecdotally rather than--

MR. DEAN: Yes, I am.

SENATOR ADLER: I'm sort of surprised, candidly. I don't mean to offend you, but I'm surprised that you come to testify and not be able to tell us whether or not the verbal threshold is costing our state more money statistically, based on real data, as opposed to based on anecdotes.

We're trying to make a comprehensive decision for the State of New Jersey. It would be helpful to know whether or not the no-threshold versus a verbal costs us more money. I'm surprised it's just anecdotes.

MR. DEAN: Okay. If your question is an average paid cost or a PIP claim subject to the threshold versus not subject to the threshold--

SENATOR ADLER: Right, you do have that information?

MR. DEAN: --that I don't have. What I can tell you, though, is that there has been a slow, but steady, increase in the average PIP claim costs for all claims since the advent of the threshold.

SENATOR ADLER: So I guess it would help us if we knew that you could break it down and say, "It's because of the verbal," or, "It's because technology has gotten better, but unfortunately also, more expensive, and therefore, these more expensive machines are necessary to help get people well again." That would be the sort of thing that would be useful for this Committee if we're making decisions whether to tighten the verbal threshold, as someone has suggested, or whether we're going to eliminate the verbal threshold, as others have advocated.

MR. DEAN: I don't want to-- And as we talk more about this particular issue, Senator, I don't want to leave anyone with the impression that we no longer see people going to their doctors over and over again, frequently and for protracted periods of time, because we indeed do see that, still. And we try not to take it into account in evaluating the claim, but nonetheless, sometimes we're the PIP insurer, not the BI liability insurer, and we need to deal with those claims.

SENATOR ADLER: That's all for now.

SPEAKER COLLINS: Assemblyman Doria.

ASSEMBLYMAN DORIA: Two questions: The first, to follow up on Senator Adler right now, as it relates to -- you're saying the cost of the treatments under PIP are going up on a yearly basis as a result of what you feel may be over-diagnostic testing?

MR. DEAN: That's State Farm's experience.

ASSEMBLYMAN DORIA: Isn't that also a result of the increased costs of health care in the operational level in all areas? Is it higher, percentage-wise, than the average increase per year -- that's what I'm asking -- that occurs in the health care industry?

MR. DEAN: I don't know the answer to that question, Mr. Doria. Although, I have to assume some of the increase is certainly attributable to that.

MR. FREDERICK: Senator Doria (*sic*), if I could speak to that, as well as the question Senator Adler-- There has been an increase. We have done a limited review of certain diagnostic tests to see how much they have increased in a period of roughly six years, and we have seen an increase of three- and fourfold of the claims we are paying for diagnostic testing. Now, I can forward to you, after this hearing, some more specific information on that.

ASSEMBLYMAN DORIA: By that, by that-- Through you, Mr. Chairman. In the amount of testing done, or what I'm asking here is the cost factor, because that's what was being addressed. I'm not saying that there's not more diagnostic testing going on. That could be a variable, as Senator Adler said, of new techniques coming out. My question was the cost and the fact that costs have gone up. And my question would be, are the costs going up at a higher level than inflation that exists in the health care area on a yearly basis?

MR. FREDERICK: And my recollection, not having those statistics in front of me, is that the increase in the amount of money that we are paying for those diagnostic tests far outstrips the normal inflation for medical claims and by a factor of three or four.

ASSEMBLYMAN DORIA: Can we see some of that?

MR. FREDERICK: Yes, as I said, after this hearing, I will be happy to retrieve those statistics and forward them to your attention, as well as the rest of the members of the Committee.

ASSEMBLYMAN DORIA: Send them to the Chairman, so we can all get them.

MR. FREDERICK: Sure. And also, to the point of comparing diagnostic testing for verbal versus zero threshold cases, there is not, necessarily, a business reason for us to collect those statistics, so that we don't normally do it. So that the way that we would have to make that comparison is to go out and do a manual file of hundreds of claim files to get a legitimate sample and then come back and report to you, and that's a manual process. So there is not a business reason for us to collect those statistics on an ongoing basis, although I can certainly understand your need for it and the comment you made. But to do that would be extremely labor intensive, since it is not something we track in the ordinary course. We do not have a need from a business standpoint to compare the relative difference in diagnostic testing for verbal threshold versus zero threshold cases.

ASSEMBLYMAN DORIA: Mr. Chairman, just to go on that, and then I have one more question.

It would seem to me that given the fact that arguments are being made by the insurance industry that there is a problem with one versus the other that those statistics should be available, and given the fact that computers today solve a lot of problems -- not that they're perfect -- it would seem that that type of statistical information should be available, especially

given the fact that the insurance industry and companies like State Farm are saying that there is a problem.

How do you know there is a problem if you don't have that kind of statistical information to create that type of comparison?

MR. FREDERICK: The particular comparison that you are talking about, we have seen the dramatic increase in costs and the amount of money paid for diagnostic testing since the *Oswin* decision. That is unquestioned.

Now, for us to sit here today and say, "Gee, it would have been a good idea for us to code all our claims in such a way that we could ask the computers to extract that information," now that we're sitting here in 1998 -- we're all smarter in hindsight. The point is that we did not have a business reason to do that, although I understand that we could have a legislative reason for wanting to collect that statistic. We can't collect every statistic possible based on the needs of what may come in the future for legislators. The computers--

We're attorneys here. We're not actuaries, and I have, at times asked for statistical data, and if there's not a business reason for it, companies generally don't do it. So the needs of the Legislature are not always the needs of the business. It costs a lot of money to do that, and until there is a specified need to do it, the data isn't necessarily collected in that format.

ASSEMBLYMAN DORIA: One final question, through you, Mr. Chairman?

SPEAKER COLLINS: Surely.

ASSEMBLYMAN DORIA: The final question is, you made, earlier, a comment that the Legislature would have to define what injuries

should then be able to move on for further action, as it relates to court proceedings. If I remember, and I'm just trying to get a clarification, you were talking specifically about what injuries should be defined by the Legislature as being those that are significant enough that should then be able to go on to the courts. And I don't think there--

I mean, it doesn't seem reasonable for the Legislature to be doing that.

MR. DEAN: Well, I think--

ASSEMBLYMAN DORIA: I mean, we're not going to start defining, because it's a relative situation, and the Senate President's point, I think, is well taken, when he talked about a pianist who has a problem, you know, with a finger. For most people that is a minor difficulty, but depending upon the uniqueness of the occupation or the background of the individual, any injury could have an impact upon that individual where there is something that would then be actionable based upon the uniqueness of that individual's background, experience, job. So there's no way we're going to, in the Legislature, start defining, nor should we start defining, what are the injuries that should then be considered to be actionable.

MR. DEAN: Well, with all due respect, Mr. Doria, I think that when the Legislature enacts a no-fault statute with a verbal threshold that they are, indeed, deciding what should be actionable for pain and suffering damages, and what we're suggesting today--

ASSEMBLYMAN DORIA: Well, they're not. What they're doing is creating the opportunity, based upon what can be shown and not shown, so

they've created the flexibility. There is no way we could otherwise do it, unless we--

Number one, there is no way to determine, ahead of time, what could be a problem -- a foreseeable problem -- for the future. There's no way. You're right, we do create an open end to the area, and that's what it should be, open ended. We can't start specifically defining it. That's not within our purview or jurisdiction, in my opinion, because we don't know.

MR. FREDERICK: I think the essential point is, is that we're not arguing that some category of injury should or should not, as a matter of right or wrong, be included or excluded. Now, as you say, there needs to be a degree of flexibility. But once the Legislature decides the level of that flexibility, there's a cost associated with it, and if they decide to grant a great deal of flexibility, then there will be a great deal of cost. And if they want to reduce the cost, then they have to narrow the flexibility.

We're not here to say you need to do it one way or the other. We're just here to say that if you state it broadly, it's expensive, and the more narrowly you define it, the less expensive it gets. And that translates into premium dollars.

SPEAKER COLLINS: We have others who have questions, but before I call on them, you were mentioning, Mr. Frederick, that you don't have all of the analyses, and so on, and I can understand that. So I just want to ask you something that you probably do have, and that's an opinion.

And the opinion I ask is this: You've indicated that you believe, or you have some statistics, that show that the increase in these diagnostic procedures, the costs involved, have increased greater -- to a greater extent --

than the cost of actually doing them, and so on, and so forth. Why do you think that is?

MR. FREDERICK: Because there is a financial incentive to use diagnostic testing as a way of meeting the ambiguous verbal threshold, because once you meet it, there is a potential payday.

SPEAKER COLLINS: But isn't all of that dependent upon what the defendant, in this particular case, would be able to respond to, so the plaintiff is doing this to get to a particular position so they can -- using your terms, for financial reasons. There is also the defendant, anywhere along this line, could agree with the plaintiff or could work out some kind of agreement with the plaintiff. Is that not true?

MR. FREDERICK: That's true. The process that occurs is, if there is no question that there is -- you haven't met the threshold, you're not dead, then the settlement value for pain and suffering is zero, because you just haven't met it.

Once you introduce ambiguity to that process, the settlement value is there. So if it's defined very specifically so that you know whether you've met it or not, it can be settled quickly, because there is no settlement value. But once there is ambiguity as to whether it is or whether it isn't, the price starts to go up. That's just what happens, and as a result, claims get settled for pain and suffering awards where there is a question of whether or not anybody intended that to be the kind of case you wanted to compensate for.

SPEAKER COLLINS: And I don't think anyone would disagree with you on that. The challenge to the citizenry, and then those who represent

it -- and I appreciated your terminology, very much so, the citizens through their Legislature, because that's what this is, and it was well stated -- is that whole understanding process, and that's the difficulty, when-- As Counsel just said to me, "This is so intriguing because it's so involved." And as I said back, "One of our challenges, not yours, is, yes."

But the citizens of this state aren't sitting around their tables talking about the nuances of the law and how intriguing, and so on. They have certain things that they want. They want them now. Often, when something happens, they say, "Oh, I wish it were a little different, because now it affects me." And they're the challenges that we all face, and thank you.

Assemblyman Charles.

ASSEMBLYMAN CHARLES: Mr. Dean, what's your -- what's happening in the value of claims? Over the years, have we seen claims being valued in the same way that they have been valued in the past, or are we seeing higher values being put on claims? Let me be a little more specific. A particular type of injury today, is it worth more than that same injury 10 years ago? Just injury now. Forget about the tests. Forget about threshold, no threshold. For example, a lumbosacral sprain, is that -- what's the value of that today as compared to 10 years ago, forgetting about thresholds?

MR. DEAN: My only possible answer to that question, Mr. Charles, is there is no answer to that question, because the number of factors that go into the value of any claim are so many that all that we can do as a company is evaluate all of those factors and judge each claim on its individual merits.

Now, if you're asking me, is the average paid cost of the bodily injury claim higher today or lower today than it was 10 years ago, I can certainly answer that. It's higher.

ASSEMBLYMAN CHARLES: Well, all right. Let's just take this one type of injury, a lumbosacral sprain. Based upon all the relevant factors, that has a value today -- all the operative factors. That same sprain 10 years ago, how much was it worth from an insurance -- how much did you settle that case for?

MR. DEAN: There's no answer to that question, Mr. Charles.

ASSEMBLYMAN CHARLES: Statistically. You must have some statistics somewhere, or you must be capable of looking through your files and categorizing injuries which had been submitted in the way of claims and coming up with an average figure of settlement. You do that as claims adjusters. A claim comes in, you see the nature of the injury, you look at it, and you say, "Well, this is lumbosacral, we'll give him X number of dollars, that's what we think it's worth." "Cervical sprain, we think it's worth X number of dollars." You must have some kind of notion, whether that's based upon insurance company's just isolated view of that or whether that's a reflection of what juries do when those types of claims are litigated before a jury. You must have a number that's associated with that.

MR. DEAN: The only number that I-- First of all, I can tell you that as a company, we certainly don't track numbers for particular kinds of injuries, but let me do this--

ASSEMBLYMAN CHARLES: May I interrupt you, then?

MR. DEAN: --because I know--

ASSEMBLYMAN CHARLES: Let me interrupt to make my point. I don't want to belabor this point.

It seems to me it would be very, very helpful to us as a Committee if we knew that, and let me tell you why. Because if it's true that a lumbosacral sprain is given the same value today as it was given 10 years ago, then we have that to understand, so we then know that the cost now of an injury -- it has a certain amount. What may be increasing, then, is these other aspects of insurance, the testing, and so on, that you've given a -- which you've said has been increasing. And if it's also true, as you say, that this testing is something that's done to meet a threshold, it may very well be that the lower the threshold-- In other words, if you didn't have a target that you had to meet, we might be better off just eliminating all thresholds.

For example, if a fracture today -- let's get to something more specific, a broken arm -- is given the same value today, within the range, as it was 10 years ago, then we wouldn't need to-- That's not a good example. Let's talk about a herniated disk -- let's talk about a herniated disk.

If you talk about a disk, if that disk injury is the same today as it was 10 years ago, but you have to go through so many more diagnostics to get to some of that now, we can eliminate all of those diagnostics and the moneys associated with that, and then just have this claim for injury, and it's settleable at the same rate as it was 10 years ago, then we're in a position, maybe, to address an area where costs could be eliminated.

Do you follow my point? My point is this. Aren't we better off, maybe, having no difficult threshold than having a threshold? A difficult threshold means lots of diagnostics, these things that you're complaining

about, types of procedures that you didn't know about when you were active in the claims field.

MR. DEAN: Well, if I understand you correctly, Mr. Charles, what you're suggesting is that we keep the no-fault part of the system that pays medical expenses, lost wages, and such, but we eliminate any bar to pain and suffering claims. And while I'm not an actuary, I can tell you with complete confidence that our premiums will skyrocket with that system.

ASSEMBLYMAN CHARLES: Well, if-- Let me just finish with this, Mr. Chairman.

If the cost of a claim -- there are certain components to the cost of a claim, correct? The costs would be the diagnostic treatment aspect of it, and the settlement -- the value of the case -- and whatever administration goes into it from the insurance company's point of view. Now, if the claim aspect of it is a constant, if that doesn't change, if you have an injury that's worth X number of dollars, if you eliminate or reduce the costs of another aspect of it, aren't you then reducing the cost of that claim?

MR. DEAN: Well, here's what I think would happen, Mr. Charles.

ASSEMBLYMAN CHARLES: If you reduce one aspect. Let's say there are three elements, and the second element, you lower the cost associated with that element, aren't you then reducing the cost of that claim?

MR. DEAN: If I accept your assumption that the other two elements don't change, yes.

ASSEMBLYMAN CHARLES: You agree. Others have said -- you might have said also -- that one of the problems that we're seeing is that we

have a great deal of diagnostics, and that those diagnostics are costly and that they are incurred because the people are trying to get to threshold--

MR. DEAN: Right.

ASSEMBLYMAN CHARLES: --pierce the threshold. I guess that means that if there were no thresholds to pierce, then many of those diagnostics would not be incurred. Is that correct?

MR. DEAN: Right.

ASSEMBLYMAN CHARLES: So if you had no threshold to pierce, then presumably, under all the testimony we've had, the cost of diagnostics then would at least be reduced. If that's one of the major components and we've reduced that cost, then we have reduced the cost of the claim.

MR. DEAN: Only if the medical costs -- the other medical costs remain constant, yes.

ASSEMBLYMAN CHARLES: All right. Then let me just ask you this. Isn't it true-- Now, you've been, before the verbal threshold -- before the verbal threshold, you were a claims person. Isn't it true that before all of that, you would see a certain dollar amount in chiropractic or physical therapy? After we went to dollar threshold, you saw those bills, maybe, even increasing to reach dollar threshold?

MR. DEAN: Yes, we did.

ASSEMBLYMAN CHARLES: So it's probable, isn't it, that those treatments -- and we've already agreed, diagnostics -- but those treatments might also be reduced if we didn't have this verbal, other difficult threshold hurdle, as you said, when you first testified, to me. Is that true?

MR. DEAN: I think what we would see, Mr. Charles--

PRESIDENT DiFRANCESCO: It's okay. You're not at a trial here. It doesn't matter--

MR. DEAN: What we would see, Mr. Charles, is a return to the days when people simply went to a doctor more often and for a longer period of time.

PRESIDENT DiFRANCESCO: I think Senator Adler asked a question, and it would be great if we could get some information, generally speaking, to people, about that question. And I think the question was, If you have a zero threshold -- let me phrase it my way. If you have a zero threshold, what's the average PIP claim? If you have the verbal threshold, what's the average PIP claim? Are they somewhat similar, or are they different?

I mean, I'd like to know, not from you necessarily, but from the industry, whether that-- You know, what's the answer to that question, because I think that would be helpful, too.

SENATOR ADLER: Because we can't decide whether to keep the verbal, to tighten it, or to eliminate it. Unless somebody is telling us that this anecdotal stuff is true and valid and expensive, or whether ATLA is right in stopping the verbal would actually save the system money-- Everybody is taking a turf position. We don't really know, statistically.

ASSEMBLYMAN DiGAETANO: Mr. President. Just a point on that request for data. If we're going to get that data, I think it's important for the Committee to have not only that, but diagnostics as a percentage of the total treatment, or total paid out, other than pain and suffering, because that

will also go to Joe's question -- Assemblyman Charles' question -- on whether or not the diagnostics are driving the claims or vice versa.

SPEAKER COLLINS: Senator Cardinale.

SENATOR CARDINALE: Thank you, Mr. Chairman.

I take the bulk of your testimony as arguing in favor of a tightened verbal threshold. Is that correct?

MR. DEAN: Yes, it is.

SENATOR CARDINALE: Now, it has always struck me, and I've been at insurance hearings for a long, long time, that insurance companies generally argue for a reduction in claims payouts. And it seems to me that that's counter to your business interests. And while that might not be understood completely, when you first look at it, you make a percentage of premium. You're allowed to have a profit which is a percentage of premium. Therefore, if premiums are higher, your company makes more money. And I have always been amazed that the insurance industry, as a whole, has argued for things that I feel would lower the premium when that's counter to their business interests.

I understand the trial lawyers arguing for their business interests, but I -- it seems to be almost counterintuitive that you would-- Why wouldn't you come in here and say, in response to Assemblyman Charles, "That's a great idea. Let's make all these lawsuits, let's drive premiums up, because we get to make more money"?

MR. DEAN: My answer, Senator, and then I'll defer to Mr. Frederick. My answer is that we're owned by a mutual insurance company, meaning that we're owned by the State Farm policyholders. We feel a

continuing obligation to do what we can to make rates in this state more affordable. We hear the complaints of New Jersey drivers about how much it costs. What we're coming forward with is an idea to fix that problem.

SENATOR CARDINALE: Now--

I'm sorry. Did you want to add something?

MR. FREDERICK: Yes. If I could add to that, the Legislature, as it has in many states, has elected to make insurance mandatory. Now, that's not something that State Farm favors, but, I mean, that's where we are today.

Once you make insurance mandatory, as the prices keep going up, the more and more upset the citizens get, as you well know. So it does not help us to have a citizenry who cannot afford our product, who is looking for very harsh measures to affect the insurance system. We would prefer to see an affordable product.

The other factor is that we're in competition with other insurers. We want to find a way to sell our product at the lowest price we can and give the best service for our policyholders. So every way we can find to reduce that price and be more competitive, we'll try and do.

SENATOR CARDINALE: Thank you.

In any number of instances-- Well, let me talk about one instance. There was a time in New Jersey when medical malpractice rates were soaring and very little was done legislatively. Recently we did something legislatively, but those stabilized. There were only two carriers, essentially, in New Jersey. One of the carriers adopted a policy, and the other followed suit, and that was, they brought everything to trial.

I'm looking at statistics here -- take 1995. There were 35,000 filings, and only 889 went to trial. In '96 there were 35,000 filings, and 862 went to trial. Why do you settle?

MR. DEAN: A couple of reasons, Senator. The primary reason to consider settlement of a claim that has some value, in our judgment, is to protect our policyholders' interests. Each time there is a verdict, you have the possibility of exposing that policyholder's personal assets to judgment. That's a serious, serious matter, and we don't do it lightly. So we carefully consider settlement, and we consider it with our policyholders' interest utmost on those cases.

The other reason we do it is our experience with judges, in our summary judgment motions on threshold cases, and with arbitrators, as part of the mandatory nonbinding arbitration program for automobile cases, and with jury verdicts, as few as they may be -- our experience has been horrible, generally speaking. And when your experience is that bad, the lesson that you learn is that these files are, indeed, candidates for settlement.

It's one thing to allow these cases to pend for five years, six years, whatever it may take to get to a trial date in a particular county, and some are as few as two years, but -- and it's one thing to dig your heels in and cave in and pay a case at the very end. That's expensive, and you're not suggesting that we do that. But to dig your heels in for that period of time and to have a verbal threshold summary judgment motion denied, when it should not have been denied in our estimation, and then to take a bad jury verdict on it is a financial burden -- it does not make economic sense for us to do that.

SENATOR CARDINALE: I have very limited experience in terms of actual cases. You have, certainly, a much wider experience. But you happen to be my insurer.

MR. DEAN: I know that.

SENATOR CARDINALE: And I was amazed that your company, on a case where there was no accident -- and that was later determined before a court, that there was no accident -- was willing to give \$15,000 to a claimant, who filed an absolutely -- absolutely -- specious claim on a basis of where there was no accident. I suspect that it only went to trial because you knew who I was, and you took it to trial and you won. I really wish you would do that in more of the cases which are brought where there is a very clear situation where there should not be a payout. I'm sure there are many that are ambiguous, but when I see these kinds of numbers, and when I've had my own personal experience-- And I want you to know that -- maybe you don't know that -- but your lawyer really put pressure on me to get me to accept a settlement, and I said, "No, I won't accept a settlement."

SENATOR KYRILLOS: He didn't know who he was dealing with.

PRESIDENT DiFRANCESCO: Gerry, on that--

Joe, why don't you respond to Gerry on that. (laughter)

But along those lines, in your two-page statement, Wayne -- and I know you were here the other day-- Actually, Kevin, it's your statement -- you mention Alex's testimony from Thursday. I think you do -- yes, in the second paragraph. And one of the other members of the Committee and I were talking about this. You presented-- He presented, rather, this \$59,000 --

documented \$59,000 claim for medical expenses on a \$55 repair on a car. Why would you pay that?

MR. DEAN: Senator, and this is in part--

PRESIDENT DiFRANCESCO: Not you, but why do we pay it?

MR. DEAN: Okay. This is in partial response to Senator Cardinale's question. We don't pay all claims, and in fact, we tried -- on a percentage basis, we tried more cases to verdict this year -- meaning 1997 -- than we ever have before. The two cases that I brought with me today, neither of them is a settled case. One is a pending PIP suit, and one is a pending BI suit against our policyholder. They're not, in their numbers, nearly so extreme as the cases that you've heard about last week--

PRESIDENT DiFRANCESCO: Right.

MR. DEAN: --but what I'm telling you is that both of these claims we're resisting payment for the kinds of reasons that you just mentioned.

PRESIDENT DiFRANCESCO: Yes. It seems so outrageous that, you know, if you contest it from day one, as the other Committee member mentioned to me, you almost have to wind up paying less than \$59,000, I mean, in some way. I just can't imagine, although I'm not involved in the system, it just didn't seem to make-- I mean, I believe the information that was given to me. It's just hard to believe that the money would be paid out.

Senator Codey.

SENATOR CODEY: I was just wondering, as a company, have you ever tried a no-settlement policy?

MR. DEAN: A no-settlement policy?

SENATOR CODEY: Yes, where you are going to go to court on every claim.

MR. DEAN: Absolutely not, Mr. Codey. We believe that we have a good-faith obligation to our policyholders to make decisions on the individual merits of each case.

SENATOR CODEY: Don't you think that if you had that policy that after a while the amount of claims would go down tremendously?

MR. DEAN: You know what, I don't know, Senator, because I have no experience with it. And while I know that certain other insurance companies have taken that position with regard to particular kinds of claims, I don't know what their long-term experience was. In fact, our primary competitor in this market is doing that with low-impact, soft-tissue automobile cases, but they don't have nearly enough experience with it to this point to tell whether it's been a successful program.

SENATOR CODEY: I was making the analogy of New Jersey Transit, where years ago, every time there was a bus accident, 400 people would file claims that they were on the bus, because they all knew that they would all get a couple of thousand dollars each. And New Jersey Transit adopted a policy "we're going to fight all of them." All of a sudden, nobody was making claims against them.

I would think that if it was a policy in effect for a period of time, the amount of claims would go down tremendously, because you would send a certain message to the public.

MR. FREDERICK: If I may respond to that, Senator. I would suggest that if we were to adopt such a policy that we'd be very quickly accused

of unfair insurance claim practices, that to simply not settle cases and to take them all to court would be a very large problem, and we would see a tremendous backlash from the public on that, and rightfully so, because once it becomes reasonable to us that the liability is established and the costs are established, we have an obligation to our policyholders, both through our contract with them and under the laws of the state, to settle that claim.

So to take that kind of posture-- I understand what you're saying-

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SENATOR CODEY: Yes, but you've almost gone the other way to say -- frankly, you settle everything. So, I mean, you've got two extremes here. It seems to me there is no in between. You've gone, we'll settle everything, as opposed to, we're going to fight everything.

That's all.

PRESIDENT DiFRANCESCO: Okay.

Assemblywoman Farragher.

ASSEMBLYWOMAN FARRAGHER: Thank you, Mr. Chairman.

When you mentioned before, about settlements in the best interests of your policyholder, I'm assuming that you're referring to cases where your policyholder may be the party at fault, and that the filing was in excess of the limits of the policy. Is that right?

MR. DEAN: What I'm suggesting is that there is a possibility of a jury verdict exceeding our insured's policy limit, yes.

ASSEMBLYWOMAN FARRAGHER: Okay, that's number one.

Number two: You mentioned that you are owned by a mutual insurance company, and I think it would be helpful to this Committee to know

why it is that in New Jersey you're an indemnity company, whereas in all other states you're a mutual company.

MR. FREDERICK: It had to do with assessments against the insurance company, which were based on the entire assets of our company rather than strictly limiting it to New Jersey. Therefore, to allow those assessments to go forward would have impacted all of our policyholders throughout the country disproportionate to their contribution to the financial condition to the company.

ASSEMBLYWOMAN FARRAGHER: And the assessments that you refer to are the assessments that were imposed on the industry for that debt that grew in the JUA and the MTF. Is that right?

MR. FREDERICK: That's correct.

ASSEMBLYWOMAN FARRAGHER: Thank you.

MR. DEAN: Mr. Chairman, may I talk about the two cases that I brought with me?

SENATOR BENNETT: Yes, go ahead.

MR. DEAN: Okay. I did bring two claim files -- copies of two claim files -- and I'd like to refer first to Claim File No. 1. Our policyholder was, indeed, responsible for this accident, but because the claimant stopped short, an arbitrator in this case eventually found his liability at 75 percent. Pages 1 and 2 of Packet No. 1 are photos of the damage to my policyholder's car, and if you look closely enough, you'll see that there is some damage near the right headlight to that car.

The owner of the other car, by the way, never presented a property damage claim to us. Now, the woman who was driving that other car was 33

years old. She did not seek any kind of medical treatment at all until 27 days after the accident, at which time she began to see a chiropractor. From September 29, 1994 through October 16, 1995, she went to a chiropractor 79 times, and each time the same three modalities were used. She got an adjustment, traction with heat, and message.

I would only point out to you, ladies and gentlemen, that despite treating for 13 months or so and despite 79 visits, there was absolutely no change in how the chiropractor treated this woman over that period.

Now, in the old days, that probably would have constituted most of the claim, but with *Oswin vs. Shaw*, this woman needed to show objective medical evidence of an injury. So her chiropractor referred her to a doctor, who describes his business as “comprehensive diagnostic testing services.” The results of just this one man’s tests are Pages 15 through 55 of your handout. That’s 40 pages of diagnostic results for a woman whose primary diagnosis, according to her own chiropractor, was cervical sprain-strain.

Three of the four tests are totally unfamiliar to me. I know what a surface EMG is, but I don’t know what a postural study is, segmental flexibility examinations, Metrecom motion analysis of the spine. I do know that they purportedly measure ranges of motion, and therefore, they’re objective evidence of decreased ranges of motion in this case.

Why am I unfamiliar with three of the four tests? It’s simple, none of these tests existed when I was a claim rep or a supervisor. They were developed in response to the verbal statute and, in particular, to *Oswin vs. Shaw*. On this point, I would ask you to note, too, that all of these tests were administered by an examiner, not by the doctor himself. The testing took 35

minutes, and the bill totaled \$1025. Incidentally, the chiropractor's bill was \$6280.

And then finally, because that objective evidence wasn't enough, the chiropractor referred this patient for MRIs. She had MRIs of her cervical and lumbosacral spine done. They showed muscle spasm, mild degenerative disease, and a mild disk bulge. For these the PIP carrier saw a bill of about \$2200.

One of the points I want to drive home is that despite all these positive findings, the chiropractor continued to treat this patient alone and did not change the modalities on one of the visits.

We did, indeed, defend this claim. Our orthopedist examined the claimant and he found nothing. We moved for summary judgment, and the claimant, as is customary, countered with an affidavit. And in the affidavit, she talked about how she used to go to dance clubs, but now she doesn't so much anymore. And how she used to walk, jog, and ride bikes with her kids, but now she doesn't do that as long or as often as she used to.

Notice, she doesn't say, "I can't dance, walk, jog, ride." It's simply a matter of "not quite as often," "not quite as long."

We lost this summary judgment motion. We lost it because the chiropractor examined her one last time and purportedly found muscle spasm resulting from this accident almost three years postaccident.

The case immediately went to mandatory nonbinding arbitration. The arbitrator awarded \$65,000 in pain and suffering damages, reduced 25 percent for comparative negligence, but when you plop prejudgment interest on top of that award, it still comes to more than \$50,000.

So in this file is a woman who missed one day of work, who, in my opinion, wouldn't have undergone any medical treatment at all if she had been responsible for the accident, and she racked up \$9500 in medical expense and more than \$50,000 in pain and suffering damages.

And I leave you with the question: Is that what you intended when you enacted the statute?

The second case is labeled State Farm Claim No. 2. This-- Oh, by the way--

SPEAKER COLLINS: Mr. Dean.

MR. DEAN: Yes.

SPEAKER COLLINS: Case No. 1--

MR. DEAN: Right.

SPEAKER COLLINS: I think we see your point. And not at all, we very much appreciate, but is State Farm Claim No. 2 going to take us in a different direction, or-- And the reason is, we have a number of other people to testify, and we still, I'm sure, would have to continue to have some exchanges with you. Feel free to go into the case, if you want, but I think I have an idea where that case -- you know, what your point will be there.

And my question is, if you think you want to go into Claim No. 2, is back to Claim No. 1.

MR. DEAN: Okay.

SPEAKER COLLINS: What you just said was, you went through the process, you gave us all of that. Obviously then, I assume that you think this case was wrongly decided, number one.

MR. DEAN: Yes, Mr. Collins.

ASSEMBLYMAN CHARLES: Just one point of clarification on that, Mr. Chairman.

SPEAKER COLLINS: Assemblyman.

ASSEMBLYMAN CHARLES: You mentioned that, in No. 1, you talked about the arbitrator and the motion. Did that go on to be tried before a jury?

MR. DEAN: That case is waiting for a trial date right now.

ASSEMBLYMAN CHARLES: So the case has not been resolved yet. Those are numbers that are out there by virtue of the arbitration process. It's still for a jury to decide. It's still for the company to decide whether or not it wants to settle the case.

MR. DEAN: But, Mr. Charles, I thought I had indicated that this case -- both cases were still pending, number one. Number two, Mr. Charles, I want you to understand that when -- and I think you know this because I believe you're a practicing lawyer. This woman heard the number \$65,000, and the possibility at settling this at some reasonable number has been eliminated.

ASSEMBLYMAN CHARLES: I won't respond to that, but I think lawyer management of their client, and that's something that lawyers do, could disabuse a client of an unreasonable expectation about settlement.

SPEAKER COLLINS: Senator Cardinale.

SENATOR CARDINALE: I wish that was so.

I noticed in these cases that-- It seems to me all of the data that you've given to us is really public record, is it not?

MR. DEAN: No, Mr. Cardinale.

SENATOR CARDINALE: This is not public record.

MR. DEAN: These are open State Farm claim files.

SENATOR CARDINALE: So these are not matters of public record. When you go into a court for a summary judgment, isn't that a matter of public record?

MR. DEAN: Those papers are public record, yes. Our claim file is not, which is why you'll see all the names and addresses redacted from the files.

SENATOR CARDINALE: Well, that was going to be my question. If there are portions of this which are matters of public record, I think there might be some usefulness in letting us see the names of the attorneys involved and letting us see the names of the judges involved and letting us see the names of the practitioners involved, because if -- and, of course, if they become matters of public record, we get a feel then for whether or not there are one or two or hundreds of practitioners of one or another field who are gaming the system in this fashion.

And I think that would be a very useful bit of information for the Committee to have.

SPEAKER COLLINS: Assemblyman DiGaetano.

ASSEMBLYMAN DiGAETANO: Thank you very much, Mr. Speaker.

I would like to ask a question on, actually, both of these cases, even though we didn't go through Claim No. 2 yet. Interestingly, when Senator Adler asked you whether you had comparative data on the threshold or no threshold cases, you did not. But you obviously have that on these two

cases. Are these two cases both verbal threshold cases? Are they no threshold cases, or is one threshold and one not?

MR. DEAN: These are both no -- verbal threshold cases. The only difference--

ASSEMBLYMAN DiGAETANO: Both no threshold?

MR. DEAN: No, I'm sorry. They are both verbal threshold cases. The only difference being, the first one is -- Claim No. 1 is a BI liability claim against our policyholder. Claim No. 2 is a PIP claim made by our policyholder.

ASSEMBLYMAN DiGAETANO: The case that we just went through -- or claim that we just went through, Claim No. 1 -- you indicated that Pages 15 through 62 deal with testing, some tests which you had never heard of as a claims manager or a claims adjustor.

MR. DEAN: Fifteen through fifty-five.

ASSEMBLYMAN DiGAETANO: Through 55, thank you.

MR. DEAN: Right.

ASSEMBLYMAN DiGAETANO: Would you say that -- just your opinion now -- would you say that those tests were done to meet the threshold or to identify an injury?

MR. DEAN: In this particular case, Mr. DiGaetano, I believe that the studies were done solely to meet -- solely for purposes of meeting the threshold. And my reason for that conclusion is, there was absolutely no adjustment to how this woman was treated.

ASSEMBLYMAN DiGAETANO: The next question I have is based on that. The tests that were done and the results revealed in those tests,

I assume that your position was not so much that there wasn't some injury, but that it wasn't related to the accident. Is that correct?

MR. DEAN: No, our position was that on our summary judgment motion, if the judge believed everything that he heard from the plaintiff's chiropractor and from the doctors who did the diagnostic tests, and if he believed everything that this woman had written in her affidavit, that it was insufficient to breach any of the threshold criteria.

ASSEMBLYMAN DiGAETANO: I'm not getting to that. I'm really getting to the issue of whether any medical treatment was necessary, not whether or not there could be a suit for pain and suffering. There was substantial treatment -- \$6000 or \$7000 worth of treatment that you mentioned here. I don't know if there was any more after that. I didn't get through the last seven pages of this yet.

But based on that, is your position that you dispute the fact that there was treatment necessary for some problem, or not?

MR. DEAN: We were not-- Mr. DiGaetano, we were not the PIP carrier for this woman, so our examination of this woman did not happen until reasonably late in the game. In fact, I don't recall, sitting here, whether she had already ended her treatment at that point, so I can't answer your question.

ASSEMBLYMAN DiGAETANO: Well, the reason why I asked that is because one of the other members of this Committee addressed moments ago some testimony that we heard last week -- it may have even been the Senate President -- regarding some claims that appear very similar to this, in that minimal or no damage was done to one or both vehicles involved in the accidents, yet there was substantial amounts of moneys paid to claimants for

one reason or another. In that case, it was for diagnostics and treatment. This, obviously, is a case where pain and suffering was sought, so there is substantial money here.

Here's the question: As a representative of the insurance company, as a former claims manager, do you normally look at the accident report and the circumstances therein before you begin paying claims for treatment, let alone diagnostics? Do you normally do that?

MR. DEAN: Do we look at the circumstances in which the accident happened?

ASSEMBLYMAN DiGAETANO: Yes.

MR. DEAN: Absolutely.

ASSEMBLYMAN DiGAETANO: And in a case like this, or in a case-- You may have heard about the cases that were brought here last week. One was \$55 damage. Another one was \$330 actual damage to the vehicle, and \$60,000 -- I'm rounding -- paid out in claims, not pain and suffering. Would you not make an assumption that there may be injuries, but they're not related to this accident? Would you do that?

MR. DEAN: The situation that you describe, in my mind, violates common sense, and unless her treating physician -- unless this person's treating physician told us something credible that convinced us that, indeed, these injuries could result from an impact of less than five miles an hour, then I would have my doubts as to whether she needed any treatment at all.

ASSEMBLYMAN DiGAETANO: Good. That's the answer I wanted.

Now, let me tell you what this Committee needs from you. We need to know how, if you think it's possible, what appeared to be fraudulent claims for injuries resulting from accidents that most of us wouldn't consider an accident or a collision -- we need to know how we can ferret those out while leaving in the system the ability for those who are injured -- maybe at a minor level, maybe at a major level -- in an accident, and those injuries resulted from that accident. How would you suggest we do that?

MR. DEAN: I believe, Mr. DiGaetano, that there is language that can-- I believe there is language that can allow pain and suffering damages for some serious injuries to the soft tissues of the body. And it's just a question of drafting it well.

And as a second point, on the PIP side of this business, I think that peer review is the solution. Allow other doctors, other chiropractors, other osteopaths, other dentists to look at what was done and to come to medical conclusions about whether those treatments were necessary.

ASSEMBLYMAN DiGAETANO: Well, in the debate over peer review that this Legislature went through, it was represented by insurance representatives that the major issue on peer review and what the great debate was about -- the need for peer review -- was where there was an injury, but where there was overtreatment. And peer review was required to prevent overtreatment.

The cases that have been shown here -- this claim -- I haven't read Claim No. 2, but I assume they're the same-- It's not about treatment. It's about whether or not these injuries were result of high school football or some

acrobatic endeavors on the part of this dancer, or whether they resulted from this accident. How do we deal with that?

MR. DEAN: I believe, Mr. DiGaetano, that a panel of the treating physician's peers could at least look at his file and his notes and determine whether he followed medical protocols in ruling out prior accidents as the cause of this injury. And I'm convinced that doctors are able to do that kind of thing.

ASSEMBLYMAN DiGAETANO: Doctors are able to determine whether or not a collision of five miles an hour or two miles an hour or twenty-two miles an hour, at what angle--

MR. DEAN: What I'm suggesting is--

ASSEMBLYMAN DiGAETANO: --caused a certain injury?

MR. DEAN: What I'm suggesting is that they could look at the notes and see if, by history and by examination, this doctor did all that he could do to rule out the possibility that the causative factor of the injury was something else.

ASSEMBLYMAN DiGAETANO: Why would the treating physician need to do that? The treating physician really has nothing to do with determining who's at fault or how the accident happened, if it happened. The treating physician just determines whether or not there is something that needs attention. Isn't that correct?

MR. DEAN: Well, many of the treating physicians with whom we deal have assignments of benefits, and they have an obligation to show us that this was, indeed, related to the accident -- their work, it was, indeed, related.

ASSEMBLYMAN DiGAETANO: I don't understand how that would be pertinent to the patient/physician or patient/treating relationship. How would that be pertinent? A patient goes with some injury or with some symptom of pain; they're there for treatment.

You're suggesting that the doctor makes a determination first that it was due to this accident, not due to this accident or some prior accident, and decides whether to treat or how to treat?

MR. DEAN: I'm suggesting that at some point, when the doctor or his patient wants to be paid for his services, one or both of them need to come forward and show us that their services were, indeed, related to the automobile accident.

ASSEMBLYMAN DiGAETANO: Okay. Beginning with the claim -- this claim in front of us, this is obviously minimal damage.

MR. DEAN: Yes.

ASSEMBLYMAN DiGAETANO: You were made aware of the claim 21 days later, I think you said.

MR. DEAN: About 27 days later.

ASSEMBLYMAN DiGAETANO: Did your company make a determination or did you have some doctors make a determination as to whether or not this injury was resultant from this accident?

MR. DEAN: We did not have that opportunity, because we did not have this woman examined until she completed the course of treatment that she was going through with her own physicians.

ASSEMBLYMAN DiGAETANO: Okay. Your issue was just pain and suffering--

MR. DEAN: Right.

ASSEMBLYMAN DiGAETANO: --therefore, the PIP claim didn't mean anything to you?

MR. DEAN: Well, we like to think that every time we get a liability claim, there's a PIP carrier out there doing a real nice job.

ASSEMBLYMAN DiGAETANO: Based on your-- Well, some of the PIP carriers that were here complaining about our system don't appear to be doing a very good job.

But based on your prior experience and what I assume your familiarity is with your current claims bureau or division or whatever you call it, would they not look at the amount of treatment in considering whether or not and at what level to settle a claim?

MR. DEAN: We teach them to ignore the frequency and length of treatment as much as possible in assessing general damages like pain and suffering.

ASSEMBLYMAN DiGAETANO: The last line I'd like to pursue is this arbitration award that you had--

MR. DEAN: Yes.

ASSEMBLYMAN DiGAETANO: --that \$65,000 that was awarded. Was that a function or a multiple of treatment delivery?

MR. DEAN: Not so much as I can-- Certainly there was nothing on the award itself that would have given that away. You know, I don't know, Mr. DiGaetano. This is not the complete file. I've gone through the file. I didn't get the feeling that they used any kind of multiple in making the award.

ASSEMBLYMAN DiGAETANO: Does your claims department track that at all, the awards for pain and suffering as a multiple of or function of medical treatment?

MR. DEAN: We don't track it except to this extent: If we see a particular claim representative guilty of using multiples in establishing settlement values for pain and suffering, we tell him to stop, and we make sure he doesn't do it anymore.

ASSEMBLYMAN DiGAETANO: Thank you, Mr. Speaker.

SPEAKER COLLINS: Thank you, Assemblyman.

Mr. Dean, if I may, just a couple of questions. I don't think we have to go into Case No. 2. But let me ask this: You mentioned one of the reasons you support peer review. If I may, and this is a blunt and open discussion, and, of course, this is not a witness stand or whatever else.

But peer review, as you said, have a group of chiropractors and doctors, and so on, analyze what another chiropractor or doctor or whatever person said. Should I infer from that that there is a question that the physician who was dealing with this injury prior to it coming to -- before the panel, the arbitration panel now -- is wrong, is dishonest, is just very comfortable expanding the diagnosis? Why, if we've already had a doctor do this, why do we have to have another doctor check on what they did?

MR. DEAN: Well, Mr. Chairman, in our experience-- Let me preface my remarks.

Nothing that-- I hope I didn't say anything today that makes it sound as if we're having problems of this sort with every chiropractor and osteopath and physician--

SPEAKER COLLINS: No, you did not.

MR. DEAN: --in the State of New Jersey.

SPEAKER COLLINS: You don't even have to say that. You surely didn't.

MR. DEAN: Putting that aside, we spend considerable amounts of time training our claims people in medical issues, yet over and over again, we need to use doctors to help us make decisions on claims. With peer review--

I'll give you an example of where peer review could be most useful to us. Suppose that our policyholder had a bodily injury claim against someone else and went for one last visit with her orthopedist, who did several tests for range of motion, and the question came up, "Are those reasonable and necessary medical expenses for us to pay?" Well, one of the issues is whether that physician followed the AMA guide to evaluation of permanent impairment. There are protocols on how to measure ranges of motion of the neck and the back and the shoulders and everything else. I can't possibly expect my claim reps to know all that material. Peer review doctors do know it. They could look at the tests, and they could determine whether they were done properly and whether they were compensable under PIP. They would serve a service that we can't possibly get in any other way.

SPEAKER COLLINS: Well, it would just seem to me that if there are AMA regulations, etc., that you wouldn't have to be a doctor to interpret what those regulations are. Others used to reading statutes and ordinances, and so on, such as attorneys, including defense attorneys, would be able to do that same thing.

But be that as it may, it would seem to me that what we have -- and I've heard a great deal of the arguments for peer review, and I can see some validity to some of them. I don't know that they're the panacea, unless we have omnipotent doctors sitting on the peer review, because they're going to be opinions of what they think, as they review what someone else thinks. My own feeling about the peer review, I think it's really much more involved in the discussions of dollar savings than it should be, but that's a personal view.

Which leads me to this question, and you, Mr. Frederick, have set this in my mind already, because you are right on target. We can reduce the cost of auto insurance down to this level, (indicating) or we can let it fly to that level (indicating). It all depends on what we offer, what we don't offer, so on, and so forth, let alone the fact that New Jersey is so different than other states.

My question is this: In your opinion -- you are not actuaries -- but you said, "That is why we favor peer review." Just in your experiences, if we were to go to a peer review system -- you don't have to describe what it is in your mind, what you picture it to be -- but what you look for, what you think we should do, in your mind, without even describing it, how much money do you think the average policyholder would save percentage-wise? You can even go high. Just give me the amount of money.

MR. FREDERICK: I have no intention of going high. I would readily agree that the immediate savings is single-digit savings, and it's going to vary depending on the system and who does the evaluation. I think--

SPEAKER COLLINS: Now, single digit, if I may, could be 9 percent savings.

MR. FREDERICK: I wouldn't put it at that high. It's probably five or less.

SPEAKER COLLINS: Five. Let's just say five. If we, as the State of New Jersey, just changed the peer review process from what it now is, and it's been in effect for years, to whatever you would want, you would think that we may save 5 percent with that one single act?

MR. FREDERICK: Not likely any more than that and possibly less.

SPEAKER COLLINS: Okay.

MR. FREDERICK: But what I would suggest is that peer review, like anything else, is not a panacea. There is no silver bullet. There is no--

SPEAKER COLLINS: No question. Keep saying that over and over, because I like to hear that.

MR. FREDERICK: Right.

SPEAKER COLLINS: Not on peer review, but on all of it.

MR. FREDERICK: But what we have to look at is the cumulative impact of adding these things together. And one of the things that peer review can help to do is help moderate this process over time. It's sort of like, we all tend to drive a little slower when we see the State Trooper sitting on the side.

SPEAKER COLLINS: I saw that a lot on my way up the Turnpike this morning. Whenever I see those lights going ahead of me, I just have to look, and there's a Trooper.

I appreciate your response.

Senator Kyrillos.

SENATOR KYRILLOS: Thank you very much, Mr. Speaker. I want to follow up on your point here, when you asked what you -- when you asked these folks what they thought the percent of savings might be on going to peer review, and you said, "About 5 percent." I'm glad we're reminding ourselves here of our overarching mission, which is to try to reduce rates for the drivers of New Jersey, while at the same time keeping a sound, reasonably generous comprehensive auto insurance system for our people.

You said 5 percent and said it wasn't a silver bullet, and it would need to be a component that in aggregate bring about those kinds of savings. I don't think you got to Page No. 2 of your testimony, and I'm not asking you to read through it. But I do notice here that you talk about the Michigan-style verbal threshold. Maybe you talked about what the percent of savings would be, and if you have, please repeat it. And if you haven't, here's your opportunity to do it, because in combination with the 5 percent that you'd save on peer review, you've got a percentage for Michigan verbal threshold. Put together, we're starting to see some real percentage savings, and those are only two components, albeit two big components, of the pie that, taken together, will bring about some needed relief for people.

MR. FREDERICK: Sometimes, as attorneys within State Farm, we're referred to as casual actuaries. (laughter) So lest I get--

SENATOR KYRILLOS: They're going to yell at you about the 5 percent, aren't they?

MR. FREDERICK: Lest State Farm get hung with the 5 percent figure for all eternity, my statement was that it would be no more than that and could quite likely be less than that, depending on how the chips fall and

where things -- how this ultimately plays out. We believe that a Michigan-style threshold, additionally, would result in a 7 percent savings, and that is the best estimate we have from our actuaries.

SENATOR KYRILLOS: And that's-- The 5 percent on peer review, I understand, was your best guesstimate. We're not going to hold you to that. It might be a little lower. It might be a little higher. But the 7 percent is the figure that your technical people have looked at and stand behind.

MR. FREDERICK: That's correct.

SENATOR KYRILLOS: So you're telling--

MR. FREDERICK: Again, I don't mean to overly burden this with details. That's an aggregate, an average figure, and you're talking about what it would do to the average insurance rate in New Jersey. There are a lot of factors that play into rates, and I wouldn't want to suggest that everybody sees an automatic 7 percent reduction as of that kind of reform.

SENATOR KYRILLOS: We're always talking about average rates. I know that you companies always get the hives when we talk about mandated percentage cuts, but if it was in the neighborhood of something like this, this is something you can live with. That's what you're telling this Committee.

MR. FREDERICK: As you correctly stated, we do get the hives when you speak of mandated rate reductions. We think that as anathetical to a competitive market.

SENATOR KYRILLOS: It seems to me, the membership, however, hives or no hives, needs to look at your recommendation on this Michigan-style threshold in terms of that kind of reduction. We can talk about micromanaging your company, and why you settle and why you don't

settle, and what's legitimate and what's not legitimate, but this is a rate reduction that you can stand behind, and when taken together with this peer review percentage that you talked about before, we're getting into the double-digit category on a reduction of 12 percent. And there are other components to come. You haven't talked about PIP at all. I don't know if you want to do that today or not, beyond peer review.

MR. FREDERICK: We hadn't, necessarily, come prepared-- I mean, we're sticking with the specific issues that were before us.

And I would add, I know, of course, that the Legislature is concerned about rate reductions. That's why we're here. But we also have to recognize that we're in the middle--

SENATOR KYRILLOS: I think we all have to remind ourselves of that, by the way.

MR. FREDERICK: We're also in the middle of the process of transitioning to multitier rating. No one knows quite where that's going to come out yet.

So when you start mandating rate reductions on top of a changing system, I'm not sure if anybody could figure out what the result would be. It's a very dangerous area to step into when you start mandating numbers without knowing what you're applying them to.

SPEAKER COLLINS: Thank you, Senator.

Gentlemen, we appreciate you coming. If you would like to make a wrap-up comment or so, and then let me just say this, Mr. Frederick. I heard you very clearly say it could be a single-digit reduction. Five percent is not something that I'm tying to you for the rest of your life, or any other number

you said. And I very much appreciate you even offering a number to give us some kind of perspective. But we even have TV cameras here today. Those who care will hear accurately what you said, and it will not go with you for your future days.

Gentlemen, any others--

MR. FREDERICK: I would just simply like to add, we've talked a lot about potential fraud and abuse of the system, and although there are certainly professionals who engage in out-and-out fraud, the majority of the medical and legal community are honorable men and women fairly representing their clients. We do not fault plaintiffs attorneys for trying to get every dollar they can for their clients. And, in fact, for them to do less would be a violation of their professional responsibilities.

What we fault is a system that encourages recoveries for injuries that most people would regard as nonserious. We fault a system that rewards misuse and encourages a lottery mentality. The issue here is not whether people will recover. People will have their medical bills paid. The issue is whether the Legislature wants to continue to support a system that pays claimants for pain and suffering awards which are nonserious or exaggerated infirmities. We can continue to pay these awards, but we will continue to pay the price for the insurance.

What we hear the citizens of New Jersey saying is that they're no longer willing to pay that.

Thank you, and I conclude.

SPEAKER COLLINS: Gentlemen, thank you.

But, before you leave, Senator Cardinale.

SENATOR CARDINALE: Just an observation on a point that you were making.

SPEAKER COLLINS: Thank you, Senator.

SENATOR CARDINALE: And it is-- I read the dental portion of Case No. 2, and that makes it very clear to me that peer review by someone who had expertise in that particular area of dentistry would have been very valuable in that case.

SPEAKER COLLINS: Well, coming from an outstanding dentist, I will surely read Case No. 2. So it didn't go for wasted.

Thank you very much for coming in, gentlemen. Thank you.

MR. FREDERICK: Thank you.

MR. DEAN: Thank you.

PRESIDENT DiFRANCESCO: Okay.

We'll get to the lengthier witnesses now.

Anthony LoCastro, who's been waiting patiently since last -- probably forever really -- but you were here last Thursday. You were kind enough to come back today.

SENATOR KYRILLOS: Were you here this weekend in the front row?

PRESIDENT DiFRANCESCO: Did you hang out here over the weekend, Joe wants to know.

You're from PRUPAC.

ARTHUR F. HERMANN: Yes.

PRESIDENT DiFRANCESCO: Okay.

MR. HERRMANN: Hi. I'm Arthur Herrmann. I'm the Director of Government Affairs in New Jersey for Prudential. With me is Tony LoCastro, who is our National Director of Personal Injury Claims for Prudential. So he's very involved in overseeing the PIP claims and their management in New Jersey, as well as other states, for PRUPAC. He hasn't been with us that long. Some of you may realize he previously had a very similar position at NCIC, the (indiscernible) plan, where he had several years of experience on New Jersey PIP claim management. And as many of you are also aware, he was very involved in the exposure of the V and K fraud ring.

We're here today -- really we're a holdover from last week, and we're really focusing on this issue of PIP more than on the verbal threshold. And really our focus on verbal threshold will be mostly to keep our remarks brief so you can move on with other witnesses.

I guess on the verbal threshold, just briefly say that we don't support the repeal of it. We think it makes more sense -- it's a less drastic alternative that if you just have medical practitioners review PIP claims, you can achieve savings that way.

SPEAKER COLLINS: Mr. Herrmann--

MR. HERRMANN: Yes.

SPEAKER COLLINS: --I guess you've already had impact.

Senator Adler.

MR. HERRMANN: We haven't even gotten to the good stuff.

SPEAKER COLLINS: You haven't even gotten over the hello, but the Senator's ready.

Go ahead, Senator.

SENATOR ADLER: You heard the question I asked the previous two speakers, and other people tried to get that same answer. Do you know overall from your data whether PIP claims are higher on a per victim basis for folks with a zero threshold or folks with a verbal threshold?

MR. HERRMANN: I don't know if Tony, as our claims man, would have information on that. I do know that we are undergoing some closed-claim studies internally to try to nail that issue down, and certainly we'll share that information with the Committee. I don't think we have an answer we can give you today on that.

SENATOR ADLER: You understand what we're wrestling with here. We're trying to find out whether the total costs in the system would decrease or increase if we strengthen the verbal threshold versus elimination of the verbal threshold. We want--

MR. HERRMANN: No. Certainly-- And we are-- Understand that there are several alternatives you're looking at, and we are currently engaged in some way to get you some statistics and some ideas and costs, which we'll share with you. We don't have that here today.

SENATOR ADLER: Will we have them by March 29, do you think?

MR. HERRMANN: I believe we understand the deadline in place from the highest places in State government--

SENATOR ADLER: All right, because we have to work late that night, you know.

MR. HERRMANN: --and attempting feverishly to get you something in a useful manner before that.

I'd really like Tony to address-- I think there's some issues in his testimony that you didn't really hear Thursday. Some of it does, I think, segue nicely from the State Farm -- the later part of their testimony -- so they'll let Tony speak now on his experiences both with us and his previous carrier he worked for.

ANTHONY P. LOCASTRO: Thanks. I just want to thank you again for your time and attention.

I come today to basically-- I wanted to clarify some things. One of the things that-- I've heard a lot of testimony about the increase in arbitrations and the increase in the amount of treatment, and I just wanted to lay out that a couple of things concern me, as a professional in this business now for almost 20 years, and I wanted to basically go over some of the things today that we're seeing just to educate you about some of the things that are occurring out in the industry.

Just back in 1994, there were only 3500 of these no-fault disputes. And I think what may be getting lost here is the fact that a lot of the dispute today between provider and carrier is just that. It's not the innocent policyholder who might have had benefits cut off because of traditional IMEs or that type of things. I wanted to lay out some of the diagnostics that we actually see today, and some of the names basically explain what they do, and then, some of the names really are kind of confusing. You have today things like SSEPs, which are somo-sensatory evoke potential, nerve conduction velocities, something called brain-mapping, visual evoke potentials, thermography, dynatron muscle testing, biofeedback, spinal ultrasound agography (phonetic spelling), and a relatively new one called

videofluoroscopy. We also see the electromyography studies, and one that was very, very popular with V and K -- grip strength testing.

Bottom line is you even have the Chiropractic Board come out with a position against one of these tests, the spinal ultrasound agography. This is a test where, I guess, more traditionally you've seen it with pregnancies -- looking at an ultrasound of the abdomen to basically look at the fetus. Well, now we have chiropractors who use ultrasound for the spine. And the Board has ruled in written form that these are very experimental and should not be compensated by insurers. Those are their words, not mine, yet we still have chiropractors doing these and, unfortunately, filing arbitrations over it and winning, which is sad.

I also wanted to clarify that the overutilization today is not just occurring with the so-called mills. I know--

SPEAKER COLLINS: Mr. LoCastro--

MR. LoCASTRO: Sure.

SPEAKER COLLINS: --allow me. Why do you think they're winning?

MR. LoCASTRO: I'm sorry.

SPEAKER COLLINS: Why do you think they're winning when they go to arbitration on that point?

MR. LoCASTRO: Because even when we bring the basic statement from the Chiro Board and we bring our own peer review doctor, you have arbitrators who will believe the treating physician and almost think whatever the treating physician says is gospel.

SPEAKER COLLINS: And is that wrong?

MR. LoCASTRO: I think it's wrong in this case when you have their own board-- I mean, I heard someone testify, Dr. Cianciulli testified last week, that they do put out documentation and they do put out positions. Now here's one of the few times, in the 18 years that I've been doing this, where they were that solid with a position. This test is experimental. It should not be reimbursed by insurers. They put that in black and white, yet we still lose arbitrations over that issue.

SPEAKER COLLINS: But why? What happens there when they read this, when your attorneys say, "Look, here it is, why are you going to award them this?" Why do you think they do it? Just your own opinion.

MR. LoCASTRO: Again, I think-- A long way goes to the treating physician. A lot of clout, I guess, goes--

SPEAKER COLLINS: And then this treating physician is violating, under the scenario you've set here, the rules of his or her profession. And yet, this arbitration board buys into a violation of their professional guidance, so to speak.

MR. LoCASTRO: Correct.

SPEAKER COLLINS: Kind of amazing.

MR. LoCASTRO: It really is amazing.

SPEAKER COLLINS: Senator Adler.

SENATOR ADLER: Confirm for my weak understanding of how the arbitration system works. Is it-- It's invoked after a carrier who said we're not going to treat anymore. Is that right?

MR. LoCASTRO: Basically, we have 60 or 105 days to decide when something is submitted whether we're going to pay it or not. We can delay the 45 days asking for more information once--

SENATOR ADLER: But do you-- Is it all or nothing at that point? You just decide to stop payment completely or--

MR. LoCASTRO: We have to make a decision in that 60 or 105 days. So what you do is, if you don't have sufficient information to warrant paying the claim, you deny the claim.

SENATOR ADLER: Are you permitted to pick and choose which bills to pay were the treatment to continue -- to authorize?

MR. LoCASTRO: No. You have to look at each one on its own case basis. You could have basically 20 submissions coming in from 20 different providers--

SENATOR ADLER: For one--

MR. LoCASTRO: --in one case.

SENATOR ADLER: For one victim?

MR. LoCASTRO: Yes.

MR. HERRMANN: For one case.

MR. LoCASTRO: Now, this is the other thing. The other sad part about this is that with the assignment of benefits provision, the assignment doesn't stop with the provider. What happens is, one of the common forms that are assigned today is an assignment of benefits. That when a new patient walks into an office, these are then sold to factoring companies. Okay. By a factoring company, I mean, businessmen go in today, and they'll buy account receivables from unpaid bills, give the doctor a percentage of the fee, and then

basically file the arbitrations. The other thing is that these tests that I've mentioned, they're not necessarily being performed by medical providers. They're being performed by business entities as well.

Prudential is involved in two high-level suits right now up in Bergen County where we did not pay because we felt qualified technicians were not providing these tests. You had laypeople basically going into doctors' offices. Some of them have these real cute arrangements, too. They'll rent office space. You know, V and K had dentists coming in from Long Island, renting the space for \$500 a day, so they could see these Haitians that were there for chiropractic care, let alone dental care. But this is common. This is common today, for nonmedical people who have technicians -- and I always joke that if you can draw Sparky on this matchbook, you, too, can do one of these tests. That's how sad it has become.

MR. HERRMANN: They also have mobile units as well.

MR. LoCASTRO: You have, you know, like in the *V and K* again, you have a doctor coming up from South Jersey in a Winnebago doing two-minute orthopedic evaluations.

SPEAKER COLLINS: Well, it's a long way from South Jersey so--

MR. LoCASTRO: Well, I'm not saying--

MR. HERRMANN: For him, South Jersey's probably here, Assemblyman.

MR. LoCASTRO: What I'm getting at is that-- Just a couple more quick facts. The arbitrations in 1997 were 16,000 -- a 60 percent increase from '96 -- almost four times where they were in '94. Eighty percent of those -- and AAA is right behind me, I know they're going to speak next --

80 percent of those were provider files. And the definition of a provider could be vis-à-vis the assignment process or to one of these factoring company processes. So again you don't have really the claimant in the dispute with your insurance carrier, you have these providers doing these tests. These tests make up 50 percent of what those 16,000 arbitrations were in 1997. So its--

SPEAKER COLLINS: Senator Cardinale.

SENATOR CARDINALE: As Speaker Collins asked you a question about why you personally think you lose even in cases where it's obviously a departure from the protocol of the individual professions, and I think you were very gentle in your answer-- Let me lead you.

MR. HERRMANN: Then all my coaching goes for naught.

SENATOR CARDINALE: Do you believe there is a bias inherent in the present system in favor of awarding the provider payment?

MR. LoCASTRO: There's definitely a bias, but in like all fairness to the attorneys, some of these tests haven't been seen. They're all things that have come about in the last four years. And what's really surprising to me -- going to Prudential two and a half months ago opened my eyes now to all 50 states. We don't see these tests in any of the other 49 states. So I say to myself that if the medical technology has advanced so much, why aren't they doing these tests in even Pennsylvania or Connecticut or any of those states. It strikes me as being odd.

SENATOR CARDINALE: I can tell you why they don't do them, because it doesn't get paid for in those states. It gets paid for in New Jersey. But doesn't that go for the question of the bias? Are there medical people on

those boards who have the competence to understand whether there is any efficacy to those tests or not?

MR. LoCASTRO: No. And the sad part is even when we go prepared to arbitration with medical documentation, independent medical exams, peer reviews, they are oftentimes ignored. I mean, it's that sad. It's gotten to that point. We lose to 85 percent to 90 percent of these. I lost 85 percent to 90 percent of my previous employer. I'm losing 85 percent to 90 percent with my current employer.

SENATOR CARDINALE: Thank you.

ASSEMBLYMAN CHARLES: Just on that point, Mr. Chairman.

Just on that point of the tests that you're talking about, has any insurance company in the State of New Jersey just decided that it was going to just make a test case of these tests? That is, go to trial on one of these cases before a judge, put in their experts and whatever else is involved to convince a court or to persuade a court or to attempt to do that that these tests should not be accepted into evidence. I mean, there are ways of addressing the issue of the scientific reliability of a test and whether or not it ought to be admissible into a court of law. Has the insurance industry in the State of New Jersey undertaken such a step with respect to some of these tests, which you say or what you contend are new or bogus or have no validity?

MR. LoCASTRO: The answer--

ASSEMBLYMAN CHARLES: And isn't that something that you can do? Can't you at some point wind this thing through the court system up to the Supreme Court in the State of New Jersey to deal with the admissibility of tests that you think are questionable in their reliability?

MR. LoCASTRO: The answer is yes. You had-- Allstate took thermography to task now about five or six ago, and you had parameters established. You had a dollar figure established and you had parameters established as to when the test could be administered. Now, as a result of that, thermography has almost gone the way of the dinosaur. We hardly ever see that test anymore, because the parameter said you weren't going to administer this test in the first 60 days of treatment. And when you were going to administer it, it was going to held to a \$432 reimbursement, where at one point it was being billed at \$1296. Currently, you have carriers in suit over the videofluoroscopy. There's a suit up in Morris County involving a couple of carriers. This one's really cute. This one--

ASSEMBLYMAN CHARLES: I don't need the explanation.

MR. LoCASTRO: Okay.

ASSEMBLYMAN CHARLES: I think the point I'm trying to make that it seems to me that if there's a real question about the reliability of these tests, these new things that are coming about to reach the threshold, there is a remedy currently in our system which allows the insurance companies to do it -- that is, to go to court and challenge it. And take each and every one of these tests -- the three or four that you mentioned -- through the court system. At some point, you would get a resolution of those issues.

MR. HERRMANN: Well, Assemblyman, we are doing that -- we and other carriers. It's time consuming. I guess the problem that Tony can address is that there's a new test every week.

ASSEMBLYMAN CHARLES: Well, it just seems as a matter of just the practice is that every test is admissible as evidence. You have to come

forth before court when you're offering those into evidence to show that there is some support in the medical treatments that make them reliable. The court has to rule and rule that they are admissible into evidence for the purpose that they're offering. Why, if there are complaints about a test -- and these complaints have been around for a long time -- it seems to me that the industry would have challenged them, just like you challenge other things, like other people challenge other things with reliability of tests involved. So if you complain about them, you can do something about them. The question is what have you done about them within the process that we have already?

MR. LoCASTRO: Well, let me address that real quick. There was an appellate division case just about two years ago called *Merlina* (phonetic spelling) *vs. State Farm* that said everything is now arbitrable. So we have to convince judges sometimes to even take these cases. A lot of times they get bounced back to arbitration where they don't have any precedent setting value, but that's just the way that the law is constituted right now.

ASSEMBLYMAN CHARLES: But you aren't saying -- telling me that you are barred from litigating this issue in the trial court and the appellate courts and the Supreme Court in the State of New Jersey? You're not telling me that are you?

MR. LoCASTRO: No. And we are taking-- Some cases have recently been filed to address some of the more unusual of these diagnostic tests. Some of these, you have to remember, have-- I mean, they were created for certain reasons, like a lot of the nerve tests were--

ASSEMBLYMAN CHARLES: Excuse me. Excuse me.

MR. LoCASTRO: Yes.

ASSEMBLYMAN CHARLES: I was there.

MR. LoCASTRO: Okay.

ASSEMBLYMAN CHARLES: I just want to make the point that there is recourse--

SPEAKER COLLINS: Make that point, Assemblyman, and we'll move on.

ASSEMBLYMAN CHARLES: I made the point. There's recourse. I'm not talking about the tests. You may be right that the tests may be bogus. All I'm saying is that there's recourse to prove that within the system that we have in place.

SPEAKER COLLINS: Senator Adler.

SENATOR ADLER: Let me ask you hypothetically, instead of doing the peer review system, we try to establish a system of professional arbitrators that were not practicing attorneys, maybe they were retired judges, maybe whatever-- Maybe doctors who didn't practice medicine, but just did arbitrations. And we required those individuals to provide written decisions that would have some precedential value and be circulated throughout the community. As part of a three-part question, to what extent do you think that would reduce costs in the system? If we established medical protocols through the Department of Insurance, to what extent do you think that would help reduce costs in the system by somewhat standardizing the treatment procedures to be employed generally with adaptation as technology improved and as individual cases varied from the standard? And to what extent would it help reduce costs from the system if you were allowed to pick and chose which services you reimbursed a provider for rather than having right now to

say, we're cutting off payment to that provider because that provider's off the protocol and we can't work with that person anymore, that person is not providing treatment anymore.

If you could pick and chose which ones to pay for, would that save money? If you had professional arbitrators with written opinions that were circulated throughout the community, would that save money? And if you had established medical protocols that would apply to the vast majority of victims, would that save money?

MR. LoCASTRO: I think all those things would help. You have to remember that if you went to professional arbitration, you still have to have another mechanism for the nonmedical situations. You have things like eligibility. You have things like the fraud or the accident itself being fraudulent.

SENATOR ADLER: Well, I'm going to ask you separately, I think, about the value of adding a real fraud prosecutor, strengthening the fraud penalties we have in place, and having some person in power to go after fraud. Somebody in the AG's Office whose job was to hunt down these people, the V and K's of New Jersey, and put those people in jail and take away their licenses. Add that part in on-- If you add those four things together, are you starting to find real savings in the system?

MR. LoCASTRO: I basically think you could find savings with the professional arbitration system just because you have-- You would have people who would, like you say, the same issues would be before them, they would know how to basically determine them, they would maybe get more education from either the Department of Insurance or AAA. They work in arbitration,

but there still may be things that only peer review can solve, too. I mean, some of these things are getting like such high level-- Like Senator Cardinale mentioned before. He saw dental treatment, and he as a dentist was able to weed through that out.

There are things in New York system, which is professional, where they can wrap the PRO in with it. We might need a combination where, you know, even if there are professional arbitrators, they may still need to rely on some entity to help them to give an opinion about some of this bizarre and exotic treatment that we see today.

SENATOR ADLER: Wouldn't professional arbitrators be in the same situation that Assemblyman Charles was describing earlier where judges have to weigh expert testimony, expertise, and look at the emerging scientific and technical know-how? Isn't that part of the job of the finder of fact?

MR. LoCASTRO: You would probably get a more consistent result than we see today. So I'm not going to say no to your concept of--

SENATOR ADLER: Would consistent result also lead to substantial savings?

MR. LoCASTRO: I think it would. I mean, right now -- you mentioned something before -- we don't get an opinion in New Jersey with regard to how someone has decided these cases. You do get a written opinion in New York system.

MR. HERRMANN: We still think, though, that superior system-- We still think the best system would be to have medical practitioners decide some of these medical type of treatment decisions, as they do in Pennsylvania, for instance.

SPEAKER COLLINS: And let me ask you-- The question I asked -- because you even have looked at Pennsylvania -- could you give me any estimate of savings that that system would put into effect?

MR. HERRMANN: I don't-- I'm not sure that we've internally done that. If we have, I don't have that information, and we'll get you that, but--

SPEAKER COLLINS: Well, if you haven't done it, why are you so supportive of it?

MR. HERRMANN: Well, we've seen, I guess, some of the other industry studies that put the number 4 percent to 5 percent, and we think that's probably ballpark after the number of the savings.

SPEAKER COLLINS: Would I be correct in assuming that the reason we're going to have that savings is because this review -- this peer review group -- is going to say to the physician who already made a diagnosis, "Well, your diagnosis is a little too high or what you've done is a little too far, and therefore, we want you to shrink it"? And then, of course, we'd save money. Is there anything illogical of my making that assumption?

MR. HERRMANN: No, I think that's one source of savings from the system. I think you might just also discourage a lot of the players who are the less reputable, you know, the vans with the diagnostic testing, from even attempting to gain in the system in that manner.

SPEAKER COLLINS: So there are people who are less reputable in this profession?

MR. HERRMANN: As there are in all professions, including my own.

SPEAKER COLLINS: Assemblyman DiGaetano.

ASSEMBLYMAN DiGAETANO: Thank you, Mr. Speaker.

Mr. Herrmann and Mr. LoCastro, you were present early last year when the Assembly Committees took testimony on the issue of peer review. And I believe the Commissioner of Insurance -- if that's the title -- in Pennsylvania was brought in. I just heard your testimony -- the testimony from Mr. LoCastro -- that currently under the arbitration system we're losing 85 percent to 90 percent of the cases. The testimony from the representative of Pennsylvania was that they're losing only 60 percent of the cases that they take to peer review, and that was less than 2 percent of all cases. However, on further questioning from Assemblyman DeCroke, he acknowledged that they lose half of the remainder on appeal. Now, that tells you that 80 percent of the cases taken to peer review are lost in whether or not its in the actual peer review decision or on appeal.

Based on Mr. LoCastro's testimony, we're talking about a difference of 5 percent to 10 percent. But let's take the maximum, 10 percent. If 2 percent or less of the claims are taken to peer review and the difference is 10 percentage points, we're talking about 0.2 percent of the claims in New Jersey that the insurance companies would now win. They were now given an advantage. How does that equate to potential savings as far as the total policy is concerned? Does it make 5 percent, 8 percent?

MR. LoCASTRO: If you started setting precedents that certain tests were not going to be allowed, they were not going to be tolerated, it could have a deterrent factor. Right now, the mind-set is anything goes. Anything goes until we determine otherwise. I mean, that's the sad news. I mean,

there's no stopping the new tests that are being created. There are no guidelines. There are no directives from the Department in terms of "this test will be accepted. This isn't"-- There's a lot of anything goes out there right now. So I would accept any deterrent at this point in time to help stem the tide, because it keeps increasing and increasing and increasing.

MR. HERRMANN: I think your question is more focused on this-- I don't recall the exact exchange. Your question, I guess, is, if this was the experience in Pennsylvania, where the significant numbers of our loss -- it's only 2 percent of the claims, how does that translate into New Jersey? I think it's very difficult to make a little translation from that, if only because in Pennsylvania, I believe, there are what -- a \$5000--

MR. LoCASTRO: It's \$5000 with an option for more--

MR. HERRMANN: Yes.

MR. LoCASTRO: --but most have chosen the \$5000.

MR. HERRMANN: So it's kind of difficult to compare the two states. I think they have different tort restrictions than we do as well, which means they don't have these new and somewhat questionable and diagnostic tests out there. So it's difficult to factor what that system does to those sort of tests. But I think common sense dictates that if a particular testing -- surface conductivity of nerves -- which medical science as a whole may find no value to, a peer review system should put an end to this sort of--

ASSEMBLYMAN DiGAETANO: See, I understand that. And I think if you went around this Committee and to the general public, you would find that most agree with you. That there are certain tests being performed that are way out of the ordinary and certainly questionable as to necessity. But

is that what's driving the cost of PIP claims or pain and suffering claims, or is it the treatment that has resulted from this or other tests to treat whatever the nature of the problem is regardless of whether it's resulted from a particular accident? What is the great cost? Is the great cost in this or other exotic diagnostic tests, or the treatment that results from it?

MR. LoCASTRO: I think one of the answers is that it's probably both. Treatment often doesn't change regardless of the outcome of these tests. These tests, you have to remember, are not always being done by the treating physician. They're being done by outside entities -- some of which aren't even medical providers. There's profit margins to be made in a battery of these tests.

The *V and K* example is a great example. Those people were put on an assembly line. On the sixth day, everybody got Test 1. On the eighth day, they all got-- There was never deviation. And you had a sample of about 3000 to 4000 patients. We actually brought in Coopers and Librandt (phonetic spelling) to spreadsheet the 3000 patients so that it jumped off the pages that on the eighth day, you know, you got this test, never any deviation, never any change, and they weren't what normal practices were when you looked at like chiropractors and things.

ASSEMBLYMAN DiGAETANO: I understand that, and I would agree with that. The interesting thing about the testimony that we had -- though earlier, not this Committee, but the Insurance Committee -- was that just along the same lines. That there are some 60 or 70 of those mills statewide that are known. Why can't we just go after them? Why can't -- if

there's so many of them, and we know where they are, and they all have so many cases, why can't we target them?

MR. HERRMANN: Well, hopefully, we'll be able to target many more of them successfully with the law that this Legislature just passed. You know, as the Attorney General testified in front of several committees on that law, it is very difficult to prove those cases without having certain changes in the law. Hopefully, we'll see a better success rate in terms of prosecution.

But I guess the point-- One of the points we're here to make today is that the diagnostic testing and these sort of problems, it's not just a problem in the mills. It's something that we see in increasing number of files, even those from, you know--

MR. LoCASTRO: The nonmills.

MR. HERRMANN: Yes. Nonmills.

MR. LoCASTRO: There were four major providers who have been indicted and either have been sentenced or were sentenced this year. The mistake they made is they billed for stuff they didn't even do. Okay. They were ghosting, as we call it.

ASSEMBLYMAN DiGAETANO: Outright fraud.

MR. LoCASTRO: Outright fraud. They were in other parts of the state, other parts of the country. But I'll give you an example of one of those four and how the system fails. There's a chiropractor from Elizabeth -- I'm sorry, from Edison -- who was federally indicted for mail fraud back in September. It was a 15-count indictment. He admitted to one of the counts, and he's awaiting sentencing. His sentencing is this Thursday here in Trenton. The Chiro Board has not determined whether he should have his license

suspended or not yet. Their letter to me was, until he's officially sentenced, we won't take any action.

Surprisingly to everybody should be the fact that he still practices. He's admitted to a pattern of phony billing and fraudulent billing. There's been statements from all of his office staff that he told them to put down for modalities when he was not even doing modalities, to put down that he manipulated patients when he didn't manipulate patients. This guy left every Wednesday to go see the Knicks play, yet he treated patients until 8:00-9:00 at night. The moral of my story is, he files arbitrations, and he still wins, despite all of this stuff that is pending against him. Now that's sad.

ASSEMBLYMAN DiGAETANO: Clearly a problem, I think, we'd all agree. But here's the last question that I have. The push was for peer review, and still, is based on testimony that we've heard before this Committee and again today. Peer review to be used: to ferret out the fraud where treatment wasn't given because he was at the Knicks game; or tests weren't given that were billed for; or accidents that didn't happen that were claimed; or the bulk of peer review -- or the thrust for peer review -- to stop or prevent overtreatment where there's an injury, but where there is a difference in opinion between doctors as to whether or not treatment should continue. What's the thrust of it?

MR. LoCASTRO: I think you could cover all those bases. I mean, if you have a-- When we looked at V and K, the one thing about V and K-- You know, V and K did everything they billed for. All that \$52 million was documented. They did those tests. They never once billed for something they didn't do. But do you know what their chiropractic adjustment consisted of?

They took a dental impactor. Okay, something that you would-- If you remove a wisdom tooth, you put in a piece of gauze where the tooth was. I hate to be graphic, but there's a device called a dental impactor that helps you pound that compound down. Their chiropractic manipulation always, always, always, 29,000 out of 29,000 times, consisted of them tapping a patient on the back with this dental impactor. That was a manipulation. You would not have found that out unless you talked to the patients, got their testimony. That's something that would have stopped case one with peer review. We wouldn't had to have 3000 cases before we got to that point.

ASSEMBLYMAN DiGAETANO: Because that was not a protocol of the New Jersey Chiropractic Society or--

MR. LoCASTRO: It absolutely wasn't one of the accepted modalities or manipulations that you're supposed to do. It's considered the lowest form of resistance, I guess, you could give the body -- hitting the body with this dental impactor. I mean, I guess what I feel is you wouldn't have to wait until it gets to the extreme if you bring case one in and lay out the pattern in case one to the peer review. You don't get that with arbitration, because you got 480 arbitrators out there, and you have to retell the story to every time you're before them. There's never a written opinion. It gets very frustrating, time consuming, and hard.

ASSEMBLYMAN DiGAETANO: But you have the ability now to cut off treatment by sending them to your physicians and not-- I should say cut off payment. Don't you?

MR. LoCASTRO: But it can still be challenged with arbitration, which we've talked about doesn't always prevail for the carrier.

ASSEMBLYMAN DiGAETANO: How long does it take to get through that?

MR. LoCASTRO: From the time of filing, usually you get a hearing within 90 to 120 days. It is pretty prompt.

ASSEMBLYMAN DiGAETANO: By the way, the figures I mentioned earlier -- the percentages -- do you differ with them, the experience that we have in New Jersey 85 percent to 90 percent and the testimony in the earlier Committee?

MR. LoCASTRO: About that we would only be saving the minimal percentage. The one thing I have to disagree with you on, though, is that it's not-- They're not arbitrating the same types of things in Pennsylvania. You're arbitrating whether you should have 40 visits as opposed to 30. We're not even doing that in Jersey right now. What we're doing is these tests is what's the gist of most of the arbitration.

ASSEMBLYMAN DiGAETANO: So they're doing overtreatment, is what you're saying?

MR. LoCASTRO: I'm sorry.

ASSEMBLYMAN DiGAETANO: They're arbitrating or peer reviewing overtreatment?

MR. LoCASTRO: Overtreatment, I would think, sums it up.

ASSEMBLYMAN DiGAETANO: Okay.

Thanks, Mr. Chairman.

PRESIDENT DiFRANCESCO: Scott, did you have a couple of questions?

ASSEMBLYMAN GARRETT: Just one.

PRESIDENT DiFRANCESCO: And I think Gerry has a question, and then we're going to move on to the next witness.

ASSEMBLYMAN GARRETT: Just one along the lines of Assemblyman DiGaetano. We have heard testimony previously that New Jersey in the last year or so-- We've seen an explosion in the number of cases that are going to arbitration. For sake of argument, be hypothetical here, that the numbers that we have heard just now from Assemblyman DiGaetano are correct-- And if we were to implement a peer review system akin to the system in Pennsylvania, that you would still see approximately about the same level of success rate for the industry on this as we are seeing previously. Isn't the goal of peer review in part to eliminate the number of cases going into peer review in the first place by sending the message that we are going to crack down and eliminate the fraud and the excessive treatment? So even though the number -- the percentage may stay the same, the ultimate amount of illegitimate cases being paid, and some correlation to your premiums, will go down?

MR. LoCASTRO: I have to say 100 percent. You would get guidelines established. You would get consistency. You would get criteria established as to what's going to play in this state and what isn't. I mean, right now, you have none of that.

SPEAKER COLLINS: Senator Cardinale.

SENATOR CARDINALE: Thank you, Mr. Chairman.

I think there is some degree of confusion. Maybe not among everyone on the Committee, but in regards to this 5 percent. When you say

that there is a potential 5 percent savings through peer review, is that 5 percent of PIP or 5 percent of the overall policy?

MR. LoCASTRO: I have to say it's 5 percent of everything, because it should keep the BI in check, as well, if some of these things are restricted and are reined in. Right now, they're not reined in.

SENATOR CARDINALE: It's my understanding that PIP is approximately 25 percent of the overall premium. So are we talking about 20 percent of the cost of PIP when we say 5 percent?

MR. LoCASTRO: Art, to you. I thought it correlated to the bodily injury as well.

MR. HERRMANN: I guess I follow your math on that. My only hesitation is that neither of us again are actuaries. So I hesitate to go to further down this road on costing out this savings of the program.

SENATOR CARDINALE: One of the confusions that I think comes about when we talk about what is potentially possible to save is that the policy is divided into a number of parts and not everybody necessarily takes all of the parts of the policy -- only bodily injury and PIP is mandatory in New Jersey.

MR. HERRMANN: Correct.

SENATOR CARDINALE: But the numbers that are published about the cost of the policy -- cost of an average policy -- include everything. Therefore, if we wanted to save-- If our goal was to save 20 percent of premium, I think it's obvious that we could not save it on any one piece of the policy. We would have to do things on each portion of the policy in order to save that. So that it would appear -- and do you agree? -- that we need to

address more than one problem. We need to address more than just peer review. We need to address a number of areas in the policy that cost money in order to have a saving that would approach a 20 percent savings.

MR. HERRMANN: Yes, absolutely. I think even some of the industry witnesses later in the day have some suggestions and some of the others things that you can do to put together a savings of a magnitude that, you know, would be meaningful to the people in the state.

SENATOR CARDINALE: Now, Prudential does more than just auto?

MR. HERRMANN: Correct.

SENATOR CARDINALE: Prudential does any number of aspects of health care?

MR. HERRMANN: Correct.

SENATOR CARDINALE: Do you see a different pattern in terms of these diagnostic tests for similar disabilities that people are suffering as to other kinds of injuries, injuries caused by other causes, or is there something unique to auto that leads to all of these exotic tests being done?

MR. LoCASTRO: It's unique to auto. These tests would not be allowed in a health environment without a second opinion. I mean, you don't even see these being billed on the health side of the house. These are tests that we only see in New Jersey, as a matter of fact, in terms of the auto coverage line.

SENATOR CARDINALE: Do you find-- You mentioned the Chiropractic Board is not taking action against people who are obviously guilty of something. Do you find a similar thing with other practitioners, other

boards? For instance, suppose it was the Medical Board, would they take action at an earlier state than the Chiropractic Board would take?

MR. LoCASTRO: I don't have experience in that-- I was disappointed by the Chiro Board in this instance, though, because if you read this provider's 40-page testimony when he was before the judge, you know, you would have probably tarred and feathered him, let alone take his license away. I mean, it was that egregious of a scenario that he laid out for the whole industry. He basically duped the whole industry. And the fact that he still has his license today shocks me.

SENATOR CARDINALE: It's my sense that the Dental Board and the Medical Board -- at least where I have a little bit of experience -- act a lot more quickly than you're describing the Chiropractic Board. Therefore, perhaps the Committee should consider not limiting ourselves simply to how we are going to treat the auto policy, but perhaps give some encouragement to these various boards where professionals are caught up in this kind of thing, that their licenses would be in jeopardy.

SPEAKER COLLINS: You're right. Okay.

Thank you.

MR. HERRMANN: Thank you.

MR. LoCASTRO: Thank you.

SPEAKER COLLINS: Thank you, gentlemen.

PRESIDENT DiFRANCESCO: Hank Strawn, the American Arbitration Association -- National Insurance Director of the American Arbitration-- Is that-- Where's Hank? Hank's in the back.

Hank, who did you bring with you?

HARRY E. “HANK” STRAWN: Excuse me?

PRESIDENT DiFRANCESCO: Brought a whole team with you.

MR. STRAWN: Looks like it, doesn't it?

Mr. Senate President, Mr. Speaker, my name is Hank Strawn. I'm the National Insurance Director of the American Arbitration Association. I would like to take this opportunity to thank you for allowing us to testify before you and the rest of the members of the esteemed Committee.

We will be addressing issues of PIP arbitration, and I would like to make a distinction between that and the court-mandated arbitration procedure that occurs in third-party cases, which we have no influence over whatsoever.

I would like to introduce the rest of the speakers today. Following their presentation, I will be available to answer any additional questions that you might have and perhaps make a few observations that may be helpful to the Committee. To my immediate left is William K. Slate, the President and Chief Executive Officer of the Association. Mary Hunter is the New Jersey No-Fault Supervisor. Phil Levine is the Regional Vice-President in New Jersey. And to my rear is George Friedman, who was one of the chief architects of the arbitration procedures that currently exist in New York that was implemented in 1988. Having said that, I'll turn the meeting over to Mr. Slate.

PRESIDENT DiFRANCESCO: Who's going to make the presentation?

WILLIAM K. SLATE II: Our intention, Mr. Senate President, was for me to make some opening remarks and then to have Ms. Hunter describe the administrative process for the Committee.

PRESIDENT DiFRANCESCO: I see. Okay.

MR. SLATE: Is that agreeable?

PRESIDENT DiFRANCESCO: Sure.

MR. SLATE: Thank you very much.

I am, as Hank Strawn just referenced, Bill Slate, the President of the American Arbitration Association. I thank the Committee sincerely for the opportunity for us to appear before you and to discuss the administrative process under the statutory program. I would tell you first of all that my personal credentials with respect to the great State of New Jersey, although they're modest, have been important ones for me personally in my life. I was at one time a visiting professor at Seton Hall University as the executive for the Federal Circuit -- the 3rd Federal Circuit. For several years, I had the great pleasure of working closely with a number of wonderful sons and daughters of New Jersey, including Justice Bill Brennan and former chief judge John Gibbons, Jack Garry (phonetic spelling), Ann Thompson (phonetic spelling), and others. So you'll understand that I honestly come before this Committee with a very high impression of New Jersey public officials.

But more important, with respect to this hearing here today, I represent the views of the American Arbitration Association, which is, as I think you know, a not for profit public service entity that's been in existence for over 70 years. And our 72 year history, in fact, is built on integrity and providing a process. And that's what we are. Its process providers -- the process is designed by the users -- are, in this instance, by the State Legislature.

The legislative history of the no-fault bill, which commenced our administration of no-fault, expressed its intent in the legislative history among,

in other ways with the following: to ease the burden and congestion of the State's courts and to expedite the disposition of disputes for New Jersey citizens. That's part of the legislative history of this no-fault bill. And I think clearly the 50,000-plus no-fault cases administered by AAA since the program's inception, in an average of five months -- as you heard here today -- is contrasted to a minimum of two years to five years in the court system, I think, has clearly met that intent.

And I think you've also heard that the caseload in no-fault, as administered by us, continues to grow. In 1996, we administered 10,600 cases, and this year we'll administer, in 1997, close to 16,000 cases. And, yes, we are all here and acknowledge that changes or improvements or reform are in order. And, of course, I would maintain that any program of any kind, public or private, functioning for almost 15 years deserves the kind of legislative scrutiny and reform that you're giving it, and all parties agree. However, I think it's important, members of the Committee, to recognize that one can quickly get into the baby with the bath water or reform questions. And as this panel considers that important question, I would say just two things before passing to my colleagues the opportunity to get to another level of specifics for you.

First, no systems are perfect and flawless. And the courts, as well as this process, are any which human kind might design will have their horrible of horrors. Yes, they should always be taken seriously and address systemically, as is being done here. But, and this is a big but, we should not accept the extremes too quickly as the norm or as the usual, even while taking them quite seriously. We, for example, survey every user of the arbitration

system under the no-fault program at the conclusion of a case. Twenty percent-plus respond. And from the standpoint of statistical validity, this is an overwhelming number. I think we all know that national elections are typically predicted on 1 percent of response.

And what do we hear from users of the system across the board? Users overwhelmingly give the process high marks even when they've not prevailed in their own cases. As to specific numbers, I'd like to mention just a couple: 98 percent of claimants and 89 percent of respondents rate the administrative services provided in this process as good or excellent; 99 percent of claimants and 81 percent of respondents rate the arbitrators as also good or excellent; 99 percent of claimants and 91 percent of respondents indicated that the arbitrator's knowledge of the subject matter was highly satisfactory; and of utmost importance, I think, 99 percent of claimants and 86 percent of respondents indicated that the arbitrator conducted a fair and equitable hearing.

To that end, we again know that the progress can and must be improved after some 15 years of operation. And to that end, we have convened a New Jersey No-fault Working Group, which held its first working session last Thursday evening, to begin to make improvements to the current process even as you do your important work here. And my colleague, Phil Levine, will speak specifically to the work that has already been undertaken. The intent of that Working Group is to complete their reform work within the next 60 days. That Working Group has already identified 24 areas under the current statutory program for improvement and reform.

I would now like to call on Mary Hunter, seated immediately to my left, who is a supervisor, as was indicated, in our no-fault program to give the Committee a very succinct overview of how this process works administratively. As I do so, I would hope sincerely that this appearance will just be the beginning of a collaborative process in which the Association might further contribute to your important work.

Mr. Speaker, Mr. Senate President, with your permission, I'd like for you now to hear from Mary Hunter.

SPEAKER COLLINS: Thank you, Mr. Slate. Let me just say, your contacts with New Jersey, if they were just tied to the list of luminaries that you mentioned, they taught you well. I will say that.

MR. SLATE: Well, thank you, sir.

SPEAKER COLLINS: Ms. Hunter.

MARY HUNTER: Good afternoon. Again, we would like to thank you for inviting and letting us have the opportunity to speak about our process. And I'll give you a brief description of how a claim is processed when we receive it.

The demand for arbitration is reviewed to make sure it meets the following requirements, such as the appropriate filing fee, the completeness of the demand, and the local in which the matter is to be heard. The demand is then given to our case assistants who input the information from the demand in our computer system. A case is then assigned and a file is created and then assigned to a case administrator. The administrator sends to the parties a initiating letter with calendar forms in order that a hearing may be heard. This also gives the respondent the opportunity to submit an answering statement

or object to the locale of the hearing. The matter is then diared for 30 days. At the end of the 30-day period, the administrator appoints an arbitrator from the rotating panel for the appropriate county, discusses possible conflicts, schedules the hearing, and sends confirming letter regarding the appointment and the hearing date. The hearings are usually conducted in the arbitrator's office, unless the parties agree otherwise.

After the day of the hearing, the administrator contacts the arbitrator for the results of the hearing. And if the hearings are declared closed by the arbitrator, his award is due within 30 days. Within that 30-day time period, the award usually will come in. The administrator then transmits the award to the parties and then closes their file. On an average, the process takes approximately five and a half months. And will now turn it over to Phil Levine.

PHILIP LEVINE, C.P.A., ESQ.: Thank you for this opportunity. I will be brief. My name is Philip Levine. I am the Regional Vice-President of the American Arbitration Association, responsible here in New Jersey for the New Jersey operations. I have been with the Association for two years.

As said, the Association has processed over 50,000 disputes under the no-fault arbitration program since inception in 1983, with over 25,000 in the last two years alone.

SPEAKER COLLINS: Mr. Levine, if I may just for me, those 50,000 cases, where have they taken place, those 50,000 cases?

MR. LEVINE: They've taken place, as Mary has said, in the form of claims submitted to the American Arbitration Association under the statute which says that the insured has a choice -- an option.

SPEAKER COLLINS: Right.

MR. LEVINE: You know, if the insurance carrier cuts off the reimbursement, the choice is to either sue the insurance carrier or go to the American Arbitration Association. So it takes place in the form of paperwork submitted to us each and every day through the mail.

SPEAKER COLLINS: Now, you said 50,000, over what period of time?

MR. LEVINE: Since 1983.

SPEAKER COLLINS: Fine. So that's 15 years, roughly 14 years. And now there's 20,000 in the last--

MR. LEVINE: Twenty-five thousand in the last two years -- 10,500 in 1996, 15,500 in 1997.

SPEAKER COLLINS: Well, why has there been such an increase in two years which equals what had taken place in roughly a dozen years?

MR. LEVINE: Based on our own internal observations, it appears that, as it was said perhaps earlier, 80 percent of the claims now seem to be going to the provider. They're being assigned to the medical provider. So perhaps one answer would be that instead of the insured walking around and accumulating bills and then turning singularly over to the insurance carrier, the insured is going to the various providers, assigning over to the doctor, who then accumulates these and turns them in for arbitration. So, for instance, if one insured has five doctors and has been going for these many tests that have already been spoken about, instead of appearing as one claim it's possible that they're appearing as five claims. We suspect that might be one of the reasons.

SPEAKER COLLINS: Thank you. Please go on.

MR. LEVINE: It has been pointed out that these claims were not processed through arbitration, then they would have been processed by the courts. Therefore, I am here to report to you that the current system does work. We are proud of our efforts in administrating the current program. Yet we recognize that even if one party to one dispute feels that the process was unfair, then we have an obligation to fix that.

The Association has a long history of trying to work with the users. Arbitrations systems are flexible, unlike the court systems. For instance, as mentioned, we seek and obtain feedback from the users in the form of surveys sent to both parties at the end of each dispute. Again, as said, we receive thousands of responses each year, approximately 20 percent of all cases.

The Association has a long history of encouraging the users to engage in open and meaningful dialogue on issues and areas of improvement that would have the most benefit. Such was the case recently done with the construction industry. The construction community after many years had indicated they wanted a faster process, a less costly process. We, the Association, as a not for profit public service, brought these organizations -- these users of that community -- together. And we're talking about national groups -- architects, professional engineers, owners, contractors, builders -- and together, through dialogue, they came to a consensus of approximately 51 recommendations.

We adopted all 51 of those recommendations. And we're proud after the passage of time -- about a year and a half since they're all been implemented -- that those benefits that they had hoped for have been realized. In their case, more efficient turnaround time, lower costs. Again, the tradition

of dialogue among the users, consensus being forged by the users, and then, as a not for profit public service, service of that consensus.

In the last several months, I'd like to mention to you there have been meetings and discussions with the various users of the current no-fault arbitration program including with the significant insurance carriers, both individually and as a group, and also with the Insurers' Defense Council as a group, with the Insurance Commissioner's Office, with the plaintiffs' bar, with the New Jersey State Bar Association, and other professional groups. In addition, we sent educational information on several occasions to each and every member of the Legislature.

From these meetings, over 24 issues were identified for review. As said, a Working Group has been assembled, and it has started its review with representation from the Insurance Commissioner's Office, the insurance carriers, respondent attorneys, plaintiff attorneys. The goal is to discuss these issues and to generate suggestions for improvement. Every aspect of how the current system works will be opened for review. The Working Group has met and has already developed seven major consensus items to begin working on. The Working Group will now address these consensus items with a goal of developing specific proposals for reform of the no-fault arbitration system. It will reach out to users of its no-fault arbitration services, such as already mentioned -- defense and plaintiffs' bar, insurers, health care providers, consumers -- to provide input to the Working Group. The Group will issue a white paper on reform of the arbitration system by March 15, 1998 and to widely distribute the white paper to various constituent groups for further input and guidance before changes are implemented.

I'll be very brief. Let me just mention what some of these major consensus items are:

1. The need for greater consistency and predictability in arbitrator decisions.

2. Assuming qualified candidates can be found and that the issues of compensation and selection can be addressed, a smaller, neutral panel is a sound idea to consider. Some the features to be considered would include: specific terms of office for the arbitrators, subject to reappointment; a review of new and renewing arbitrators by a multipartisan screening committee; and improved arbitrator education, perhaps with a continuing education requirement.

3. There is a need for greater accountability for arbitrators. And some of the features might include written explanation of decisions, authority to clarify awards, periodic review by a multipartisan screening committee, perhaps publication of awards, and terms of office.

4. Internal appellate procedures for certain awards built into the very no-fault rules themselves with, perhaps, specific amount levels to avoid frivolous appeals.

5. It is a good idea to develop an expedited panel to deal with certain issues on a expedited basis, issues of threshold issues, issues of conditions precedent. And this panel may very well end up being the same as the master review panel.

6. Whistle-blower authority for arbitrators who suspect fraud or insurer misconduct should be put into the rules. The Association rules would

expressly permit arbitrators, under these circumstances, to refer matters to the fraud unit of the New Jersey Department of Insurance.

7. Develop an approach to allow arbitrators to have access to medical experts, assuming threshold issues and issues of costs can be addressed.

In summary, our message is clear. The Association continues to perform its public service mission in an evenhanded manner in administering to the current system here in New Jersey. The current system continues to be reviewed to meet the current needs of the user community. There are other arbitration systems with key features that may be advantageous to the current New Jersey system such as a small panel of arbitrators, access to medical expertise, and similar. And, the Association is engaged in the review of the current system along with its users, including the public, through its legislative representatives such as the members of this Committee. Finally, the Association continues to be capable and willing to perform the administrative work associated with any revisions made to the current system.

Thank you.

SPEAKER COLLINS: Thank you, Mr. Levine.

Senator Adler, a little bit ago, you had a question.

SENATOR ADLER: Actually, I think he covered it. I was going to ask about written decisions--

SPEAKER COLLINS: Okay.

SENATOR ADLER: --and the ability to standardize the decision-making process throughout the State so the results are more uniform than we have right now. He addressed it perfectly, I thought.

SPEAKER COLLINS: Very well done, Mr. Levine.

Any other questions or comments?

Mr. Strawn has joined us.

I assume the silence means a comfort level.

Mr. Slate.

MR. SLATE: Mr. Speaker, if it would be of interest to the Committee to have a listing of the areas which Mr. Levine articulated that the Working Group is working on right now, we have copies of that and would be happy to provide it to the Committee.

SPEAKER COLLINS: We surely would like that. But let me ask this. What was the genesis of-- The Working Group you mentioned in your comments had a meeting last Thursday evening and got started but-- What's the genesis of that coming about?

MR. SLATE: May I defer to Mr. Levine since he was at the helm on that.

SPEAKER COLLINS: He's at the helm.

Okay, helmster, go right ahead.

MR. LEVINE: When you say the genesis, I'm a little bit unclear.

SPEAKER COLLINS: Well, why did this group meet last Thursday? What-- All of a sudden, some time in their recent past, you decided to have this group meet and talk about no-fault, and so on. What caused that?

MR. LEVINE: Well, it's clear that some of the things we talked about -- that I talked about in terms of the items--

SPEAKER COLLINS: Right.

MR. LEVINE: --are not consistent with the long tradition of arbitration, which is of confidentiality, for instance. It's clear that starting in the early spring -- March, April, May -- certainly in terms of what took place in May and June, lots of comments came about that indicated that, you know, tradition is fine, but maybe not applicable here in New Jersey for this no-fault arbitration system. So beginning in the summertime, we began this process of trying to hold what I call the dialogue. The dialogue should really come forth from the users themselves. Again, we're a public service firm with a long tradition of serving the consensus.

In other states, they have different arbitration systems with different features. We're not here to dictate. We're here to serve. And so the hope has been that the dialogue would take place from among the users. And we spoke with various groups, we certainly sent literature to the State Legislature, we sent notes to the Commissioner's Office, to the Governor's Office-- The hope was that the dialogue would come about with us to the side. What appeared to be the case starting certainly in August, September, October time frame is that perhaps we should be stirring the pot a little bit and helping that dialogue take place. So the meetings gave us the 24 or so, the 2 dozen or so, thoughts as to issues that were of concern. And I believe simply, we stepped up to the plate and recognized that we still want the dialogue, but we're going to help if at all possible to forge that consensus.

SPEAKER COLLINS: Thank you.

Senator Cardinale.

SENATOR CARDINALE: Thank you, Mr. Chairman.

You've probably heard testimony here today and on other occasions that expresses more than I would "dissatisfaction" with the process as it occurs in New Jersey with respect to review of PIP claims. You've heard that even the most egregious cases, even *V and K* which was subsequently found to have been totally fraudulent, are routinely decided in favor of the provider by a huge percentage. Can you tell us why there is all that satisfaction with the system that you talked about and these high percentages when you have those very egregious cases being decided in favor of the provider in just about every instance, even where the provider is using tests that have no basis in the scientific literature?

MR. SLATE: I'd like to ask Hank Strawn, who is our national insurance coordinator and who's worked on various insurance programs in six different states, to respond specifically, Senator Cardinale, if I may. But I would like to observe that, I think-- As I said in my opening remarks, I think that the suggestion that in a disproportionate number of cases, the horrible of horrors exist is a pretty broad open-ended statement. I don't believe we would be getting the user satisfaction from respondents and claimants if the system was that much out of control. We hear broad generalizations made, but then we hear one or two cases offered up in support of those.

SENATOR CARDINALE: Well, we've had certainly more than one or two cases presented to this Committee and to other committees. *V and K* were an enormous number of cases. There is evidence before this Committee that tests are being created that have no prior basis, that are not being used in other states, and that your arbitrators are routinely deciding those cases in favor of the provider. I'm a provider. I don't have a bias against

providers, but I do have a bias against fraud. And it almost sounds to me, as I've listened to this testimony, that you're a willing conspirator in that fraud. I want to disabuse me of that notion.

MR. STRAWN: Senator, if I may, and I'm going to cite an example, because I've obviously been actively involved in the quality control process or reasserting the quality control process of the arbitration system currently in New Jersey for several months now. And during that time, I've actually witnessed several arbitrations and joined them in progress and tried to get a feel for what exactly happens in the course of these adjudications in New Jersey. I'm just going to cite a brief example, because this is something I saw the other night, and I think this will exemplify what you're saying essentially.

Briefly, the arbitration or-- The questions in issue during the course of the arbitration were these. There was an electromyocardiogram that was presented for the arbitrator because it had not been paid. There were two doctor visits, physical therapy visits, that were also presented to the arbitrator which also had not been paid. And there was a thermogram that was presented that had not been paid. It was later determined in the course of this arbitration that the electromyocardiogram had been okayed by the IME specialists, the independent medical examination, done by the insurance company, and they allowed that. They suggested, okay, we'll go ahead and pay this test. The two physical therapy visits were also allowed because they were sandwiched in between a series of others, and it was basically determined that the reason why these did not get paid was probably due to adjustor error. They got buried or something happened to them.

So, in the course of that hearing, the only question -- the only controversy was whether or not the thermogram should be paid. And I'd like to reflect what Mr. LoCastro said earlier that I've also been involved in this process for many, many years in many, many places, and New Jersey is one of the few areas that I've ever seen where a thermogram is still recognized as a viable diagnostic test. Now that may not be the case within the medical industry, but certainly the court decision that I read, the *Allstate vs. Thermogram Diagnostics*, which seemed to indicate that the courts we're willing to take a position with respect to that.

So with that in mind, the doctor that presented the thermogram as a viable diagnostic tool certainly established what I would consider to be all of the elements of a prima facie case or at least a case suggestive based upon his testimony that the thermogram was necessary and that it was viable. The insurance attorney on the other hand, the defense attorney, had absolutely nothing to suggest otherwise except some anecdotal information that he relayed to the arbitrator. In the course of that hearing, it was obvious that based upon strictly the weight of the evidence presented at that hearing that the arbitrator essentially had no choice but to rule that the thermogram was admissible and it should be compensated for.

I think that it could have been more aggressively defended, and it could have put the arbitrator in a position as a trier of fact to resolve the medical dispute between, perhaps, a peer review and a treating doctor, as to whether or not that was indeed a viable test. I think that there could have been additional training provided to that arbitrator, maybe in the course of formal training sessions, that could have given him that information as well.

However, at least within the confines of that specific arbitration, there was no possible way based upon the evidence that the arbitrator could have ruled in any other fashion.

SENATOR CARDINALE: So you would like us to believe that insurance companies routinely present cases before your panels where they have no basis and no justification for challenging to the extent of 85 percent to 90 percent -- that what they talked to us about where the Chiropractic Board, and you heard this today, has itself said that a particular modality is not a valid modality, that your arbitrators, nonetheless, routinely approved payment for that modality -- that you think that this is something that they just didn't defend it properly?

MR. STRAWN: In that particular case, Senator, it was evident that they didn't defend it properly. Can I speak to what the arbitrators do routinely? No, sir, I cannot. Not today. I would like to think, however, that with additional education and medical protocol with the assistance of an expert medical panel that the arbitrators would make decisions in accordance with what the accepted medical practice suggested they would. I'm not certain that that's happening now.

MR. LEVINE: I would also like to interject, if I may, very briefly, Senator. I think it was Assemblyman Charles, my apologies if it wasn't, pointed out within the existing system -- within the existing court system a framework of how disputes are resolved. There are things that people can do -- that insurance can do to push if they feel, in fact, there's an unfairness. The State of New Jersey has an arbitration statute on its books which says that for certain limited, or granted, limited grounds-- But for fraud suspecting

corruption, you can go to the courts and try to get an arbitration award overturned. Now the courts will give great leeway no doubt to an arbitration decision.

But if I was a businessperson running an insurance carrier, I would invest in the money to do as I think you did say, that you can get a particular treatment ruled not proper for purposes of supporting a claim. There are things-- We anecdotally, because we're not directly named, we anecdotally believe that perhaps only six cases a year are appealed to the court system. Six out of the 25,000 or 15,000 a year where-- And again, we don't know the conclusion of the six. We're not even saying that the six were overturned. But we certainly are here to dispel the notion that each and every case, each and every arbitrator is suspect. In fact, it's probably just the opposite, as the demand shaped by the-- Most arbitrators, if not all arbitrators -- 98 percent perhaps of arbitrators give a very judicial rendering of what's in front of them.

The query may be what's in front of them, as Mr. Strawn just pointed out. He's observed several times at random at what's put in front of an arbitrator maybe too little, too late, and literally, what is an arbitrator to do? They are-- In order to get this arbitration decision to be considered binding and in order to keep it out of the courts, it has to be a binding decision. Therefore, it must be an adversarial process. And, therefore, the current arbitration system is totally adversarial. Were the both parties treated that way, we cannot say. We believe the surveys do reveal great satisfaction. Perfect satisfaction, no. You heard us say that if even one person feels that it was unfair, we want to go fix that perception and that reality.

But we are dealing with the fact that with the thousands and thousands that go through our portals, yes, there maybe the 100 horrors that have to be contended with. And we don't feel we want to make excuses for the 100, but that may be part of the reality.

MR. STRAWN: But, Senator, may I just say--

MR. SLATE: Senator Cardinale, one other thing, too. The one case that I heard discussed here today by the first speakers, that was Case No. 1, my understanding is that that was a court-annexed arbitration. That was not in our system. So it's also important to differentiate when you're talking which system, because there are different systems and there are different arbitrators. And that was-- I don't believe -- I think I'm correct that was not one of our cases which was being discussed today.

SENATOR CARDINALE: Whether it was or wasn't, a moment ago, Mr. Strawn, you mentioned--

MR. STRAWN: Can I just add one thing, Senator?

SENATOR CARDINALE: --that you thought there was some point--

SPEAKER COLLINS: Can we-- Just hold.

Senator Cardinale.

SENATOR CARDINALE: That there was some point to having some medical background available to the arbitrators -- some panel or something. Why would you think when you're deciding a medical question, as opposed to some other kinds of questions, that your arbitrators are better able to decide those questions than medical people -- people who are trained scientifically?

MR. STRAWN: Senator, I think that was addressed earlier, and I think that you have to look at an accident claim in terms of a macro concept. And I think that a lot of the medical necessity issues that are addressed in the course of reviewing and investigating an accident claim have to do with some of the testimony that was earlier provided where you begin talking about low-impact, soft-tissue claims, which I would hazard to guess make up a significant proportion of the total claims that are either filed in New Jersey or come into the system.

If you look at a claim in a macro context, you begin to understand that a five-mile-an-hour impact at a toll booth on the Parkway is not likely to result in two years of chiropractic treatment and, you know, hundreds or even thousands of dollars of associated diagnostic tests. That those tests reasonably, in most cases, would not be medically necessary. If I were to hand you, as a peer review specialist, a packet consisting of medical treatments and tests that were performed, my understanding is -- according to the earlier testimony -- that you could determine theoretically whether or not proper medical protocol was followed in the conduct of those tests. But to determine whether they were medically necessary in the context of the overall dynamics of that accident would be very difficult for you to do unless you had testimony and further evidence suggesting the severity of the accident at hand. I'm not sure how you, as a peer review provider, could do that based upon submission of medical records only.

SENATOR CARDINALE: I would suggest to you that it's done by professional boards in the State of New Jersey on a routine basis. There are peer review systems which currently exist in the State of New Jersey, and they

deal with the narrower question, not the broad question, that you're talking about. The narrower question of whether normal protocols were followed by a given practitioner in the course of handling the problems of a given patient, which problems may have arisen from a multitude of sources. So that that's historically and well proven that it is possible for that to take place. I don't think I need to prove that it is possible. It is currently being done. It's been done for many years.

Every hospital has a peer review. They have grand rounds. They have one or another things where they are reviewing one another's work, and they are expert at that. What bothers me about the present system is that you seem -- and some of the others who seem to be benefiting from the system -- to be supporting the portion of the system which is an obvious failure. The portion of the system which is an obvious failure is the portion that allows treatments of dubious nature to continue to be rendered. And maybe, giving you the benefit of the doubt, it is because the people who are rendering those judgments are not scientifically trained to recognize the difference between treatment that is according to protocol and treatment which is not according to protocol.

Let me give you an example which has come up here at a previous meeting. We are often cited a Federal study by the chiropractors. And that Federal study -- and one of them came here at the last meeting and cited that Federal study-- And it says chiropractic treatment is the best kind of treatment you can have for lower back pain, but if you go more than 60 days, you're in the wrong place. Now I believe that your arbitrators are routinely approving -- and tell me if I'm wrong -- treatment by chiropractors which extends well

beyond 60 days. Is that because you haven't read the Federal study? Is that because you don't like the Federal study? Or is that because there's some sort of bias -- as Mr. LoCastro indicated he thought there was -- on the part of your arbitrators because they are participants in the system in another aspect of the system.

MR. STRAWN: Senator, I have to tell you that I came into this process thinking very similarly along the lines that you did. I had a great deal of skepticism and cynicism regarding the no-fault arbitration system in New Jersey. And I spent considerable time either trying to confirm that cynicism or dispel it, and I have to tell you that based upon my observations that the arbitrators that we employ on our panel do the best job that they know how to do. Now, if some of their medical knowledge is limited, then perhaps that's an internal situation that we can readily address by providing additional training. I also would acknowledge the fact that in the course of these hearings that there are medical issues that do arise that may be better served and be addressed by a panel of doctors in assistance to render the appropriate decision. And we're suggesting now that we are in the process of discussing and implementing such a procedure to remedy that problem.

SENATOR CARDINALE: You've heard Senator Adler and others talking about means by which we might take out of the system the apparent conflict of interest that would have to result from having people who are either plaintiffs' lawyers or defense lawyers serve as arbitrators. Is it a fact that most of your arbitrators are either plaintiffs' lawyers or defense lawyers?

MR. STRAWN: Yes, it is, Senator.

SENATOR CARDINALE: Why do you believe that doesn't create an inherent conflict in the system?

MR. STRAWN: I believe that that creates a perceived conflict of interest in the system. I've known many attorneys who have served either as a defense attorney or a plaintiff attorney and can interchange their roles almost in perceptively. I think these arbitrators take an oath when they come into the process to essentially swear that they'll be fair and they'll be objective in the adjudication of these cases, and I think, by and large, they do so, that they leave their particular biases at home. No, I'm not going to say that to a 100 percent degree of certainty that that's the case, but I think in most cases, they try very, very hard to do the best job that they can. And I will have to say, again, if I may, that they do a very, very credible job of evaluating the evidence that's before them -- or at least in my experience that's what I've witnessed them doing -- and I don't know that we at this point can ask them to do anything more than that.

MR. LEVINE: I would just like to interject, if I may, and clarify that what you just said at the last moment, arbitrators do not make the medical decisions. There's a perception that they do. As was testified the last time, they weigh the evidence. And there's a major distinction there, because in an adversarial process, in order to keep the decisions out of the courts -- in order to keep the claim out of the court, you need an adversarial process. The insurance carriers, as well as the claimants, have got to put on the best show of their evidence as possible. If there's a failure in that, traditionally, historically, anecdotally -- call it what you will -- it is known that many times the arbitration if considered a more informal process, and therefore, not

necessarily the best attorney, the lead attorney, the more senior attorney is engaged in the process. It is possible with the rapid shoot up in the volume over the last couple of years -- that we've already testified -- that perhaps now there's more focus now coming to the arbitration process. And maybe perhaps, there's a recognition that the arbitrator has got to be shown much more credible evidence in order to be prevailing on that particular dispute.

We also did a survey on whether or not being a claimant attorney or respondent attorney or we have a small handful of totally neutral arbitrators -- retired judges in effect-- The decision making was exactly the same within one percentage point, in terms of prevailing, nonprevailing, across the board. So we have found that there is no bias within any of those segments.

SENATOR CARDINALE: I would probably agree with you that whether it's a defense attorney or a plaintiffs' attorney it is equally bad. A retired judge was an attorney at one point in time and probably, if he's serving on one of those panels, was involved in this system. I would suggest to you that any attorney who is involved in this system is inherently imbued with the prejudices of this system that have existed over a very long period of time. Why would you not seek out arbitrators who are attorneys perhaps who are not people who handle cases of this type? There are many attorneys. There are only 3000 attorneys out of the 85,000 in New Jersey who are members of ATLA. Why is it that mostly your people are members of ATLA?

MR. STRAWN: Senator, that's just not true. We have over-- If you look at the numbers -- 52 percent essentially--

SPEAKER COLLINS: Hold one second. Hold one second here. If we could draw this somewhat to a conclusion.

You can respond to the Senator's comment about the biases imbued in people who serve in this area, and then maybe the Senator could have a wrap-up question, and we'll move forward.

Mr. Strawn.

MR. STRAWN: Senator, approximately 52 percent of the attorneys in our panel currently are plaintiff oriented, if you will, 48 percent are defense oriented, and I know a very few defense attorneys who are currently associated with ATLA.

SENATOR CARDINALE: I will just tell you that I make no distinction, just to wrap it up--

MR. STRAWN: Yes, sir, I understand that.

SENATOR CARDINALE: --between attorneys who are on one side of the table or the other side of the table. They are both imbued, and I think that that's the way we ought to look at this if we want to come to a conclusion that's going to-- If they're defense attorneys, they're going to have biases; if they're plaintiff attorneys, they're going to have biases. And defense attorneys are no less biased toward a perpetuation of the present system, because they make their fees from the present system. And were we to change that, they have a great deal to lose just as well. But I-- The Speaker is correct, we should--

MR. SLATE: Yes. If I might just conclude then -- Mr. Speaker, thank you -- and say in response that the system we have in place in New Jersey was designed and built on the legislation that was enacted in 1983 by a user group, an advisory group, that executed that legislation -- implemented it. We administer a system that was designed by users taking the cue from the

legislative intent. If this Legislature wants another system and it includes arbitration, we're happy to administer that. We're not wedded, if you will, as an institution to this particular system. There have been references to other systems in other states where permanent arbitrators -- smaller panels who are permanent, full-time professionals -- are employed. If you wanted to talk about that, we could tell you that that system works very well.

But again, we're here to serve at the will of the users including this Legislature. And I simply want to conclude by letting you know that we're committed to public service here and to the citizens of New Jersey, and we're happy to work with this Committee in contributing to the design of any system that you see fit.

SPEAKER COLLINS: Well, thank you, and we very much accept that as a statement of fact. The Legislature, through this Committee, is trying to decide where we should be going. There are some who feel that the whole arbitration panel should be made up of defense attorneys. But those biases imbued in attorneys, I am sure, are imbued in so many other people in the system, and we'll just have to see what happens.

Well, we do have a question from Assemblywoman Farragher.

ASSEMBLYWOMAN FARRAGHER: Actually -- thank you, Mr. Speaker -- it's not a question. It's just an observation based on the comments of my good friend from Bergen County, Senator Cardinale. I'm not so sure whether we keep the current system in place or if we go to some modification of that or a different system, that we would want to have people serving on that who were not familiar with automobile insurance and the claims processes and all of that. For instance, I personally would not select an attorney to

defend me in a criminal case who was a corporate lawyer. I just, you know, would want to have people who were familiar with the system who perhaps through their experience could ferret out a phony, if you will. So I just wanted to make that observation. I know that probably it will be surprising to some. It's just that the Senator and I almost always agree on these issues. On this one, I think that we would not want to do that.

PRESIDENT DiFRANCESCO: Okay. No other questions.

MR. STRAWN: Thank you for the opportunity to appear.

PRESIDENT DiFRANCESCO: Now, I thought you were gone a half hour ago. Thank you very much for--

MR. STRAWN: Thank you.

MR. LEVINE: Thank you.

PRESIDENT DiFRANCESCO: --being here. In case we need you any further -- we may need some more information. We may want to ask some other questions as we get down the road. I assume we'll call you, Hank, and try to arrange it in some fashion. But thanks a lot, it's been very helpful.

MR. STRAWN: We'd welcome the opportunity.

MR. LEVINE: Yes, sir, Senator, we'll make ourselves available. Thank you.

PRESIDENT DiFRANCESCO: Okay. Well, the Cardinale rule, we wouldn't have any lawyers testify today, right? All the rest are lawyers.

SENATOR ADLER: That's a biased comment.

PRESIDENT DiFRANCESCO: Either for one side or the other.

SENATOR ADLER: Don't talk.

PRESIDENT DiFRANCESCO: Let's see. Gerry Baker. Gerry, are you still doing this stuff? Don't you get tired of coming down here to Trenton to talk about these problems? (laughter)

And Daniel Waldman is with you. He's the Treasurer of whatever. I-- He's the head-- He's the Treasurer-- Oh, is this the Treasurer of the State Bar--

DANIEL WALDMAN, ESQ.: Yes.

PRESIDENT DiFRANCESCO: --or ATLA?

MR. WALDMAN: No. State Bar.

PRESIDENT DiFRANCESCO: State Bar, okay.

SPEAKER COLLINS: So that's the State Bar that has both plaintiff and defense attorneys.

MR. WALDMAN: Many more people than that.

SPEAKER COLLINS: Thank you.

MR. WALDMAN: It's many sections and committees--

PRESIDENT DiFRANCESCO: What happened to Jay Greenblatt from Vineland, New Jersey?

MR. WALDMAN: Mr. Greenblatt, unfortunately, has been engaged in a protracted trial down in southern Jersey. And so, I was designated--

PRESIDENT DiFRANCESCO: Since Gerry-- He doesn't do any work anymore, I know. Independently wealthy and does all of this stuff as a volunteer. Well, I do appreciate you gentlemen being here and your patience, of course. The floor is yours from my standpoint.

MR. WALDMAN: Thank you. Mr. Chairman, Committee members, and staff, as you know, my name is Danny Waldman, and I am indeed the Treasurer of the State Bar Association. Gerry Baker is here today as a member of our Association. He is Chair of our Automobile Reparations Committee. He, as you know, is a frequent lecturer of the Institute of Continuing Legal Education, which is sponsored by our State Bar, Rutgers University Law School, and Seton Hall Law Schools.

I appreciate the opportunity to present the Association's views on the topic of verbal threshold and to share our expertise. And especially, Mr. Baker's expertise with you. After my brief remarks of the Bar Association's position on the threshold, which dates back to at least 1986, I'll turn to Mr. Baker to answer your questions and to explain the historical development of the case law in New Jersey on the verbal threshold. I think Mr. Baker has previously submitted to you materials in advance of this meeting.

For the record, the New Jersey State Bar Association has in the past opposed the verbal threshold since it's inception and it continues to do so today. Let me tell you why. We perceive it as a fundamentally unfair system to ask accident victims to give up their legal right to hold the negligent driver accountable in exchange for a premium reduction. Although, we are fully cognizant of the fact that one of the primary goals of this Committee is to obtain reductions in auto insurance premiums.

In discussing the impact of the verbal threshold in other states, a New Jersey news service spokesperson said back, 13 years ago, in 1985 that the verbal threshold did not cause rates to go down, but in those states it caused it to trail inflation. That was set forth in the *Trenton Times* on July 16, 1985.

It is clear that New Jersey consumers expect more than a vague promise that rates will stabilize, decline, or trail inflation in exchange for elimination of their legal rights. Couple this with widespread reports in the press that industry profits have soared, and with the fact that civil case filings have declined, we question why rates remain the highest in the nation, although we recognize that one of the major reasons is that we are the most densely populated state in the nation in terms of people and cars.

Let me point out here that statewide statistics from the Administrative Office of the Courts indicate that since the advent of the verbal threshold, the number of lawsuits has been falling. Civil case filings and automobile negligence cases have, since 1991, declined almost 26 percent, again, according to the Administrative Office of the Courts.

Our research indicates, that as to court cases, about two-thirds of all verbal threshold cases wind up being dismissed. In addition to these court dismissals, attorneys often reject some verbal threshold--

PRESIDENT DiFRANCESCO: Danny, two-thirds wind up being dismissed or settled?

MR. WALDMAN: Dismissed.

PRESIDENT DiFRANCESCO: Dismissed.

MR. WALDMAN: Yes, sir.

G E R A L D H. B A K E R: Two-thirds of cases in which motions have been filed -- I mean they have been selected by the carriers as being questionable under the verbal threshold somewhere in excess of 50 percent. Sixty percent to two-thirds ultimately end up being dismissed. I can discuss that in more detail.

MR. WALDMAN: In addition to these dismissals, attorneys often reject some verbal threshold cases before the initiation of a lawsuit when the client comes in the office, or there will be a settlement before a verbal threshold motion is even filed. It is also clear that approximately 88 percent of all covered motorists have, we think, unwittingly selected the verbal threshold without fully comprehending the nature of this decision.

I guess one of the good things about becoming old is that you can see the system develop -- at least I have from 1971 or 1972 to the present. I know that 10 years ago when the verbal threshold was adopted there was a lot of debate about whether it should be a knocked out system or not. The present statute gives you the verbal threshold unless you consciously opt to the contrary to take the zero dollar threshold. So the net result is we really don't know whether people are doing this for a premium reduction purpose or because they just didn't know any better. Time after time our experience has shown that litigants believe they have full coverage, only to find out what they have bought is a policy that bars access to the courts.

While the verbal threshold appears to have been effective by reducing the number of personal injury cases, it has been at the expense of consumers' legal rights. We feel that that is unfair. The verbal threshold has been unfairly credited as the mechanism for reduction in premiums. The contrary is true.

We believe that New Jersey's no-fault insurance system contributes substantially to escalating costs. That is why we support the repeal of no-fault. No-fault fosters a system where all medical bills for every person, even those who cause an accident, are paid. Without no-fault coverage, approximately 85

percent of the public would get most of their medical expenses paid by health insurance coverage. Therefore, PIP benefits may be duplicative coverage for the vast majority of accident victims. Unlimited PIP benefits may be no bargain if the trade-off is surrendering your legal rights.

The verbal threshold is extremely unfair and excludes not only people with minor injuries from recovery, but also excludes some very seriously injured people as well. Physicians will tell you that many soft-tissue injuries, such as disk injuries to the neck or back or internal derangement of a knee, are more debilitating than fractures. In addition, people who suffer permanent injuries or disability or permanent loss of a bodily function have suffered injuries that will be with them for the rest of their lives. These accident victims should not be precluded from seeking damages.

We are not talking about treatment for suit, we are talking about treatment to heal, to make a person whole again. But to be sure, you must understand that the verbal threshold, as it exists now, is indeed a creature of statute. Our appellate courts, in interpreting the statute, have required that an injured person demonstrate a serious impact from injury upon his life and that the injury must be objectively demonstrated by physicians. Hence, there is a need frequently in the verbal threshold to have diagnostic tests undertaken to establish objective manifestations of injury. There is no evil in ascertaining objective manifestation of injury, the law mandates same by the court made cases. That is not treatment for suit, rather treatment for suit is overtreating when no treatment is necessary.

Thank you, Mr. Chairman for this opportunity. The State Bar Association appreciates this time to come before you today. We are committed

to working with this Committee, the Legislature, and the Governor on the issues. Let me now turn over to Mr. Baker to provide you with his comments and analysis on the development of the verbal threshold.

I thank you.

SPEAKER COLLINS: Before Mr. Baker starts, Mr. Waldman, let me ask you just two questions.

MR. WALDMAN: Yes, sir.

SPEAKER COLLINS: One, you said that 88 percent of the citizens choose the verbal threshold, you don't know why -- we're not here to determine why -- but then you said not knowing that it bars them from the court system. Is that an accurate statement? Are they barred from the court system?

MR. WALDMAN: Well, I think, barring in the sense that some people who have the verbal because they didn't opt out--

SPEAKER COLLINS: Right.

MR. WALDMAN: --and accordingly do not have the zero dollar threshold--

SPEAKER COLLINS: Right.

MR. WALDMAN: --obviously will have accidents and some of those accidents will result in injuries which would readily have been brought under a zero dollar threshold, but which will be indeed barred, as we know through the developing case law, if one has the verbal threshold. So to that extent that those consumers have not made an intelligent choice, yes, there is a barring.

SPEAKER COLLINS: But they are not barred. They can still go to court and have determined if they fall into the various loopholes, as some call it, of the verbal system.

MR. WALDMAN: You are correct that they are not barred from suit. As we say, it's only \$165 to file a complaint; whether that person can prevail or not is very much open to question.

SPEAKER COLLINS: Well, that's after they go.

The second question: you say that 85 percent of the people, if we got rid of no-fault, would still be covered through their health insurer. A quick calculation, 15 percent wouldn't be -- 15 percent of roughly 8 million people I think is 1.2 million, which is the number we heard a lot with regard to charity care in our recent actions there.

Is that where those 15 percent would be picked up to have their medical bills paid, in charity care, or who would take care of those citizens who are injured and need medical assistance, how do they get taken care of under your plan?

MR. WALDMAN: You're asking me as to those people who do not have health insurance?

SPEAKER COLLINS: Right, the 15 percent who do not have health insurance. You said 85 percent do.

MR. WALDMAN: Through the tort system, primarily.

SPEAKER COLLINS: So they wouldn't fall under "charity care." They would go through the system that many other states have.

MR. WALDMAN: As we had before 1972.

SPEAKER COLLINS: And if it's ruled, they're ruled that their medical bills are not to be paid because then -- they don't have health coverage. Who then pays for them?

MR. WALDMAN: If there is no tort action?

SPEAKER COLLINS: Right, or if the tort action takes place and they are found to not be someone who deserves to have medical dollars paid to them, what happens to them?

MR. WALDMAN: Well, I think we have to then deal with catastrophic funds, Medicare -- things of that nature -- Medicaid.

PRESIDENT DiFRANCESCO: I'm going to step out for a few minutes, so if I could just jump ahead of you for a minute.

Well, the other 15 percent, I assume, would buy auto insurance that would include health benefits. Would you recommend that to somebody?

MR. WALDMAN: Absolutely.

PRESIDENT DiFRANCESCO: From your standpoint, you talked about the threshold and how it restricts people from suing for legitimate injuries for pain and suffering. From your standpoint then, we should have no threshold. Philosophically you believe -- your organization -- that we should have no threshold.

MR. WALDMAN: Yes, but also for another reason other than what I stated. I really believe that the present system with the state of the verbal threshold -- if I could say it that way -- is fueling the medical. I think that very well intentioned injured people are pursuing, through their physician, diagnostic tests -- not in a wrong sense because the courts, in interpreting the

verbal threshold statute, mandate a certain burden that they have to overcome to proceed with their claims, and it can't be done without diagnostics.

So if you take out the verbal threshold, you don't have this fueling of medical, and I think you will see tremendous -- millions, billions of dollars -- savings if you don't have to fuel medical. That's what's happening now, and not in an evil sense necessarily. There is a lot of fraud out there, but not the well-intentioned injured person who has got to meet a burden of proof in a verbal threshold case mandated by court decisions.

MR. BAKER: Recognize it was the Legislature -- and this is what I hoped that we would get a chance to talk about -- it was the Legislature who created the threshold; it's not a medical threshold, it was in our statute.

PRESIDENT DiFRANCESCO: Right.

MR. BAKER: You commented earlier about the target and how the monetary threshold used to be a target. If you remove the target, if you remove the threshold, then there is nothing that you have to meet.

PRESIDENT DiFRANCESCO: Well, are you advocating that, Gerry? That's what I'm asking. Are you advocating no threshold?

MR. BAKER: Advocating the repeal of the verbal threshold.

PRESIDENT DiFRANCESCO: Is there no verbal threshold that you could -- in your mind -- create that we could accept. Is there any verbal threshold that you could support? Any?

MR. BAKER: No.

PRESIDENT DiFRANCESCO: The weakest possible verbal threshold that you could ever imagine, could you support it?

MR. BAKER: It still would be something to shoot for. The old monetary threshold of \$200, which was insignificant, was something to shoot for. If it's so low that anyone who has an injury can meet it, then what's the purpose of having it? How would you define it, someone who has a minor bump or bruise? At some point it doesn't make sense to define it. What will happen in reality is that people won't bring claims on things that are not significant. Lawyers today are not going to go out and take a minor case that we are already used to rejecting under the verbal threshold because it's not going to be worth anyone's time because there is a certain value to the case.

PRESIDENT DiFRANCESCO: I don't really know, Gerry, if that's true or not. I'm not in that practice and so, therefore, I don't know. Certainly in worker's compensation, there are a lot of minor cases when-- If a lawyer can go to worker's comp court that day and have 15 minor cases, he can make a buck.

MR. BAKER: But you can't have 15 liability cases and go to court on one day. It doesn't work that way. The cases have to be put into suit, you've got to do your discovery, you've got to get your medical exams--

PRESIDENT DiFRANCESCO: I would submit to you there are a lot of lawyers out there who will start lawsuits with very minimal medical expenses.

MR. BAKER: Not that minimal. The reality of the system is that if you get rid of the threshold, the smallest claims -- those that are currently defined as minor under our current system -- are still not going to be brought.

PRESIDENT DiFRANCESCO: I don't believe that.

MR. BAKER: And the carriers will settle a lot of them quickly because you don't have that verbal threshold to keep them in the court system for the next two years.

PRESIDENT DiFRANCESCO: I just think that it's irresponsible for you two to suggest that there is no threshold -- under no means -- that your organizations could support.

MR. BAKER: Let's not call it irresponsible. Help me to think of something.

PRESIDENT DiFRANCESCO: Me?

MR. BAKER: I have 51 statutes.

PRESIDENT DiFRANCESCO: You work with it every day, Gerry. Both of you work with it every day. You should be able to think of something. We are asking for your input to tell us how to improve this system.

MR. BAKER: Type A.

PRESIDENT DiFRANCESCO: Improve means cutting out some of the costs.

MR. BAKER: Type A.

PRESIDENT DiFRANCESCO: What?

MR. BAKER: Type A, significant limitation of use of a body function. Get rid of all the other types. There you go. There's your most minimum of restrictions under our current system which the Legislature adopted in 1988 for application in 1989.

Type A, you have it in your bill. Does that satisfy you? I'm not even advocating that.

PRESIDENT DiFRANCESCO: I don't know what satisfies me today. I just think that I don't know that I can agree, although I know you have a lot more experience than I with respect to the statute. There won't be small suits based upon small amounts of medical bills and, therefore, a lot more litigation. Therefore, I would hope that your organizations -- and I am sorry I said irresponsible -- that your organizations could come up with something to help us frame a threshold that you think would help keep down the costs. I understand today the costs-- You're suggesting this threshold is very difficult and that is working in that respect, except for what you just said about fueling the cost of diagnosing tests.

If there is some way that you can help us frame a threshold that would eliminate those small lawsuits--

MR. BAKER: I think I could probably work my way through the organization with a significant limitation of use of body function as Type A being the only acceptable threshold. The reality is it's still our position that whatever the threshold is it creates a target. Now we are going to be out there trying to show that any injury was significant.

There is plenty of case law in existence that says minor or insignificant injuries are not sufficient to meet Type A under the verbal threshold. If that's where your mind is going, if that would help the Committee, that is something we could work on.

PRESIDENT DiFRANCESCO: Well, no. Not your position, but the position of the legal community seems to be that we should abolish no-fault.

MR. BAKER: But because no one has said to us before, until right now, can you think of something that would be just a minor limitation. I just thought of one for you. Significant limitation and use of a body function.

PRESIDENT DiFRANCESCO: Because if we abolish no-fault, there has to be some limitation on lawsuits -- I believe so anyway.

MR. BAKER: I think I could probably swing that through the various organizations. I've been doing this, as you have, for 15 years.

PRESIDENT DiFRANCESCO: See, I knew. I had confidence in you. I knew that you would come up with something quick.

MR. WALDMAN: Could I make one point?

PRESIDENT DiFRANCESCO: Yes.

MR. WALDMAN: It's been something that has distressed me over the past decade. When no-fault came in 1972, my recollection was-- The trade-off was that we were going to get rid of the small lawsuits, the sprains, strains, scrapes, and tears. What has happened -- in which I think is a real stressor to a lot of people that suffer injury -- is that as time has gone by, injuries such as -- and let me just use two examples -- disk injuries or internal derangement of a knee, where you have some orthoscopic surgery -- those are being looked upon by the courts as soft-tissue cases because they are not fractures, they are not disfigurements, etc., under the verbal threshold statute. Those are serious injuries.

It's that type of a situation which causes us alarm. So, when you say to us can we make a better threshold type statute, we would be glad to work on it, but we feel that there are a lot of injuries now, for example, that are within the verbal that are getting knocked out, that are being treated as verbal

threshold cases which were never intended to such as derangements of knees, disk injuries in the neck and back. It's that type of a problem.

We want to work with you. We have no other end other than to do that and have a good result here.

MR. BAKER: If I may, the purpose of my coming here was to try to explain to you what the current case law is in New Jersey because I think you have been given misconceptions. I have heard and read the testimony from several witnesses who said that the New Jersey court system has emasculated the verbal threshold and created something which you did not intend. I don't believe that is the case.

My purpose for coming here was to give you a brief review of the development of the case law so that you could see what, in reality with real cases -- because I cited to you and passed out to you -- that there are 28 cases that have been decided in the State of New Jersey to date that deal with verbal threshold compliance. That's the entire body of our case law. If you read those 28 cases, which you don't have to do because I am going to tell you briefly about them, you will see just what the courts are doing with real cases.

It's all facts specific because the language that is used, which is what the Legislature needs to do, is general enough to give the court guidelines, and then we expect the courts to look at the facts of an individual case and make a determination as to whether someone needs the verbal threshold.

SPEAKER COLLINS: Gerry, just before you get started, a couple of things. One, we have Assemblyman Garrett who wants to ask a question -- Senator Adler does. But before I call on Assemblyman Garrett, let me just-- The discussion that you just had with the Senate President and then when you

said that surely you think you could come up with a minor injury and you went on -- we very much appreciate that. That's the kind of dialogue and give-and-take we want.

Many have made assumptions from the beginning and I know I speak for the Senate President, and the two of us have talked about this many times, that where this Committee may be going-- The fear of being misquoted, or at least taken out of context, the two Chairs do not know where this Committee is going to be going. The reason for this is because once and for all -- at least temporarily once and for all -- we want to do something that will move us off the so-called dime that has been argued for more than two decades. So minor might not be the keyword, maybe expand minor, but whatever it's determined in your mind.

Secondarily is that as we look at all of this, we are going to do something. What we want to do -- and I know I speak for every member -- wherever some may assume they are already lined up -- is to do what is correct. That's the whole purpose of these discussions. Rightly or wrongly in what we ask you and other testifiers when they have come before us is help us and then we will make a decision, and we'll live with it and so will you.

Having said that, Assemblyman Garrett.

MR. BAKER: Please recognize, as you did with the representatives from State Farm, this is not the official position of the New Jersey State Bar Association, and to the degree that we had that discourse, it was a hope that maybe we can have discussions for the future.

SPEAKER COLLINS: Let me just say, not to be misunderstood here. The State Bar is very, very important. State Farm, the AAA, and all of

the others that we started with this particular Committee, let alone the chairpeople of insurance committees of years passed, have dealt with literally hundreds of other testifiers. All of them are being evaluated and their information gleamed on what they are saying and not, very honestly, what groups they represent. We'll deal with that battle once a bill is formulated and we go forward. But, thank you.

Assemblyman Garrett.

ASSEMBLYMAN GARRETT: Thank you. I look forward to your comments later on about your summary. I respect your positions, and I rely on some of your publications in the past in my office.

MR. BAKER: Thank you, even though you don't normally agree with me. But that's okay.

ASSEMBLYMAN GARRETT: I still rely on your publications.

Just a couple of things on, first, some facts that you stated. You stated, I guess, as your fact as far as what would happen under your scenario, that 85 percent of the population would be able to look to their health carriers for coverage. My question is how do you arrive at that 85 percent figure?

MR. WALDMAN: The 85 percent--

MR. BAKER: I don't think the State Bar, if I may, has the study. This is information that has essentially been presented before this Committee over a long period of time. I remember, Senator Cardinale, you and I had this debate years ago when we were talking about how much the proper limit of coverage should be. The statistics that were available at that time is that if you set med pay at \$10,000 to \$15,000, you would cover 85 percent of the medical claims.

ASSEMBLYMAN GARRETT: Okay, I was hearing it another way. The way I was hearing it was that if we did away with the PIP portion and if they had a med pay or even if it didn't have a med pay--

MR. BAKER: State Bar's position is that there has to be some form of a med pay, I think it was either \$10,000 or \$15,000, and that would cover the majority of the medical bills as a result of a motor vehicle accident.

ASSEMBLYMAN GARRETT: I think the Speaker may have taken it the same way I did because he came up with that 15 percent not having insurance. This goes back to a question that was here the other day that others have raised and I've raised about, for the percentage of the population *A*, that doesn't have insurance -- you're suggesting that it's 15 percent -- or *B*, the population that is self-insured or in ERISA plans, would not have any insurance. We've covered this before and that was the question to previous people who have testified as to what did those people do. There is a growing segment on the market that is in the ERISA plans that we would not be able to regulate.

MR. BAKER: But they would have the med pay provision which would cover most of their medical bills. Anything beyond that would be part of the tort claim. Anything that is not covered in their tort claim will have to be handled however they would handle it.

ASSEMBLYMAN GARRETT: I always rely on Senator Cardinale, who I see always brings up the good examples, but one of the testimonies was that this 40 percent of all the auto accidents they said was single-vehicle accidents. That sounds like a high number to me.

MR. BAKER: I've never seen such a study.

ASSEMBLYMAN GARRETT: Yes, I think it was somebody from the Chiropractors that gave the number.

MR. BAKER: The Senator's fine example is what happens if you run into a tree?

ASSEMBLYMAN GARRETT: Right.

MR. BAKER: You can't sue the tree. Well, that's not exactly true either because you may be able to sue a property owner. The bottom line is that you can't sue a tree, but I really would have to see statistics. I really don't have more than a casual or occasional rare case involving a single-vehicle accident.

ASSEMBLYMAN GARRETT: The last question goes to what you were saying as far as the minor injury accidents, if we did away with the no-fault. Am I hearing you correctly on this point that if we do away with the no-fault -- excuse me, verbal threshold -- that the minor claims which are now trying to be built up in order to reach that target, whether it's a monetary target or whether we have a verbal threshold target-- What's going to happen to those cases once we get rid of that target for them to aim at?

MR. BAKER: I don't think that you have to assume that every single motor vehicle accident is going to sue. If they are small cases they're just not going to be processed.

You're a practicing attorney and you do personal injury work. The reality is, if somebody comes in with a soft-tissue sprain and has been to the doctor a couple of time -- just like you do today -- you'll look at the case and say, "You don't meet the verbal threshold. I'm not going to take your case." So are you going to take that case if there is no verbal threshold?

The reality is that you may be able to bring it, but it doesn't have any real value, so you're going to reject it anyway; otherwise, you're going to bog your practice down and you won't have time to do the things that are necessary. So the reality is, unless the case has some significant value, nobody is going to take it.

ASSEMBLYMAN GARRETT: So isn't the position that with having a target there that what happens is that the attorney has to take that minor case and work up to that target? That's the allegation, that the attorney has to build up a case in order to meet the verbal threshold.

MR. BAKER: First of all, you're assuming that the attorney is the one who does the diagnostic treatment. It's the doctor who does it. The attorney just works with the evidence that we're given. The reality is that someone comes into my office and they have a soft-tissue injury, they have been to the doctor a few times, there is no diagnostic conformation of an objective injury, which is not my business-- I don't treat, I'm just the attorney. They come to me, and I don't have sufficient facts to meet the verbal threshold, as I will explain if you want me to, the reality is that we are going to reject a case. That's one of the values. We just don't even take them anymore. Why bother to take it. So if there is no verbal threshold, why would my judgement be any different? I can bring the case, sure, but so what, what's the case worth? Unless I have some significant medical treatment, some diagnostic objective evidence that there is an underlying injury of some significant value, we are just going to use the same standard of judgement we use today, and we're going to reject the case.

ASSEMBLYMAN GARRETT: Doesn't that run counter to your argument, by having a verbal threshold or having a target, what is going on out there is that people are building up the claims?

MR. BAKER: That's not my argument. I believe the use of diagnostic testing has a variety of purposes. One is that doctors use them in order to treat their patients. I mean, we didn't have CAT scans and MRIs that were sophisticated in 1989 when the verbal threshold statute was passed.

I bet a lot that if you had an injury today -- because I hurt my knee in a nonmotor vehicle accident, and my doctor said, "You know, I think you have a tear and you need surgery, I can make that judgement, but I could verify it with an MRI. What do you want to do?" I said I want the MRI. The reality today is that people want the medical treatment because it's the best medical treatment, it's the best thing that's available.

So you go ahead, and most diagnostics, in my opinion, are used by doctors as part of the sound medical care that they are giving to their patients. Even things like the grip test that Tony LoCastro talked about is very important. I know what a Metrecom is because I've been practicing long after the witness from State Farm. It happens to be sophisticated diagnostic testing which lets you know just how much loss of motion a patient has. That's important for a doctor to know. It's also important to the insurance companies to know, because when they negotiate with us, they want to know what the person's injuries are.

ASSEMBLYMAN GARRETT: So the argument that we are spending more than we need to on treatment goes to the issue of having a no-fault system that allows those payments to be made, not because we have a

verbal threshold that the doctor or the attorney is trying to reach. The argument that the doctor said we'll give you that extra treatment -- we'll give you that extra test -- in order to make that diagnosis that has nothing to do with having the verbal threshold. That goes to the argument of having a no-fault system that pays that medical bill that the doctor knows he is going to be paid for.

MR. BAKER: It can have more than one relationship. I think it relates to both of them.

ASSEMBLYMAN GARRETT: How does it relate to the verbal threshold?

MR. BAKER: It relates to the verbal threshold because you created a statute that requires objective medical proof in order to meet it. I can't tell you whether someone has a permanent limitation of use of a body function based solely upon a physical examination and observation by a physician.

The courts require and the insurance industry requires objective evidence, even the Michigan threshold, which if you read it carefully defines serious impairment as an objective manifestation. So if you give me that legal standard to meet, which is not something that doctors necessarily need, then I have to go out and find a way to do it. I need to come up with objective evidence because you've required it, otherwise I can't prove my case.

How do I get objective evidence? You say I need to have more than the doctor's examination. So I need to have some test that is going to show me what the underlying condition is. I need a CAT scan, I need an MRI, I need an EMG, I need a grip test, I need a Metrecom so that I have

documented objective proof of injury. If I can't get that proof, I'm not going to take the case or the courts are going to throw it out as we see they routinely do in more than 50 percent of the cases.

So it's a combination. You've created a standard that I need the testing to meet, and then you criticize us for going out and getting the testing. How else am I going to meet this legislative standard? If you get rid of the standard, then I don't need the objective test to meet it. Then the only reason to have the diagnostic testing is if the doctor needs it for the treatment of the patient.

ASSEMBLYMAN GARRETT: So the claims will still be made, but they won't enter into suit, they will just go through the carrier directly.

MR. BAKER: No. I'm suggesting to you that many of the cases that lawyers are not taking today because they don't meet the verbal threshold they still won't take. The value isn't sufficient even though you permit them to bring it. They are going to use the same judgement. They are going to say the doctor's report is weak, there isn't any backup diagnostic testing, I'm not going to bother even to handle your case.

If they have the diagnostic backup and the lawyer wants to take the case, then the probability is that you have sufficient evidence to meet the verbal threshold. My judgement in my office is not going to change whether you give me a threshold or not as to whether I'm going to take the case. I'm going to reject exactly the same cases or take exactly the same cases.

Please recognize that I don't order tests, the doctors do. I just take the evidence that is given to us, and based upon that I make a judgement as to whether or not I meet the standard that you have.

Were you in office in '89? You voted--

ASSEMBLYMAN GARRETT: No.

MR. BAKER: No. Okay, that was voted for in 1989. I have to live with it.

ASSEMBLYMAN GARRETT: I take no credit.

MR. BAKER: Please don't object that I, then, have to go out and get the testing to meet the standard. I mean, that's a catch-22. If you create the standard, then I have to go and meet it.

SENATOR BENNETT: Senator Adler.

SENATOR ADLER: Gentlemen, we have been hearing testimony from various sides that some doctors are biased and some medical providers are biased in favor of giving excessive and unnecessary treatment. I think we have heard a little bit of testimony on the other side that some doctors are very prone to find no injury even in the case of death. We've heard lawyers, and Senator Cardinale is very good at pointing out there are a lot of lawyers that are not so scrupulous, certainly not the high level of the two of you.

I guess I am having trouble intuitively understanding the notion that we would not have more lawsuits from the sleazy lawyers if we got rid of the verbal threshold or got rid of no-fault. That we wouldn't have a lot more bogus claims and nuisance claims that end up soaking up a lot of dollars and any saving we might realize from eliminating the verbal threshold and therefore reducing the necessity of this diagnostic testing. Any savings would be more than offset by additional costs of more payouts from these bogus claims that right now are getting screened pretty effectively. We've got good

statistics that show that the number of actual of filings in court has really leveled off over the course of the last 10 years.

MR. BAKER: There would be more.

SENATOR ADLER: Give me some comfort in terms of how overall we could save money rather than watch an explosion of new costs in the system.

MR. BAKER: There would be more claims, but they would be smaller claims because the averages would go down. If they were bogus under the verbal threshold, they are still bogus, and all the carriers have to do is just refuse to pay on them.

SENATOR ADLER: But you know that they wouldn't. They would pay a nuisance value just to get rid of a lot of these claims. They pay \$4000, \$5000, or \$10,000--

MR. BAKER: Well, \$4000, \$5000, or \$10,000 is not nuisance value. I don't think lawyers are going to take a \$4000 or \$5000 case with a nuisance value. They get a \$1000 fee, and the time they have to spend investigating, even just paying for doctors' reports, is a fortune because there is no regulation, with respect-- You have to document your case. In order to make it worth some money, there is going to have to be diagnostic testing or some objective evidence of injury, some loss of income, or some loss of -- whatever is in order to make the claim worth while.

But the reality is, yes, there will be a certain number of smaller claims that will come back into the system. Overall I believe the savings to the system will be more than enough to allow us to reduce the cost of automobile insurance.

MR. WALDMAN: From a practical point of view, it would seem to me that the smaller claims are just going to remain that and not be put into suit if a lawyer takes one or two, or however many it is. The practicality is that I'm not going to put a small claim into suit in this day and age where I have to, perhaps, go to trial two to two and a half years from now and pay a doctor \$2500 to \$4000 or \$5000 to come in and testify on a small claim. There is no way to recoup that. You'd have to assess it as a cost to the client, the client's claim would become worthless.

So I don't really see a proliferation of lawsuits. I see, as Gerry suggests, there will be a few more claims in the system but small claims resolved at a pre-suit level.

SENATOR ADLER: I guess intuitively I don't see that the same way. I think there would be a lot more claims, and it would not be your level of lawyers of doing it, but the other level, that Senator Cardinale effectively pointed out, will be bringing in a lot of these claims.

MR. BAKER: So somebody brings 20 claims, 50 claims, 100 claims that are \$5000 cases, and the carrier denies coverage on them or denies payment on them or offers them a few thousand bucks; these guys ultimately, over the course of a year or two, are not going to be making enough money to be able to continue to handle those kinds of cases.

What's going to happen is that it's going to be uneconomical. Remember, for whatever the arguments are with respect to contingent fees, the lawyer only gets paid if he wins the case, he only gets paid a percentage of what he recovers. There is no value to handling dozens or hundreds of -- what you call -- bogus cases in which you may get nothing out of it.

The carriers have the ultimate recourse: If they find that there is a lawyer or a group of people who are bringing a lot of claims that are of no significance, deny payment on them and make them go to court.

SENATOR ADLER: I think your testimony has been to the contrary. I think Senator Cardinale has been pretty good in pointing out that the V and K folks were winning arbitrations.

MR. BAKER: I don't know the statistics.

SENATOR ADLER: I suspect their so-called patients were winning claims in court, or settlements, and making a lot of money in the process before the system finally worked. It took a long time to work.

MR. BAKER: There wasn't-- When there was proof sufficient to show that they were engaged in fraudulent practices, then that proof was presented in the correct forum, whether it was before the arbitrators or the courts, then they were denied payment.

We're being like Monday-morning quarterbacks by looking back and saying, well, now we know they were engaged in fraudulent practices. What the folks from the AAA had to say was the arbitrators can only go on the evidence that was presented to them at the time of arbitration. And unless I saw all of those cases--

I mean, Mr. LoCastro comes in, he is testifying that he has made an entire case based upon one bad group of doctors. But until that evidence was available-- Presumably the evidence that was presented to the arbitrators up to that point in time was sufficient to justify payment. But we are only hearing stories. We don't have the cases in front of us so we could look at them and find out what went on before the arbitrators.

SENATOR ADLER: What we do know is that there has been reduction of case filings, and that's probably reduced the cost of the system in some way.

MR. BAKER: There has been a reduction--

SENATOR ADLER: What we're struggling with is trying to find out empirically how we are to save money in the system, and you're asking us really to take a leap of faith, to get rid of a verbal threshold, which certainly has effected the number of case filings in the court system.

MR. BAKER: We're suggesting that the overall savings will be more than the increased cost of adding some smaller cases back into the system, which ultimately will reduce the overall average. But I don't think anyone knows the answer to that.

Our real point of view, with respect to the verbal threshold, is it unjust to take away the rights to sue of people who are legitimately injured in accidents. We are not talking about the bogus claims, we're talking about all the people -- and I have cases. We have a list of 400 unpublished Appellate Division opinions of all of your constituents, a certain number of 250 of whom have been denied the right to bring soft-tissue claims because the court felt that they didn't meet the verbal threshold. These are real people whose rights have been taken away because they have the verbal threshold. Those are the ones that we're really most concerned about.

So it's more the philosophical basis that we oppose of the verbal threshold because it protects -- takes away people's rights, for who? Who's it protecting? The careless driver? The careless driver couldn't care less, his insurance company is paying for it. So people who cause accidents are not

being held responsible in order to increase the profits of the insurance industry and perhaps bring down costs for some amount of money which has not yet been documented to us. It's a trade-off.

SENATOR BENNETT: I got a whole list, Joe. I'm sorry, there are six people ahead of you.

SENATOR KYRILLOS: Just a quick clarifying point in response to Senator Adler's question.

The claims would be lower in your view, why? More claims but--

MR. BAKER: These are going to be the cases that haven't met the verbal threshold.

SENATOR KYRILLOS: Because they don't have to meet threshold standards, is that what you're saying?

MR. BAKER: Yes. The verbal threshold cases if they are worth this much (indicating), then the cases that don't meet the verbal threshold are worth this much (indicating). Which is one of the reasons why most lawyers aren't going to want them and most people aren't going to want to bring them.

SENATOR BENNETT: Senator Adler, are you finished then?
(affirmative response)

Senator Cardinale and then Assemblywoman Farragher.

SENATOR CARDINALE: Thank you. I want to go back to the point that you make about objective medical proof being necessary and, therefore, running of PIP costs. I realize that there are diagnostic tests that are necessary for medical treatment, but you had made the point that you go beyond that in order to have what you need for the next portion of the case.

Now, I was here when we did the verbal threshold. It was never anticipated by the Legislature that PIP was going to be used to finance going beyond what was necessary for medical care. There are two aspects, apparently, of what is going on in PIP according to your testimony.

I don't think anybody at this table wants to limit treatment that is necessary to make people whole after an automobile accident. I think some, at least one person, object to the fact that PIP is being used to finance the underpinnings of the lawsuit for bodily injury. Tell me why I'm wrong.

MR. BAKER: Because in most circumstances the treatment that you are talking about, which is being ordered by treating doctors, is being utilized for their diagnostic purposes. What the court said in *Allstate vs. Thermographic Diagnostics* is that the judgement as to whether or not a test, such as a thermogram, should be utilized is within the subjective determination of the treating physician. It is the doctors who are making the decision that they want to use the MRI, that they want to order a thermogram, if that be it, that they want to get the Metrecom so that they can have a baseline measure, which you are familiar with. They want to know what the range of motion of their patient is. They want to have it documented in their files because that's the way sound medical practice is accomplished.

If, in addition to that, it happens to provide the objective evidence that allows us to meet the verbal threshold, then it serves the patient's legal rights as well as their medical care. But I can't think of anything that will take away the use of testing and medical treatment and medical reports to meet a threshold if there is one. As long as you have one, you have to have objective proof to meet it.

SENATOR CARDINALE: A moment ago you heard the people from-- Let's distinguish between scientific and legal. You heard Pru say that they have claims all over the country and that these particular diagnostic tests, to which they object, are not found in other states. That would seem to belie the fact that these tests are necessary for medicine because I don't think we have different kinds of species of human in other states. We're all pretty much the same. If we came up with a system which said you can't use PIP tests, tests paid for by PIP, to go into court, you have to do the same thing you would need in a trip and fall or some other kind of case. How would your Association react to that?

MR. BAKER: It seems to me that you're overreacting to something that's been created. If that's your problem, then get rid of the threshold. You're going through mechanisms. You're trying to change its shape and say, well, it's there, but it's not there.

SENATOR CARDINALE: Let me tell you why I don't want to get rid of the threshold, all right, and it's based on numbers. It's not based on opinion or anything else. It's based on numbers.

New Jersey Manufacturers, verbal threshold, \$294; zero threshold, \$503. Allstate, verbal threshold, \$204; zero threshold, \$691. Prudential, verbal threshold, \$252; zero threshold, \$918. It seems to me -- and I have some more, but-- It seems to me that once we go to a zero threshold -- for that aspect of the policy, the bodily injury liability aspect of the policy -- we run up a substantial additional cost for the zero threshold.

Now, if you eliminate PIP, which is part of the program that your Association is suggesting, there is a saving. But you're coming back with

\$10,000 or \$15,000 of med pay. My staff has indicated -- my Committee Staff -- has indicated that that saves -- the difference between the two is about \$10. So now if you are somebody who is insured by Prudential, you're going to save \$10 by the exchange of a \$15,000 -- and that's based on \$15,000; our numbers are based on \$15,000-- You're going to save \$10 on the one side of the policy, and you're going to pay about \$650 on the other side of the policy.

If I go back to my constituents and say I did you this wonderful service, and it's only going to cost you another \$600 a year for your insurance, they would be right to run me out of town.

Tell me why that scenario is wrong, because we have-- You see, your Association has made a real attempt to paint comparisons that are not -- they're comparing, frankly, oranges with apples -- pineapples -- because they're very, very different. We are not the same as any other state in terms of the kind of verbal threshold we have, in terms of the kind of road miles, in terms of a myriad of variables. But we are the same as New Jersey.

And so if we compare the zero threshold in New Jersey, which is what you say everyone should have, it seems to me that 88 percent of the people who are currently covered by the verbal threshold, as imperfect as that verbal threshold is, are going to be paying more money, not less. And tell me why that's not so.

MR. BAKER: You know we've changed positions completely over four years, because the last time we were here, I was advocating retaining PIP, and you were advocating reducing it to \$15,000, but that's what happens as the system changes. That's interesting.

SENATOR CARDINALE: I learned that that didn't save any money, so I abandoned that position.

MR. BAKER: The State Bar has not done an actuarial study. We didn't come here to testify on the basis of an actuarial study. Other groups have. They have given you the data. I have no data to give you. I can't answer any more specifically than that. We will take whatever legislation is proposed and review it and give an opinion back. We do not have the cost data. We rely upon the data that is produced by other people, and it is our view that the elimination of the verbal threshold, the repeal of no-fault, primarily the elimination of the \$250,000 worth of medical coverage through our auto insurance system, which is health insurance, the elimination of thousands of verbal threshold cases, which clog the courthouse, the elimination of 15,000 PIP arbitrations, which they testified to what amount to 20,000 PIP arbitrations are all part of the costs of the system -- that when you take those costs out of the system, and hopefully bring it into conjunction with other cost saving factors such as reducing the number of accidents, highway safety, reducing the cost of auto repair in the State of New Jersey, trying to limit the number of uninsured motorists, if you put that packet -- and, of course the fraud program, which is in effect -- if you put that package together, the overall cost will go down.

SENATOR CARDINALE: Then let me--

MR. BAKER: I can't go beyond the information that I'm here to testify about, which was whether or not our verbal threshold is working to reduce claims.

SENATOR CARDINALE: Let me go at another aspect of what it is that we might do, which some of the Committee may be aware of and others may not. I don't know that you're aware of it, because you haven't been here at our hearings recently.

MR. BAKER: I've been reading. I read them all.

SENATOR CARDINALE: And we've missed you, by the way. I've always enjoyed having you at our hearings.

MR. BAKER: Thank you, Senator.

SENATOR CARDINALE: Your organization has taken a very firm position -- which I think is shared, probably, by most people -- that if a person is injured as a result of an automobile accident, they ought to be compensated, particularly they ought to be compensated if they were not the one who created the injury -- they were not the person at fault.

Now, if we could derive a system where they could be compensated just as much, on average, as they are compensated today, without any increase in premium, but with, in fact, a decrease in premium of about 25 percent to 30 percent for the mandatory coverages, and have that money get into their hands within weeks or months, rather than years, and unclog the court system, and get rid of all these arbitrations, and get rid of all the incentive to game the system, would you be supportive of that?

MR. BAKER: In theory, of course. But no one has been able to come up with such a solution, Senator.

SENATOR CARDINALE: It's a bill that was introduced in the last session of the Legislature, and it does exactly that.

MR. BAKER: We disagree. That doesn't do it. That doesn't do it at all. It's a Draconian measure that will eviscerate the rights of the people of the State of New Jersey. It does not work.

SENATOR CARDINALE: Tell me why.

MR. BAKER: Because what you're proposing is to take away people's rights to sue for pain and suffering. Whether they are at fault or not for an accident, you're giving them a choice, whereby even if they were stopped at a red light and somebody hits them at 60 miles an hour, they cannot recover for their pain and suffering.

SENATOR CARDINALE: That's not the bill that I'm referring to.

MR. BAKER: Which one are you referring to?

SENATOR CARDINALE: I'm referring to making pain and suffering first-party coverage so that regardless of fault, you recover pain and suffering. I'm not talking about the Governor's No. 1 Choice. I think that's the one you're referring to. I'm referring to an entirely different proposal, where you would do a closed-claim study, find out what's actually happening today in the various types of injuries, put that on a schedule, and automatically pay both parties in the accident, fault or no-fault. I'm talking about true no-fault, which we've never had in New Jersey.

We've had one hearing in this Legislature on that bill. A major insurance company said they could live with the 30 percent reduction in the mandatory coverages with that bill in effect because of the costs it takes out of the system. And you're very right. There are major costs in the system that have nothing to do with compensating the injured party. They have to do with

the process. If you take those transaction costs out of the system, you can save immense amounts of money.

But it's at a cost, and the cost is to your organization, and the cost is to others -- and I don't mean to say that your organization is gaming the system, but there are others who definitely are gaming the system, and those people would be shut out. No one is denied medical care. No one is denied compensation for their injuries.

What's wrong with that system?

MR. BAKER: It's a drain. That's what's wrong with that system. It doesn't-- No one has--

Of course, recognize, please, I came here to talk about a bill -- a verbal threshold and the applicability, whether today's verbal threshold is adequate, and we're now talking about some bill that's not before us that's-- It would be wonderful if it worked. But no one has yet shown us that you can even come up with some sort of a study that it's going to tell everybody who is involved in an accident that your case is worth *X* dollars.

If, in fact, we were capable of doing that, then we wouldn't have the negotiations that we have today. Because Allstate or State Farm or Prudential could simply look at the file and say, "Oh, you have such and such an injury. We know your case is worth *X* dollars." And the plaintiffs' lawyers and everybody would know that. But it doesn't happen that way, because every case is an individual case, and we all have differences of opinion. I have some differences of opinion when people come in and present a case to you and say, "Oh, this person shouldn't have been awarded *X* dollars." And you say, "Oh, let us know who the medical practitioners and the attorneys are."

Well, I would like you to hear who the plaintiff was, who was injured in that case, and find out from her. You sit as the jury and listen to her testimony, because she testified before the arbitrator who gave her the award.

You know, I'd be happy to-- I don't know what to say to you. I'll be happy to review the bill with you, you know.

SENATOR CARDINALE: I would just like you to understand-- Okay, I understand, maybe it's unfair. You are unfamiliar with the bill. But the bill has been evaluated by the Department of Insurance. They have indicated that these savings are possible. The bill has been reviewed by State Farm Insurance, who testified before our Committee that it would work, but that's a discussion, probably, for another day.

MR. BAKER: If that's the panacea, then why don't you just give it to everybody, and we can all go home then. Everyone will agree, this is the answer and what are we here for. I don't-- I really doubt--

SENATOR CARDINALE: Because we need to get a public forum to get people to know about it. You see, you're helping to provide that public forum.

MR. BAKER: But, Senator, all you have to do is submit it to all of us and say this is the new auto insurance law, and we'll just sign on to it, but it's not that -- it can't be that easy.

SENATOR CARDINALE: Laurine, would you give him a copy of the bill.

MR. BAKER: If it was in last year, I would have it in my files, and obviously, it didn't get beyond the one hearing, so, you know, if people consider it seriously, then we'll sit down and review it.

SENATOR CARDINALE: Largely because of the-- Largely it didn't get beyond one hearing because of the opposition from your organization.

Now, you're a member of more than one organization.

MR. BAKER: No, not from the New Jersey State Bar Association. That bill was not--

SENATOR CARDINALE: No, I don't think the State Bar testified on that bill.

SENATOR BENNETT: Well, let's not get hung up on this bill from last term. We're in a new term, and we've got new ideas to be able to go forward. And I'm not saying your idea is a bad one, but we're focusing today on where we are, and I don't want to get bogged down in something that we had yesterday.

SENATOR CARDINALE: I don't intend to bog you down, Mr. Chairman. I have just one more question.

When you talk about med pay-- Med pay comes in many forms. What do you envision this med pay being? Would med pay cover only the party who was not at fault? Would it cover the party who was at fault, as well as the party not at fault? What is -- exactly what form of med pay are you advocating in place of PIP?

MR. BAKER: Med pay is exactly as it was prior to the adoption of the no-fault act. Med pay is a first-party benefit under your own policy, regardless of fault.

SENATOR CARDINALE: Okay. Since you're discussing that, do you disagree with our analysis that it saves a few dollars -- the comparison

between our current PIP, \$250,000 worth of coverage, going down to \$15,000 worth of med pay? My staff tells me it's \$10.

MR. BAKER: I argued four years ago, when you wanted to reduce it, and I said, no, that it wouldn't save all that much money, so--

SENATOR CARDINALE: I know you did. But you don't disagree. It's a minor savings.

MR. BAKER: You put it in conjunction with the elimination of the verbal threshold, the removal of verbal threshold motions, and the elimination of PIP arbitration, the bottom line is, it can save a significant amount of money.

SENATOR BENNETT: Assemblywoman Farragher.

ASSEMBLYWOMAN FARRAGHER: Thank you, Mr. Chairman.

Reference was made to the State Farm testimony, earlier, about the confusion regarding testing, and you don't have a copy of what we have. What we have is diagnostic testing that was done two months after the accident, and that was the State Farm's representative's problem. Why was it done two months-- And in reading the findings myself, anything that's listed here in the findings, some of it could be quite -- could be lifelong for the individual, or it could have happened after the accident, sometime within the two months. And his point was: you know, we're expected to probably pay for this test, and it had no value.

And, in fact, it had no value. It's a good test, and it digitizes the body and determines angles of range of motions. It is an excellent test for someone with a musculoskeletal disorder so that you can assess the progress. For example, a child who is determined to have scoliosis, you can track whether

there needs to be some serious correction done before the child gets any older. But, in this instance, it was done two months after the accident and never done at the end of treatment, so that was his point. Why was it done, basically? And it's not cheap.

And I think that some of the titles on some of the pages, for example -- I won't say the company -- it's called an impairment report. It could easily say cervical spine examination report instead. So this is keyed -- this is obviously keyed to inflame something in someone. "It's an impairment report. Oh, my God." It's impairment.

MR. BAKER: No, but that's a term of art.

ASSEMBLYWOMAN FARRAGHER: Oh, I know that.

MR. BAKER: We heard someone testify today about the AMA guidelines of physical impairment. I mean, that's what it's called.

ASSEMBLYWOMAN FARRAGHER: But I don't--

MR. BAKER: That's the purpose of it, to assess impairment.

ASSEMBLYWOMAN FARRAGHER: Sure. But I go to -- have been going to doctors for my whole life, off and on. Now that I'm of an advanced age, I go to a rheumatologist, and he does range of motion every time. It does not need to be a digitized setup.

So I guess the State Farm representative was saying that this seems to be an industry that has grown up around this, that they are taking tests that are legitimately used for other conditions and applying them in auto conditions, something that they do not see in other states.

MR. BAKER: But would it be inappropriate for your doctor, one time, to do a computerized range of motion study so he knew exactly what

your functioning was? That's all that happened here. You have someone who was injured in a motor vehicle accident and the treating doctor made a determination at one point in time, because he's going to be required to explain to the insurance company what his patient's injury is, that I would like to have a baseline study so that I know exactly what this patient's loss of function is, beyond my ability to simply say to the patient-- Everyone criticizes range of motion studies that are just subjective. "Oh, move your arm, stand up, bend down, twist your head, turn your head to the right and the left." People say, "Well, that's not very diagnostic," because it's so subjective. So one time during the course of treatment this doctor decided to do a computerized, recognized range of motion study, which no one contested was inappropriate. Metrecom is well known, and there has been no case law to say that Metrecom can't be utilized as a standard medical diagnostic test, and so the doctor did it.

And he presumably testified or wrote a report that was submitted to the PIP arbitrators that said "This, I felt, was necessary, in my subjective judgment, to determine what the range of motion of my patient was."

ASSEMBLYWOMAN FARRAGHER: That's true. What my problem with this particular case is, then he proceeded to treat her 50 more times and never did a follow-up. Do you know what I'm saying?

MR. BAKER: So what you're saying is, he should have done more testing and charged more money to the company.

ASSEMBLYWOMAN FARRAGHER: If that was-- If his intent was to determine the extent of the treatment he should be giving, he should have.

MR. BAKER: Let me tell you-- Really, what I was-- I haven't said one word yet about what I was supposed to talk about, which is the applicability of the verbal threshold, but let me tell you, the case law is clear that if all he did was a range of motion study after two months but did not evaluate range of motion at the time of discharge -- and I can cite you a specific case, *Oswin vs. Shaw*, which you've heard about before, where there was no discussion of range of motion upon discharge -- that case may not meet the verbal threshold. So you can't argue that he did that test solely to fuel, as Senator Cardinale has suggested several times, solely to fuel the verbal threshold. I think that doctor did the test because he thought it was necessary to find out, with objective testing, what his patient's range -- loss of motion was so he could decide how to continue to treat her.

And if the insurance company feels otherwise, all they have to do is bring in another doctor to testify in an opposite fashion, and they have every right to have her examined and present their own medical reports.

ASSEMBLYWOMAN FARRAGHER: Mr. Chairman, my point was, it was confusing not only to them, but to me, you know, as to why would he do it two months into -- why didn't he do it right away? Why do it two months into treatment? Why continue to treat her for many more months, and not document that, like, now the condition is cleared up.

I guess, because I'm hung up on the treat to cure thing, I would want to know that I fixed all the wrong things, if I was the doctor.

MR. BAKER: Please recognize, I think, that this shows the hazard of taking a few scattered examples, trying to look at them, and as laymen, make a determination as to what the doctor did or didn't do. That's why we

have an arbitration system, where both parties-- It's adversarial. The insurance companies have every right to hire the best lawyers that they can find and the best doctors that they can find, and they have every right under the statute to have the claimants examined, and they can then present their testimony to whatever the forum is that the Legislature gives to them.

As far as what happens in other states, Mr. LoCastro-- This may show the reason why you need to have an adversary system. Do you remember what Mr. LoCastro said? Now, he is one of the most educated and most knowledgeable people of New Jersey PIP, based upon his experience with NCIC, over many, many years. But he's only worked for Prudential for two and a half months, and I don't know what the level of his knowledge is with respect to treatment in the other 50 states, but he comes in and he makes a casual comment, "Well, we don't see this in other states." I would like to have an opportunity to cross-examine Mr. LoCastro about where the documents are. Let him submit the hundreds of thousands of claims where Prudential can prove to us that they don't use Metrecom. I dare say I can provide sufficient proof to you that Metrocoms are used across the United States, that grip tests are used across the United States, that CAT scans and MRIs are used across the United States.

That's why we have an adversarial system, so that people can't just make loose comments that aren't backed up with documents.

ASSEMBLYWOMAN FARRAGHER: Yes. Well, Mr. Baker, this was the State Farm case, and this Committee is certainly aware that anybody that's coming in to present a case is probably going to come in with the

example of the most outrageous situation that they can come up with, and that's true for every witness.

MR. BAKER: I can give you examples where the insurance companies, where NCIC has routinely, throughout the State of New Jersey, abused the PIP system by failing to pay doctors their legitimate bills. That's why you have an explosion of PIP claims. It's not because doctors are satisfied with the system. It's because, using assignments now, they have the right to go into PIP arbitration to protect their own rights when their bills aren't being paid.

NCIC created a system which the Appellate Division said was not proper, whereby they created their own flat rate to pay physical therapists, per office visit, even though it wasn't authorized under the medical fee schedule. And the Appellate Division said you can't do that. That's improper. And that's an abuse by the insurance company. You've had testimony of insurance companies that have abused the system.

The best that you can do, as legislators, is create a system that makes sense, and then the enforcement has to be left to the courts, to determine -- to weed out the abuses to the system on both sides, whether it's the insurance company or the claimants who are abusing it. And I think that's what our current system is.

And, you know, what I came here to say was -- is that I think the verbal threshold that we have in existence today, which we don't agree with but nonetheless, has been effective, because there are many cases that are, in fact, being dismissed by the courts because the plaintiff has not provided objective evidence of injury, nor have they been able to establish that there was a serious

impact on their lives, which is the standard the courts have set forth that's not even in the legislation.

So I do think our current verbal threshold has been effective. We've been on a long time, and it doesn't seem like, you know, unless you ask me questions about it-- I mean, I can give you a brief review of the case law, but I want to assure you that from our view, the court system has not emasculated the verbal threshold, that there are many cases in which claimants have had their claims dismissed because they weren't able to sufficiently provide objective evidence to meet the threshold. Those cases have been affirmed. Over two-thirds of them have been affirmed by the Appellate Division, and of those that are remanded down, most of them are settled out before they even get to trial.

So the current threshold which you have -- the nine types of injuries -- have, in fact, reduced the number of claims. Again, we think that's improper in most cases, that there are many constituents of yours whose claims should not have been eliminated from the court system, but nonetheless, that verbal threshold does work to do that.

ASSEMBLYWOMAN FARRAGHER: It wasn't my intention to keep you off track. It's just that when we have somebody who has a lot of knowledge about this, who has done a lot of work and filed a good report with us, that we like to get into discussions with witnesses such as yourself.

MR. BAKER: Well, thank you.

ASSEMBLYWOMAN FARRAGHER: Thank you, Mr. Chairman.

ASSEMBLYMAN DiGAETANO: Just for the information of the public and the Committee, the Speaker has asked the Committee Aides to

speak to those witnesses who would be coming up after this panel, and they have agreed to come back on the 4th, so this will be the final panel today.

Mr. Baker, you're doing very well today. You had me as a fan until you implied, and maybe I'm mischaracterizing what you felt, but you implied, I think, that the system is fine the way it is and it's working. I happen to like what I call the runny egg rule, those cases that jump out and say, "This is wrong." Claims Nos. 1 and 2, today, the cases that were brought to us last hearing, where there -- in one case, \$55 in damage to the vehicle, just a scuffed bumper. In another one, \$300. Today, maybe \$100, \$200, and there were thousands, tens of thousands, in some cases, hundreds of thousands of dollars paid out. The reason why I like them is because everybody agrees -- everybody, I don't care what side of the aisle you're on here -- that they're wrong. They're problems and they need to be addressed.

Taking Senator Cardinale's premise -- and this is one area in which I tend to agree with him, believe it or not -- if we do away with the verbal threshold, we will see additional suits. The critics tell us that some of those suits will be, for lack of a better term -- and I am not an attorney -- frivolous/ nuisance suits. What suggestion do you have to give to this Committee to help the Committee deal with weeding out the frivolous or nuisance suits, if the Committee decided to move away from the verbal threshold or move away from no-fault all together?

MR. BAKER: You don't have to. We already have a frivolous lawsuit statute.

ASSEMBLYMAN DiGAETANO: And your implication is that it's working?

MR. BAKER: It's available to be utilized in any case where any party feels -- any insurance company who feels that a suit that is brought is frivolous has a current statute on the books to utilize. I don't know whether they are utilizing it or not. It exists.

No one disagrees that if you can establish-- We may have a disagreement over what's frivolous. That first State Farm case today, I don't know that that's a frivolous suit. I'd like to hear from the woman who was injured as to why she didn't go to see a doctor until whatever it was -- two or three days. That doesn't surprise me, she didn't see a doctor for a couple of days after the accident.

ASSEMBLYMAN DiGAETANO: Twenty-seven days.

MR. BAKER: Twenty-seven days sounds surprising, but we haven't heard the testimony, and we don't know. If it's a frivolous suit, then we have a statute that deals with that.

ASSEMBLYMAN DiGAETANO: Well, I would tend to agree with you that we don't know the facts, except in the case that was brought to us last hearing of the scuffed bumper.

MR. BAKER: Yes, I didn't--

ASSEMBLYMAN DiGAETANO: Now, unless one of the claimants was standing between the two vehicles when that bumper got scuffed, it would be hard for me to believe that anyone sustained any significant injury.

MR. BAKER: You know what you need to have? You need to have some more information -- and it is available, not through the State Bar, but through other organizations -- on low-impact collisions. There are

videotapes. You would be surprised as to what the force of impact is on a body, even with a 10 mile an hour rear-end hit, which, if I remember the woman in Case No. 1 was a rear-end hit, but I can't recall exactly. There are studies on both sides.

But for you to really understand-- I mean, I don't understand at all. I've used some of the experts. There are engineers who could actually bring you that evidence, and it is available, and I'm sure through other organizations they'd be happy to provide you with some testimony on low-impact collisions.

ASSEMBLYMAN DiGAETANO: Let me just sum up by saying that it's your position -- and tell me if I'm mischaracterizing -- that the current system to weed out frivolous lawsuits is sufficient and this Committee need make no further address to the potential problem of a proliferation of suits which are baseless.

MR. BAKER: We need to look at the terms and you need to look at the terms of the current statute, which I didn't reread before coming in today. And you also have your new fraud statute that also deals with claims that don't have a solid foundation in fact. If you put those two together, it may be that the frivolous law statute may need a little reworking, and maybe that should be looked at.

But I do believe there is sufficient stuff on the record. And in addition to that, any insurance company who feels that a claim is not -- does not have a solid basis in fact has a very simple remedy -- say no. Don't pay it. Force the plaintiff to go to court and prove his case. That's all, and that will take care of it fast enough.

ASSEMBLYMAN DiGAETANO: Assemblyman Charles.

ASSEMBLYMAN CHARLES: Mr. Baker, we've had some testimony today and on other days about the threshold -- the verbal threshold -- how it's working, how it's not working, how the courts have interpreted it. And one of the things that's coming through is that the courts are behaving as if there is no verbal threshold, that it's a bunch of words, and that in practice it doesn't mean -- it doesn't create any kind of barrier to suit.

You said you came here prepared to discuss that issue. Would you now discuss it in summary?

MR. BAKER: Shortly, briefly, because it's been a long time.

The reality is, if you look at actual cases, there are only a limited number of cases that have been published in the Appellate Division that deal with whether or not someone meets the verbal threshold. And the cases are based in sound logic and by no means do they suggest that the courts do not consider the verbal threshold to be a legitimate bar to people's rights to make a claim.

Just a couple of brief cases in which the courts have held the plaintiff met the verbal threshold for soft tissue, which are nonfracture injuries, cited in the materials that I handed out to you: one case, *Cineas*, where four doctors found objective evidence of muscle spasm and limitation of motion; *Arencibia*, where the doctor's description of spasm and loss of motion was verified by radiologic tests -- it showed a subluxation -- and a neurological test that showed rediculopathy, which means that there was some underlying neurological problem; *Moreno*, where the doctor found muscle spasm that still existed two years after the accident, and the MRI showed a herniation of the

disk. These are actual reported cases in which plaintiffs have met the verbal threshold, and none of them, do I think, would interfere with your intent to remove minor cases or nonserious cases from the system. *Cavanaugh*, muscle spasm found by a neurologist two years after the accident that impacted upon the plaintiff's employment and on his marital relationship.

The cases where the courts have thrown the plaintiffs out and have dismissed them because the plaintiffs didn't meet the verbal threshold are cases like: *Favell*, where the plaintiff continued to work after the accident, attended college, and played basketball. The court said, "That doesn't meet the standard of a serious impairment." *Watkins*, where a physical therapist--

ASSEMBLYMAN CHARLES: Excuse me. Let me interrupt you for a second--

MR. BAKER: Yes.

ASSEMBLYMAN CHARLES: --so that we can maybe bring this to a close.

You cited a statistic earlier, or the other gentleman did, with regard to the motions for summary judgment for failure to meet the verbal threshold and what the statistics show about those motions. What are they? Would you discuss that for a minute.

MR. BAKER: Well, we don't know how many motions are brought to dismiss a claim under the verbal threshold. The insurance company makes the election. They decide, "Do we think this case does not satisfy the threshold." We don't know how many cases have been filed like that. And we don't know exactly how cases are granted -- motions are granted or not.

What we do know and what I was able to count statistically is -- I went back through all of the unpublished Appellate Division cases over the last five years, and they are all of record. We can find them, and they're all published in articles that I and other people have written in the various law journals. And there have been 400 cases since 1993 that deal with the verbal threshold on an appellate level that are unpublished. And of those cases, 65 percent of them, the Appellate courts have affirmed the dismissal of the case under the verbal threshold. In 35 percent, the court has remanded it to go to the jury, so the jury would make the determination.

So what I conclude from that, Assemblyman Charles, is that the courts are enforcing the verbal threshold. The Appellate courts are, in two-thirds of the cases, accepting the findings of the trial judges that the plaintiff does not meet the threshold, and accordingly, the courts have not emasculated the verbal threshold. They are very serious about its application, and every other Friday, any one of you could walk into any courthouse in the State of New Jersey and you would probably see 10 to 20 verbal threshold motions, including Bergen County, Senator Cardinale. If you come over with me some Friday afternoon, for motion day, and you will see that more than 50 percent of the cases are being dismissed by the courts because they do take the verbal threshold seriously.

ASSEMBLYMAN CHARLES: Thank you.

SPEAKER COLLINS: Gentlemen, thank you very much. We appreciate your input. And going back to where we began, any suggestions you have, minor or even expanding on minor, we very much appreciate.

We have asked other testifiers who had signed up today if we could hear their testimony at our next session, and they have agreed, and we appreciate that. So this will conclude today's Committee meeting.

The next Committee meeting will be on February 4. It will be in Committee Room No. 11 -- Committee Room No. 11 -- and we will finish up with some of the testifiers from today, also deal with rate and risk classifications.

And then, on February 9, we will have what is scheduled as our last session. It will be covering miscellaneous items, whatever that is left over. And there is the possibility -- I'm not saying the probability, but the possibility there could even be one more session. But time will tell. The next session is February 4, in Committee Room No. 11.

Thank you all for attending.

(MEETING CONCLUDED)