ELIMINATION OF THE *OSWIN V. SHAW* SERIOUS LIFE IMPACT REQUIREMENT: A SERIOUS IMPACT ON THE FUTURE OF NEW JERSEY'S NO-FAULT AUTOMOBILE INSURANCE

Holly R. Blanchard[*]

I. INTRODUCTION

Catherine Norris was involved in a car accident, rear-ended by Cecilia Altamar on December 4, 2001.[1] As a result, Ms. Norris suffered a small disc herniation in her lower vertebrae, causing her to experience back pain and occasional numbness in her right leg.[2] While she was compensated for specific damages through the standard automobile insurance claims process, she sought to bring suit for the recovery of non-economic damages she had suffered as a result of her injuries.[3]

However, when Ms. Norris purchased her no-fault automobile insurance policy,[4] she selected the verbal threshold tort option.[5] Ms.

[*] J.D. Candidate, 2007, Seton Hall University School of Law; B.A., 2003, University of Pennsylvania. I would like to thank my parents, Michael and Nadine Blanchard, for their love and support throughout my law school career. I would also like to express my gratitude to A.J. La Rosa, for his caring and patience. Finally, this Comment would not have been successfully completed without the invaluable assistance I received from Professor Howard Erichson.

[1] Norris v. Altamar, No. L-117-03, 2005 WL 2585469, at *1 (N.J. Super. Ct. App. Div. Oct. 14, 2005).

[2] *Id.*

[3] *Id.*

[4] "No-fault insurance" describes an automobile insurance scheme that requires all drivers to carry insurance providing coverage up to policy limits for their own damages, regardless of who is at fault in an accident. In addition, no-fault insurance places restrictions on the policyholders' ability to sue other drivers for non-economic damages. A "pure" no-fault system would completely bar policyholders from suing other drivers for damages. However, no state uses a pure system. Instead, states that implement a no-fault scheme use a combination of the no-fault system and standard liability insurance, called "real" no-fault insurance. *See generally* KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 724–29 (4th ed., Foundation Press 2005) (presenting a basic yet comprehensive overview of the underpinnings and development of no-fault automobile insurance).

[5] *Id.*

Norris enjoyed lower premiums as a result of her selection, but the *quid pro quo* was the restriction on her ability to sue for non-economic damages arising from injuries sustained in an automobile accident.[6] The New Jersey statute governing the verbal threshold option allows only those people to bring suit whose injuries fall under one of the statutorily defined categories of injury.[7] Additionally, at the time of Ms. Norris's claim and for nine years prior, judicial interpretation of the same statute had imposed an additional requirement on prospective plaintiffs—the injury must also have a serious impact on the plaintiff and her life.[8] At trial, Ms. Norris failed to show that her non-economic injuries had a serious impact on her life, despite being permanent in nature; as a result, her case was dismissed on summary judgment.[9]

Ms. Norris appealed the trial judge's decision, and while her appeal was pending, the New Jersey Supreme Court handed down a decision in *DiProspero v. Penn*[10] rendering the serious life impact requirement null and void in suits for non-economic damages, such as those claimed by Ms. Norris.[11] Her case can now proceed at trial, and given that she has already established the permanent nature of her injuries and no longer has to demonstrate a serious life impact, she will likely withstand the defendant's motion for summary judgment.

This is just one example of many appeals on New Jersey's dockets currently awaiting the retroactive application of *DiProspero*.[12] *DiProspero* has opened the door to appeals and new suits similar to that of Ms. Norris.[13] Presently, automobile accident victims who have

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[6] *Id.*

[7] *See* N.J. STAT. ANN. § 39:6A-8(a) (West 2002).

[8] *See* Oswin v. Shaw, 609 A.2d 415 (N.J. 1992).

[9] Norris v. Altamar, No. L-117-03, 2005 WL 2585469, at *1 (N.J. Super. Ct. App. Div. Oct. 14, 2005).

[10] 874 A.2d 1039 (N.J. 2005).

[11] *See id.*

[12] The decision in *DiProspero* has been granted "pipeline" retroactivity for appeals. *See* Beltran v. DeLima, 877 A.2d 307, 310 (N.J. Super. Ct. App. Div. 2005).

[13] *See, e.g.,* Fithen v. Johnson, No. L-1353-03, 2005 WL 3299165 (N.J. Super. App. Div. Dec. 7, 2005); Klitsch v. Gilbert, No. BUR-L-3643-02, 2005 WL 3242322 (N.J. Super. App. Div. Dec. 2, 2005); Sandrow v. Mastrullo, No. L-3307-02, 2005 WL 3196574 (N.J. Super. App. Div. Nov. 30, 2005); Mattia v. Capone, No. ESX-L-10932-02, 2005 WL 3158058 (N.J. Super. App. Div. Nov. 29, 2005); Rodriguez v. Hopewell, No. L-3864-02, 2005 WL 3115819 (N.J. Super. App. Div. Nov. 23, 2005), Davis v. Gaspari, No. L-1688-03, 2005 WL 3071576 (N.J. Super. App. Div. Nov. 17, 2005), Immordino v. Romano, No. MER-L-3338-02, 2005 WL 3050612 (N.J. Super. App. Div. Nov. 16, 2005), Carroll v. Buchanan, No. L-2106-03, 2005 WL 3040770 (N.J. Super. App. Div. Nov. 15, 2005), Youssef v. Procopio, No. L-4112-03, 2005 WL 2923570 (N.J.

selected the verbal threshold tort option in their no-fault automobile insurance policies can bring suit for pain and suffering under a significantly less stringent standard.[14] According to the insurance industry, requiring only that plaintiffs sustain a permanent injury, and not an injury that has a serious impact on their lives, leads to a substantial increase in automobile insurance premiums for policyholders selecting this option because the price of litigation and likely settlement costs will be passed on to consumers in the form of higher premiums.[15]

Previously, Ms. Norris's claim would have been dismissed on summary judgment because of the New Jersey Supreme Court's 1992 decision in *Oswin v. Shaw*.[16] In *Oswin*, the court held that for plaintiffs selecting the verbal threshold in their no-fault automobile insurance policy to sue for pain and suffering, they must demonstrate not only that their injuries fit into one of the nine statutorily defined categories of injury, but also that the injury alleged had a "serious impact on the plaintiff and her life."[17] *Oswin* dealt with the interpretation of the statute introducing the verbal threshold to New Jersey insurance law ("the 1988 Act").[18] The 1988 Act allowed policyholders a choice of either the verbal threshold tort option or a no threshold option; the latter was available for a much higher premium, but in return gave the policyholder the opportunity to sue for non-economic damages arising from *any* injury, and not just those defined in the statute.[19] Plaintiffs who selected the verbal threshold option enjoyed

Super. App. Div. Nov. 7, 2005), Harrison v. Lora, No. L-1139-02, 2005 WL 2848184 (N.J. Super. App. Div. Nov. 1, 2005).

[14] *See* discussion *infra* Part VI.

[15] *See Industry Fears 'Serious Impact' on Auto Market of N.J. Court Ruling*, INSURANCE JOURNAL, July 4, 2005, http://www.insurancejournal.com/magazines/east/2005/07/04/features/57616.htm. According to Pinnacle Actuarial Resources, an actuarial consulting firm serving the automobile insurance industry, the increases in bodily injury, uninsured and underinsured motorist coverage costs that might result from the decision in *DiProspero* for drivers selecting the verbal threshold option in their no-fault insurance policies are between thirty-four and fifty-seven percent, or "approximately $98 to $163 annually per car." *Id.* New Jersey is already in a particularly perilous situation for rate increases, given that the average expenditure for private passenger automobile insurance has consistently been the highest in the nation. Historically, New Jersey has paid up to four times the national average in dividends to policyholders, and at times that figure has reached six times the national average. *See* Insurance Information Institute: Facts and Statistics, http://www.iii.org/media/facts/statsbyissue/auto. (last visited September 9, 2006).

[16] 609 A.2d 415 (N.J. 1992).

[17] Oswin v. Shaw, 595 A.2d 522, 527 (N.J. Super. Ct. App. Div. 1991).

[18] *Id.* at 523.

[19] *See* CYNTHIA M. CRAIG & DANIEL J. POMEROY, NEW JERSEY AUTOMOBILE INSURANCE LAW 13 (Gann Law Books 2004) (1998). This was the first time that the more restric-

significantly lower premiums, but were restricted in their right to sue for general damages; in order to bring suit, they had to show that their injuries fell within one of the nine statutorily defined categories.[20] In reaching its decision, the court relied on the legislature's intent to "close[] the courthouse door to all lawsuits except those involving *bona fide* serious injuries . . . [and] maintain[] the substantial benefits of no-fault [insurance] at an affordable price."[21]

The New Jersey Supreme Court in *DiProspero*[22] significantly altered the requirements to bring suit.[23] Now, appeals and claims for non-economic damages like Ms. Norris's would survive a motion for summary judgment and proceed to trial. In *DiProspero*, the court considered whether the "serious life impact" standard set in *Oswin* carried forward to claims brought following the passage in 1998 of the Automobile Insurance Cost Reduction Act (AICRA) which amended the 1988 Act.[24] The court held that *Oswin*'s "serious life impact" stan-

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tive tort option became the default option. Prior to the passage of the 1988 Act, a policyholder who did not elect otherwise became subject to the $200 monetary threshold, instead of the $1500 threshold, which offered lower premiums. *Id.* Following the passage of the 1988 Act, "all insureds were made subject to the verbal threshold unless they affirmatively elected otherwise on a coverage selection form." *Id.*

[20] *See* 1988 N.J. Sess. Law Serv. 119 (West) (current version at N.J. STAT. Ann. § 39:6A-8(a) (2003)):

> Tort exemption; limitation on the right to noneconomic loss:
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> Every owner, registrant, operator or occupant of an automobile to which . . . personal injury protection coverage, regardless of fault, applies . . . is hereby exempted from tort liability for noneconomic loss to a person who is subject to this subsection . . . unless that person has sustained a personal injury which results in *death*; *dismemberment*; *significant disfigurement*; a *fracture*; *loss of a fetus*; *permanent loss of use of a body organ, member, function or system*; *permanent consequential limitation of use of a body organ or member*; *significant limitation of use of a body function or system*; or *a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute that person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.*

Id. (emphasis added).

[21] *Oswin*, 595 A.2d at 524 (citing Governor's Reconsideration and Recommendation Statement to Senate, No. 2637-L.1998. c. 119, *see* N.J. STAT. ANN. § 17:28-1.4).

[22] DiProspero v. Penn, 874 A.2d 1039 (N.J. 2005).

[23] *See* discussion *infra* Part V.

[24] *DiProspero*, 874 A.2d at 1047–49. The court had previously denied certification on this issue. *See* James v. Torres, 808 A.2d 873 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 816 A.2d 1049 (N.J. 2003).

dard did not survive AICRA.[25] The court argued, among other reasons, that AICRA represented a complete overhaul of New Jersey's automobile insurance statute and therefore *Oswin*'s interpretation is not applicable to AICRA.[26] Following *DiProspero*, for plaintiffs to bring suit for non-economic damages under the verbal threshold (now termed the "limitation on lawsuit") option,[27] they must demonstrate only that their injuries fit into one of the six statutorily defined categories,[28] rendering irrelevant in verbal threshold cases the impact on damage calculations, if any, that the injury had on the plaintiff's life.

Had the proverbial slate upon which AICRA was drafted been wiped clean at the time of its creation, it would indeed be difficult to argue that the "serious life impact" prong had survived the amendments to the 1988 Act. However, AICRA was not written upon a blank slate. This Comment will argue that under an examination of the strong legislative intent powering the evolution of New Jersey automobile insurance law to its present form, the precedential value of the *Oswin* decision, the reasoning of cases heard prior to *DiProspero* in the New Jersey Appellate Division supporting the "serious life impact" prong, and AICRA's shortcomings, it is clear that the *DiProspero* court was incorrect in rejecting *Oswin*'s "serious life impact" require-

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[25] *See* discussion *infra* Part V.

[26] *DiProspero*, 874 A.2d at 1046.

[27] While now officially termed the "limitation on lawsuit" option (*see* N.J. STAT. ANN. § 39:6A-8(1)), it is popularly referred to in practice by its old name, the "verbal threshold." CRAIG & POMEROY, *supra* note 19, at 13. The verbal threshold is called that because the subsection of the statute in which it is found is intended to define the nature of the injury that a plaintiff must suffer in order to bring suit. Essentially, the plaintiff's injuries must fall under one of the statutory definitions. *See* N.J. STAT. ANN. § 39:6A-8(1) (West 2005).

[28] *See* N.J. STAT. ANN. § 39:6A-8(1) (West 2005):

> Tort exemption; limitation on the right to noneconomic loss:
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> Every owner, registrant, operator or occupant of an automobile to which . . . personal injury protection . . . regardless of fault, applies . . . is hereby exempted from tort liability for noneconomic loss to a person who is subject to this subsection . . . unless that person has sustained a bodily injury which results in *death*; *dismemberment; significant disfigurement or significant scarring*; *displaced fractures*; *loss of a fetus*; or *a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement*. An injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment.

Id. (emphasis added).

ment.[29] Ultimately, while AICRA did amend the 1988 Act, the thrust behind the 1988 Act had remained in place up to and beyond the time of AICRA's passage; thus, refusing to carry forth the *Oswin* standard would not only be bad policy, but it would ignore the legislative intent behind AICRA and its predecessors.

This Comment begins with a presentation of the history of New Jersey automobile insurance statutes. It will introduce the lengthy yet important history to highlight the Legislature's continuing intent to draft a law allowing for recovery of a plaintiff's losses while maintaining reasonable no-fault premiums. Part II will also discuss the development of the verbal threshold, the underlying topic of this paper. Part III of the Comment will provide an analysis of the New Jersey Supreme Court's decision in *Oswin v. Shaw*, the case which interpreted AICRA's predecessor to include a "serious life impact" requirement. Part IV introduces and provides a detailed explanation of AICRA, and offers a comparison to its predecessor, the 1988 Act. Part V presents the New Jersey Supreme Court's decision in *DiProspero v. Penn*, which eliminated the earlier "serious life impact" requirement imposed in *Oswin*. Part VI rebuts the court's decision in *DiProspero* and argues that *Oswin*'s "serious life impact" standard should be retained based on the role of legislative intent in the creation of AICRA, prior judicial construction of issue, and a critical examination of AICRA.

II. HISTORY OF NEW JERSEY AUTOMOBILE INSURANCE STATUTES

New Jersey's history with automobile insurance legislation highlights the state's ongoing attempts to balance the policyholder's right to recover for losses incurred as a result of bodily injury against maintaining reasonable and affordable premiums.[30] In 1972, the Legisla-

[29] Recently proposed amendments, which move to instate the *Oswin* "serious life impact" requirement for suits brought post-AICRA, left the issue for the Legislature to clarify for the courts the meaning and correct interpretation of this statute. *See, e.g.*, Assemb. B. 4381, 211th Leg. (N.J. 2004); Assemb. B. 4227, 211th Leg. (N.J. 2004); S.B. 2688, 211th Leg. (N.J. 2004); S.B. 2705, 211th Leg. (N.J. 2004); *available at* http://www.njleg.state.nj.us/bills/BillsByNumber.asp (last visited Sept. 15, 2006).

[30] Prior to 1929, no legislation in New Jersey had been written to address the financial responsibilities of drivers in automobile accidents causing either bodily injury or property damage. CRAIG & POMEROY, *supra* note 19, at 2. Between 1929 and 1952, only those individuals who had committed certain specified offenses had to prove that they had the financial ability to respond to any claim for either injury or property damage in an accident. *Id.* With the passage of the Motor Vehicle Security-Responsibility Law of 1952, New Jersey expanded the number of people who had to demonstrate proof of financial ability to respond to claims by injured parties. *Id.* at 3. Specifically, it required any person involved in an accident resulting in $100 or

ture adopted the New Jersey Automobile Reparation Reform Act, known in short as the "No Fault Act,"[31] which signified the switch to compulsory no-fault insurance from a voluntary insurance scheme for personal injury protection ("PIP") benefits for all drivers registered in the state of New Jersey.[32] The effect was that "all insurance policies written for private passenger vehicles were required to provide enumerated personal injury protection benefits to certain classes of persons *without regard to who was at fault* in the accident."[33] PIP benefits included medical-expense benefits, income continuation benefits, essential-services benefits, death benefits, and funeral expenses benefits payable to an insured and members of the insured's family who sustained bodily injury or death as a result of an automobile accident, without regard to the fault of the insured.[34] While the default option was the limitation on lawsuit option, drivers were ultimately given an option to remain with the default choice or to retain their right to sue for any injury.[35] The No Fault Act implemented a monetary threshold, in contrast to a verbal threshold, of $200 for the recovery of non-economic loss for bodily injury and resultant medical expenses.[36] The monetary threshold meant that plaintiffs would only be able to bring suit for non-economic damages if it was proven that their medical expenses had exceeded $200.[37]

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more in damages to post a security fixed by the Department of Motor Vehicles unless that person had separate liability insurance. *Id.* New Jersey had a voluntary insurance scheme in place until 1972; however, it shifted to a compulsory no-fault insurance scheme in 1972 when it became clear that a voluntary insurance scheme failed to provide adequate protection to automobile accident victims. *Id.* at 10. Similarly, the voluntary scheme imposed an enormous financial burden on the state through the number of claims being made through the Uncompensated Claim and Judgment Fund, which provided a measure of relief to persons sustaining losses in automobile accidents caused by uninsured or financially unstable motorists. *Id.*

[31] N.J. STAT. ANN. § 39:6A-1 to -18 (effective Jan. 1. 1973).

[32] CRAIG & POMEROY, *supra* note 19, at 10. The Act also made uninsured motorist coverage mandatory. *Id.* Additionally, the No Fault Act implemented protective measures in hopes of containing rising rates which had been shown in part to result from fraudulent claims; for example, penalties were assessed to persons making false or fraudulent claims. *Id.* at 9.

[33] *Id.* (emphasis added).

[34] N.J. Coal. of Health Care Prof'ls, Inc. v. N.J. Dep't of Banking and Ins., 732 A.2d 1063, 1068 (N.J. Super. Ct. App. Div. 1999).

[35] CRAIG & POMEROY, *supra* note 19, at 203.

[36] *Id.* at 202.

[37] "The section barred civil suits for damages 'if the bodily injury is confined solely to the soft tissue of the body and if the medical expenses incurred or to be incurred by such injured person for the reasonable and necessary treatment of such bodily injury, is, less than $200.00, exclusive of hospital expenses, x-rays, and other diagnostic medical expenses.'" CYNTHIA M. CRAIG & DANIEL J. POMEROY, NEW JERSEY AUTOMOBILE INSURANCE LAW 242 (Gann Law Books 2004) (2004).

In another effort to lower the rising costs of PIP premiums, the Legislature amended the No Fault Act in 1983 with the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act, providing policyholders the option to elect a higher monetary threshold of $1500 instead of the previous $200 threshold in return for lower premiums.[38] The $200 amount remained the default policy selection.[39] The increase in the monetary threshold was a response to the scenario that had become all too common to the courts: "[E]very torts lawyer in the state[] soon recognized that it would be easy to inflate damages above the $200 threshold level—and hence to enable a torts suit—by *increasing the cost of medical treatments*."[40] However, even the $1,500 threshold did not prove to be a barrier to suits as claimants found it nearly as easy to circumvent the $1500 threshold as they did the $200 threshold. Between 1980 and 1988, the "severity" of claims had doubled: claims for bodily injury had risen from $7592 to $14,484,[41] easily enabling a plaintiff to vault the threshold, either artificially or legitimately, and bring suit.

In 1988, the Legislature replaced the monetary threshold with a verbal threshold in response to the ease of manipulation of the monetary threshold.[42] This reformulation of the tort threshold was a direct response to the shortcomings of prior law. "The statute was a pragmatic accommodation provoked by the spiraling costs and decreasing availability of automobile insurance, congestion in the courts, and the conviction of many that the judicial system should not give audience to minor automobile injury claims."[43] The verbal threshold is intended to define the nature of the injury that a plain-

[38] *Id.* at 42.

[39] *See supra* note 19 (explaining that $200 was the default policy selection).

[40] *See* Howard M. Latin, *No Fault: To Be or Not To Be? When Drivers Sue Drivers: Exposing the Myths Underlying Automobile Litigation*, 166 N.J. LAW. Jan. 1995 at 24 (emphasis added). *See also* John D. Worrall, *Private Passenger Auto Insurance in New Jersey: A Three-Decade Advertisement for Reform,* in DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY 106 (J. David Cummins ed., 2002) (noting "[i]t was a simple matter to exceed the [$200] lawsuit threshold"). The 1972 Act's $200 threshold had been eroded by the inflation of the price of medical services so as to reduce it to $77.62 in real figures. *Id.* The Legislature, in implementing the $1,500 threshold found that the numbers of suits were not being reduced as it had hoped; the $200 threshold had failed because the amount was simply too little when considered in light of medical expenses even without their artificial inflation. *Id.*

[41] *See* Worrall, *supra* note 40, at 110. By 1988, because the costs of medical care had been continuously inflated, the $200 monetary threshold originally introduced in 1972 had been whittled down to only $56 by 1983. *Id.*

[42] N.J. STAT. ANN. § 39:6A-8, 8.1 (effective Jan. 1, 1989).

[43] Oswin v. Shaw, 595 A.2d 522, 523 (N.J. Super. Ct. App. Div. 1991).

tiff must suffer, instead of the amount of medical bills incurred, in order to maintain a suit for non-economic loss.[44] Thus, the *more restrictive* tort option became the default tort option, applicable to all policyholders except those who elected otherwise, unlike the 1983 Act which set the less restrictive $200 threshold as the default.[45] Similar, however, to the earlier version of the Act, policyholders still retained the option to select a zero-threshold policy that, while having much higher premiums, allowed the insured to retain the right to sue for non-economic loss resulting from any injury.[46]

III. *OSWIN V. SHAW*: THE NEW JERSEY SUPREME COURT'S INTERPRETATION OF THE 1988 ACT

The New Jersey Supreme Court in *Oswin* faced the issue of whether plaintiff's injuries were sufficient to vault the 1988 version of the verbal threshold and thus maintain a suit for non-permanent injuries.[47] Plaintiff's injuries were alleged to fall under either category seven ("permanent consequential limitation of use of a body organ or member") or category eight ("significant limitation of use of a body function or system").[48] The New Jersey Appellate Division, later affirmed by the New Jersey Supreme Court, concluded that the test for whether a plaintiff's injuries have vaulted the verbal threshold did not depend merely on the plaintiff's treating physician's assertions that the injuries suffered fit within one of the categories; instead, the court stated that the real test is "whether the injury has a serious impact on the plaintiff and her life."[49]

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[44] *See supra* note 28 and accompanying text.

[45] *See supra* note 20 and accompanying text.

[46] The verbal threshold option has been by far the most popular choice among policyholders in New Jersey. Approximately three years after it was introduced, "85% of the population ha[d] opted for the lower cost 'verbal threshold' over the higher cost 'no threshold' option." *Oswin*, 595 A.2d at 524. *But see* Worrall, *supra* note 40, at 104 (highlighting that while no-fault is the most popular option in New Jersey, selected by nearly ninety percent of the insureds in the state, this "popularity" may just be a framing effect because no-fault is the default choice for policyholders in the state).

[47] Oswin v. Shaw, 609 A.2d 415, 416 (N.J. 1992).

[48] *Id.* at 427.

[49] Oswin v. Shaw, 595 A.2d. 522, 527 (N.J. Super. Ct. App. Div. 1991), *aff'd* 609 A.2d 415 (N.J. 1992). The New Jersey Supreme Court later declared that a "[significant] limitation of use of a body function or system should be construed to mean something more than a minor limitation of use. We believe that a minor, mild, or slight limitation of use should be classified as insignificant within the meaning of the statute." *Oswin*, 609 A.2d at 428 (internal quotations omitted) (quoting Licari v. Elliot, 441 N.E.2d 1088, 1091 (N.Y. 1982)).

In arriving at the "serious life impact" requirement, the New Jersey Appellate Division ultimately looked to the interpretation of New York's similar no-fault automobile insurance statute for guidance, noting that the New Jersey Legislature specifically and expressly intended the 1988 Act to be patterned after the New York state law.[50] The Governor's Reconsideration and Recommendation Statement issued prior to the production of the 1988 Act's final version provided the court with "strong evidence of [the] legislative intent" not only behind the switch to a verbal threshold over a monetary threshold, but also behind the objective to construe the New Jersey statute in a manner consistent with the current interpretation of the New York statute.[51] Regarding the switch from a monetary to a verbal threshold, then Governor Kean stated:

> [The better] compromise is to make the verbal threshold the basic liability coverage in every automobile insurance policy the law of the land in New Jersey [while allowing] . . . individual insureds . . . to opt for a monetary threshold, at a higher cost . . . . I recommend adoption of a zero dollar threshold option [that] will allow individuals to opt into a pure fault liability system, a choice which will be reflected in their higher premiums. The purpose of the zero dollar [verbal threshold] option is to remove the incentive to inflate medical bills—thereby placing an unnecessary burden on PIP coverage—in order to reach some specified monetary threshold. I believe the citizens of New Jersey recognize that when their medical bills are being promptly paid, without regard to fault, they lose next to nothing in relinquishing the ability to sue for pain and suffering for nonserious injuries only and, consequently, the vast majority will maintain the base verbal threshold.[52]

Concerning the similarities between New Jersey's proposed law and New York's current law, the Reconsideration and Recommendation Statement expressly stated:

> The verbal threshold contained in this recommendation is patterned after that in force in New York State. [New York's] verbal threshold specifically sets forth those injuries which will be considered "serious." Lawsuits for non-economic injuries, such as pain and suffering, will be allowed for these enumerated "serious injuries" only. It is my intention that the term "serious injury," as defined in this recommendation, shall be construed in a manner that is consistent with the New York Court of Appeals' decision in

[50] *Oswin*, 595 A.2d at 524.

[51] *Id.*

[52] *Id.* at 523–24.

> *Licari v. Elliot*. Whether a plaintiff has sustained a "serious injury" must be decided by the court, and not the jury. Otherwise, *the bill's essential purpose of closing the courthouse door to all lawsuits except those involving* bona fide *serious injuries* will be diluted and the bill's effectiveness will be greatly diminished. In addition, strict construction of the verbal threshold is essential; any judicial relaxation of this plain language will impede the intent of maintaining the substantial benefits of no-fault at an affordable price.[53]

Based on this statement of the Legislature's goal to keep no-fault insurance premiums affordable, the court followed the language present in the Governor's Recommendation, concluding that the 1998 Act was to be construed in a manner that only permitted plaintiffs with a "serious" injury to sue.[54] Applying this reasoning to plaintiff's case, the court cited the *Licari* decision in support of the proposition that a significant "'limitation of use of a body function or system' should be construed to mean something more than a minor limita-

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[53] *Oswin*, 595 A.2d at 524 (citations omitted) (emphasis added). The *Licari* decision's summarization of the legislative intent behind the changes to the New York no-fault scheme mirrors the intent behind the changes made in New Jersey; essentially, New York plaintiffs were similarly padding their medical bills in order to vault the monetary threshold, and the Legislature responded with the implementation of the verbal threshold. *See generally Licari*, 441 N.E.2d 1088. This was not the only motive behind the switch to a verbal threshold in New York; like New Jersey, New York's verbal threshold was intended to keep suits for minor, non-serious injuries out of the courts, not only to reduce congestion in the courts, but also to further the goal of keeping no-fault automobile insurance premiums affordable. *Id.*

[54] The Supreme Court in *Oswin* recognized that its test might pose some problems in its application:

> We understand that one might view the "serious impact on plaintiff's life" test as somewhat subjective. To ensure uniform application of that test, we emphasize that plaintiffs must submit objective, credible evidence that could support a jury finding in his or her favor. We respect the abilities of medical professionals to ascertain the presence of a genuine, disabling injury, but we nevertheless are satisfied that the Legislature sought to guard against a finding of "serious injury" when plaintiff's proofs are based solely on subjective complaints of pain.

Oswin v. Shaw, 609 A.2d 415, 429 (N.J. 1992) (emphasis omitted).

The "objective medical evidence" requirement was one part of a three-part requirement for a plaintiff's injuries to vault the threshold under the sixth, seventh, and eight categories of injury. *See* Thomas P. Weidner & Michael J. Canavan, *The "New" Verbal Threshold: But is it Improved?*, 24 SETON HALL LEGIS. J. 117, 123 (1999). The other two requirements were (1) "plaintiff must show a nexus between the injury and the disability," and (2) plaintiff must show a serious life impact. *Id.* (quoting *Oswin*, 609 A.2d at 429). This flows from the *Oswin* court adopting what has been deemed as the "summary judgment plus" standard: essentially, the "question of whether an injury is 'serious' is a matter for the court to decide, but disputes regarding the nature and extent of the injury will survive summary judgment only if the plaintiff has submitted objective medical evidence to support his or her claims." *Id.* at 122 (emphasis omitted) (citing *Oswin*, 609 A.2d at 422).

tion of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute."[55] Because the plaintiff had failed to show that her injuries were more than a mild limitation on use, her claim was dismissed on summary judgment.[56]

IV. THE AUTOMOBILE INSURANCE COST REDUCTION ACT

The Automobile Insurance Cost Reduction Act[57] (AICRA), New Jersey's most recent alteration to its no-fault insurance scheme, was enacted in 1998. [58] AICRA was enacted "in order to further limit the number of lawsuits filed and thereby reduce premiums for bodily injury coverage."[59] From the time of the passage of the 1988 Act until the passage of AICRA, New Jersey had consistently paid the highest or near-highest average automobile insurance premiums in the country.[60] AICRA contained numerous provisions aimed at reducing the cost of insurance, some with the purpose of addressing the failure of the 1988 Act to "stem the tide of lawsuits related to soft tissue injuries,"[61] and others hoping to contain the severity of claims that were

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[55] *Oswin*, 609 A.2d at 428 (quoting *Licari*, 441 N.E.2d at 1091).

[56] *Oswin*, 595 A.2d at 528.

[57] N.J. STAT. ANN. § 39:6A-8 (Supp. 2006).

[58] The need for automobile insurance reform was a prominent campaign issue in the pending gubernatorial race between incumbent Governor Christie Whitman and her challenger, State Senator James R. McGreevey. Following Governor Whitman's reelection, the Senate and Assembly created a Joint Committee on Automobile Insurance Reform that held seven committee meetings and five "deliberations" between December 16, 1997 and April 2, 1998, addressing the history of the no-fault scheme in New Jersey, current areas of the law needing reform, and culminating in the drafting of AICRA. New Jersey State Library, Legislative History Compilations, http://www.njstatelib.org/NJLH/LH9899/CHAP21.HTM (last visited Sept. 15, 2006).

[59] Sponsor's Statement to S.B. 3, 208th Leg. (N.J. 1998), http://www.njleg.state.nj.us/9899/Bills/s0500/3_i2.pdf.

[60] *See* Randy Diamond, *N.J. Car Insurance Rates Again Top Nation*, RECORD (Hackensack), Feb. 9, 1995 at A-3; *see also supra* note 15.

[61] CRAIG & POMEROY, *supra* note 19, at 255. *See also* N.J. STAT. ANN. § 39:6A-1.1 (West 2002). The Legislature sought again to address the issue of "padding" of plaintiffs' medical bills; however, their efforts were directed at a slightly different area this time. *See* discussion *infra* Part II. Their concerns regarding the verbal threshold no longer centered around the padding of medical bills to vault a monetary threshold; instead, the focus was the rate increases resulting from extremely high and inflated payouts for injuries and unnecessary treatment. *Id.*

> Whereas, Since the enactment of the verbal threshold in 1988, the substantial increase in the cost of medical expense benefits indicates that the benefits are being overutilized . . . ,thus undermining the limitations imposed by the threshold and necessitating the imposition of further controls on the use of those benefits, including the establishment

being artificially inflated by limiting the methods of treatment for injuries to those specifically approved by the Commissioner of Banking and Insurance.[62]

In response to the difficulty that New Jersey's lower court had had in interpreting the "subjective" categories of injury of the 1988 Act,[63] and the subsequent lack of uniformity in decision making[64] regarding injuries alleged to fall within these categories, AICRA revamped the disputed categories in the 1988 Act.[65] The first three categories of death, dismemberment, and loss of a fetus, were carried forward without change.[66] The Legislature expanded the fourth category, significant disfigurement, to include significant scarring.[67] The fifth category, fracture, was reduced in scope to now include only displaced fractures.[68] The changes made to categories six through nine were the most substantial; all four categories were replaced and the terms "significant" and "consequential" have been substituted by the single qualifier of "permanent."[69] The final qualifying category of

> of a basis for determining whether treatments or diagnostic tests are medically necessary.

N.J. STAT. ANN. § 39:6A-1.1(b).

[62] *See* N.J. STAT. ANN. § 39:6A-1.1. The Commissioner adopted N.J. ADMIN. CODE. 11:3-4, which established the standard medical procedures and protocols, and provided a list of certain acceptable and unacceptable diagnostic tests. *See* N.J. ADMIN. CODE. 11:3-4 (Supp. 2005).

> Specifically, N.J. ADMIN. CODE. 11:3-4.6 establishes medical protocols by reference to six care paths which establish standard courses of appropriate treatment, including the administration of diagnostic tests, for identified injuries stemming from trauma to the neck and back. The care paths are not applicable to generally more serious injuries such as dismemberment, scarring, fractures, or head and organ injury. As noted, these care paths apply only to generally less serious-injuries—soft tissue injuries—which, in [the] D[epartment] O[f] B[anking][and] I[nsurance]'s view, have driven up PIP and liability premium costs.

N.J. Coal. of Health Care Prof'ls, Inc. v. N.J. Dep't of Banking and Ins., 732 A.2d 1063, 1074 (N.J. Super. Ct. App. Div. 1999).

[63] This refers to prior categories six through nine in the 1988 Act. *See* 1988 N.J. Sess. Law Serv. 119 (West). While not numbered in the statute, they are here referred to by number for ease of reference.

[64] *See* James v. Torres, 808 A.2d 873, 876 (N.J. Super. Ct. App. Div. 2002) *cert. denied*, 816 A.2d 1049 (N.J. 2003).("It would not be an understatement to say that it can appear difficult to find an analytical thread unifying subsequent judicial treatment of what constitutes a 'serious impact' upon a plaintiff's life.").

[65] *Compare supra* notes 20 *with* 28 (providing the text of both the 1988 Act's and AICRA's versions of the categories of injury).

[66] *See* N.J. STAT. ANN. § 39:6A-8 (West 2002).

[67] *See id.*

[68] *See id.*

[69] *See id.*

injury under AICRA now reads "a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement."[70] The statute also defines how the permanence of an injury shall be determined: "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment."[71]

In sum, AICRA aimed to eliminate suits for all non-permanent injuries (other than displaced fractures) that were previously viable causes of action under the 1988 Act. AICRA also implemented a physician certification requirement, requiring that for a plaintiff to satisfy the provisions of the statute, he must, within sixty days following the date of the answer to the complaint, provide the defendant with a certification based on objective medical evidence from his treating physician.[72] The certification is required to state, under the penalty of perjury, that the plaintiff has suffered an injury falling under one of the statutorily defined categories.[73] Additionally, AICRA created the Office of the Fraud Prosecutor, designed to investigate and curtail fraud within the insurance industry.[74]

V. *DIPROSPERO V. PENN*: THE NEW JERSEY SUPREME COURT BIDS FAREWELL TO *OSWIN'S* "SERIOUS LIFE IMPACT" REQUIREMENT

Thirteen years after *Oswin* and seven years after AICRA's passage, the New Jersey Supreme Court, in *DiProspero v. Penn*, granted certification on the issue of whether *Oswin*'s "serious life impact" requirement was intended to be carried forward to verbal threshold claims for non-economic damages brought post-AICRA.[75] In *DiProspero*, a verbal threshold plaintiff sought recovery for non-economic damages arising from injuries suffered in an automobile accident which included a restricted exercise regimen, inability to eat certain hard foods, and back pain.[76] Plaintiff's injuries did not, however, restrict her in such a manner that she could not partake in most "normal" daily activities.[77] The New Jersey Law Division, affirmed by the

[70] *See id.*

[71] *See id.*

[72] *See* N.J. STAT. ANN. § 39:6A-8 (West 2005).

[73] *Id.*

[74] *See* N.J. STAT. ANN. § 39:6A-4 (West 2005).

[75] DiProspero v. Penn, 874 A.2d 1039 (N.J. 2005). The court had previously denied certification on this issue. *See supra* note 24.

[76] DiProspero v. Penn, No. L-7318-01, 2004 WL 439350, at *1–2 (N.J. Super. Ct. App. Div. 2004).

[77] *Id.* at *1.

New Jersey Appellate Division, held that plaintiff's injuries, while sufficient to satisfy the sixth category of injury of AICRA (a permanent injury within a reasonable degree of medical probability), were not sufficiently serious to allow recovery because AICRA requires a plaintiff to demonstrate not only that they have suffered a permanent injury, but also that the injury had a serious impact on plaintiff's life.[78]

On certification, the New Jersey Supreme Court reversed.[79] While the New Jersey Appellate Division, which had addressed this same issue twice before in *James v. Torres*[80] and *Rios v. Szivos*,[81] relied on the previously expressed legislative intent behind AICRA to reach their decision, the New Jersey Supreme Court stated that because the language of AICRA is unambiguous and does not expressly include a "serious life impact" requirement, there is no need to resort to any sort of extrinsic aids, like legislative intent, to determine the correct interpretation.[82] However, the court realized that it could not "ignore the unique historical background of AICRA and the prior judicial construction of a predecessor statute—the 1988 verbal threshold" in its decision.[83] To support its holding that the Legislature did not intend for *Oswin*'s "serious life impact" requirement to be carried forward to cases brought post-AICRA, the Court focused on four extrinsic aids[84] to determine whether they in fact point to an interpretation other than that which arises from the clear language of the statute.[85]

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[78] *Id.* at *3.

[79] *DiProspero*, 874 A.2d at 1057.

[80] 808 A.2d 873 (N.J. Super. Ct. App. Div 2002), *cert. denied*, 816 A.2d 1049 (N.J. 2003).

[81] 808 A.2d 868 (N.J. Super. Ct. App. Div. 2002).

[82] *DiProspero*, 874 A.2d at 1048.

[83] *Id.* at 1049.

[84] The court also considered the significance of Governor Whitman's conditional veto of AICRA. *Id.* at 1055. The Court relied on the fact that Whitman failed to reference the "serious life impact" requirement in her conditional veto statement which, according to the court, "strongly impl[ies] that she did not expect that *Oswin*'s extra-statutory standard would apply to AICRA." *Id.* at 1056. *See generally* Governor Whitman's Conditional Veto, http://www.njstatelib.org/NJLH/LH9899/CHAP21.HTM (last visited Jan. 5, 2006).

[85] *DiProspero*, 874 A.2d. at 1050. Specifically, the Court stated:

> To overcome the presumption that the Legislature acted deliberately by not incorporating *Oswin*'s serious life impact standard into AICRA, defendants must demonstrate through extrinsic aids that the Legislature expected that this court would interpret the wholly new limitation on lawsuit threshold in the same manner as the discarded 1988 verbal threshold.

Id.

The court first looked to basic canons of statutory construction.[86] Defendants had argued that although the Legislature was well aware of the construction of the verbal threshold reached in *Oswin,* that construction remained in place for nearly thirteen years without legislative action. The court rebutted that argument by stating "the Legislature is presumed to be aware of the judicial construction of its enactments, and a change in the language in a statute ordinarily implies a purposeful alteration in the substance of the law."[87] It bolstered this rationale by offering a "selective incorporation" argument; while AICRA expressly incorporates one portion of the holding in *Oswin*, the "objective medical evidence" requirement, it fails to include the requirement of a "serious life impact."[88] From this, the court concluded that this sort of selective incorporation "strongly implies that [the Legislature] consciously chose not to incorporate" the "serious life impact" requirement.[89]

Next, the court turned to the contentious debate over the meaning of AICRA's preamble, considering whether it supports a finding of intent to carry forth the "serious life impact" requirement.[90] Three segments of the preamble formed the basis of defendant's argument:

> Whereas, The principle underlying the philosophical basis of the no-fault system is that of a trade-off of one benefit for another; in this case, providing medical benefits in return for *a limitation on the right to sue for non-serious injuries;* and
>
> Whereas, While the Legislature believes that it is good public policy to provide medical benefits on a first party basis, without regard to fault, to persons injured in automobile accidents, it recognizes that in order to keep premium costs down, the cost of the benefit must be offset by a reduction in the cost of other coverages, most notably *a restriction on the right of persons who have non-permanent or non-serious injuries to sue for pain and suffering;* and
>
> . . . .
>
> Whereas, To meet these goals, this legislation . . . provides for a revised lawsuit threshold for suits for pain and suffering which will

[86] *Id.* at 1050–51.
[87] *Id.* at 1049.
[88] *Id.* at 1050.
[89] *Id.*
[90] *DiProspero*, 874 A.2d at 1051.

> *eliminate suits for injuries which are not serious or permanent,* including those for soft tissue injuries . . . .[91]

The court found this purported evidence of legislative intent to be "merely descriptive" of the six new categories of injury.[92] "We cannot find a suggestion in the statute or its history that the Legislature did not regard the threshold injuries to be *serious* injuries.[93] The logical conclusion is that the Legislature created those threshold categories for the purpose of denominating six classes of serious injuries."[94]

Third, the court considered the Sponsors' Statement to the senate bill ratified as AICRA.[95] In the opening section, the Statement notes "[n]o provision in this bill is intended to repeal otherwise applicable case law."[96] The plaintiff and defendant offered conflicting interpretations of this statement; the plaintiff argued that the *Oswin* decision no longer falls under the category of "applicable case law" because AICRA is a statute separate and distinct from the 1988 Act considered in *Oswin*, while the defendant claimed it supported the proposition that the Legislature intended that the bill be interpreted consistent with the *Oswin* "serious life impact" standard.[97] The court summarily dismissed the importance of the statement, noting "as with all extrinsic aids enlisted to divine legislative intent, a court must proceed with caution and exercise 'controlled judgment' in determining the weight that should be accorded to a sponsor's statement."[98] Ultimately, the court did not afford the statement much weight, and concluded that when the sentence was viewed in conjunction with the entire paragraph, it "as a whole makes it clear that the sponsors intended to replace the verbal threshold as it had existed at the time of *Oswin* with a completely new threshold."[99]

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[91] *Id.* at 1050–51 (quoting N.J. STAT. ANN. § 39:6A-1.1(b) (emphasis added)).

[92] *Id.* at 1051.

[93] *Id.* at 1052 (emphasis added).

[94] *Id.*

[95] *Id.*

[96] *DiProspero*, 874 A.2d at 1052; *see* Sponsor's Statement, *supra* note 59.

[97] *DiProspero*, 874 A.2d at 1052–53.

[98] *Id.* at 1052 (citing Deaney v. Linen Thread Co., 118 A.2d 28 (N.J. 1955)).

[99] *DiProspero*, 874 A.2d at 1053 (citation omitted). The court bolstered its interpretation of the Sponsor's Statement by offering a "completely new threshold" argument, arguing that because AICRA represents a complete overhaul of the 1988 Act and contains several provisions not found in the 1988 Act, any construction of the 1988 Act does not apply to AICRA. *Id.* at 1053–54. In support, the court noted that while the 1988 Act was clearly and indisputably based on New York automobile insurance law, "the Joint Committee on Automobile Insurance Reform that drafted the bill that became AICRA acknowledged that the source of the limitation on lawsuit threshold was Florida law." *Id.* at 1054. To the court, this shift from a foundation in New York law to Florida law was additional strong evidence that the Legislature, in

Finally, the court confronted the issue of the legislative intent and other policy considerations behind AICRA to determine whether they were so strong as to point to a reading of the statute other than the one gleaned from its express language.[100] Defendants contended, "the Legislature must have intended to retain the serious life impact standard because one of AICRA's paramount goals was to reduce the cost of automobile insurance" through a reduction in the number of litigated claims.[101] Imposing a higher, serious life impact standard would further such a goal. While it is indisputable that reducing the number of claims is a goal of AICRA, the court disagreed with this assessment.[102] The court urged that the limitation on lawsuit threshold must be viewed in light of the statute as a whole.[103] Doing so reveals that AICRA is a detailed and comprehensive as well as multi-pronged

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the passage of AICRA, intended to distance itself from the interpretation of the 1988 Act. *Id.*

However, from a reading of the entire Committee Report, it is clear that while the *language* of AICRA, namely the categories of injury, are similar to Florida's (*see* FLA. STAT. ANN. § 627.737(2)), the Report does not offer much evidence that they intended AICRA's *interpretation* to be analogous to Florida law, which shows no serious life impact requirement. In fact, the word "Florida" is only mentioned five times in the thirty-four page transcript of the meeting to which the court cites. The most relevant excerpt from the Committee Report demonstrates this:

> SENATOR CODEY: Jack, this essentially is the Florida language with teeth behind it in terms of criminal penalties, in terms of perjury or falsification of the—
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> SPEAKER COLLINS: Yes. Yes. Using the Florida language as a base and also coming up with [sic] trying to tinker with some of the problems that have been shown down there and then putting real teeth into it, I think this is good, solid language that meets really what we were after, contracts the frivolous lawsuits — at least we believe it will — but also allows real cases to go forward and has a savings into [sic] it.

See Committee Meeting of the Joint Committee on Automobile Insurance Reform, *Deliberations with Regard to Automobile Insurance Reform, March 30, 1998*, http://www.njleg.state.nj.us/legislativepub/pubhearings1998.asp#JCIR.

On the other hand, it plainly appears that what the Committee desired to achieve through their choice of language was to "contract [the amount of] frivolous lawsuits," a goal that has been present since the inception of the verbal threshold, and is not new to AICRA. *Id.* Because the transcript is not dispositive as to whether the Legislature intended the *interpretation* of AICRA to be modeled after Florida law, the canon of statutory construction cited by the court ("a legislative enactment patterned after a statute of another state is ordinarily adopted with the prior constructions placed on it by the highest court of the parent jurisdiction") is incorrectly applied in this situation. *See DiProspero*, 874 A.2d at 1054 (citing *Oswin v. Shaw*, 609 A.2d 415 (N.J. 1992)).

[100] *DiProspero*, 874 A.2d at 1056.

[101] *Id.*

[102] *Id.* at 1056–57.

[103] *Id.*

approach to containing the costs of automobile insurance.[104] To the court, the limitation on lawsuit threshold presented "but one means" of stabilizing and reducing costs.[105]

VI. WHY THE "SERIOUS LIFE IMPACT" LIMITATION SHOULD BE RETAINED IN CLAIMS BROUGHT POST-AICRA

A. A Pattern of Consistent Legislative Intent

Since the inception of no-fault insurance in New Jersey in 1972, it is clear that while the substance of the law has changed dramatically, the intent behind each of the amendments has remained the same—to limit lawsuits brought for non-economic damages in order to keep premiums both stable and affordable.[106] A limitation on lawsuit clause in a no-fault insurance policy, whether it is a monetary or verbal threshold limitation, serves as a barrier to plaintiffs seeking to bring these suits.[107] Allowing these suits without restriction under a no-fault scheme could potentially render PIP benefits unaffordable to many current policyholders due to the wide popularity of the limitation on lawsuit option[108] and also given that, presumably, people selecting the limitation on lawsuit option have done so because they experience significant savings in insurance premiums from their election. The costs of litigation and the potentially high jury verdicts that may result would be passed on to these policyholders in the form of higher premiums, potentially eliminating their incentives for choosing the limitation on lawsuit option.

As previously explained, the Legislature has attempted to strike this balance first through a monetary threshold, and currently through the use of a verbal threshold.[109] While the monetary threshold had obvious shortcomings, the Legislature's intent in its implementation did not.[110] Imposing a minimum threshold for the amount of medical bills required in order to bring suit would, absent abuse in the form of medical bill padding, limit the amount of suits brought by allowing only those plaintiffs who have suffered medically

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[104] *Id.*

[105] *Id.* at 1056.

[106] *See* discussion *supra* Part II.

[107] *See* supra notes 20–21 and accompanying text (providing the statutory language and explaining the legislative intent behind the limitation on lawsuit clause).

[108] *See* Worrall, *supra* note 40, at 104.

[109] *See* discussions *supra* Part II and Part IV.

[110] *See* discussion *supra* Part II.

significant injuries to sue for pain and suffering.[111] However, as explained, the Legislature replaced the monetary with verbal because of medical bill padding.[112] Adopted in response to this issue, the verbal threshold as found in the 1988 Act and AICRA was intended to stand as an important and significant barrier designed to limit the number of suits.[113] The difference between the 1988 Act and AICRA was the method of implementation of this goal—the 1988 Act switched from a monetary to a verbal threshold, while AICRA sought to achieve similar goals by revamping the categories of injury and tacking on additional requirements for verbal threshold plaintiffs.[114]

Furthermore, the judicial interpretation of AICRA presented in *DiProspero* removes a segment of the verbal threshold barrier that has remained in place for over a decade, the "serious life impact" requirement.[115] Through its judicial implementation, the "serious life impact" requirement has become a central part of verbal threshold litigation.[116] Given the long history of inclusion of the "serious life impact" standard and the legislative intent behind AICRA, it is reasonable that the Legislature would have "expect[ed] that [the courts] would [have] interpret[ed] . . . [AICRA] . . . in the same manner as the discarded 1988 [Act]."[117]

This longstanding nature of *Oswin*'s "serious life impact" requirement raises additional questions in light of the *DiProspero* court's assertion that "the Legislature is presumed to be aware of judicial construction of its enactments."[118] Interestingly, the *DiProspero* court offered this canon of statutory interpretation to support the *opposite* conclusion—that the Legislature must *not* have intended to preserve the *Oswin* standard when it created AICRA because presuming their awareness of *Oswin*'s interpretation, it chose to expressly adopt certain aspects of former verbal threshold case law, but excluded the *Oswin* standard from AICRA.[119] However, the *DiProspero* court's reasoning lends itself to an equally persuasive counterargument—the Legislature, presumed to be aware of the *Oswin* interpretation of the 1988 Act, never objected or moved to amend the statute to specifi-

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[111] *See id.*

[112] *See id.*

[113] *See* N.J. STAT. ANN. 39:6A-1.1(b) (West 2002) (stating expressly in the Preamble that AICRA is intended to limit suits for nonserious injuries).

[114] *See* discussion *supra* Part II.

[115] *See DiProspero*, 874 A.2d at 1056.

[116] *See* discussion *supra* Part II.

[117] *DiProspero*, 874 A.2d at 1050.

[118] *Id.* at 1049.

[119] *See supra* note 99.

cally exclude a "serious life impact" requirement during the *thirteen years* in which *Oswin*'s interpretation stood. Such "reverse" selective-incorporation, which arguably represents Legislative acquiescence to *Oswin*, holds just as much weight as *DiProspero*'s selective incorporation argument, yet reaches the opposite conclusion.

This continuity and clarity of legislative intent cannot be ignored; a reading of the verbal threshold standard that makes is easier for a plaintiff to bring suit for non-economic damages runs counter to the legislative purpose of AICRA and its predecessors.[120] Even the Legislature itself has recognized the problems presented by the *DiProspero* decision; in fact, several amendments have recently been proposed in both the state Assembly and Senate that move to reinstate the "serious life impact" requirement in verbal threshold litigation.[121] In accordance with good policy, the "serious life impact" standard should thus be reinstated.[122]

B. Prior Judicial Construction of the Issue Presented in DiProspero

Earlier decisions from the New Jersey Appellate Division relied on the weight and clarity of the legislative intent behind New Jersey's no-fault laws in holding that the serious life impact standard was intended to be carried forward to suits brought post-AICRA.[123] That

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[120] *See* N.J. STAT. ANN. 39:6A-1.1(b) (West 2002) (stating expressly that AICRA is intended to limit suits for non-serious injuries).

[121] *See supra* note 29.

[122] *See* 73 AM. JUR. 2D *Statutes* § 61 (2005) (explaining the effect of legislature's intent, objectives, and purposes in statutory interpretation):

> In the interpretation of statutes, the *legislative will is the all-important or controlling factor.* Indeed, it is sometimes stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. Thus, a construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature. (emphasis added) (citations omitted).

See also 73 AM. JUR. 2D *Statutes* § 62 (2005) (describing the relation of general rules of construction to determination of legislative intent):

> In the interpretation of a statute, the intention of the legislature is gathered from the provisions enacted, by the application of sound and well-settled canons of construction. However, since all rules for the interpretation of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, *every technical rule as to the construction of a statute must yield to the expression of the paramount will of the legislature.* (emphasis added) (citations omitted).

[123] *See, e.g.* James v. Torres, 808 A.2d 873 (N.J. Super. Ct. App. Div 2002), *cert. denied*, 816 A.2d 1049 (N.J. 2003); Rios v. Szivos, 808 A.2d 868 (N.J. Super. Ct. App. Div. 2002).

the New Jersey Appellate Division has reached the conclusion opposite of *DiProspero,* combined with the New Jersey Supreme Court's denials of certification on the issue until the year 2005, is further evidence that the court in *DiProspero* erred in its conclusion.[124] In *James v. Torres*,[125] a plaintiff subject to the verbal threshold suffered injuries in an automobile accident and sought recovery for her resulting noneconomic damages.[126] The trial judge dismissed her case because her injuries were not shown to have a serious impact on her life.[127] Plaintiff appealed, arguing that the Legislature did not intend to carry forward *Oswin*'s "serious life impact" standard, stressing that AICRA omits any mention of such a requirement.[128] The court disagreed, emphasizing the weight to be given to the legislative purpose[129] and noting that plaintiff's interpretation would undermine that purpose:

> the entire thrust behind the passage of AICRA was to reduce the number of litigated claims and, thus, to bring stability to automobile insurance premiums. If courts were to permit claims to go forward even in the absence of proof of a serious impact on a plaintiff's life, it would run counter to this legislative purpose . . . [because] . . . with more lawsuits comes higher costs.[130]

Similarly, in *Rios v. Szivos,*[131] the court concluded, mirroring the reasoning of the New Jersey Law Division's decision in *Rogozinski v. Turs*,[132] that "[b]ecause AICRA reflects an intention to 'tighten' the threshold and further restrict lawsuits arising from automobile accidents," the Legislature did not intend that AICRA dispose of the cen-

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[124] *See James*, 808 A.2d 873 (N.J. Super. Ct. App. Div. 2002).

[125] *Id.*

[126] *Id.* at 875.

[127] *Id.* at 876.

[128] *Id.*

[129] "[I]n the absence of specific guidance, our task is to discern the intent of the Legislature not only from the terms of the Act, but also from its structure, history and purpose." *James*, 808 A.2d at 878 (internal quotations omitted)(citing Jiminez v. Baglieri, 704 A.2d 1285,1290 (N.J. 1998)). Ultimately, the court stated that "it is not the words but the *internal sense of the law* that controls." *James*, 808 A.2d at 878 (emphasis added)(internal quotations omitted)(citing Jiminez v. Baglieri, 704 A.2d 1285,1290 (N.J. 1998)) The court continued to define the proper sources of legislative intent—"the policy behind the statute, concepts of reasonableness and legislative history . . . it is a general principle of statutory construction that 'statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good discretion.'" *James*, 808 A.2d at 879 (quoting Parker v. Esposito, 677 A.2d 1159, 1162 (N.J. Super. Ct. App. Div. 1996)) (citations omitted).

[130] *James*, 808 A.2d at 878 (N.J. Super. Ct. App. Div. 2002).

[131] 808 A.2d 868 (N.J. Super. Ct. App. Div. 2002).

[132] 799 A.2d 41 (N.J. Super. Ct. Law Div. 2002).

tral holding of *Oswin*.[133] Confronted with the same issue, the court in *Rogozinski* specifically stated "the Legislature's stated purpose is the key to the interpretation of any law."[134] Even though AICRA may have amended the 1988 Act, the purposes had remained the same, which to the court "d[id] not reflect an intention to modify the essential holdings of *Oswin*."[135]

C. AICRA: Multi-Pronged, But Maybe Not Multi-Protective

DiProspero placed great weight on the fact that AICRA contains several other provisions other than its version of the verbal threshold aimed at containing the costs of automobile insurance.[136] The court pointed to the creation of the Office of the Insurance Fraud Investigator, the implementation of the medical certification requirement, and the "tightening" of the verbal threshold through an overhaul to the categories of injury.[137] The court concluded that the existence of these additional protective measures eliminates the need for another protective measure—the "serious life impact" standard.[138] Under a closer examination, AICRA's new measures may not be sufficiently "protective" or effective in reducing the costs of insurance so as to support the abandonment of the serious life impact requirement—a hurdle to too many verbal threshold suits.

The weakest of the new "prongs" aimed at reducing the cost of insurance seems to be the new threshold itself,[139] lending further support to the carryover of the "serious life impact" requirement. It appears that the new threshold has not been "tightened" to the extent that the *DiProspero* court believes.[140] While AICRA did revamp the categories of injury to eliminate suits based on non-permanent injuries, it is possible that the number of future claims eliminated by these changes could be negated by an *increase* in claims based on

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[133] *Rios*, 808 A.2d at 869 (quoting *Rogozinski*, 799 A.2d at 49).

[134] *Rogozinski*, 799 A.2d at 48. The same issue has been considered in the New Jersey Law Division, with some cases reaching the opposite result. *See, e.g.*, Compere v. Collins, 799 A.2d 721 (N.J. Super. Ct. Law Div. 2002) (offering a "completely new threshold" argument and refusing to rely on extrinsic aids to determine the legislative intent because the language of AICRA is clear and unambiguous).

[135] *Rogozinski*, 799 A.2d at 49.

[136] DiProspero v. Penn, 874 A.2d 1039, 1046–47(N.J. 2005).

[137] *Id.* at 1047.

[138] *Id.*

[139] *See* N.J. STAT. ANN. § 39:6A-8(1) (West 2005) (presenting the language of AICRA's verbal threshold).

[140] *Compare 1988 NJ Sess. Law Serv. 119 (West) with* N.J. STAT. ANN. § 39:6A-8(1) (West 2002).

permanent, non-serious injuries.[141] AICRA's definition of "permanent" does not speak to the seriousness of the injury; it merely requires that the injury not heal to function normally with further medical treatment.[142] Previously, claims based on permanent, non-serious injuries would have been dismissed on summary judgment for failure to vault the threshold; hence, the "new" threshold appears to create a sort of "trade-off" by eliminating suits for non-permanent injuries and replacing them with suits for permanent, non-serious injuries.[143]

Similarly, the physician certification requirement does not appear to be a strong factor in containing the cost of insurance. This requirement, while new in terms of language, is not new to New Jersey in practice. The court in *Oswin*, as part of a three-part holding, required that the plaintiff submit objective, credible evidence to attest to the nature and extent of the plaintiff's injury.[144] Notwithstanding the absence of a clause in the statute stating that a doctor would be subjected to penalties for fraudulent reports, those who submit such false reports would always be subject to penalties for perjury. The codification of this punishment cannot alone be enough to limit the number of suits brought. This, combined with the problems presented by the new verbal threshold, create enough doubt as to the effectiveness of AICRA's "new multi-pronged approach" to undermine the conclusion that the *Oswin* "serious life impact" requirement is no longer needed.

VII. CONCLUSION

The New Jersey Supreme Court's elimination of *Oswin*'s "serious life impact" requirement in *DiProspero v. Penn* has the potential to open the courthouse to an increased number of verbal threshold suits and appeals.[145] While this presents an issue of concern in itself, the decision in *DiProspero* is also troubling in that it runs contrary to

[141] AICRA's definition of permanent does not include a seriousness element. A permanent, non-serious injury could be something that does not affect the daily life of the person, but it still "permanent." Before, this type of injury would have been regarded as frivolous, and related suits would be disallowed. *See* discussion *supra* Part III.

[142] *See* N.J. STAT. ANN. § 39:6A-8(1) (2005).

[143] *See* Henry Gottlieb, *Lawyers Seeing Fewer Trials and Less of Each Other*, NEW JERSEY LAW JOURNAL, Oct. 3, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1127811911612 (noting that prior to the decision in *DiProspero*, the number of cases was actually *declining* and highlighting the potential fallout from the decision in terms of the number of cases on the docket and the expected increase).

[144] Oswin v. Shaw, 609 A.2d 415, 429 (N.J. 1992).

[145] *See* Gottlieb, *supra* note 143.

the consistent legislative intent behind New Jersey's latest construction of its no-fault automobile insurance statute, AICRA.[146] Examining New Jersey's history of no-fault auto insurance illustrates that a central goal of the Legislature has consistently been to reduce the number of suits in order to keep insurance premiums affordable—whether it be through a monetary or verbal threshold limitation.[147] By eliminating the long-standing standard set out in *Oswin*, the court in *DiProspero* has removed an important limitation on lawsuits, which had remained unaltered by the Legislature for nearly thirteen years.[148] An increase in the number of suits may have the effect of rendering unaffordable automobile insurance premiums, contrary to the legislative intent behind AICRA and its predecessors. While it may be too early to feel the effects of the decision, recently proposed amendments to reinstate *Oswin*'s requirements[149] illustrate the growing awareness of the problems that the *DiProspero* decision may cause.

[146] *See* discussion *supra* Part VI.

[147] *See id.*

[148] *See* discussion *supra* Part V.

[149] *See* sources cited *supra* note 29 and accompanying text.