

01 COMMONWEALTH OF PENNSYLVANIA
02 HOUSE OF REPRESENTATIVES
03 JUDICIARY COMMITTEE
04 SUBCOMMITTEE ON COURTS

05 * * * * *

06 PUBLIC HEARING
07 ON HOUSE BILLS 1104 AND 1510

08 * * * * *

09 BEFORE: DON WALKO, SUBCOMMITTEE CHAIRMAN
10 Thomas R. Caltagirone, Committee Chairman
11 Kathy Manderino, Joseph A. Petrarca, Bryan
12 R. Lentz, and Harold James, Members

13 HEARING: Thursday, November 8, 2007
14 Commencing at 10:05 a.m.

15 LOCATION: Courtroom 676
16 Philadelphia City Hall
17 Broad & Market Streets
18 Philadelphia, PA 19102

19 WITNESSES: Rep. John Taylor, Sam Marshall, Robert
20 Passmore, Scott Cooper, Frank Canty,
21 Clarence Bowser

22 Reporter: Sharon Marsh
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01 P R O C E E D I N G S

02 -----

03 CHAIRMAN WALKO:

04 I'd like to welcome everybody here this
05 morning. Thank you for your interest and support of
06 legislation and I'd like to just state quickly I am
07 Don Walko, Chairman of the Subcommittee on Courts of
08 the Judiciary Committee. To my left is Judiciary
09 Committee Chairman Tom Caltagirone from Berks County,
10 and to my right Representative Joe Petrarca from
11 Westmoreland County and staffer David Rother
12 (phonetic) of the House Judiciary Committee.

13 So first I'd like to ask John Taylor, the
14 sponsor of the House Bill 1104, to come up and render
15 testimony.

16 REPRESENTATIVE TAYLOR:

17 Is this fine right here, Mr. Chairman?

18 CHAIRMAN WALKO:

19 Yes, sir.

20 REPRESENTATIVE TAYLOR:

21 Good morning to all my colleagues and
22 staff and welcome to Philadelphia, Mr. Chairman, and I
23 hope you've enjoyed coming to Philadelphia from
24 Pittsburgh once or a couple of times a year you get
25 here. And I want to thank you and Chairman

01 Caltagirone for entertaining this bill.

02 House Bill 1104 is labeled the plain
03 language bill. It's also a concept that we've passed
04 out of the house last term by a very comfortable
05 margin and specifically, it really just changes the
06 terms limited tort and full tort to the words limited
07 right to sue, and full right to sue in the form that
08 all insurance consumers sign when they are issued
09 insurance, the choices that they have to make as to
10 what type of insurance they want. And this bill hopes
11 to make that clear.

12 Again, basically, we just want every
13 insurance consumer to have a fundamental understanding
14 of exactly what they're buying. In my other capacity
15 as an attorney, which I don't really do plaintiff work
16 and never really did, but in the course of being
17 involved in our legislative offices, we are often
18 asked the question about what this concept is. What
19 is the difference between limited tort and full tort,
20 and more importantly, after the fact, don't understand
21 what particular insurance they bought, what insurance
22 concept that they're entering into. Just looking at
23 price and then making a decision based on that.

24 In our caucus, I guess the --- one of the
25 biggest criticisms of the bill is what certainly

01 valued colleague Mark Mustio would say --- he's an
02 insurance agent --- that each and every consumer has a
03 very thoughtful, deliberate conversation with their
04 insurance agent, who sits down and explains to them
05 the difference in these concepts. I've always argued
06 that that may be the way Representative Mustio
07 conducts his business, but it's certainly not the way
08 that it's conducted in most cases, certainly not the
09 way people go through when they buy insurance on line,
10 certainly not something that I heard from my own
11 insurance agent, whom I've known since first grade.

12 It's expected that we all understand the
13 difference between these two concepts, and frankly,
14 that is not the case. And on the way in here this
15 morning, I happened to be on an elevator with a judge
16 of the Common Pleas Court, who does criminal matters,
17 and he asked what it is I'm doing here today, and I
18 talked about limited tort, changing the language, and
19 he said, isn't that the concept where you have to sue
20 for less money, which is an incorrect notion, and it
21 was coming from a judge. And if that's the case, I
22 can't understand how the average consumer would have
23 any idea of what it is they're purchasing, based on
24 the language that currently exists.

25 Just by way of argument, talking about

01 criticisms of this legislation, again, I think it's
02 about as simple as it can be --- but one of the
03 criticisms in particular is that the lawyers are for
04 it. It can't be good if lawyers are for it, so we are
05 worried about it. It makes perfect sense that trial
06 lawyers would be advocates of this particular
07 legislation because they are the front lines of people
08 who hear the complaints from consumers that either
09 don't understand what they're choosing, or have they
10 chose something that is not right for them. Probably
11 all of us are on the second line of defense.

12 The other thing is because we're involved
13 in it, that there has to be something more to it.
14 You'll notice in this bill, it's a very simple
15 concept. The underlining has merely changed language,
16 and we were very clear about what this bill does to
17 get that ability to do it, and we're only changing the
18 language. And if in fact, there's some other
19 dastardly plot that I have not been able to see, and
20 nobody has been able to articulate, then I'll stand
21 corrected and look at that. But as of now, it's
22 merely changing the language. We want all the
23 consumer public to have a better understanding of what
24 it is they're purchasing, on the very form that
25 they're required to sign. Again, we're appreciative

01 that the Subcommittee is taking this concept up and
02 looking at this bill and hearing from all the
03 stakeholders. We're hopeful that the full committee
04 has a chance to do that and get this out onto the
05 floor for a full debate.

06 In this particular calendar year, we've
07 been talking about transparency and openness and full
08 understanding. I think this particular language in
09 the bill gives the consumers of Pennsylvania that
10 right. And I appreciate your hearing from me. Thank
11 you.

12 CHAIRMAN WALKO:

13 Thank you, Representative Taylor.

14 Questions? Representative Petrarca?

15 REPRESENTATIVE PETRARCA:

16 One question, John. Do you know what
17 other states are doing?

18 REPRESENTATIVE TAYLOR:

19 Sorry?

20 REPRESENTATIVE PETRARCA:

21 Do you know what's going in other states?

22 REPRESENTATIVE TAYLOR:

23 In other states regarding this language,

24 no.

25 REPRESENTATIVE PETRARCA:

01 Do other states do the limited tort, full
02 tort, right to sue?

03 REPRESENTATIVE TAYLOR:

04 I don't have full information, but the
05 concept in general, how it's laid out in language, you
06 will hear from many people on that that are on the
07 agenda here this morning.

08 CHAIRMAN WALKO:

09 Thank you for that excellent statement.
10 Representative Taylor, would you like to join us for
11 the rest of the hearing?

12 I don't know if the next two want to
13 combine or not, but in any event, Mr. Sam Marshall of
14 the Insurance Federation of Pennsylvania and Mr.
15 Robert Passmore of the Property Casualty Insurers
16 Association of America. Thank you so much for coming
17 in on this very busy day here in Philadelphia.

18 MR. MARSHALL:

19 This is like being back in law school in
20 moot court or something. But it's a pleasure to be
21 here. As a Philadelphia boy, it's always nice to have
22 hearings here in my home town.

23 Good morning, and thank you for the
24 opportunity to be here. I'm Sam Marshall, and I head
25 up the Insurance Federation of Pennsylvania. We are a

01 trade association representing insurers of all shapes
02 and sizes doing business here. Our members include
03 not only the bulk of the auto market, but also the
04 bulk of the insurance industry generally.

05 At the outset, let's all make a few
06 concessions. First, let's all concede the word tort
07 is not one of those that most of us use or understood
08 in everyday language or dealings. And let's concede
09 that if we go back to 1989, when the idea of full and
10 limited tort was proposed, you might have titled it
11 something else.

12 Second, let's all concede that veritably
13 every contract has terms that don't fall within most
14 people's everyday language or dealings. I don't care
15 if it's your phone service, your cable company, your
16 warranty on household appliances, your mortgage, or
17 your credit card company, or a contingency agreement
18 you signed with a lawyer. Routine contracts,
19 including insurance policies, use terms that
20 thankfully aren't part of most people's everyday
21 conversations.

22 Third, let's all concede that unique
23 terms aren't, on their own, necessarily a problem.
24 The problem is whether and how they're explained. I
25 understand the appeal of calling something a plain

01 language bill, but to me the clarity comes in the
02 explanation, not the title.

03 Fourth, let's all concede that among the
04 many issues facing Pennsylvania, insurance or
05 otherwise, consumer confusion about the meaning of
06 tort elections in auto coverage isn't high on that
07 list. Prior to Act 6 in 1990 auto insurance was a
08 dominant issue. Coverage was expensive, especially in
09 Philadelphia. Insurers were scaling back or leaving
10 the state. Consumers weren't confused. They were
11 outraged that they had to buy coverage they couldn't
12 afford, and in many cases couldn't get through the
13 voluntary market.

14 Since then auto insurance hasn't been the
15 front-burner issue that it was in the 1980s. It's
16 been in many ways a success story since Act 6 of 1990.
17 Rates have been flat or have dropped, and coverage has
18 become widely available through a competitive market,
19 with aggressive marketing in areas that were
20 previously underserved.

21 And until last year, the issue of alleged
22 consumer confusion about the tort option wasn't even
23 an issue. Somehow, for all the attention auto
24 insurance always gets from consumers, from the General
25 Assembly, from the media, from the trial bar, and from

01 us, it wasn't even raised in over 17 years.

02 There's no better example than right here
03 in Philadelphia. When he was still the mayor,
04 Governor Rendell signed an executive order to explore
05 ways to lower the cost of auto insurance, and Mayor
06 Street and the Philadelphia City Council follow
07 through. They came up with new ways to reduce the
08 cost of the limited tort option. In doing so, they
09 had extensive hearings and meetings with many parties
10 about the tort option. Heck, that was the sole focus,
11 but somehow the alleged confusion of the term tort
12 never made anybody's radar screen.

13 The same has been true across the state.
14 Last year, when this issue hit the General Assembly in
15 the final days of the session, the Insurance
16 Department's Consumer Services Division reported, and
17 I quote, that it is unaware of any complaints from
18 consumers indicating they did not understand the
19 terminology full tort or limited tort, saying there's
20 the potential for the change in the language will
21 cause confusion where there isn't any. And in my
22 work, I hear a lot of complaints from you, the
23 administration, the media, and consumers, and
24 confusion over this language hasn't been one of them.

25 I think reason for this is, whatever they

01 may think about the term tort, the two-sentence
02 explanation that immediately follows is pretty clear.

03 One option allows for recovery of "pain
04 and suffering and other non-monetary damages" in all
05 situations. The other limits recover of these damages
06 to serious injuries and some other listed exceptions.
07 The law also requires that anybody choosing the
08 limited torn option personally sign and date that
09 choice.

10 My trial bar colleagues are apparently
11 satisfied with that explanation and signature
12 requirement, since they've never suggested that the
13 explanation itself is confusing, just the word at the
14 beginning. If you take a look at the form itself, a
15 one-pager, so hardly one that hides the essence in
16 long verbiage, you see this all in close proximity.

17 That's not to say people always
18 understand what they sign, or read contracts as
19 carefully as they should, or remember what option they
20 chose and why they chose it years later when they have
21 a claim. But the current law is as understandable as
22 anything I've seen in explaining this, as even the
23 trial bar seems to acknowledge. And I'm not sure what
24 else you can do beyond making the consumers take the
25 specific and additional steps the law now requires if

01 they want anything less than the right to seek pain
02 and suffering damages in every instances.

03 I'll make two final concessions. First,
04 we don't think changing from "tort" to "right to sue"
05 will make any difference in what options consumers
06 choose. It is the explanation and the price
07 difference that drive consumer choices, not the title.
08 I'd say that "right to sue" is itself not that
09 commonly used, clear or accurate. It is not the right
10 to sue that is limited, but the amount of possible
11 recovery in a suit.

12 Second, we lose the battle of sound
13 bites. "Plain language" always sounds good, and has
14 the superficial appeal of seeming an easy "give" on
15 our part. Just change your forms going forward.
16 Unfortunately, it is never that easy. Changing even a
17 few words in an auto form means a whole new series of
18 filings with the Insurance Department, which always
19 takes more time and money than those who order it
20 think.

21 More importantly, changing the language
22 will, as the Insurance Department noted last year when
23 it opposed this change, create new problems. The new
24 words, "right to sue" instead of "tort," are to only
25 apply to new private passenger motor vehicle liability

01 insurance policies applied for and issued after a set
02 period.

03 I'm not sure and the Department wasn't
04 sure whether that includes renewals or changes in
05 coverage, as with new cars, new drivers, or other
06 changes. Those are at times considered new policies.
07 What is meant here? Would everybody who has already
08 made a tort election have to make it again or be
09 thrown into the full tort/full coverage pool, with the
10 increased premiums that come with it?

11 That's confusion and administrative
12 problems for us, of course, but it is also a problem
13 for consumers, who generally don't want to have to go
14 to their agents and re-sign a form every time they buy
15 a car or renew a policy or add a driver. And if they
16 don't do this, they'll be stuck with the higher
17 premiums that made auto insurance the issue it was in
18 the 1980s, which is not something any of us need to go
19 through again.

20 At best, you will now have a market where
21 some people's policies refer to "tort" options, while
22 others' refer to "right to sue" options, with both
23 meaning the exact same thing. I don't think the
24 "tort" title is quite the problem my trial bar
25 colleagues make it out to be, but at best, this change

01 seems to be replacing one element of confusion with
02 another.

03 I'll agree with the trial bar on one
04 thing. It may be time to take a fresh look at Act 6
05 and see what areas need to be modernized. Some of
06 that may include addressing areas of possible consumer
07 confusion. While I don't think changing the word tort
08 ranks high on that list, there are other areas that
09 do. Try reading the explanation of "stacking" and
10 tell me if you think that's clear.

11 More important is how to address how
12 forms are given and signed. Act 6 was enacted just
13 before the internet started being where consumers
14 purchase products, including insurance. Some of its
15 rules predate those types of computer-driven sales,
16 with instant issuance and the like, and it may be time
17 to update the law to reflect that.

18 Whatever you do, I'd ask that you keep in
19 mind a few guiding principles.

20 First, answer real consumer problems.

21 Second, keep coverage affordable. If
22 you're going to mandate that people buy insurance,
23 make sure they have affordable options.

24 Third, be wary of unintended or maybe
25 even intended consequences. The changes that seem

01 simplest often create the most litigation and odd
02 results.

03 Finally, remember the adage, if it ain't
04 broke, don't fix it. This law has worked well for
05 consumers for almost two decades, and while
06 improvements are always possible, make sure that
07 that's what you're really doing.

08 Again, thanks for the chance to be here.
09 I'd be happy to answer questions now, or do you want
10 to let Bob go and then you can ask both of us?

11 CHAIRMAN WALKO:

12 Why don't we do that? Good idea.

13 MR. PASSMORE:

14 Good morning, Chairman Walko, Chairman
15 Caltagirone, and members of the House Judiciary
16 Committee's Subcommittee on Courts. My name is Robert
17 Passmore, and I am Director for Personal Lines for the
18 Property Casualty Insurers Association of America,
19 also known as PCI. PCI has over 1,000 members that
20 write over 52 percent of the auto insurance premium in
21 the \$4 billion personal automobile insurance market in
22 Pennsylvania.

23 I would like to thank the members of the
24 subcommittee for the opportunity to speak to you today
25 about the proposals to change the current tort and

01 limited tort language in House Bill 1104 and House
02 Bill 1510.

03 The current language has been in use
04 since 1990. That is 17 years of loss history, case
05 law, and consumer familiarity with the terms tort and
06 limited tort. Changing the terminology now, removing
07 what is known and replacing it with the unknown, risks
08 destabilizing the marketplace, increasing litigation,
09 driving up losses and the rates paid by Pennsylvania
10 consumers.

11 The language being proposed, "right to
12 sue" or "limited right to sue" might not seem to be
13 significantly different, but it is misleading. Those
14 terms can lead consumers to believe that claims can
15 only be resolved through litigation when the majority
16 of claims are resolved amicably, without the need for
17 litigation.

18 It also implies that they do not have the
19 right to file a lawsuit now. Those who do choose the
20 limited option still have the right to file a lawsuit
21 to recover their economic damages, such as medical
22 bills, lost wages and out-of-pocket expenses. Their
23 right to recover is not limited if they have sustained
24 a serious injury, as defined by Pennsylvania law.
25 There are also exceptions to the limited tort

01 election, such as injuries sustained in accidents
02 caused by a drunk driver or when the other driver is
03 uninsured.

04 These mistaken beliefs would likely lead
05 to increased litigation and loss costs that consumers
06 would pay in the form of higher premiums.

07 But those increased costs don't stop
08 there. Seventeen (17) years of case law would no
09 longer apply, and the new language would inevitably
10 wind up in the courts. The cost of these challenges
11 would ultimately be paid by consumers as well.

12 The consumer can save significantly on
13 their auto insurance by choosing limited tort
14 coverage. As a 2004 NAIC study points out, by
15 choosing limited tort, savings ranged from 15 to 40
16 percent, depending on where the insured lived. The
17 study found that in Philadelphia, 60 percent of
18 drivers realized these savings by choosing limited
19 tort coverage.

20 While cost is always important to
21 consumers, having the right coverage for their needs
22 is paramount. So it is important to remember that the
23 consumer can change their election at any time before
24 an accident occurs. If they choose limited tort
25 coverage and their needs change, they can contact

01 their agent or insurance company to change that
02 election the next day or the next month.

03 Therefore, we don't believe that this
04 proposal will benefit Pennsylvania consumers.
05 Consumers that choose "right to sue" will not only pay
06 more for their insurance as those that choose "tort"
07 do now, but all consumers will pay more.

08 Once again, I would like to thank you for
09 the opportunity to speak to you today, and I would be
10 happy to answer any questions you may have.

11 CHAIRMAN WALKO:

12 Thank you. Representative Petrarca?

13 REPRESENTATIVE PETRARCA:

14 Just a couple quick questions. I guess
15 you're saying that this change is not needed.

16 MR. PASSMORE:

17 Yes.

18 REPRESENTATIVE PETRARCA:

19 So you're saying you're against it also?

20 MR. MARSHALL:

21 Correct. It's not just that it's not
22 needed. It's that it creates problems.

23 REPRESENTATIVE PETRARCA:

24 I've had questions over the years, asking
25 me about what tort means. What does this mean? I

01 don't understand how you can stand there and tell us
02 this is not going to be clearer or that it's not going
03 to be plain for people to understand what limited tort
04 or full tort is.

05 MR. MARSHALL:

06 And I'll admit that the word tort might
07 not be something that's commonly used, but frankly,
08 the two-sentence explanation that follows it --- if
09 you look at the form, it's right there, just one page.
10 And the two-sentence explanation that follows is the
11 best explanation there is. Bob talked about it as
12 well. Frankly, the full right to sue versus limited
13 right to sue, I'm not exactly sure what that means,
14 either. You see, it's the explanation that counts.

15 REPRESENTATIVE PETRARCA:

16 Will you still have the explanation ---
17 we could still have an explanation.

18 MR. MARSHALL:

19 And I think that, frankly, changing the
20 title --- as I said, 17 years ago we might have called
21 it something else, and so be it. But in that 17 years
22 there's absolutely no doubt that there are people who
23 don't understand what tort is, but do understand the
24 explanation. The proposal doesn't say that the
25 explanation is somehow inadequate. You do have to

01 separately sign it and date it. There's only a
02 certain amount of hand-holding that you can do, and I
03 think the difficulty in changing a form after 17 years
04 is that now you're going to have some policies having
05 one title, some policies having another.

06 In Representative Taylor's bill, it says
07 here this only applies to new policies, but then you
08 raise the question, what is a new policy? Is it a
09 renewal? Is it when you add a car? Is it when you
10 add a driver? Those are all questions that are likely
11 to result in a lot of needless litigation and costly
12 litigation.

13 REPRESENTATIVE PETRARCA:

14 We can certainly define those terms.

15 MR. MARSHALL:

16 And I guess somebody's going to ---
17 therein, Representative, lies the challenge, because
18 every time somebody tries to --- we're dealing right
19 now with a couple of cases that, after 17 years, it
20 just came up, and the court and came up with a new
21 standard for when you have to give certain waivers
22 because they said here, every time you add a third car
23 to your policy, something new kicks in, and those are
24 the types of difficulties.

25 And frankly, if somebody were to say the

01 explanation is bad; if somebody were to say it's
02 getting passed over on the insurance application
03 process, those would be, I think, real problems.
04 Nobody's saying the explanation is bad. Everybody's
05 acknowledging that we have to have a separate
06 document, separate signature on this, separate
07 acknowledgement letters, you have a date on it. It is
08 as much as you possibly can. It is being pulled out
09 and getting separate treatment. To put everyone
10 through the administrative rigmarole of changing the
11 title from one title that on its own people don't
12 understand, to another title that on its people
13 wouldn't understand, I don't think achieves anything
14 good. If you focus on the explanation, if you look at
15 the explanation and you tell me you don't understand
16 that, that's a topic worthy of consideration. But
17 nobody's saying they don't understand the explanation.
18 And I think that's the important thing.

19 REPRESENTATIVE PETRARCA:

20 If this law passes and the terminology
21 changes, you feel that will bring about more lawsuits?
22 And if it does, doesn't in a sense prove that it's
23 more clear?

24 MR. MARSHALL:

25 Actually, I don't think it will bring

01 more --- as I mentioned, our marketing people who did
02 some work on this, don't feel that will result in more
03 legal tests than full tort and limited tort versus
04 full right to sue or limited right to sue, but the
05 more litigation that it would bring about would be the
06 people who had already made those decisions, who had
07 already made the full right to sue or limited right to
08 sue elections would try to open that up and say, gee,
09 because I added a new car, I should have gotten this
10 new title. I think that's the litigation that would
11 be opened up. I don't think that you would see
12 consumers making different choices, because frankly,
13 the explanation and separate acknowledgement and talk
14 with the agent and the difference in rates are what
15 drives consumer choices, not the title before the
16 explanation.

17 CHAIRMAN WALKO:

18 Thank you, Representative Petrarca.
19 Representative Manderino?

20 REPRESENTATIVE MANDERINO:

21 Thank you. Good morning. I want to pick
22 up with --- Mr. Marshall has partially answered where
23 a lot of my questions were going to go, but I missed
24 his testimony and I apologize that I wasn't here for
25 it.

01 I want some more specific examples of
02 what type of 17 years of litigation you think is going
03 to be opened up, because I did some checking after Mr.
04 Marshall and I had a conversation about this bill.
05 And judges tell me that whether people understood what
06 kind of coverage they got or didn't get, depending on
07 who the attorney is, they may have to litigate that or
08 not, and now I'm not sure that there would be any
09 change. I really am just trying to understand your
10 point of view, and am having a hard time of what
11 floodgates of litigation a change in the language
12 would open up. And the more specific you can be, the
13 more you might be able to convince me that you have a
14 point there.

15 MR. MARSHALL:

16 The floodgate of litigation that we could
17 see is that you have a bill that only applies to new
18 policies issued on or after a certain date. You have
19 to change all the language on the forms and now you're
20 going to add some forms that say full right to sue,
21 limited right to sue.

22 REPRESENTATIVE MANDERINO:

23 Stop right there. Doesn't that change,
24 meaning the legislation saying that that wording
25 changes, have to do with your costs of printing new

01 forms and distributing new information and nothing to
02 do with changing the rights under the law?

03 MR. MARSHALL:

04 Correct. I realized that I was going to
05 have a long sentence there and ---.

06 REPRESENTATIVE MANDERINO:

07 Okay. Sorry.

08 MR. MARSHALL:

09 Because the litigation that we fear is
10 that when you said it only applies to new policies
11 issued on or after a date, the question becomes, what
12 is a new policy being issued? Is it a renewal? Is it
13 when you add a car? Is it when you add a driver?
14 Those are things that --- and defining what is a new
15 policy, maybe that would be more clarifying or
16 something like that, but that is something that I'd
17 just refer you to a most recent case, the Sackett
18 case, where it overturned 17 years ---.

19 REPRESENTATIVE MANDERINO:

20 What was the case called?

21 MR. MARSHALL:

22 It's called Sackett versus Nationwide.

23 REPRESENTATIVE MANDERINO:

24 Is that in here somewhere?

25 MR. MARSHALL:

01 No. It deals with stacking language.

02 REPRESENTATIVE MANDERINO:

03 Okay.

04 MR. MARSHALL:

05 But I did mention in my illustration that
06 frankly, people understand that a lot less than they
07 understand full tort/limited tort. But in any event,
08 the point is, what you will see is somebody saying,
09 you know, I added a new car. I added a new driver. I
10 should have gotten these new forms all over again, so
11 while I left it limited tort, and I went along with it
12 renewal after renewal after renewal, because I added a
13 new car, this is effectively a new policy. Therefore,
14 I am deemed to have chosen full tort. That's the kind
15 of case that would define whether it's a new policy.

16 REPRESENTATIVE MANDERINO:

17 So if our goal, which I fully support, is
18 plain language in all of our statutes, that consumers
19 can understand and we can all sit here and agree, I
20 don't care how you state it, that the average Joe,
21 even the average lawyer before they went to law
22 school, didn't know what tort means either. If the
23 goal is plain language that a consumer can understand,
24 can't we address that? These bills are proposals to
25 change language, not litigant's rights under the law,

01 so if we get to the issue of renewals and whether or
02 not that's issuing a whole set of policies, as
03 compared to --- and we had something in the language
04 that said either that adding a car or something that
05 just said basically that we're not changing what your
06 rights are. We're just changing the language, then
07 that's what would be clear, that if somebody tried to
08 litigate and say, well, limited tort meant one thing
09 but limited right to sue means something different
10 now, Your Honor, Your Honor can just say eh, you're
11 out of here.

12 MR. MARSHALL:

13 In fact the bill does say that,
14 Representative Taylor's bill.

15 REPRESENTATIVE MANDERINO:

16 Okay, so there's no problem?

17 MR. MARSHALL:

18 The problem is --- and I welcome you to
19 say, okay, we're now going to define just what is a
20 new policy. And into there --- and I welcome you to
21 read through the Supreme Court's opinion in the
22 Sackett case, because we start getting into questions
23 now, what is an insurable interest? When does it
24 change? What does that mean? One of your
25 difficulties when you do that is that you're coming

01 along and you're wading into an area of what is an
02 insurable interest when you add a new driver or add a
03 new car or when you change other elections in the
04 policy, that possibly in --- and I'd love to see the
05 language in the bills, but I haven't been able to come
06 up with one.

07 REPRESENTATIVE MANDERINO:

08 I hear what you're saying about the
09 language, but I don't see the floodgate of litigation
10 if the change of the language is doing nothing to
11 change the litigants' legal rights.

12 MR. MARSHALL:

13 Okay. I don't think --- and I think your
14 perceived floodgate, the way the law is, you are
15 deemed to be in full tort unless you specifically
16 elect limited tort.

17 REPRESENTATIVE MANDERINO:

18 But wouldn't you be deemed to be full
19 right to sue, unless you choose limited right to sue?

20 MR. MARSHALL:

21 What we're dealing with is a marketplace
22 where everything is --- then they add --- and they're
23 going on and they're getting renewals and all that.
24 But what happens when they add a car, if they add a
25 driver, or they change addresses or they change other

01 coverages, the question becomes, does that make it a
02 new policy, where they have to specifically, again,
03 elect limited tort? Because if they didn't make that
04 new election, they will then be deemed, when they have
05 a claim, to be a full-tort insured. So what you can
06 see, and what we would forecast, is that everybody
07 who's in the limited tort pool, when they come up with
08 the case where they're deemed full tort after they've
09 had a claim. The first question you ask is can we
10 jump them out of limited tort into our new pool who
11 like to sue? And all we had to do was establish that
12 it was a new policy, because somewhere along the way
13 he added a car or added a new driver.

14 REPRESENTATIVE MANDERINO:

15 Today I have an automobile policy. Like
16 many of my constituents I have chosen the limited tort
17 option. My kid gets a car. I put the kid's car on my
18 policy. I call my agent and say, add my kid's car.
19 What kind of car? You tell him. You want the same
20 type of coverage you have on the main vehicle? Yeah.
21 Okay, bye. My son now has the limited tort option.
22 Correct?

23 MR. MARSHALL:

24 Correct.

25 REPRESENTATIVE MANDERINO:

01 If my son tried to go to court or I tried
02 to go to court, and say, I didn't understand what I
03 called and told my agent to add my son's policy, that
04 I was choosing limited tort, what would the court say
05 to that?

06 MR. MARSHALL:

07 You know, the real question,
08 Representative, is when you add that son, or you add
09 the car, if you were adding a third car for your son
10 or something like that, the court would say, well,
11 that's a new policy, and when you ---.

12 REPRESENTATIVE MANDERINO:

13 What does the case law say now?

14 MR. MARSHALL:

15 Right now, it doesn't hinge on the new
16 policy question. Right now, that tort election that
17 was individually made continues.

18 REPRESENTATIVE MANDERINO:

19 Correct. Why wouldn't it be the same
20 darn thing?

21 MR. MARSHALL:

22 And I welcomed you to come up with that
23 language. I'd love to see it, but what you have right
24 now is, you said here in the bill that with a new
25 policy, but defining what is a new policy is, I would

01 suggest, a more difficult ---.

02 REPRESENTATIVE MANDERINO:

03 Okay, then I misunderstood what you said
04 about the Taylor bill already having that language in
05 it. What's the language in it that the Taylor bill
06 already has?

07 MR. MARSHALL:

08 The language that the Taylor bill has is
09 that it says full tort means the same as full right to
10 sue. Limited tort means the same as limited right to
11 sue. But again, some of this goes to --- if you want
12 to change the title, knock yourselves out. It's a lot
13 of administrative hassle, and perhaps not just
14 administrative hassle. It's the form, and has a very
15 clear two-sentence explanation. If somebody doesn't
16 like an explanation says, you want to re-do that
17 explanation? It's gobbledygook. Who could possibly
18 understand it? But it's a two-sentence explanation
19 that has to be specifically signed and dated. I'd
20 understand if people said gee, I didn't understand
21 what tort meant. But did you understand the two
22 sentences immediately following?

23 REPRESENTATIVE MANDERINO:

24 No, people understand the prices and
25 whether they can afford or not afford to pay, but it

01 just doesn't --- and that is the primary reason that I
02 know that my decision is to use limited tort. If they
03 can't afford full tort in the city. I don't think
04 that's going to change if we change the language, for
05 many people, but I think that for those people they
06 will have a better consumer understanding of what it
07 is that they're choosing or not choosing.

08 MR. MARSHALL:

09 With full right to sue and limited right
10 to sue, there's nothing any more accurate about what
11 it is. Actually full tort and limited tort may not be
12 daily conversation terms, but they are accurate. It's
13 the explanation I think that has the language.
14 Nothing changes anything. And be careful in trying to
15 solve a problem that isn't quite a massive problem.
16 When you consider a new policy, ask is it good policy
17 and when is it a good policy?

18 What you don't want is to have companies
19 being skittish and expecting litigation. And the last
20 thing the consumer needs is ---.

21 REPRESENTATIVE MANDERINO:

22 Where is that in the bill?

23 MR. MARSHALL:

24 What the bill ---.

25 REPRESENTATIVE MANDERINO:

01 I don't remember seeing that in the bill.

02 MR. MARSHALL:

03 What the bill says is that every time you
04 get a new policy you now have to make the new
05 election.

06 REPRESENTATIVE MANDERINO:

07 So your problem is not with the language
08 of exchanging right to sue with tort; your problem is
09 with the definition of what's a new policy?

10 MR. MARSHALL:

11 That would be the main problem in terms
12 of litigation, but I would say that everybody else
13 doesn't now have higher rates. We've been able to
14 hold down rates. I think frankly, to make everybody
15 go issue new forms, compile new forms, recalibrate all
16 the letters and get all of that out, yes we'll have to
17 have one pile for renewals --- one pile of documents
18 for one group of people, another pile of documents for
19 another group. We will --- having to put in that
20 complexity, some people having to say one thing, some
21 people having to say another. We will from time to
22 time botch it. We're a big business and I don't
23 happen to think that adding that administrative layer
24 to solve what I think is frankly a non-problem with
25 the title, and to create the definition problem ---.

01 REPRESENTATIVE MANDERINO:

02 I ask your indulgence, Mr. Chairman.

03 Other than changes to the --- do changes in forms
04 happen only because the legislature changes Act 6, or
05 does sometimes the Department say to the insurance
06 company, you have to do something new, some new
07 regulation, some new something, and by such-and-such a
08 date, you have to have them in use. Does that ever
09 happen?

10 MR. MARSHALL:

11 No so much.

12 REPRESENTATIVE MANDERINO:

13 Maybe the way I asked it. We've been
14 living under Act 6 since 1990, is it?

15 MR. MARSHALL:

16 Yes.

17 REPRESENTATIVE MANDERINO:

18 How many times, if ever, has Act 6, the
19 policy, the new language --- when Act 6 came in we
20 needed all new forms and all new language. Okay? Now
21 how many times since 1990 to 2007, have you needed new
22 forms?

23 MR. MARSHALL:

24 Actually, in terms of the Department
25 ordering them?

01 REPRESENTATIVE MANDERINO:

02 Or the legislature.

03 MR. MARSHALL:

04 Or the legislature? I don't think the
05 legislature passed any changes, but the Department has
06 --- all during that time, it has not happened, but I
07 will say that the companies from time to time make
08 changes on their own. Whether it's a rider or a
09 change in arbitration rules or whatever it may be. It
10 does happen. But what we're dealing with here, is a
11 rule that would say some people are going to have to
12 say this, and some people are going to have to say
13 that.

14 REPRESENTATIVE MANDERINO:

15 So when a company changes their forms
16 because they have new arbitration rules that they're
17 going to apply, now first they have to go to the
18 Department and ask is it okay for me to change my
19 forms this way? And then the Department approves it.
20 It says yes, it's okay for you to change your form
21 this way. Now what do you do?

22 MR. MARSHALL:

23 Then you would have that in. The
24 difference is ---.

25 REPRESENTATIVE MANDERINO:

01 Then you would have that in. Would
02 everybody who is renewing a policy or adding a new car
03 have to schlepp in to the agent and re-fill out all
04 the new paperwork?

05 MR. MARSHALL:

06 That's not even on the same wavelength.
07 The difference is that all of the changes that I've
08 seen in the 17, 18 years since Act 6, and even before
09 that, they don't deal with the election changes. They
10 may be a new form, but they don't deal with the
11 election, and particularly here, they don't deal with
12 the election provision where if you do nothing, you're
13 deemed to be in the more expensive category.

14 REPRESENTATIVE MANDERINO:

15 But it does affect my right as a consumer
16 even more if you changed the arbitration clause and
17 don't even let me know that, right?

18 MR. MARSHALL:

19 No, no. But you are told about that.

20 REPRESENTATIVE MANDERINO:

21 By issuing a whole new form; correct?

22 MR. MARSHALL:

23 By issuing a new form that --- the
24 difference is ---.

25 REPRESENTATIVE MANDERINO:

01 But if I renew or add somebody to my
02 policy, you got to do a new form. Right?

03 MR. MARSHALL:

04 You get your new policy. The difference
05 in what we're talking about here is, first of all,
06 that would change then for all policies ---

07 REPRESENTATIVE MANDERINO:

08 Right.

09 MR. MARSHALL:

10 --- that the company does. The company
11 won't have old forms and new forms at the same time.
12 Under this, you would have old forms and new forms.
13 But the difference here in what we're talking about is
14 that the consumer has to make a specific election.
15 The consumer has to come in and personally sign a ---.

16 REPRESENTATIVE MANDERINO:

17 So I can make an educated choice as
18 compared to the insurance company making a one-sided
19 choice that affects my rights.

20 MR. MARSHALL:

21 No. Because this is your consumer
22 protection, that you as a General Assembly bestow.
23 There are other elections like the stacking provision,
24 for instance. There are other options in the
25 purchasing of coverage. This is one where if the

01 consumer doesn't make an election, he is deemed to
02 have chosen the more expensive coverage. And what you
03 don't want is to have people --- what you don't want
04 is a lot of after-the-fact litigation, someone saying,
05 hey, you know what ---?

06 REPRESENTATIVE MANDERINO:

07 You know, to me it's a legitimate concern
08 if you're saying now I'm going to have to --- you're
09 all of a sudden --- your fear is you don't want to pay
10 out claims for something that he was paying a premium
11 for.

12 Thank you, Mr. Chairman.

13 CHAIRMAN WALKO:

14 Thank you. Representative Taylor?

15 REPRESENTATIVE TAYLOR:

16 Thank you, Mr. Chairman.

17 Gentlemen, I certainly can understand
18 your argument about the inconvenience and the expense
19 to re-do. That argument then, we have to weigh versus
20 the benefit to the consumer.

21 What concerns me is that --- at least Sam
22 said that --- I don't know if you said this too ---
23 that marketing tells you that not many
24 differentiations will occur in choices due to that
25 language, yet you say it will, and I quote,

01 destabilize the marketplace.

02 That's a scary notion, destabilizing the
03 marketplace. That's the kind of argument that, you
04 know, I see as a good argument, plus it's a scary
05 threat. So could you go into detail about how an
06 entire market could be destabilized because of a
07 change in a few words?

08 MR. PASSMORE:

09 I think Sam summed it up very well, with
10 the changes, the things that would happen. He
11 mentioned the problems of the good chance of
12 litigation on the question of what is a new policy.
13 Those are the kinds of things where forms have been
14 introduced with terms that have been used ---.

15 CHAIRMAN WALKO:

16 Use the microphone, please. People are
17 having trouble hearing.

18 MR. PASSMORE:

19 I'm sorry. These are forms and terms
20 that have been used for 17 years, and there's
21 certainly a great degree of comfort, by consumers and
22 the insurers, about them. And again, if you change
23 now, what seems to be settled, it could introduce some
24 instability.

25 REPRESENTATIVE TAYLOR:

01 I don't think we're interested in
02 destabilizing the market. Sam, I think Representative
03 Manderino explored enough with you about the new
04 policy language and I think that this language would
05 tend to make that happen after a renewal or adding on,
06 and then, Sam, I think that limited tort or full tort,
07 I think this language helps that situation rather than
08 hurts it, but how do you respond?

09 As an insurance representative, explain
10 to me what your definition is of new policy. I'm
11 talking about the words right out of this bill.
12 What's your explanation of what the term new policy
13 means? If I call and add a car or add a person, is
14 that a new policy or not, according to the insurance
15 industry?

16 MR. MARSHALL:

17 We generally don't. The courts tell us
18 what a new policy is. And you've gone right to the
19 heart of what our concern is. What one company thinks
20 is a new policy another company might not. That's why
21 law schools crank them out by the dozens.

22 But what we're worried about is that
23 whatever one thinks is a new policy, it's all
24 contingent on how a court determines these, and what
25 you don't want is to go along and say, I don't think

01 when you add a driver that makes it a new policy. I
02 don't think when you add a car, that makes it a new
03 policy. I don't think when you change other limits,
04 property damage limits or whatever it is, if you
05 change other elements of coverage in your auto policy
06 that that makes it a new policy. I don't think it
07 does. But you know what? The court may.

08 And that's --- and we deal with that
09 problem all the time. Now, when you --- frankly, from
10 a pure consumer perspective, you don't want everybody
11 --- you don't want the insurance industry, whether
12 it's pockets of it, a large portion of it, or all of
13 it --- and first of all, insurance companies making
14 decisions based on different views of what a new
15 policy is. Second, you want everybody saying that
16 anytime you make any change, we're going to deem that
17 a new policy, because that's going to result in
18 enormous inconvenience to the consumer. And frankly,
19 speaking now as a consumer, it's really ---.

20 I have limited tort myself. When our son
21 gets added to the policy, or we add a car, frankly, I
22 don't want to have to down to my agent's office and
23 sign a new tort election form. I want that --- and I
24 can tell you, my agent --- I wish we were generating
25 some of those premiums that were really worth the

01 imposition of him having to schlep down or drag me
02 down.

03 And I want to do it all instantly, so
04 having to go in every time that happens, to make a ---
05 it doesn't seem reasonable to people that every time
06 something new happens in their lives to have to renew
07 their limited tort election or get hit with a higher
08 premium.

09 REPRESENTATIVE TAYLOR:

10 And that's not the legislative intent to
11 do that, but I think your answer to your own question
12 was you deal with it all the time.

13 MR. MARSHALL:

14 No, actually, we don't deal with it all
15 the time. There are elections that have to be made,
16 and if they're not made, you're deemed to have the
17 more expensive coverage. That is Pennsylvania law.
18 It isn't a national full tort/limited tort deal. This
19 is a Pennsylvania-specific election element.

20 That is what makes it unique, and if
21 you're going to impose, not just on insurers and
22 agents, but also on consumers, some odd burden that
23 any time you do something new it might be a new policy
24 and you have to re-affirm your election. Maybe you
25 can clarify it, but I don't think it can be done

01 through remarks on the House floor.

02 REPRESENTATIVE TAYLOR:

03 It sounds to me that that's a worthy
04 issue for a legislative body in general. But I don't
05 think this bill has anything to do with any of that.

06 MR. MARSHALL:

07 If you don't address it in this bill,
08 you're going to have that problem of going up against
09 it. And God bless, you could make it difficult.

10 REPRESENTATIVE TAYLOR:

11 I think that's a great scare tactic.

12 MR. MARSHALL:

13 You know what? I wish it was a great
14 scare tactic, Representative Taylor, but for instance
15 right now we're dealing with a case that overturned
16 --- dealt with "what is a new policy?" and it
17 overturned --- and it is on reconsideration before the
18 Supreme Court --- but the Supreme Court came out and
19 with a five-four decision, came out with a whole new
20 understanding than what the insurance industry had in
21 mind, and what the Insurance Department had in mind as
22 a regulator on what qualifies as a new policy where a
23 new election would be needed. And that's a real ---
24 it did that in the area of stacking waivers, a
25 relatively small subset in comparison with full and

01 limited tort elections.

02 And that's what you're worried about, 17
03 years later, you can get a case that wasn't in
04 anyone's mainstream thinking, and that is --- I just
05 suggested as we try to go through it, the complexity
06 of doing that balanced against whatever virtue there
07 is in changing the title on a form, you know, I think
08 the great complexity outweighs the other virtue.
09 Also, you have the risk that people will pay more for
10 insurance because of increased administrative costs.
11 And will concede, we pass those on to consumers.

12 But the cost isn't just the cost
13 producing new forms and having them printed. The cost
14 is going to be that you're now going to have some
15 policyholders with one piece of language, some
16 policyholders with another piece of language, so then
17 you go into those policies and some people will get
18 one set of renewal policies, and some people will get
19 another set. You're just creating a ---.

20 REPRESENTATIVE TAYLOR:

21 I understand your point, and I'll just
22 conclude by saying we're asking you, or maybe retort,
23 if this new policy will have such a problem --- and
24 you are constantly in the capitol, is there any
25 legislation around that establishes what's a new

01 policy? Is this burning issue in the industry, are
02 there bills trying to correct this unbearable problem?

03 MR. MARSHALL:

04 It actually made it to the Supreme Court,
05 and the Supreme Court decided it in Sackett versus
06 Nationwide, which is under reconsideration. It
07 generally hasn't been, because we haven't had --- it
08 becomes an issue because of this bill. It actually
09 becomes an issue when you have a law where some people
10 are going to have one piece of language and some
11 people are going to have another. And the question is
12 when do they come under the new language.

13 REPRESENTATIVE TAYLOR:

14 But they're not going to have different
15 rights.

16 MR. MARSHALL:

17 You're right. None of this changes the
18 underlying substance. And nobody's challenging
19 whether the two-sentence explanation that follows that
20 title is accurate, misleading, confusing,
21 understandable. Everyone seems happy with those two
22 sentences. To me, that's the key. If you would have
23 said consumers didn't understand those two sentences,
24 that would be a different story. But understanding
25 the one word in front of it? God bless you if you can

01 understand what your contract with Comcast is, or your
02 warranty on your television set, or anything like
03 that. But again, everybody has to have it who has a
04 car. And I think what you have actually is people do
05 understand the explanations. Nobody's challenging the
06 explanations. What we're talking about is a one or
07 two word change, and what we suggest is that the
08 potential problems outweigh the benefit.

09 CHAIRMAN WALKO:

10 Thank you, Representative Taylor. One
11 clarification. Would you spell the name of that case
12 versus Nationwide? And I don't know if you have a
13 cite for it, to put on the record or not.

14 MR. MARSHALL:

15 I don't have the exact cite. But it's
16 Sackett, S-A-C-K-E-T-T, versus Nationwide.

17 CHAIRMAN WALKO:

18 And the other thing, I just have a real
19 brief question. The wording, full right to sue,
20 limited right to sue, are those accurate words?

21 MR. MARSHALL:

22 I don't think they are.

23 CHAIRMAN WALKO:

24 Why not?

25 MR. MARSHALL:

01 I don't think they are because what ---
02 and again, what do they really mean? Limited right to
03 sue, it isn't really a limited right to sue. You have
04 the full right to sue. What you have is a limited
05 recovery within that right to sue.

06 CHAIRMAN WALKO:

07 Actually, you could probably say, full
08 right to pain and suffering damages, and limited right
09 to pain and suffering damages.

10 MR. MARSHALL:

11 That is more accurate than full right to
12 sue.

13 CHAIRMAN WALKO:

14 But isn't it more accurate than full
15 tort?

16 MR. MARSHALL:

17 It isn't more accurate. It would give
18 you --- it speaks a little more in layman's terms.
19 But I don't think it's any more accurate. You know, I
20 think if you were to go about this --- because you
21 don't have a limited right to sue. You have every
22 right to sue. It's your recovery. And it's only in
23 the area of the pain and suffering damages. So if you
24 phrase it as limited right to sue, to me that's
25 misleading, because it could be interpreted as I can't

01 always sue. Of course you can always sue. What you
02 have is --- if you elected to get less expensive
03 coverage, what you have is --- your right to collect
04 on pain and suffering damages is limited. It's
05 limited to serious injuries and some exceptions. So I
06 guess if you really wanted to call it something you
07 could say, full right to pain and suffering, limited
08 right to pain and suffering. Or you could say, pain
09 and suffering in all situations, pain and suffering
10 all serious situations as enumerated in the statutes.
11 That would be, I would think, a more accurate term.

12 CHAIRMAN WALKO:

13 I think it's a more accurate phrasing to
14 say right to sue than it is to say full tort or
15 limited tort. Tort is a breach of a duty that is a
16 proximate cause of damage. And you're saying that
17 you've got a limited duty, breach of duty, proximate
18 cause, and right to damages. So isn't that inaccurate
19 to say you have a limited tort?

20 MR. MARSHALL:

21 I guess it's inaccurate in the same sense
22 of limited right to sue. As I said, if you go back to
23 1990, we were all back there in 1989 hashing through
24 more problems than I care to tell you about. But that
25 to me, goes to the explanation and at times the

01 explanation is, gee, flip through your policy on
02 occasion, or the explanation is some long-winded deal.
03 But the explanation here is very simple, two sentences
04 that you have to sign and date. And what we're
05 talking about here is the general question, is the
06 explanation not adequate? I don't know that in two
07 words you're going --- two words or four words, you're
08 ever going to completely capture the essence. I think
09 that two-sentence explanation does. And that's ---
10 you know as legislators, I'm not sure there's much
11 more you can do than to have clear and concise
12 explanation that the consumer has to separately sign
13 and date every time he buys a policy.

14 CHAIRMAN WALKO:

15 It just seems to me that right to sue
16 means the right --- it includes the right to recover
17 your damages, and one is limited in the amount of
18 damages you can recover, and one is not. And that's
19 why I think it's accurate.

20 MR. MARSHALL:

21 And in that sense, Representative, I
22 guess I probably agree with you. But you're saying
23 limited right to sue and that's not accurate, because
24 the right to sue isn't limited. It's the damages that
25 are limited. So what you're replacing here is one

01 that might be inaccurate with another one that's
02 inaccurate. I don't think that's an improvement.

03 CHAIRMAN WALKO:

04 Well, I disagree with that.
05 Representative Manderino?

06 REPRESENTATIVE MANDERINO:

07 Thank you. And I know both Mr. Marshall
08 and I are long-winded. I'll try to be concise.

09 I consider myself a savvy consumer. I'm
10 also a lawyer by training. Yet I'm floored by
11 something I heard you say to Representative Taylor.
12 As a consumer, if I had a 15/30 auto insurance policy
13 when I signed up at age 22 years old with Nationwide,
14 and then ten years later, after I'm married with two
15 kids, all of a sudden I say to myself I better make
16 sure I have adequate coverage. And I call and I talk
17 it over with my agent, and I decide I really need
18 100/300 police with an umbrella. As a consumer, I
19 think I have just chosen a whole new policy.

20 You just told him that changing levels of
21 coverage is not a new policy as the insurance company
22 sees it. So your definition of new policy seems to be
23 limited only to, I have never written a policy for
24 this consumer before, and now I'm writing a new policy
25 for this consumer, so it's a new policy. And nothing

01 else in the realm of somebody who's currently already
02 within my book of business is ever a new policy. Did
03 I misunderstand you?

04 MR. MARSHALL:

05 Yeah, actually, what I was trying to say
06 is that sometimes what is a new policy and what isn't
07 vary. What I was talking about is --- and with the
08 hypothetical that you just gave, that that wouldn't,
09 under this bill, be considered a new policy for
10 purposes of a new tort election.

11 REPRESENTATIVE MANDERINO:

12 If I as a consumer --- and now I'm Kathy
13 Consumer here, Sam. If I am going through in my mind
14 through this whole decision of whether or not I have
15 adequate insurance coverage, enough that I call my
16 agent to explore my options, why would a discussion of
17 limited versus full tort not be --- every reasonable
18 expectation is that that ought to be brought up to the
19 consumer if they're evaluating what kind of coverage
20 you have. Here are all the things that could affect
21 the kind of coverage you have potentially in your
22 family. Why would that not be part of the
23 conversation? Why should we not expect it to be part
24 of the conversation?

25 MR. MARSHALL:

01 We have two different questions here. It
02 may well be part of the explanation or the equation or
03 whatever it was, conversation, that you would have
04 your agent, and many agents do periodically say, let's
05 update and evaluate what your coverage is. Now, as to
06 whether you expect it to be, understand that if this
07 is what you want to say, and this is your call, if
08 what you want to say is that every time under the
09 example you gave, every time you make a change, a
10 substantial change --- but I don't know what the
11 definition of substantial is --- every time you had a
12 change in your coverage, if you want to call that a
13 new policy, and a person has re-do his tort election,
14 that's something you may want to consider, but I would
15 suggest that if you do that, it's going to be a lot of
16 paperwork for us; it's going to be a lot of paperwork
17 for agents. But I can tell you, it's going to be a
18 real inconvenience for the consumers, because in your
19 example, we've all been there in some way, shape or
20 form, whether it's adding a kid to the policy or
21 adding a car to the policy, you want to be able to
22 handle that over the phone. I don't want to have to
23 go to the agent ---.

24 REPRESENTATIVE MANDERINO:

25 Don't you think a faxed signature is

01 considered valid?

02 MR. MARSHALL:

03 Actually what we're talking about here is
04 a change you can make over the phone.

05 REPRESENTATIVE MANDERINO:

06 I understand, but he could fax me the
07 form and I could fill out the election and send it
08 back to him. Is that illegal?

09 MR. MARSHALL:

10 Actually the fax, you've got to have
11 somebody witness it. You may be able to do it, and
12 you may want to, and if you want do that ---.

13 REPRESENTATIVE MANDERINO:

14 And I haven't seen my agent for 20 years,
15 so I don't know. I made a lot of changes, and I've
16 signed papers. And you can do that through the mail
17 or through the fax.

18 MR. MARSHALL:

19 If all you want to do with this bill is
20 create a lot more paperwork for consumers every time
21 they make a change, that they have to re-do their tort
22 elections, I think you're going to do that, and
23 they're going to have to re-do their stacking
24 elections and maybe they'll have to re-do another
25 election that they have. Fine. I think what you're

01 adding, and this was Representative Taylor's point,
02 yes, everybody who has a car has to have auto
03 insurance, I think you want to make it consumer-
04 friendly and I don't think what you're talking about
05 will make it consumer-friendly. I think if every time
06 I make a change in my policy I have to re-do my tort
07 election, this is just a lot of paperwork.

08 CHAIRMAN WALKO:

09 Thank you, Representative Manderino and
10 Mr. Marshall. Mr. Marshall and Mr. Passmore, thank
11 you so much.

12 Next to follow is Mr. Scott Cooper,
13 Legislative Policy Chair for the Pennsylvania Trial
14 Lawyers Association.

15 MR. COOPER:

16 Chairman Walko, members of the committee,
17 and staff, thank you for allowing the Pennsylvania
18 Association for Justice (formerly the Pennsylvania
19 Trial Lawyers Association) to testify today.

20 My name is Scott Cooper. I am an
21 attorney and partner at the law firm of Schmidt
22 Kramer, formerly Schmidt, Ronca and Kramer, in
23 Harrisburg. I practice 99 percent motor vehicle
24 accident cases, all from a plaintiff's standpoint. So
25 I appreciate all the different sides.

01 And also I'll be addressing some of the
02 issues that Representative Mandarino addressed, the
03 new policy. I am the co-counsel on the Sackett case,
04 so I have the information on Sackett, and will be able
05 to tell you what they ruled in Superior Court and what
06 they ruled in the Supreme Court, which is actually a
07 lot different than I think what's been discussed here
08 today.

09 Obviously, we're in favor of House Bill
10 1104 and also House Bill 1510, but mainly 1104. To
11 begin with --- it's in my testimony, but it provides
12 plain, transparent, common-sense language for the
13 person who's selecting their tort options when they're
14 applying for or purchasing private insurance.

15 I receive every day I'd say one to two
16 calls in our legal office from people who are involved
17 in accidents and the first thing I ask, normally, is,
18 after having the accident happen, do you have full
19 tort or limited tort, and usually you hear one of
20 three things that would lead you to believe that the
21 person has limited tort. "I have full coverage." "I
22 have limited tort (or full tort)" or "I did whatever
23 my agent told me to do." And that's what we normally
24 hear. And usually when I ask about tort, it's "I have
25 absolutely no idea. I'll have to look.

01 What the change in the language will do
02 is provide --- you can't change the whole form.
03 Representative Taylor understands that. And I
04 appreciate --- what will happen is, people buy these
05 policies over the internet now. You'll see the form,
06 and you'll see limited right to sue, full right to
07 sue. And then you'll ask for the explanation from the
08 agent. You'll get the explanation. You'll ask the
09 questions that Mr. Marshall talked about in these two
10 sentences.

11 Well, if you look at the form, the two
12 sentences before the premium differential --- which
13 actually the companies don't even have to give you,
14 even though it's in the law, and I can address that,
15 too --- say I take limited tort, which limits my
16 rights unless there's exceptions, or I have a quote,
17 serious injury, as explained in the policy. No one
18 reads the forms for the most part. People get it;
19 they sign it; they sign by the X; they stop in over
20 lunch or they fax it back, and then they have limited
21 tort.

22 But if I see on that form that I'm
23 signing, limited right to sue and full right to sue,
24 that not only binds myself, but binds my children, my
25 spouse, any resident relative, anyone who lives with

01 me in the household, I'm going to ask questions, and
02 I'm going to say what are these exceptions? And the
03 exceptions aren't as outright as we're lead to
04 believe. They talk about well, there's exceptions for
05 drunk drivers, or if the other driver is uninsured.
06 There's cases --- there's a case in Dauphin County
07 where there was a drunk driver. The person was going
08 to be eligible to sue for full right to sue, or full
09 tort, and the person, the defendant, was hit and
10 killed before --- between the plea and before he could
11 be sentenced. And that person was stuck with limited
12 tort because he'd never been, quote, convicted, under
13 the statute.

14 In addition, the uninsured, there's a
15 case, Roth versus Aetna, which I think is a Supreme
16 Court case, where someone had uninsured motorist
17 coverage. The other driver was uninsured. And the
18 statute was supposed to say, well, if you're hit by an
19 uninsured driver, and you have limited tort, you
20 should be able to get full tort rights under your
21 policy. The Supreme Court said, no, you can't get
22 full tort rights under any exception if the other
23 driver is uninsured. You still have to show that you
24 have a serious injury.

25 So it's not just well, you have all these

01 other exceptions that apply, because they're tightly
02 construed by the Pennsylvania Supreme Court.

03 Second concern we had was, in the old
04 version, which by the way was amended into another
05 bill back in 2006, the amendment passed I think by
06 over 140 to 60 in the House when it was amended into
07 the bill in 2006. That was in November. One of the
08 concerns the Insurance Commissioner had was that it
09 applied to the new forms after December 31st of 2006.
10 The Insurance Commissioner was concerned about the
11 tight window. That was the main problem, with all the
12 new forms and getting them approved.

13 If you look at the legislation, the
14 legislation is not effective for 60 days after it's
15 been signed by the Governor. And then it only applies
16 to new policies applied for and issued 90 days after
17 that. So there's a five-month or 150-day window from
18 the time the bill is passed and signed by the
19 Governor, between these policies that would be issued.
20 And it's "applied for and issued," which I'll get into
21 in a second.

22 So there's a difference in that, and I
23 think when Act 6 was passed in 1990, Act 6 became
24 effective in July, and it was signed in the middle of
25 February. That's almost the same five-month window,

01 and they had to do a whole bunch of other forms and
02 whole bunch filings. This is one form that you have
03 to give to people when they're taking out the policy.
04 They still have this form, which now, I guess in the
05 computer age I'm sure it takes maybe 30 seconds to
06 just cut out tort and type in right to sue. And then
07 file it with the Insurance Department. And it's going
08 to be approved.

09 Third, it's extremely limited, again, it
10 its scope. As I mentioned, at the end it says it's
11 only for policies applied for and issued 90 days after
12 this would become effective. So you'd have 150 days.
13 It doesn't apply to existing policies. It cannot
14 apply to existing policies. Despite what may be
15 argued, the courts have already ruled on a lot of
16 these issues, under the Financial Responsibility law,
17 what is a new policy.

18 And you had asked for a couple of cites,
19 Chairman Walko. There's three cases. The first case
20 is Rupert versus Liberty Mutual Insurance Company, 291
21 F.3d 243, a Third Circuit Decision from 2002. The
22 second case is Smith versus The Hartford. It's a
23 Superior Court case 849 A.2d 277. It's a 2004
24 Superior Court case. And Sackett, but not the Supreme
25 Court case, and I'll explain the difference between

01 the two, because I think that's important. The
02 Superior Court cite is 880 A.2d 1243. And that's a
03 2005 Superior Court decision.

04 To start with, the Sackett Supreme Court
05 decision did not decide what was in the policy and
06 what was not in the policy. What happened in Mr.
07 Sackett's case is, he had a two-car policy and had
08 rejected stacking. Now keep in mind, Section 1738 of
09 the law says, when you purchase coverage, you have a
10 right to purchase stacking on any vehicle. Because he
11 only had a two-car policy, he was okay rejecting
12 stacking. The problem that was created was when he
13 applied for --- not apply for --- he added a third car
14 to a two-car policy. Nationwide kept the same policy
15 number, the stated coverages, and all they did was
16 issue this policy with the third car. The Supreme
17 Court ruled that as a matter of law, when you add the
18 third car, or you have three cars and you add a fourth
19 car, if you had previously rejected stacking and add a
20 car, you need a new rejection of stacking form.

21 They didn't say this was a new policy.
22 They said you have to just get the new form. This has
23 been the law for 17 years. Now, the problem that's
24 been created --- and this is doomsday in fact if you
25 do the personal injury cases, the whole system's gone

01 out of whack --- is the insurance companies were not
02 following the law that was written for 17 years. The
03 law says you have to do this, and they knew about
04 this. There was all these issues being litigated.

05 Now, there was a ruling in Sackett, in
06 the Superior Court, which I think is important. One
07 of the original holdings in the Sackett Superior Court
08 decision, which I believe was by Judge Klein, who came
09 out of Philadelphia, was that --- one of the arguments
10 made was that when you add the third car to a two-car
11 policy, you're creating a new policy. This argument
12 was actually briefed, and the Superior Court held, and
13 they relied on this other Smith case, that when you
14 add a new car, you're not making a change to the ---
15 it's not a new policy. They already ruled in Sackett,
16 which was not addressed in the Sackett Supreme Court
17 decision, and in Smith, which is --- that when you
18 make these types of changes, you're issuing a new
19 policy. So there's already been that case, so this
20 issue's already been resolved.

21 And in addition, for Representative
22 Manderino and the committee, I could explain also, she
23 had given the example of how when you make a change 22
24 years later, the Rupert case is important, just to
25 show you how the insurance companies do this when you

01 change a named insured. And in the Rupert case, Mr.
02 Rupert --- before I forget, I was involved in that
03 case, but if Mr. or Mrs. takes out a policy, and over
04 time, one of them dies, and at the initial inception
05 of the policy they rejected stacking, and Section 1738
06 says it has to be signed by the first named insured.
07 And then what happened was, one died and the other one
08 takes it over. You have a totally different named
09 insured. And then the one that took it over said,
10 well, I'm in an accident and they had to give me a new
11 rejection of stacking form, because I was the new
12 named insured. The companies came in and said no, we
13 don't. We can keep the same policy forever, and one
14 of the examples --- essentially, if my daughter, who's
15 five years old now, takes over my policy 18 years from
16 now, or however long, if I elected limited tort, she'd
17 be bound by my tort election.

18 So it doesn't change --- if there is no
19 new policy that's issued when you do these forms,
20 Representative Taylor, making these changes, and that
21 was one main change --- and there may have been an
22 ambiguity, but if you look right at the end, it says,
23 applied for and issued after 90 days after the
24 effective date.

25 In my testimony on page two,

01 Representative Hayden just sums it up. When this was
02 being debated back 1989 and 1990, he said "For the
03 first time, I think, under the bill, we will require
04 more information be given to our constituents in
05 understandable plain English. In fact, that plain
06 English is spelled out in the bill." This is all
07 that's being asked, to make this one change. So what
08 will happen is, the everyday person will see the form,
09 will see, "limited right to sue" and "full right to
10 sue," and hopefully, if one out of ten, two out of a
11 hundred, make that change, then so be it, but at least
12 they're going to questions of the agent and get the
13 explanation of what these "serious injuries" are.
14 Nobody knows. It's just this esoteric, vague term
15 that applies, depending on where you live in the
16 state, on different terms.

17 One other area I wanted to address also.
18 House Bill 1510 addresses one other --- and this is
19 something that I don't think it's necessary that we
20 --- we would like this passed at some point, but the
21 plain language I think is the most important. In
22 Donnelly versus Bauer, and I give the cite in my
23 testimony, is one example of a whole series of cases.

24 If Mr. Marshall wants to talk and open up
25 Act 6 and make changes, we'll do that if this passed,

01 but Act 6 has a lot more rulings from the courts that
02 have been unfair to consumers than the insurance
03 companies, by far. There's this case, Donnelly;
04 there's a case called Salazar (phonetic) and there's
05 another case, Winslow, where the courts have said, and
06 actually Donnelly is the best example. At the end of
07 the form, it says they have to give you that premium
08 differential between limited tort and full tort, and
09 in these cases, the insureds did not receive the
10 premium differential, and the Insurance Commissioner
11 said it was okay. This is what's in the Act, but they
12 were blank. And the Supreme Court said, yeah, they
13 should get it, and the fact is that it's required to
14 get the premium differential, but the legislature
15 never put a remedy in the Act, so therefore, we're
16 now, even though we have the right, there's no remedy
17 for the consumer if you don't get the premium
18 differential. That's something I think is a big
19 problem.

20 The Salazar case, and it's not cited in
21 my materials, but just another example of how the
22 insurance companies --- there's unfairness. Section
23 1791.1(b) requires that when you do the renewals ---
24 I'm speaking of renewals --- an insured is provided
25 notice of the two alternatives, full tort and limited

01 tort, and in Salazar, the Supreme Court --- the people
02 didn't get that renewal. They just never got it. And
03 they said, well, we should get full tort, because we
04 never got it and it's in the statute. We never got
05 the language. The Supreme Court said again, you have
06 a right under the statute, but the legislature never
07 put a remedy in. So we're not going to do anything in
08 that case. It was State Farm, which I think has about
09 17 percent of the market share throughout the state,
10 and in the market conduct evaluation for 2007, they
11 looked at 60,699 private passenger policies, and they
12 looked for violations of this section, and they found
13 60,699 violations of that section. So clearly, in
14 your --- all we're asking is for the people to get the
15 information they're required to get. And if they ask
16 questions and some people get to choose it, fine.

17 One last area I just wanted to point out.
18 There's some argument made, well, people just look at
19 the cost. You know, it's cheaper here, cheaper there.
20 There are studies and there are papers that show, and
21 this is statistics from an article by a Dr. Lauren
22 Regan from Temple University. She's done articles on
23 what are the demographics of people who take limited
24 tort. And it shows that price is only one factor.
25 There's a lot more. For instance, education, income,

01 whether a person has health insurance, how many people
02 are in the house, the sex, those are all things they
03 take into consideration. So I would say you add this
04 one additional element, and that's another additional
05 element that they're --- you know, do they understand
06 it?

07 In Philadelphia County right now, 67
08 percent of people select limited tort. However ---
09 you think well, it's because of the rates. However,
10 and I was surprised when I saw this, from 1991 through
11 the present, the county in the state with the lowest
12 percentage of limited tort selected by policy is
13 Luzerne County, which I don't think is in the middle
14 of nowhere. And in 1996, the lowest amount of limited
15 tort selectors were Luzerne County, Carbon County,
16 Fayette County, Beaver and Lawrence. But the lowest
17 cost for insurance, at 35 percent, were Snyder and
18 Lancaster. Those are in the middle. Even Allegheny
19 County was somewhere around 40 percent. So price is
20 not only --- is not the only determining factor.

21 Finally, there's been a reference made
22 that well, it's going to be all these new forms. It's
23 going to cost lots of money. Representative Manderino
24 talked about the arbitration clause being changed.
25 First of all, when that's changed, the companies add

01 it to the policy; they file it with Insurance
02 Department and then you get a renewal on this and it's
03 hidden in about 15 pages where it says, please look at
04 this. It's been reviewed and --- the nominee for the
05 Insurance Commissioner showed a 15-page Allstate
06 renewal where he even saw that this exclusion was
07 added, and I think he referred to it as gobbledygook,
08 you know with 15 pages of gobbledygook, they're adding
09 this exclusion. So they make sure you get it if it
10 works to their advantage. And I attached to my
11 materials --- this is a form that Nationwide sent out,
12 and I think a lot of other companies have sent out in
13 light of the Sackett decision. This is not a form
14 that they were required to do. It's not a form that
15 the Insurance Commissioner told them they had to do.
16 It's not a form that the legislature told them they
17 had to do.

18 What happened was, Nationwide saw this
19 opinion and went like, wow, we have a problem. We
20 haven't been following the law for 17 years. Now when
21 someone's added a car, we may have to provide stacking
22 coverage if they get into a car accident. So what did
23 they do? They went back and looked at all the
24 policies --- they knew had a problem. And then
25 because they knew it was going to help them, they put

01 together this form that they did and sent to the
02 policy holders.

03 So in this situation they just have to
04 modify a form and add three words and take out one
05 word.

06 I want to thank Representative Taylor for
07 all the work he's done on this and thank you for
08 hearing me today, and I'd be happy to answer any
09 questions.

10 CHAIRMAN WALKO:

11 Thank you, Mr. Cooper. Any questions?
12 First, I'd be remiss if I didn't announce for the
13 record that Representative Harold James,
14 Representative from Philadelphia, and Representative
15 Bryan Lentz, from Delaware County, have joined us.

16 REPRESENTATIVE LENTZ:

17 Thank you, Mr. Chairman. What do you say
18 about the fact that agents are required to fully
19 explain this and in fact have an incentive to sell
20 full-tort policies since they would increase their
21 commissions?

22 MR. COOPER:

23 That's a good question. However, I think
24 you have to look at present day experience. People
25 don't get it --- I think the majority of the policies

01 now are either sold over the phone by in-house --- if
02 I call 1-800-622-whatever, and I get an in-house
03 person. I'm not getting an agent. And in fact I
04 remember when I took out my policy when I was in law
05 school, I had no clue what this was. You don't get
06 that explanation, because you hear "do you want full
07 tort or limited tort?" and I will never forget this,
08 and I said "what's the difference?" and he said "well,
09 limited tort, you can't sue unless you get hurt real
10 bad." That was the explanation. You don't get a full
11 explanation. "Real bad," whatever that is.

12 In addition, not only do you get the in-
13 house company you call over the phone, but you also
14 have now sales over the internet, where what happens
15 is you call in and someone suggests you go into the
16 internet and you download the forms. They say, do you
17 want full tort, limited tort, you get a premium
18 differential for this, this and this. And you
19 download the forms, sign and send it back.

20 So maybe with some agents you will get
21 the full explanation, but you're not going to get, at
22 least probably 50 percent of the time, the
23 explanation.

24 The other thing is, like I said earlier,
25 usually I think, more often than not, you call up the

01 agent, and they say, well, what do you want, you tell
02 them, and they put an X by where to sign. If I see a
03 form, I think, you know, whether you're the average
04 consumer or just any person, if you see that form and
05 it says limited right to sue, and you're signing under
06 it, you're going to think --- at least you have an
07 obligation if you have kids and family, to ask that
08 question to the agent, what does this mean? If you
09 don't, so be it. You have limited tort. That's the
10 end of the story, but again, it goes to, if the agent
11 --- you can't sue the agent, necessarily, because
12 they're immune under certain aspects of the Insurance
13 Agency Act.

14 So there are certainly agents who do a
15 great job, but I think for the most part, you know,
16 maybe 50 percent of the time, policies aren't even
17 with an agent, and you're getting the information ---.

18 Also, one other thing, I don't think you
19 look to market throughout the country --- and this was
20 asked early on today, and I think Mr. Marshall
21 referred to it. We're the only state, I think, that
22 has this form that has the election. There's only
23 three states in the country that have --- it's
24 considered choice, no-fault, is one way to refer to
25 it. There's Kentucky, which has like a monetary

01 threshold, like \$1,000; New Jersey, and then you have
02 this choice in Pennsylvania. So when you're looking
03 at agents from around the country, Pennsylvania's are
04 the only one that have this limited right to sue form.

05 REPRESENTATIVE LENTZ:

06 If I then waived or limited the right to
07 sue, and we had the same facts before a jury, and in
08 one case the policy is limited and in the other case
09 the policy is full, limited tort, full tort, but the
10 same facts in both, recovery is limited. Is that an
11 accurate summary?

12 MR. COOPER:

13 For non-economic damages. For the most
14 part, usually a person who's been injured with limited
15 tort, if you're --- and this is why sometimes people
16 with good health insurance have limited tort --- you
17 also have to be a sophisticated consumer to understand
18 this, because you still maintain your right to out-of-
19 pocket unreimbursed medical expenses and unreimbursed
20 wage loss, so if I'm someone who has a really good
21 health insurance plan, with really good disability
22 benefits at work, and I'm in Philadelphia, maybe,
23 there is a reason to take limited tort. But if you're
24 in Dauphin County and you look on the Insurance
25 Department's web site, there's a listing of different

01 companies with premiums for \$50,000 liability
02 policies, and the average is only a \$7 to \$18 a month
03 savings, and you may not choose that. So it really
04 depends on the different facts of what you have, but I
05 think it's generally right, if the jury finds --- and
06 that's assuming a court doesn't dismiss it first ---
07 that you don't have a serious injury under
08 Pennsylvania law, then you can't recover anything,
09 basically. Under full tort, you can, but you still
10 have to prove your case to a jury. There's a lot of
11 fringe cases, and I think actually, if someone is
12 taking --- you know if someone --- I think maybe you
13 do away with the fringe cases where you have this
14 issue about is it limited tort, limited right to sue,
15 full right to sue, that person is going to take full
16 right to sue, you may see less cases in the court,
17 because there's not going to be as many disputes
18 between the company and the consumer as far as whether
19 you can recover for pain and suffering. You still
20 have to prove compensable injuries, but it's --- but I
21 think if there's a chance that one or, like I said,
22 two more people are going to take full right to sue.

23 The fact that you have no job or that
24 you're retired, shouldn't impact whether or not you're
25 eligible to recover for pain and suffering in

01 Pennsylvania, because that's essentially what it comes
02 down to under limited tort. It's not only the injury,
03 but how does it interfere with your daily activities.

04 REPRESENTATIVE LENTZ:

05 Thank you.

06 CHAIRMAN WALKO:

07 Representative Manderino?

08 REPRESENTATIVE MANDERINO:

09 My questions are around the stacking
10 issue and Sackett. First of all, when I as a consumer
11 am a policy choice, we talked a lot about making a
12 conscious choice in the law requiring me to check full
13 tort or limited tort and sign here. But Act 6 --- was
14 it Act 6 that also limited stacking goes with limited
15 tort and ability to stack goes with full tort?

16 MR. COOPER:

17 No, it's two different ---.

18 REPRESENTATIVE MANDERINO:

19 So there's a second question.

20 MR. COOPER:

21 Right. Actually, when Act 6 came into
22 effect, not only did it start with --- prior to Act 6,
23 you could stack, and that was by case law. There was
24 no Section 1738 for stacking. Once Act 6 came in,
25 there's actually three main choices you need to make.

01 First is full tort/limited tort; you have that. Then
02 the statute says as a matter of law, you have
03 uninsured and underinsured motorist coverage equal to
04 your liability, whatever that limit is. So now,
05 taking you down this road, they would say, this is
06 what your coverages are. You have a hundred --- you
07 now have \$100,000 uninsured and underinsured. So now
08 your second choice is, do you want to reject it? You
09 can reject that. And if you do reject it, that's a
10 second form that you would have to sign.

11 REPRESENTATIVE MANDERINO:

12 Okay. So under the current law, if I
13 signed one form, and I make a limited tort or full
14 tort selection, but if I don't sign the second form, I
15 have made --- the law presumes stacking.

16 MR. COOPER:

17 Correct. It presumes stacking.

18 REPRESENTATIVE MANDERINO:

19 I have to sign a second form to waive my
20 right to stacking?

21 MR. COOPER:

22 Correct.

23 REPRESENTATIVE MANDERINO:

24 And that's just since 1990.

25 MR. COOPER:

01 Correct.

02 REPRESENTATIVE MANDERINO:

03 And I missed this. Under Sackett what
04 happened?

05 MR. COOPER:

06 What Sackett said was, in 1738 when you
07 add a car to the two-car policy --- you've already
08 rejected stacking, so in Sackett's case, he had full
09 tort, and he had rejected stacking on the two-car
10 policy. He then added a third car. What the Superior
11 Court said was there was a new policy. So it was
12 trying address --- the courts have already addressed
13 that. What the Supreme Court said was totally a legal
14 issue: does 1738 require them to get a new form when
15 you add a car to a two-car policy, or a fourth car to
16 a three. And the Court said, yes, because you have
17 the right --- and this is what I argued before the
18 Supreme Court --- the statute says you have a right to
19 purchase the three-car stacking, but they never got
20 that chance to purchase it. And Sackett specifically
21 says, in like the second or third-to-last sentence,
22 when you replace a car or delete a car, that does not
23 change anything. It's just when you're adding a car
24 to the two or the three.

25 REPRESENTATIVE MANDERINO:

01 Okay. So I am a consumer with one car.
02 And I add a second car. Every consumer who adds a
03 second car, by law, ought to be signing another piece
04 of paper if they are choosing to waive stacking?

05 MR. COOPER:

06 Under current law, yes.

07 REPRESENTATIVE MANDERINO:

08 Okay. Under current law, you argued if
09 they are adding a third car, or another car after two,
10 they ought to get the same option to have to
11 consciously reject stacking?

12 MR. COOPER:

13 Correct.

14 REPRESENTATIVE MANDERINO:

15 Now, what was the --- how did we go for
16 17 years without this being decided until --- or 15
17 years, or whatever it was when Sackett was decided?

18 MR. COOPER:

19 I could not tell you. You know, I think
20 it ---.

21 REPRESENTATIVE MANDERINO:

22 Was there any case law prior to that?

23 MR. COOPER:

24 Not on the ---.

25 REPRESENTATIVE MANDERINO:

01 Where you already have two cars on your
02 policy and you waived stacking before, so therefore
03 lower courts ruled that the third one would be --- or
04 did the issue never come up?

05 MR. COOPER:

06 No, the issue, as far as I could tell,
07 since --- and the people here in the back will tell
08 you, I probably would know about the case --- I have
09 never --- the closest it came up prior to this was
10 that Rupert decision, where the person --- they
11 changed the named insured and said there was a new
12 policy. And the court, the Third Circuit, said no.
13 But there was no Superior or Supreme Court case that
14 was published that I could see where this issue came
15 up. You know, keep in mind, I guess, 1990, they first
16 had 1738, so you probably have a couple years before
17 cases work through the system.

18 Also some companies were doing this the
19 whole time. I can't tell you. I just know from ---
20 there were certain companies which were doing it the
21 whole time. Sackett did take three years to work its
22 way through the system. So some companies knew about
23 this and this argument the whole time. And I think
24 what happens is that --- and I'm just speculating, but
25 the case did work its --- if someone litigated it,

01 it's either in a county court decision and it just
02 there, or there was an offer of 50 percent or
03 something like that, but it was this issue that worked
04 its way up.

05 There's also another case, Cranley
06 (phonetic) which was worked in restacking, which is
07 not the topic today, limited tort/full tort, but there
08 was a question about whether or not you could even
09 waive stacking on a single-car policy. That took
10 about ten years to be decided, and that was finally
11 decided in 2005 by the Supreme Court, where they said,
12 you can waive stacking on a single-car policy, but it
13 has to be a knowing and intelligent waiver. So one
14 argument, we raised in Sackett to the Supreme Court on
15 this motion for re-argument is, the statute comes in
16 in 1990. The Supreme Court first decides once and for
17 all in 2005, that you can waive stacking on a single
18 car policy, but it has to be knowing and intelligent.
19 There are cases now where they had to go back when a
20 person went from one car to two, because they couldn't
21 make a knowing and intelligent waiver on a one-car
22 policy to waive stacking and sign the form --- so they
23 had to go back and get all new forms just to go from
24 one to two cars. And we didn't hear any problems with
25 that, because it helped the companies.

01 REPRESENTATIVE MANDERINO:

02 Now I'm going to take that analogy to
03 what we're talking about today, because it seems that
04 the real crux of the problem is not changing the
05 words, but the words triggering the re-litigation, if
06 I can use that term, of the issue of what is a new
07 policy. Now, you have a client and he or she is badly
08 injured, and your job is to try to get them coverage,
09 and you're going to unturn every stone that you can to
10 try to find a way to get them coverage, when what the
11 heck they have is enough to cover on third of the
12 medical costs, because of the limits of coverage. How
13 are you going to argue that they are going to --- that
14 they ought to fall under the default, that this was a
15 new policy and it falls under full tort when they
16 weren't given a conscious decision to elect to change
17 torts?

18 MR. COOPER:

19 Me, myself?

20 REPRESENTATIVE MANDERINO:

21 Yes.

22 MR. COOPER:

23 I'm not. You know, I can't say how many
24 thousands of lawyers in Pennsylvania, I can guarantee
25 that someone wouldn't try it, but when you read

01 Section Two, it "shall only apply to new private
02 passenger motor vehicle liability insurance policies
03 applied for and issued after 90 days after the
04 effective date of this act." It's not a renewal. You
05 have to actually apply for a new policy, and it has to
06 be issued, and between that and the case, between
07 Smith and even the Sackett Superior Court decision,
08 there wouldn't be a new policy.

09 REPRESENTATIVE MANDERINO:

10 Okay. I sit down every five years and
11 re-evaluate my policy and I decide the policy I have,
12 as a single person, is not the policy I should have as
13 a married person with two little kids. So I --- I
14 don't want a 15/30 policy anymore. I want a 100/300
15 policy. What does the current case law say about
16 whether that is a new policy or not?

17 MR. COOPER:

18 It's not.

19 REPRESENTATIVE MANDERINO:

20 There's current case law that says that's
21 not a new policy?

22 MR. COOPER:

23 When you --- it's not a new policy.

24 Well, Sackett said it would not be.

25 REPRESENTATIVE MANDERINO:

01 Sackett doesn't address that issue.

02 MR. COOPER:

03 The Sackett Superior Court decision
04 addressed what's a new policy. That's why Sackett is
05 solely --- it's one issue under 1738. The Sackett
06 Superior Court decision addressed what is and what is
07 not a new policy, and said, when you add the third car
08 to the two-car policy, that's not a new policy.

09 REPRESENTATIVE MANDERINO:

10 What about when you change the coverage
11 of your current policy? Let's not even talk about
12 adding a new car or adding people.

13 MR. COOPER:

14 That would definitely ---.

15 REPRESENTATIVE MANDERINO:

16 Is there current case law on that issue?

17 MR. COOPER:

18 The Smith case said it's not a new
19 policy.

20 REPRESENTATIVE MANDERINO:

21 So you're saying ---.

22 MR. COOPER:

23 In fact in Smith, ---

24 REPRESENTATIVE MANDERINO:

25 What level of decision is Smith?

01 MR. COOPER:

02 Superior Court. And the allowance of
03 appeal was denied. In Smith, they had the liability
04 coverage, and they had rejected uninsured motorist.
05 They increased the liability coverage and then said,
06 well, we should have gotten a new uninsured or
07 underinsured rejection form. Similar to stacking, but
08 not the same. The Superior Court said, no, it's not a
09 new policy. The rejection form applies throughout the
10 lifetime of that policy. Just so --- actually, in
11 Sackett, rejecting the form would have applied if they
12 had replaced car. If Mr. Sackett, one or two cars,
13 and just changed to like a Pinto or a Honda or
14 something, they wouldn't have needed a new form. But
15 because he had added a car to the policy, the statute
16 required a new form. It was still the same policy,
17 same policy number and everything.

18 REPRESENTATIVE MANDERINO:

19 Maybe you can answer this. So therefore,
20 under the case law right now, it sounds like case law
21 recognizes the same definition of new policy as the
22 Insurance Federation talked about, that basically
23 says, nothing's a new policy unless you're a new
24 client walking in for the first time.

25 MR. COOPER:

01 And applying for new car insurance.

02 REPRESENTATIVE MANDERINO:

03 And applying for new car insurance.

04 MR. COOPER:

05 Because even under Rupert, when you
06 change the named insured, and that's probably one of
07 the most important things. It was like the wife, and
08 the husband died, and they replaced one named insured
09 for the other. They kept the same policy number, and
10 still didn't have to get a new form.

11 REPRESENTATIVE MANDERINO:

12 Thank you, Mr. Chairman.

13 CHAIRMAN WALKO:

14 Thank you. Any other questions? Thank
15 you very much for your testimony.

16 MR. COOPER:

17 Thank you.

18 CHAIRMAN WALKO:

19 Mr. Frank Canty and Mr. Larry Lee, and
20 Mr. Clarence Bowser.

21 MR. CANTY:

22 Good morning, Mr. Chairman.

23 CHAIRMAN WALKO:

24 Good morning. Is there a third person
25 with you?

01 MR. CANTY:

02 He wasn't able to make it.

03 CHAIRMAN WALKO:

04 Oh, okay.

05 MR. CANTY:

06 Mr. Chairman, my name is Frank Canty, and
07 this is my friend and client, Clarence Bowser. He's
08 been my client for about 30 years, and my friend for
09 30 years. Before I introduce Mr. Bowser to tell his
10 story about limited tort and full tort selection on
11 his policy, I wanted to just talk to you about the
12 fact that I've been practicing for about 40 years, 30
13 of which was in West Philadelphia. And I've heard all
14 types of stories regarding Act 6, which has been
15 existence 17 years. Individuals come to my office 17
16 years later saying I have full tort because I have
17 full coverage. They are still confused after 17 years
18 of this law being in place.

19 If we do change that to plain language,
20 it wouldn't open the flood gates to litigation. It
21 would open the flood gates to knowledge. And that's
22 what it's all about, informing and often advising our
23 clients and our constituents, but to date, that has
24 not been resolved with Act 6 in place. But I'm not
25 going to continue to bore you about what has happened

01 to me in my practice for 17 years. I'm going to
02 introduce Mr. Bowser.

03 CHAIRMAN WALKO:

04 Thank you. Welcome.

05 MR. BOWSER:

06 Ladies and gentlemen, my name is Clarence
07 Bowser. I live at 6160 Delancey Street, Philadelphia.
08 My age is 52. And at one time they had me on limited
09 tort and the only reason I had limited tort was
10 through the agent was because when he presented me
11 with the insurance he never told about the full tort
12 and limited tort. Once I found out I had limited
13 tort, I immediately upgraded my insurance to full
14 tort, which wasn't much of a difference in the
15 payment, which I should have found out if the agent
16 had explained that, too.

17 The insurance, right now, like I said, I
18 have full tort. It's something that we need.

19 MR. CANTY:

20 Mr. Bowser, when did you first get
21 limited tort?

22 MR. BOWSER:

23 2005.

24 MR. CANTY:

25 When you took out the limited tort, did

01 your agent ever explain to you the difference between
02 limited tort and full tort?

03 MR. BOWSER:

04 No, he didn't.

05 MR. CANTY:

06 Would it have been a difficulty for you
07 in terms of price, limited tort versus full tort?

08 MR. BOWSER:

09 No.

10 MR. CANTY:

11 Did your agent ever explain to you the
12 difference in price between limited tort and full
13 tort?

14 MR. BOWSER:

15 No.

16 MR. CANTY:

17 Did you ever ask him about that?

18 MR. BOWSER:

19 Yes, I did, after I went back.

20 MR. CANTY:

21 Did you ever change your policy?

22 MR. BOWSER:

23 Yes.

24 MR. CANTY:

25 To what?

01 MR. BOWSER:

02 Full tort.

03 MR. CANTY:

04 Why did you change your policy to full
05 tort?

06 MR. BOWSER:

07 I wanted my right to protect myself.

08 MR. CANTY:

09 And what was the price originally?

10 MR. BOWSER:

11 I pay monthly payments, and there was a
12 \$30 difference in my payment every month.

13 MR. CANTY:

14 Would it have made a difference if he had
15 explained to you what limited tort was and it was
16 cheaper?

17 MR. BOWSER:

18 No.

19 CHAIRMAN WALKO:

20 Mr. Bowser, do you know, what is a tort?
21 Could you define a tort? Or at the time you got the
22 policy did you know what a tort was?

23 MR. BOWSER:

24 No.

25 CHAIRMAN WALKO:

01 Do you know what it is now?

02 MR. BOWSER:

03 Basically I know the limited --- I don't
04 know what tort means, but I know limited is definitely
05 limited. I don't know exactly what tort means.

06 CHAIRMAN WALKO:

07 Does it strike you odd that they would
08 use a word in a policy and not explain it to you, so
09 that even now, after all this time with the good
10 attorney, you don't know the meaning of it. Doesn't
11 that strike you as odd?

12 MR. BOWSER:

13 Yes, sir.

14 CHAIRMAN WALKO:

15 Representative Manderino?

16 REPRESENTATIVE MANDERINO:

17 Thank you both for being here. And I do
18 have a couple more questions, Mr. Bowser. It was 2005
19 when you first took out this policy, right?

20 MR. BOWSER:

21 Yes, ma'am.

22 REPRESENTATIVE MANDERINO:

23 So none of us have great memories as we
24 get older, but that wasn't that long ago. Didn't you
25 have to sign something?

01 MR. BOWSER:

02 Well, what happened was, when I went in
03 to get my insurance, I asked --- I told him I wanted
04 insurance and the agent got the papers and asked me to
05 sign them and at the time, I thought I was getting
06 protection for myself. So limited and full tort, I
07 thought I was getting the full.

08 REPRESENTATIVE MANDERINO:

09 So you were given a piece of paper to
10 sign. Were you given a verbal explanation of what you
11 were signing?

12 MR. BOWSER:

13 No, not really. He never explained the
14 differences between the torts.

15 REPRESENTATIVE MANDERINO:

16 Now something, and I'm not questioning
17 your truthfulness. I'm just trying to understand.
18 Usually you don't wake up one morning and say, gee,
19 what kind of insurance coverage do I have. I better
20 go make sure. What prompted you? Did you have an
21 auto accident? Did somebody you know have an auto
22 accident? And then you heard that there was a
23 difference? Tell me.

24 MR. BOWSER:

25 I had an auto accident.

01 REPRESENTATIVE MANDERINO:
02 You got in an auto accident?
03 MR. BOWSER:
04 Yes, I had an auto accident.
05 REPRESENTATIVE MANDERINO:
06 And what happened?
07 MR. BOWSER:
08 I talked to my attorney.
09 REPRESENTATIVE MANDERINO:
10 And he said, forget it, I can't help you,
11 because ---.
12 MR. BOWSER:
13 He said, because I had limited tort.
14 REPRESENTATIVE MANDERINO:
15 Okay. And then you said to him, what's
16 limited tort?
17 MR. BOWSER:
18 And I asked him about limited tort.
19 REPRESENTATIVE MANDERINO:
20 So what happened with regard to that
21 accident? Was there a lawsuit?
22 MR. BOWSER:
23 No.
24 REPRESENTATIVE MANDERINO:
25 Did you have health insurance?

01 MR. BOWSER:

02 Yes.

03 REPRESENTATIVE MANDERINO:

04 So your medical coverage, whatever you
05 had suffered in your auto accident was covered under
06 your health insurance?

07 MR. BOWSER:

08 Yes, ma'am.

09 CHAIRMAN WALKO:

10 Any more questions?

11 MR. CANTY:

12 An agent is somebody who sells you
13 insurance and collects a fee from that. And I'm
14 supposed to tell you the difference between limited
15 tort and full tort. So is he really an agent, or is a
16 salesperson? Because an agent's supposed to be more
17 than just somebody that sells you something and gets
18 paid for that. So we also need to pay attention to
19 the definition of agency. And that agent, say, goes
20 back to State Farm with 20 policies, 18 of which are
21 limited tort.

22 Thank you.

23 CHAIRMAN WALKO:

24 Thank you. Thank you very much, Mr.

25 Bowser and Mr. Canty. I'd like to thank everybody who

01 came here today and offered very thorough and
02 intelligent and informed testimony. Thank you very
03 much.

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HEARING CONCLUDED AT 12:00 P.M.

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