

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1694

INTRODUCER: Banking and Insurance Committee and Senator Richter

SUBJECT: Motor Vehicle Personal Injury Protection Insurance

DATE: April 22, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</u>	<u>Burgess</u>	<u>BI</u>	Fav/CS
2.	<u>O'Connor</u>	<u>Maclure</u>	<u>JU</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill enacts limits on the attorney's fee awards related to disputes under the Florida Motor Vehicle No-Fault Law. The bill limits attorney's fees recovered pursuant to a No-Fault dispute to a maximum hourly rate of \$200 per hour, or:

- For a disputed amount less than \$500, 15 times the disputed amount recovered, up to a total of \$5,000.
- For a disputed amount of \$500 or more but less than \$5,000, 10 times the disputed amount recovered, up to a total of \$10,000.
- For a disputed amount of \$5,000 up to \$10,000, five times the disputed amount recovered, up to a total of \$15,000.
- For class actions, three times the disputed amount recovered, up to a total of \$15,000.

The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault Law.

This bill substantially amends section 627.736, Florida Statutes.

II. Present Situation:

Florida Motor Vehicle No-Fault Law

Under the state's No-Fault Law, owners or registrants of motor vehicles are required to purchase \$10,000 of personal injury protection (PIP) insurance which compensates persons injured in accidents regardless of fault. Policyholders are indemnified by their own insurer. The intent of no-fault insurance is to provide prompt medical treatment without regard to fault. This coverage also provides policyholders with immunity from liability for economic damages up to the policy limits and limits tort suits for non-economic damages (pain and suffering) below a specified injury threshold. In contrast, under a tort liability system, the negligent party is responsible for damages caused, and an accident victim can sue the at-fault driver to recover economic and non-economic damages.

Florida drivers are required to purchase both personal injury protection (PIP) and property damage liability (PD) insurance. The personal injury protection must provide a minimum benefit of \$10,000 for bodily injury to any one person and \$20,000 for bodily injuries to two or more people. Personal injury protection coverage provides reimbursement for 80 percent of reasonable medical expenses, 60 percent of loss of income, 100 percent of replacement services, for bodily injury sustained in a motor vehicle accident, without regard to fault. The property damage liability coverage must provide a \$10,000 minimum benefit. A \$5,000 death benefit is also provided.

In 2007, the Legislature re-enacted and revised the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7405, F.S.) effective January 1, 2008.¹ The re-enactment maintained personal injury protection (PIP) coverage at 80 percent of medical expenses up to \$10,000. However, benefits are limited to services and care lawfully provided, supervised, ordered, or prescribed by a licensed physician, osteopath, chiropractor, or dentist; or provided by:

- A hospital or ambulatory surgical center;
- An ambulance or emergency medical technician that provided emergency transportation or treatment;
- An entity wholly owned by physicians, osteopaths, chiropractors, dentists, or such practitioners and their spouse, parent, child, or sibling;
- An entity wholly owned by a hospital or hospitals;
- Licensed health care clinics that are accredited by a specified accrediting organization.

Attorney Fee Awards

Pursuant to s. 627.428, F.S., parties that prevail against insurers in court, including PIP claimants, are entitled to an award of reasonable attorney fees. In determining a fee award, a court engages in a "lodestar" calculation, which is the reasonable number of hours the attorney

¹ See ch. 2007-324, L.O.F.

worked multiplied by a reasonable hourly rate.² In determining a reasonable fee, courts should consider the following factors set forth by the Florida Bar:³

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged.
- The amount involved and the results obtained.
- The time limitations imposed.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent.

In personal injury cases in which the prevailing claimant's attorney has worked on a contingency fee basis, it is within the court's discretion whether or not to use a contingency risk multiplier of up to 2.5 times the "lodestar" amount in determining the fee award.⁴ In federal cases, the use of a contingency risk multiplier in computing attorney fee awards under federal fee-shifting statutes was effectively eliminated in 1987.⁵ A trial court has discretion regarding whether to apply a contingency risk multiplier, using the following criteria to determine whether a multiplier is necessary: (1) whether the relevant market requires a multiplier to obtain competent counsel; (2) whether the attorney could mitigate the risk of nonpayment; and (3) the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.⁶ If the trial court determines that a multiplier is necessary, it may apply the following multipliers:

- A multiplier of 1 to 1.5 if success was more likely than not at the outset;
- A multiplier of 1.5 to 2.0 if the likelihood of success was approximately even at the outset;
- A multiplier of 2.0 to 2.5 if success was unlikely at the outset of the case.⁷

Motor Vehicle Insurance Fraud

Recently, Florida has experienced an increase in motor vehicle related insurance fraud. The number of staged motor vehicle accidents received by the Division of Insurance Fraud (Division)⁸ has nearly doubled from fiscal year 2008/2009 (776) to fiscal year 2009/2010 (1,461). The Division is also reporting sizeable increases in the overall number of PIP fraud referrals, which have increased from 3,151 during fiscal year 2007/2008 to 5,543 in fiscal year

² See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

³ See R. Regulating Fla. Bar 4-1.5(b).

⁴ See *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

⁵ See *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987).

⁶ See *supra* note 4 at 834.

⁷ See *id.*

⁸ The Division of Insurance Fraud is the law enforcement arm of the Department of Financial Services.

2009/2010. Florida led the nation in staged motor vehicle accident “questionable claims”⁹ from 2007-2009, according to the National Insurance Crime Bureau (NICB).¹⁰

On April 11, 2011, the Office of Insurance Regulation (OIR) released the *Report on Review of the 2011 Personal Injury Protection Data Call*. The office received data from 31 companies that participated in a data call which covered a scope period from 2006-2010. The reporting companies cumulatively represent over 80.1 percent of the motor vehicle insurance marketplace in Florida.¹¹ The OIR report provides evidence that costs in the PIP system are rising rapidly:

- PIP payouts have increased from approximately \$1.5 billion in 2008 to approximately \$2.5 billion in 2010.
- From 2006 to 2010, the number of lawsuits pending at year-end increased by 387 percent, while the number of settlements increased 315 percent.
- Florida PIP claims involve approximately 100 medical treatments at an average total cost of \$12,000, well above the national average excluding Florida of approximately 50 treatments at an average total cost of \$8,000
- The PIP pure premium in Florida, which is the amount of premium needed to cover losses, has increased 50 percent, from just under \$100 per car in the 4th quarter of 2008 to over \$150 per car in the 3rd quarter of 2010 (the most recent period for which data was collected).
- The rise in PIP payouts and the corresponding increase in premium costs are occurring despite the fact that the number of crashes and crashes with injuries decreased from 2005 to 2009, according to the Department of Highway Safety and Motor Vehicles.

Motor vehicle insurance fraud is a long-standing problem in Florida. In November 2005, the Senate Banking and Insurance Committee produced a report titled *Florida’s Motor Vehicle No-Fault Law*, which was a comprehensive review of Florida’s No-Fault system. The report noted that fraud was at an “all-time” high at the time, noting that there were 3,942 PIP fraud referrals received by the Division of Insurance Fraud during the three fiscal years beginning in 2002 and ending in 2005. That amount was easily exceeded by the over 5,500 PIP fraud referrals received by the division during the 2009/2010 fiscal year. Given this fact, the following description from the 2005 report is an accurate description of the current situation regarding motor vehicle insurance fraud:

Florida’s no-fault laws are being exploited by sophisticated criminal organizations in schemes that involve health care clinic fraud, staging (faking) car crashes, manufacturing false crash reports, adding occupants to existing crash reports, filing PIP claims using contrived injuries, colluding with dishonest medical

⁹ The NICB defines a “questionable claim” as one in which indications of the behavior associated with staged accidents are present. Such claims are not necessarily verified instances of insurance fraud.

¹⁰ The National Insurance Crime Bureau is a not-for-profit organization that receives report from approximately 1,000 property and casualty insurance companies. The NICB’s self-stated mission is to partner with insurers and law enforcement agencies with law enforcement

¹¹ Based on 2009 Total Private Passenger Auto No-Fault Premiums reported to the National Association of Insurance Commissioners (NAIC).

treatment providers to fraudulently bill insurance companies for medically unnecessary or non-existent treatments, and patient-brokering...¹²

Fraudulent claims are a major cost-driver and result in higher motor vehicle insurance premium costs for Florida policyholders. Representatives from the Division of Insurance Fraud have identified the following as sources of motor vehicle insurance fraud:

- Ease of health care clinic ownership.
- Failure of some law enforcement crash reports to identify all passengers involved in an accident.
- Solicitation of patients by certain unscrupulous medical providers, attorneys, and medical and legal referral services.
- Litigation over de minimis PIP disputes.
- The inability of local law enforcement agencies to actively pursue the large amount of motor vehicle fraud currently occurring

III. Effect of Proposed Changes:

Section 1. Amends s. 627.736, F.S. The bill limits attorney's fees recovered pursuant to a No-Fault dispute to a maximum hourly rate of \$200 per hour, or:

- For a disputed amount less than \$500, 15 times the disputed amount recovered, up to a total of \$5,000.
- For a disputed amount of \$500 or more but less than \$5,000, 10 times the disputed amount recovered, up to a total of \$10,000.
- For a disputed amount of \$5,000 up to \$10,000, five times the disputed amount recovered, up to a total of \$15,000.
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The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault law.

Section 2. The act is effective July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹² The Florida Senate, Committee on Banking and Insurance, *Florida's Motor Vehicle No-Fault Law*, Report Number 2006-102, 37-38 (November 2005), available at http://archive.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-102bilong.pdf (last visited April 20, 2011).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Proponents of limiting attorney's fees assert that doing so will reduce unnecessary litigation related to de minimis personal injury protection claims and reduce a major monetary incentive for committing motor vehicle insurance fraud. Opponents of the bill assert that the attorney fee limitations will prevent claimants from contesting incorrect PIP benefit payments by insurers and that attorney fee awards are not a motivation for fraud because attorney's fees are only available if the insurer does not pay the disputed amount within 30 days of receiving a demand letter and the plaintiff subsequently obtains a judgment in court or the insurer renders payment after the 30-day demand letter period expires.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on April 12, 2011:

The committee substitute deletes all provisions of the bill except for a fee schedule for attorney's fees recoverable by the plaintiff in an action under the Florida Motor Vehicle No-Fault Law and a prohibition against application of a contingency fee multiplier in such cases.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
