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Committee on Banking and Insurance

Senator Rudy Garcia, Chair

FLORIDA'S MOTOR VEHICLE NO-FAULT LAW

SUMMARY

In 1971, Florida became the second state in the country to adopt a no-fault automobile insurance plan. The no-fault reform was offered as a viable replacement for the tort system as a means to quickly and efficiently compensate injured parties in auto accidents regardless of fault. The principle underlying the no-fault law is a trade-off of one benefit for another, by assuring payment of medical, disability (wage loss) and death benefits, regardless of fault, in return for a limitation on the right to sue for non-economic damages (pain and suffering). The law's purpose was to reduce auto insurance costs, lessen litigation, and compensate injured individuals quickly, efficiently, and adequately. Currently, twelve states, including Florida, have some form of no-fault provision.

The law provides for compulsory purchase of no-fault coverage, referred to as personal injury protection (PIP), which compensates the policyholder directly up to \$10,000 without regard to fault for bodily injury sustained in a motor vehicle accident. This coverage also provides the policyholder with immunity from liability for economic damages up to the policy limits and for non-economic damages (pain and suffering) for most injuries. Property damage (PD) liability coverage of \$10,000 is also required which pays for the physical damage expenses caused by the insured to third parties in the accident. Additionally, under Florida's Financial Responsibility law, motorists must provide proof of ability to pay monetary damages for bodily injury (BI) and property damage (PD) liability at the time of motor vehicle accidents or when serious traffic violations occur.

The Legislature enacted significant no-fault reforms in 2001 and 2003; however, according to many stakeholders, these reforms have not gone far enough in resolving the problems within the no-fault system which include fraud, abuse, inappropriate medical treatment, inflated claims, inadequate compensation to

victims, increased premiums, and the proliferation of law suits. As a result of these concerns, in 2003 the Legislature repealed the Motor Vehicle No-Fault law to take effect October 1, 2007, unless reenacted by the Legislature during the 2006 Regular Session and such reenactment becomes law to take effect for policies issued or renewed on or after October 1, 2006.

Florida has a costly automobile insurance system with serious problems, though not at a "crisis" level. The market is competitive and coverage is readily available. Florida experienced significant premium increases, particularly for PIP coverage, from 1999 through 2003. But, this has been followed by rate decreases or very small increases in 2004 and 2005. PIP loss costs¹ in Florida have also leveled off, but they have continued to outpace other no-fault states for at least the last five years. Loss costs for BI liability insurance in Florida are also well above the national average and higher than most no-fault states. High medical costs and utilization of medical services continue to drive PIP costs and the incidents of PIP fraud and abuse, primarily involving health care fraud, are at an all time high. Anti-fraud measures have helped to increase the number of arrests and prosecutions, but the resources of the Division of Insurance Fraud are limited.

The no-fault law meets the goal of compensating victims (and their medical providers) much more timely than under a traditional tort system. But, the efficiencies expected from no-fault due to decreased litigation and expense related to proving fault have not been fully realized due to the expenses associated with investigating and litigating the cost and utilization of medical services. However, reforms enacted in Florida in 2003 appear to have been effective in reducing such litigation.

The major recommendations by committee staff are as follows:

¹ Total paid losses divided by total insured vehicles, excluding loss adjustment expenses.

1. Reenact the no fault law, provided that additional reforms are enacted to control costs, most importantly, a medical fee schedule as listed below.
2. Adopt a medical fee schedule for PIP set at a specified percentage above the Medicare fee schedule
3. Eliminate or limit the contingency risk multiplier for attorney fee awards in PIP cases.

Additional recommendations relating to fraud, health care clinics, and other PIP issues are listed under Recommendations at the end of this report.

BACKGROUND

Legislative History of Florida's No-Fault Law

Florida became the second state in the country to adopt a no-fault automobile insurance plan which took effect January 1, 1972. The legislation authorized first-party personal injury protection (PIP) benefits up to \$5,000 to policyholders who sustained bodily injury in auto accidents regardless of fault. Policyholders could sue in tort for non-economic damages (pain and suffering) only if certain criteria were met. Additionally, liability insurance coverages for bodily injury (BI) of \$10,000 and property damage (PD) of \$5,000 were made compulsory as to all owners and vehicles subject to the law. The legislative objectives of the original no-fault law were enumerated by the Florida Supreme Court in 1974 in *Lasky v. State Farm Insurance Co.*, wherein the Court opined that the no-fault law was intended to:

- assure that persons injured in vehicular accidents would be directly compensated by their own insurer, even if the injured party was at fault;
- lessen court congestion and delays in court calendars by limiting the number of law suits;
- end the inequities of recovery under the traditional tort system; and
- lower automobile insurance premiums.²

Deficiencies in the original law were remedied by the 1976 Legislature in which the tort threshold was strengthened by replacing the “dollar threshold” (which specifies a dollar amount that medical costs must exceed before an injured person can pursue a liability claim) with the “verbal threshold” (which distinguishes claims in terms of the description of the injury). In 1977, the Legislature eliminated the two mandatory liability coverages (BI and PD) enacted in 1971,

because of cost and compliance reasons, reduced PIP benefits to 80 percent of medical expenses and 60 percent of lost wages, and increased PIP deductibles. In 1978, in an effort to continue to curb rising motor vehicle rates, the Legislature again tightened the verbal threshold by eliminating the right to sue for certain serious nonpermanent injuries, raised the PIP benefit level to \$10,000,³ and increased deductibles.

The next major legislative effort to address auto insurance issues occurred in 1988 when the Legislature enhanced enforcement of compulsory motor vehicle laws, mandated that motorists obtain property damage (PD) liability coverage of \$10,000 and addressed the issue of uninsured motorist insurance. After the 1988 reforms (and prior to reforms in 2001), various amendments were made to the law, however, the basic foundation of the no-fault provision has not substantially changed.

The Legislature enacted major no-fault reforms in 2001 and 2003, largely in response to the findings of rampant PIP fraud in Florida by the Fifteenth Statewide Grand Jury in 2000. The 2001 Legislature required the registration of certain health care clinics; provided that insurers or insureds were not required to pay claims by “brokers;” limited access to vehicle accident (crash) reports so that illegal solicitation activity could be curtailed; created a civil cause of action to allow insurers to sue individuals under certain circumstances; mandated insurers to specify items on claims which were reduced, omitted, or declined; and established billing time frames for providers.

The Legislature enacted further reforms in 2003, by strengthening criminal anti-fraud provisions, licensing health care clinics under the Agency for Health Care Administration (AHCA); expanding the presuit demand letter to 15 days and applying it to all PIP disputes; specifying criteria as to “reasonable” charges for services; requiring the Department of Health (DOH) to establish a list of diagnostic tests that are not “medically necessary;” mandating that only Florida licensed physicians do independent medical examinations (IME’s) and prohibiting insurers from “materially” changing an IME opinion; mandating a “disclosure and acknowledgment form” that providers/insureds must execute at initial treatment; eliminating the \$2,000 PIP deductible; changing the calculation of deductibles; prohibiting providers from forgiving collection of co-payments or deductibles on

³ The \$10,000 PIP benefit became effective on January 1, 1979.

² 296 So.2d 9 (Fla. 1974).

PIP claims as a general business practice; and providing for the repeal of the no-fault law effective October 1, 2007.⁴ A year later, the Legislature exempted numerous providers from the ambit of the health care clinic law.

Constitutionality of Florida's No-Fault Law

Florida's highest court has upheld the constitutionality of the no-fault law. In *Lasky v. State Farm Mutual Insurance Co.*, the PIP provisions were challenged on grounds of denial of right of access to courts, due process, trial by jury, and equal protection. The Supreme Court in a sweeping opinion held that prompt recovery of major expenses and immunity from negligence in the PIP law was considered a fair exchange for the waiver of tort action rights. Eight years later, the Supreme Court again affirmed the principle tenets of the no-fault law elucidated in *Lasky* in the case of *Chapman v. Dillon*.⁵ The Court held that the legislative amendments, lowering the PIP benefits and increasing the amount of permitted optional deductibles, did not necessarily result in reduced compensation and increased litigation. The Court reasoned that an injured person would still receive prompt payment for his major and salient economic losses even where he is at fault, and that the legislative changes still provided a reasonable alternative to traditional action in tort and thus did not fundamentally change the essential characteristics of the no-fault law.

Current Automobile Insurance Provisions; Mandatory and Optional Coverages

Under Florida law, motorists are required to purchase personal injury protection (PIP) and property damage (PD) liability coverages. The no-fault coverage, referred to as PIP, provides \$10,000 of coverage for the following: payment of 80 percent of reasonable medical expenses, 60 percent of loss of income, plus a \$5,000 death benefit, for bodily injury sustained in a motor vehicle accident, without regard to fault. PIP covers the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in the insured motor vehicle, and persons struck by the insured motor vehicle. This coverage also provides the policyholder with immunity from liability for economic damages (medical

expenses) up to the \$10,000 policy limits and for non-economic damages (pain and suffering) for most injuries. Specifically, the immunity provision protects the insured from tort actions by others (and conversely, the insured may not bring suit to recover damages) for pain, suffering, mental anguish, and inconvenience arising out of the vehicle accident, except in the following cases: (1) significant and permanent loss of an important bodily function; (2) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (3) significant and permanent scarring or disfigurement; or (4) death. This is known as the "verbal threshold" which means that suits for pain and suffering may commence only if injuries meet these levels of seriousness.

Current law also requires vehicle owners to obtain \$10,000 in PD liability coverage which pays for the physical damage expenses caused by the insured to third parties in the accident. Additionally, under Florida's Financial Responsibility law, motorists must provide proof of ability to pay monetary damages for BI and PD liability after motor vehicle accidents or serious traffic violations. The minimum amounts of liability coverage are \$10,000 in the event of injury to one person, \$20,000 for injury to two or more persons, and \$10,000 property damage, or \$30,000 combined single limits. Many drivers purchase "optional" coverages in addition to mandatory insurance including bodily injury liability, (which may be required by the Financial Responsibility Law), uninsured motorist, collision, comprehensive, medical payments, towing, rental reimbursement and accidental death and dismemberment. Insurers may not require motorists to purchase any of these optional coverages.

METHODOLOGY

Committee staff reviewed relevant automobile data from various stakeholders, interviewed representatives from constituent groups, and sent a survey to the top thirty-one insurers representing 82 percent of the premium volume for private passenger auto coverage in Florida. Nineteen companies representing 62 percent of the market responded to most of the survey questions. A separate survey was sent to representatives with the Academy of Florida Trial Lawyers, Florida Medical Association, Florida Chiropractic Association, Florida Osteopathic Medical Association and the Florida State Massage Therapy Association, known collectively as the "Coalition." Separate surveys were also sent to the Florida Hospital Association, the Florida Orthopaedic Society, and the Florida Chiropractic Society.

⁴ The affected sections are: ss. 627.730, 627.731, 627.732, 627.733, 627.734, 627.736, 627.737, 627.739, 627.7401, 627.7403, and 627.7405, F.S. Insurers are authorized to provide, in all policies issued or renewed after October 1, 2006, that such policies may terminate on or after October 1, 2007.

⁵ 415 So.2d 12 (Fla. 1982).

FINDINGS

Is Florida's No-Fault System Working?

In general, Florida's no-fault provisions were intended to assure that persons injured in accidents are compensated promptly, adequately, and fairly by their own insurer, without regard to fault; to end the inequities and costs of recovery under the traditional tort system; and lower automobile insurance costs. In an effort to evaluate how well these goals have been achieved, the following information is provided.

Availability of Motor Vehicle Insurance

Motor vehicle insurance is readily available for Florida drivers. A significant indicator of the availability of auto insurance is portrayed by the small and still declining number of drivers who must obtain coverage in the residual or involuntary market from the Florida Automobile Joint Underwriting Association (FAJUA), known as the "insurer of last resort." As of June 30, 2005, there were only 1,546 private passenger vehicles insured by the FAJUA as compared to 40,482 in 2002.⁶ In 2004, the FAJUA had just a 0.32 percent statewide market share of earned premiums, insuring less than one half of 1 percent of vehicles registered in the state. In 2004, there were 372 insurers writing personal auto insurance in the voluntary market. The continuing ability of the voluntary market to absorb additional FAJUA policies is evidence that auto insurance has remained available in this state.

Compliance with Mandatory Vehicle Insurance Laws

Florida motorists have a high level of compliance with purchasing the two compulsory auto insurance coverages, personal injury protection (PIP) and property damage (PD) liability, according to the Department of Highway Safety and Motor Vehicles (DHSMV). The actual uninsured vehicle rate has been reduced from 31 percent in 1992, to 4 percent as of July 2005. In other words, 96 percent of vehicles are currently insured.

Efforts to Combat Fraud and Abuse

Motor vehicle reforms in 2001 and 2003 have proved beneficial to the Division of Insurance Fraud's (DIF) efforts to combat PIP fraud. Arrests for PIP fraud have increased 74 percent over the past three years and PIP cases presented for prosecution have increased 49 percent during that period. Restitution to insurance

victims has also increased (to \$32 million) in 2004. However, PIP fraud and abuse are at an all time high with health care fraud the leading cost "driver." Health care clinic fraud and staged or fake accidents are the most common types of PIP fraud. Fraud referrals for PIP have increased over 400 percent from 2002-2003 (615 referrals) to 2004-2005 (2,628 referrals).⁷ The Division is able to open less than 25 percent of these referrals.

Division intelligence indicates that "hundreds" of health care clinics have been established primarily in the South Florida area for the sole purpose of perpetrating PIP fraud. Over 65 percent of the more than 2,435 medical clinics licensed by AHCA under the Health Care Clinic Act⁸ in 2005 are located in Dade, Broward, and Palm Beach counties. There are 4,590 clinics exempt from AHCA licensure and therefore subject to no state regulation under the Act. Both AHCA and DIF find that due to lack of oversight over exempt clinics and because of the PIP fraud problem among clinics (especially exempt clinics), that all clinics that accept PIP reimbursement and that qualify for an exemption from licensure should be required to obtain an exemption certificate limited to two years and subject to renewal application, and that AHCA be allowed to inspect exempt clinics. Also, AHCA and DIF have found that various fraudulent motor vehicle insurance acts currently prohibited under Part I of ch. 817, F.S., are not disqualifying offenses for clinic licensure. Adding these provisions to the law would prohibit persons convicted of these crimes from obtaining a clinic license. Further, posting anti-fraud reward signs in clinics would be beneficial to inform individuals that they may receive rewards for furnishing insurance fraud information to DIF.

The Division describes other fraudulent activity which should be subject to criminal penalties in order to deter such activity and to be consistent with prior legislative enactments. Specifically, the Division recommends that fictitious documentation of an auto accident (i.e., "paper" accident) with the intent to file a claim should be a second degree felony with a two year minimum sentence, as the current law provides for planning or participating in an intentional accident for this purpose. Also, the Division recommends a criminal penalty for soliciting or receiving a bribe in return for accepting treatment from providers or clinics. It is also important

⁶ Due in part to the sharp decline in premium volume, it was necessary for the FAJUA to begin assessing member companies in September 2004.

⁷ Part of this increase is due to the ease in which insurance companies and consumers can now report fraud to the DIF by use of their "e-file" web-based reporting system.

⁸ Chapter 400, Part XIII, F.S.

to restrict access to police accident citation logs so that runners can't obtain logs to solicit PIP accident victims, as the law currently restricts access to vehicle crash reports. There is also a need to narrow the "victim services programs" exception for access to crash reports so that individuals cannot falsely claim membership in these programs to obtain reports.

The resources of the Division to combat fraud are limited due to problems in recruiting and retaining sworn law enforcement investigators with the agency. New detectives start at salaries below the Florida Department of Law Enforcement (FDLE) as well as other police agencies. Starting salaries for the FDLE are \$44,921 but are \$38,783 for the Division. According to DIF officials, FDLE is the state agency that best mirrors the Division in terms of the complexity of investigative matters. There is also a high separation rate of trained DIF investigators who leave for higher paying positions with other police agencies, particularly the Florida Department of Law Enforcement.

Officials with the Division also state that there are an insufficient number of experienced, proficient prosecutors to process these complex PIP fraud cases through the criminal justice system. There are now two full-time PIP fraud prosecutors serving the Dade State Attorney's Office. Division officials assert that the success the agency has experienced by obtaining dedicated PIP prosecutors in Dade County (e.g., increases in cases handled, convictions, increases in sentences imposed) validates their recommendation for a prosecutor for Orlando and for Tampa.

Affordability of Motor Vehicle Insurance

The average rate changes for insurers representing 62 percent of the premium volume for private passenger automobile coverage in Florida reflect a downward trend in rates from 2003 to 2004 for BI and PD liability insurance and increases of less than 1 percent for PIP, uninsured motorist (UM), and medical payment (MP) coverages. These favorable results are continuing in 2005 and generally correspond with the time period when the last PIP reforms were enacted.⁹ However, similar results are occurring nationwide so this positive trend may also be due to fewer accidents, improved auto safety features, and a more competitive insurance market. Prior to this period, however, Florida's PIP premiums increased nearly 60 percent from 1999 to 2003.

Premium examples for six major insurers for Jacksonville, Tallahassee, Orlando and Miami reflect decreases in 2005 from 2004 for four of the five primary coverages (PIP, liability, collision, and comprehensive), with some exceptions for very small increases. However, premiums for uninsured motorist (UM) coverage reflect significant increases. Examples of current average PIP premiums in the four cities vary greatly depending on various factors, but range from \$90 to \$243 for a 40-year old married female with one moving violation, and from \$276 to \$791 for an 18-year old single male with no accidents or violations.

The National Association of Insurance Commissioners (NAIC) ranks Florida 14th among the states for 2002 (the latest data available) when calculating average premiums per insured vehicle for combined coverage (\$931.15) and 13th in average expenditures per insured vehicle (\$870.35). These amounts are above the countrywide average for premiums per insured vehicle (\$879.99) and for expenditures per insured vehicle (\$773.68).

A correlation exists between population density and cost of auto insurance in both tort and no-fault states, including Florida. States with the largest populations generally have the highest premiums and Florida ranks eighth nationally for population density. Though certain legislative changes to this state's auto laws would affect premiums, the correlation between population density and auto-premium cost is not likely to be eliminated regardless of whether Florida utilizes a no-fault or tort system.

Profitability of Insurance Companies

Automobile insurance carriers writing private passenger automobile policies in Florida in 2003 are earning profits that are comparable with insurers countrywide. This data is from the NAIC Report on Profitability for 2003 (the latest information available). For 2003, the total percent of return on net worth for Florida private passenger auto was a healthy 10.3 percent, slightly better than the countrywide rate of return of 9.4 percent. However, for each of the two prior years (2002 and 2001), Florida private passenger auto had a negative rate of return, compared to low positive returns countrywide. For 2002, Florida private passenger auto had a negative 1.3 percent rate of return on net worth compared to the countrywide 4.1 percent return. The results were even worse in 2001, with a negative 3.5 percent return in Florida, compared to a 2 percent return countrywide.

⁹ Ch. 2003-411, L.O.F., took effect October 1, 2003.

Adequacy of Motor Vehicle Coverage

The \$10,000 PIP benefit level determines how much compensation for economic loss individuals receive under no-fault. Auto insurers responding to the committee staff survey (representing 62 percent of the private passenger auto market) stated that 26 percent of PIP claimants exceeded the maximum \$10,000 level and that the average PIP payment per claimant was \$4,906. However, a much higher average paid PIP claim of \$7,009 is reported for Florida for 2005 (2nd quarter) in “Fast Track” insurance data. This significant difference is apparently due to the staff questionnaire asking for the average PIP payment *per claimant*, while the Fast Track data reports the average payment *per claim*, with includes amounts paid to two or more persons under the same PIP policy for the same accident.

Inflation has substantially reduced the PIP benefit level so that the January 1979 benefit level of \$10,000 is worth only \$3,982 today (September 2005) based on the increase in the Consumer Price Index (CPI) since that time. Considered a different way, the \$10,000 limit would be \$25,110 in September 2005, if increased at the CPI rate.

PIP Loss Costs in Florida and Nationwide

Staff analyzed PIP loss costs in Florida and nationwide based on the Fast Track Monitoring System for the second quarter of 2005, as reported by the Property Casualty Insurers Association of America (PCI).¹⁰

A “pure premium” for PIP is calculated to reflect the average paid PIP loss per insured vehicle, excluding expenses. For 2005 (2nd qtr.), the Florida PIP pure premium was \$127.92, which was an increase of only 2.4 percent over 2003 (1st qtr.). This was a significant improvement compared to the 22.9 percent increase over the prior two year period from 2000 (4th qtr.) to 2003 (1st qtr.) This is one indication that there has been some recent improvement in Florida PIP loss experience, whether due to legislative reforms or other factors.

¹⁰ The Fast Track Monitoring System is the primary source for monitoring current trends in auto insurance loss costs. Insurers representing more than half of the private passenger market report quarterly loss data within 45 days of the end of each quarter. Three statistical agents collect Fast Track data: the Property Casualty Insurers Association of America (PCI), the National Independent Statistical Service, and the Insurance Services Office (ISO). The results for all three are summarized and reported by PCI and is made available to state insurance departments.

The recently improved PIP claims costs are primarily a function of claims frequency (the number of paid claims) rather than claims severity (the amount paid per claim). Claims frequency has decreased by 4.2 percent from 1.91 paid claims per 100 vehicles in 2000, to 1.83 in 2005; whereas claims severity has increased 31.4 percent from an average of \$5,333 in 2000, to \$7,009 in 2005.

Although Florida PIP costs are showing recent improvement, the results are less impressive when compared to other states. When Florida is compared to seventeen other PIP states¹¹ in 2005, Florida’s PIP pure premium (\$127.92) is 69.7 percent greater than the seventeen-state average (\$89.10), which reflected a widening gap over the past five years. Florida’s PIP claim frequency during this period (1.83) was 16.6 percent above the average (1.57) and Florida’s PIP claim severity (\$7,009) was 23.8 percent above the average (\$5,663).

Staff also analyzed a report of the Fast Track data compiled by the Insurance Services Office (ISO), for the first quarter of 2005, which uses a different grouping of eleven states to reflect countrywide PIP losses. ISO includes only no-fault states that restrict lawsuits in tort, with one exception.¹² As of 2005 (1st

¹¹ The seventeen states selected by PCI provide PIP coverage either under a no-fault or an “add-on” system. Add-on states require insurers to offer PIP coverage but do not restrict the right to sue in tort. The seventeen states are Delaware, Florida, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New York, North Dakota, Oregon, South Carolina, Texas, Utah, and Washington, plus the District of Columbia. These include 11 of the 13 no-fault states (including D.C.), plus 6 of the 10 “add on” states. PCI excludes Colorado which repealed its no-fault law, Pennsylvania, a no-fault state which has changed its auto insurance system multiple times, and New Jersey, a no-fault state which has had unusual residual market problems that may skew the results. PCI also excludes four add-on states (Arkansas, South Dakota, Virginia, and Wisconsin) for reasons unknown to committee staff.

¹² The eleven states are Florida, Hawaii, Kentucky, Kansas, Massachusetts, Michigan, Minnesota, New York, North Dakota, South Carolina, and Utah. These include all of the no-fault states except Pennsylvania and New Jersey (also excluded by PCI for reasons explained in the previous footnote). ISO also excludes Colorado which repealed its no-fault law. But, ISO includes one “add on” PIP state, South Carolina, that does not restrict lawsuits in tort. Also, the ISO report is for the first quarter of 2005, as compared to the PCI second quarter report, which results in different data for prior quarters, because different

qtr.), Florida's PIP pure premium (\$126.69) is 13.4 percent greater than the eleven-state average (\$111.68). The data also reflects that Florida's PIP losses have greatly outpaced the average over the past five years, since Florida was 11.9 percent below the average in 2000. In 2005 (1st qtr.), Florida's PIP claim frequency (1.88) was 17.5 percent above the average (1.62), but Florida's PIP claim severity (\$6,748) was 2.0 percent below the average for the eleven states (\$6,884).

Bodily Injury (BI) Liability Loss Costs in Florida and Nationwide

No-fault laws are intended to reduce the number of liability lawsuits for bodily injury. Florida has relatively high bodily injury (BI) loss costs, with a pure premium for BI estimated to be eleventh highest in the nation in 2003 and higher than most no-fault states.¹³ Florida was one of only four no-fault states to have a BI pure premium above the nationwide average. When compared to all states, Florida has below-average BI claims frequency, which indicates that its tort threshold is generally successful in limiting the number of BI claims. But, Florida's claims frequency is higher than most no-fault states, even when the accident rate is neutralized as a factor. This indicates that the Florida tort threshold may not be as effective as other no-fault state thresholds, despite Florida's use of a verbal threshold that is perceived to be stronger than a monetary threshold. Once the threshold is pierced, the amount of the BI claim in Florida is well-above the national average, even though it is lower than all no-fault states but one.

Medical Costs

Florida's PIP loss costs have increased over the past years, due primarily to increased claims severity, i.e., the increased amount paid for the average PIP claim. Much of this higher cost was driven by increases in the cost of health care during that period. Increased health care costs are due to the increased usage of medical services and increases in per service costs.

A 2004 survey of automobile insurance claims by the Insurance Research Council (IRC)¹⁴ indicates that the cost of medical treatment to claimants under PIP and

Medical Payments coverage increased rapidly in all states from 1997 to 2002, with costs rising at a higher rate than both the consumer price index (CPI) rate of inflation and the rate of medical care inflation. In its analysis of four no-fault states, the IRC found that certain treatments are particularly more expensive in Florida than found in New York, Michigan or Colorado.¹⁵ For instance, the average total amount charged by chiropractors for treatment of PIP patients in Florida (\$4,837) was three times that charged in New York (\$1,549) and Michigan (\$1,522). Chiropractic costs rose at a much higher rate for the surveyed PIP claimants nationally than for the surveyed BI claimants. For example, in 1997, the average cost of a chiropractic visit for a PIP claimant was \$102, a lower rate than the \$110 charged to BI claimants. However, in 2002 the rate for a PIP claimant had risen to \$166 while the fee charged a BI claimant rose at a more moderate rate to \$130. Emergency room treatment also accelerated quickly from 1997 to 2002, with the average total charge per claimant in Florida rising from \$1,048 to \$2,104. Physical therapist charges and general practitioner costs also increased significantly for Florida during this period.

Fee Schedules and Treatment Protocols

Health care providers are not required by law to adhere to a fee schedule or utilization protocols for PIP in Florida, except for a limited number of specified diagnostic procedures. For all other procedures, medical health providers may only be compensated for "medically necessary" services and may only charge a "reasonable amount" for the services and supplies rendered. However, the determination of what are medically necessary treatments and what are reasonable charges is often litigated in Florida courts between providers and insurers which further increases costs to the no-fault system. In contrast, fee schedules are used in Florida to limit health care costs for worker's compensation, Medicare, and Medicaid, and contractual fee limits are common between health insurers and providers.

Since medical treatment is the primary cost driver for PIP coverage, some states have enacted PIP medical fee schedules in an attempt to contain such costs. New York provides that PIP medical charges are under its worker's compensation fee schedule and treatments not included may be established by rule. New Jersey has a PIP fee schedule by limiting fees to the 75th percentile

insurers report the data for any given quarter as insurers are added or dropped and due to corrections to prior data errors.

¹³ Insurance Research Council, *Trends in Auto Injury Claims* (2004).

¹⁴ Insurance Research Council, *Auto Injury Insurance Claims: Countrywide Patterns in Treatment, Cost and Compensation* (2003).

¹⁵ Insurance Research Council, *Analysis of Auto Injury Insurance Claims From Four No-Fault States: Colorado, Florida, Michigan, New York* (2004).

of the practitioners within various regions in the state. Oregon has a fee schedule for PIP benefits that is tied to its worker's compensation fee schedule. New Jersey has further adopted treatment protocols for treatment rendered under PIP coverage. On the national level, Medicare is subject to a fee schedule pursuant to federal law which is revised annually. The Medicare fee schedule classifies different patient conditions and illnesses into diagnosis related groups (DRG) and reimbursement amounts vary depending on the region of the country where treatment is rendered.

Insurers are the primary supporters of medical fee schedules and medical treatment protocols and uniformly voiced that support in the surveys they submitted to staff. Supporters of these measures state that fee schedules and utilization protocols will not limit access to quality health care, as some claim, stating that there is no shortage of treating physicians for worker's compensation, Medicare, or Medicaid injuries which indicates that availability of treatment should not be a problem in the PIP arena.

The committee staff survey indicated that most medical providers and plaintiff attorneys oppose medical fee schedules and medical treatment protocols. The opponents noted that such measures operate as governmental price controls and are contrary to the values of the free market. If a fee schedule is adopted, it is claimed that some physicians may choose not to accept PIP claimants and thus access to quality care problems will develop that are similar to those asserted to exist in the Medicaid, Medicare and worker's compensation system in Florida. Utilization protocols are similarly problematic because they force medical treatment into a "one size fits all" mold and often prevent a treating physician from exercising his or her expertise regarding treatment of that physician's patient.

Health care in Florida has risen markedly in recent years, which results in higher premium costs for Florida's drivers. Other no-fault states have effectively used PIP fee schedules to reduce medical costs. Enactment of a PIP fee schedule would also greatly reduce the large number of disputes which end up in court, thus decreasing litigation costs which can reduce or mitigate increases in PIP premiums.

Attorney Involvement in PIP and BI Auto Insurance Claims

A critically important indicator of the effectiveness of the recent legislative reforms is the large reduction in the total number of insurance related law suits filed in

county courts which has decreased 68 percent from 2001 (67,437) to 2004 (21,446).¹⁶ These figures represent the number of incidents of service of legal process issued in any civil action or proceeding in Florida against insurers in county courts. According to officials with DFS, these law suits are "predominantly" PIP cases. This downward trend in the filing of law suits has continued for the first nine months of 2005.

Insurers, attorneys, and medical providers believe that the 15-day presuit demand letter¹⁷ (issued prior to the commencement of a lawsuit) which was enacted in 2001 and revised in 2003, is a contributing factor in accounting for this decrease. However, insurers remain liable for significant attorney fee awards due to three fee related issues: one-way attorney fees; contingency risk multipliers; and bad faith.

An insurer must pay attorney fees under all insurance litigation (including PIP cases) if it loses in court; however, if the insurer prevails, its fees are not paid by the other side.¹⁸ This "one-way" attorney fee provision has been law since 1893 and serves to provide access to competent counsel for insurance claimants. Florida is not the only state to have this type of fee arrangement in insurance cases; states such as New Jersey, Pennsylvania, Missouri, Washington, West Virginia, North Carolina, and Idaho have variations of the one-way attorney fee provision.

Personal injury protection litigation involves insurance companies and providers, and only in rare cases involves insureds. This is because providers have insureds execute an "assignment of benefits" in which insureds assign all rights, benefits, obligations and duties to providers for the purpose of allowing providers to recover PIP benefits due insureds pursuant to their insurance policy.

Florida courts use two different common law methods to calculate attorney's fees: "lodestar" and "contingency risk multipliers." Courts apply the lodestar approach to calculate the fees to be paid to the winning attorney, basically the number of hours expended by the attorney on a particular case,

¹⁶ Data compiled by the Department of Financial Services under s. 624.307, F.S.

¹⁷ Insurers have 15 days to respond to a pre-suit demand letter for overdue PIP benefits (benefits an insurance company has not paid within 30 days after receiving notice of a covered loss).

¹⁸ Section 627.428, F.S. The one-way attorney fee provision is also referred to as a fee-shifting statute.

multiplied by an hourly rate. In some cases, that fee is multiplied by an amount ranging from 1 to 2.5 if the court finds that the client would not have been able to obtain competent counsel without the possibility of the multiplier (e.g., contingency risk multiplier). The court determines the amount of the multiplier by analyzing after the fact what the attorney's likelihood of success was at the start of the trial.

The "bad faith" provisions in the Insurance Code under the civil remedy statute¹⁹ allow an insured to sue their own insurer in a first party breach of contract case where the insured alleges that the insurer failed to act in good faith to settle claims when it should have done so, had it acted fairly and honestly towards the insured with due regard for the interests of the insured. The effect of this law allows the insured to sue beyond the limits of their policy and for tort-type, as opposed to contract-type, damages.

Federal and state courts are re-examining the need for an enhancement of the risk multiplier under a fee shifting statute (e.g., one-way attorney fees) because the lodestar amount is presumed to be a "reasonable" fee without an enhancement. Florida courts have noted that parties in insurance litigation are now on more of an equal footing. Parties have assigned their benefits to the medical provider or medical facility, and that provider or corporation does not have trouble finding a lawyer. Also, from a public policy perspective it would appear that the use of the contingency risk multiplier, in particular, conflicts with the goals and purposes of the no-fault law. The Florida Supreme Court has stated it is "beyond dispute that the multiplier was created to promote litigation, not to limit it."²⁰ In contrast, the goals of the no-fault system were to reduce litigation and court congestion. Eliminating the multiplier or limiting its applicability would serve the original goals of the no-fault law.

Additional Issues under the Current Law

Committee staff has identified additional areas of concern under the no-fault law:

1. Because of the many legislative changes since 1971, the no-fault statutes are confusing for not only novices, but also judges and experienced practitioners. Reorganizing the no-fault law in a logical and more easily understandable fashion would reduce confusion and help to ensure that the

enactments of the Legislature are followed correctly.

2. Insurers may bring a civil action for insurance fraud pursuant to s. 627.736(12), F.S., only if a party has been convicted, pled guilty or pled nolo contendere for insurance fraud associated with a PIP claim. This requirement greatly limits the insurer's ability to bring such an action and is dependent on state prosecution of the provider. If prosecution is not pursued, an insurer cannot recover damages for practices such as presenting a claim with false or fraudulent treatment or items, rendering physician services when unlicensed, or providing material misleading information to the insurer. Such a civil cause of action could be effective in preventing such practices.
3. It is unclear whether Medical Payments coverage and PIP benefits above the \$10,000 minimum are subject to the statutory requirements for PIP benefits.
4. Claimants are currently required to produce a sworn statement of their earnings for purposes of demonstrating loss of gross income and earning capacity to insurers. Generally, an employer produces the sworn statement for an employee. However, in the case of a self-employed person, the person seeking wage loss benefits is the same person signing the sworn statement, creating a potential moral hazard.
5. Insurers currently have 15 days to respond to a pre-suit demand letter for overdue PIP benefits (benefits an insurance company has not paid within 30 days after receiving notice of a covered loss). Insurers assert additional time is needed because 15 days is not sufficient time to evaluate the merits of a demand letter for overdue benefits and determine if the claim should be paid.
6. Injured parties are generally permitted to reserve PIP disability benefits for payment as lost wages. However, the law does not clearly address this issue and there is often miscommunication or uncertainty between the insurer and policyholder whether this has been done.
7. The priority of payment for PIP claims involving multiple insurance carriers is uncertain, leading to litigation.
8. Currently, a medical provider must bill a PIP insurer in a statement of charges within 35 days of rendering medical treatment. An exception exists if the provider submits to the insurer a notice of initiation of treatment within 21 days after the provider's first examination or treatment of the claimant. In that case, the statement of charges may include charges for treatment or services rendered

¹⁹ Section 624.155, F.S.

²⁰ *Sarkis v. Allstate Insurance Co.*, 863 So.2d 210 (Fla. 2003).

within 75 days of the statement's postmark date. This extended 75-day period provides an opportunity for unnecessary and excess treatment and makes it more likely that the \$10,000 PIP benefits will be exhausted. This compromises the insurer's ability to utilize an independent medical examination. Reducing the 75-day time period may help fight fraud and abuse by allowing insurers greater oversight regarding medical treatment and the ability to utilize independent medical exams before all PIP benefits have been used.

9. Some medical providers do not provide patients with a written bill disclosing the treatment rendered and charges for such treatment, or do so in forms that are difficult to understand. Requiring providers to provide such a bill at the time of treatment would help auto accident victims be on guard against excessive and expensive treatment that needlessly exhausts PIP benefits and enable them to report such information to their insurer.
10. Policyholders, medical providers, and their representatives sometimes face difficulty in obtaining from insurers a written report itemizing all payments made or a copy of the applicable insurance declarations page and insurance policy. This information is useful in ensuring that an insurer is abiding by the policy contract in its provision of benefits and making timely payments.
11. There appears to be an inordinate amount of litigation regarding whether a properly binding assignment of benefits has been made, and which providers have priority when multiple assignments have been made. There are not clear requirements for creating a valid assignment of benefits, for determining priority of payment under multiple assignments of benefits, and for revocation of assignments by policyholders, all of which lead to uncertainty and litigation.
12. Amounts payable from an insurer must bear simple interest at the rate applied to judgments in s. 55.03, F.S., or the rate established in the insurance policy, whichever is greater. However, on amounts repayable to an insurer, the insurer does not collect interest on the payment.
13. Medical records from medical providers that are submitted during the litigation discovery process are sometimes created after the fact, creating an avenue for claiming a right to reimbursement for treatment that may or may not have been rendered.
14. Current law is not clear regarding which persons are subject to an examination under oath. Additionally, there is no set hourly rate payable to a person for an examination under oath, which can lead to excessive charges.

15. Often insureds fail to attend required independent medical examinations.
16. Sometimes insurers do not receive notice of the existence of a claim for months or even years after an accident occurs.
17. Sometimes the parties to a PIP lawsuit "venue shop" to have PIP lawsuits tried in counties where it is believed that the party is more likely to have a "favorable outcome." This is problematic when venue is transferred to a jurisdiction where the injured party does not reside, is not where the accident occurred, or (in the case of an assignment of benefits) is where treatment was rendered.

Effect of Repealing No-Fault in Florida

The most direct effect of repealing the no-fault statutes would be to eliminate the requirement that vehicle owners purchase PIP coverage and that insurers offer this coverage. This can be viewed as a "savings" by deducting the premium for PIP, but it is a savings due to a loss of coverage.

If no-fault is repealed, the only mandatory insurance requirement remaining would be property damage liability of \$10,000, since Florida does not mandate bodily injury liability insurance, unless triggered by the Financial Responsibility Law due to certain accidents or violations. Presumably, the Legislature would consider mandating BI liability if no-fault is repealed. But even without the mandate, over 90 percent of vehicles currently have BI coverage, according to the results of the survey sent to insurers by committee staff.

The cost of bodily injury (BI) liability insurance will increase if no-fault is repealed. This is due to the fact that some of the injuries that are currently compensated by PIP will instead be compensated under BI, plus non-economic damages may be recovered. Similarly, the cost of uninsured motorist coverage (UM) will also increase due to the repeal of no fault, though not likely as much as BI, but for the same reason. Certain injuries that are now compensated by PIP will, instead, be compensated by UM. These are the injuries for which the other driver is at fault, but either does not have BI liability or does not have sufficient BI to cover the damages. If the Legislature mandates BI liability, it will act to decrease UM premiums, depending on the level of enforcement and the increased percentage of drivers who purchase BI coverage. The more drivers that have BI coverage (and the higher the limits purchased), the lower will be the UM premiums. But, given the large percentage of drivers who already carry BI coverage (over 90 percent based on committee survey results),

there is limited opportunity for UM savings by mandating BI.

A benefit for auto insurers by the repeal of no-fault would be to relieve them from paying attorney fees in most auto injury cases. The statutory requirement to pay attorney fees applies only if the insured (or his assignee) successfully sues his own insurer. In a third-party liability suit, the insurer is generally not required to pay attorney fees to the plaintiff, unless it is determined that the insurer acted in bad faith in denying the claim. Therefore, even though BI costs will increase if PIP is repealed, the costs associated with payment of attorney fees in PIP cases will generally not be transferred to BI.

If no fault is repealed, the costs associated with health care provider fraud and abuse are likely to be reduced, because this problem is primarily associated with PIP claims, more so than liability claims.

Some auto insurers, however, may economically suffer from the repeal of no-fault, relative to their competition. These are the insurers that serve the “non-standard” or high-risk market and write a much higher percentage of minimum coverage, PIP/PD-only policies. For these insurers, which are typically the smaller, Florida-domestic insurers, converting to a fault-based BI liability system would be a much more significant change affecting premium volume and business operations than for the larger, national insurers writing standard risks.

If no fault is repealed, fault must be established in every accident that results in an injury to determine who is liable. Florida is a comparative fault state, meaning that the percentage of fault will also need to be allocated among the parties to the accident. Granted, that is the current law for property damage claims, so this is already required for two-party accidents. For bodily injury, however, this is likely to result in longer periods of time for insurers to make payments to claimants and to finally resolve claims, and may be an issue that has to be litigated.

One of the purposes of no-fault was to reduce these types of transaction costs and to allow a greater percentage of the premium dollar to be paid in benefits. But, the increased PIP litigation in Florida between insurers and health care providers regarding medical necessity and reasonableness of charges has compromised this goal.

The committee staff survey asked for the insurers to estimate their loss adjustment expenses for PIP and BI, respectively, which staff converted to a percentage of the earned premiums for PIP and BI. The survey results indicate that insurers paid a greater percentage of PIP premiums in loss adjustment expenses than for BI in 2002 and 2003, but slightly less in 2004. This indicates that the goal of reducing expenses under no-fault as compared to tort is generally not being met, but there is evidence of recent improvement.

As the cost arguments in favor of no-fault fade, given the relatively high cost of coverage in Florida and many no-fault states, the social benefit of no-fault is increasingly cited as the main value of the system. Persons without health insurance are assured of at least \$10,000 in coverage if they are injured in an auto accident.

Health care providers stand to be the biggest losers if no-fault is repealed. PIP is one of the few remaining insurance systems that pays billed charges, as long as they are “reasonable.” If no-fault is repealed, the health care provider would first look to the victim’s health insurer, if any, for payment, which is likely to be at a discounted rate or subject to a “usual and customary” fee schedule. Other accident victims may have no health insurance, resulting in uncompensated care, in cases where the victim was at fault or the at-fault driver does not have liability insurance. Even if an at-fault driver has liability coverage, health care providers are likely to wait longer for payment, as compared to PIP.

The no-fault law appears to meet the goal of compensating victims and their medical providers much more timely than under a traditional tort system. A study by the Insurance Research Council compared BI and PIP in the number of days between the report of injury and the first payment.²¹ First payment was received within 30 days for 35 percent of PIP claimants, but only for 16 percent of BI claims. First payment was received within 90 days for 80 percent of PIP claimants, but only for 31 percent of BI claimants. It took more than one year for the first payment to be made for 27 percent of BI claims, but only for 4 percent of PIP claims.

Health insurance costs are also likely to increase if no-fault is repealed. The health insurance system will be forced to absorb additional costs of auto accident

²¹ Insurance Research Council, *Auto Injury Insurance Claims; supra*, pg. 91.

victims who are at fault or hit by a non/under-insured driver.

The repeal of no-fault would return to the more traditional legal philosophy of holding persons responsible for injuries caused by their negligent operation of a vehicle. In theory, this encourages safer operation of a vehicle. It also is generally viewed favorably by the public as a fairer system consistent with views of personal responsibility.

If PIP is repealed, there will be additional lawsuits against at-fault drivers, in those cases where the injury is non-permanent or does not otherwise pierce the verbal threshold of the current no-fault law. But, there will be decreased litigation between insurers and health care providers over PIP payments. It is unknown what the net effect will be on the court system. But, Florida has the reputation of being a litigious state, and the prospect of opening the courts for pain and suffering awards for additional auto injuries will probably be taken to its fullest advantage.

CONCLUSIONS

Florida has a costly automobile insurance system with serious problems, though not at a "crisis" level. The market is competitive and coverage is readily available. Florida experienced significant premium increases, particularly for PIP coverage, from 1999 through 2003. But, this has been followed by rate decreases or very small increases in 2004 and 2005, which may be due, in part, to reforms enacted in 2003, but which also reflect nationwide trends. Industry data reflects that PIP loss costs in Florida have also leveled off in 2004 and early 2005, but they have continued to outpace other no-fault states for at least the last five years. Loss costs for bodily injury liability insurance in Florida are also well above the national average and higher than most no-fault states, indicating that Florida's no-fault law is not particularly effective in reducing BI costs.

High medical costs and utilization of medical services continue to drive PIP costs and the incidents of PIP fraud and abuse, primarily involving health care fraud, are at an all time high. Anti-fraud measures have helped to increase the number of arrests and prosecutions, but the resources of the Division of Insurance Fraud are limited.

The no-fault law meets the goal of compensating victims (and their medical providers) much more timely than under a traditional tort system. But, the

efficiencies expected from no-fault due to decreased litigation and expense related to proving fault have not been fully realized due to the expenses associated with investigating and litigating the cost and utilization of medical services reimbursed by PIP. However, reforms enacted in Florida in 2003 appear to have been effective in reducing such litigation.

Inflation has significantly eroded the mandatory \$10,000 PIP benefit level enacted over 26 years ago. About one in four PIP claimants reach the limit, according to a staff survey of insurers. But, increasing mandated PIP limits will increase premiums for all vehicle owners. The concerns regarding Florida's high premium level and affordability of coverage tend to overshadow concerns regarding the adequacy of PIP limits.

RECOMMENDATIONS

Based on the above findings and conclusions, committee staff offers these major recommendations:

1. **Reenact the no fault law, provided that additional reforms are enacted to control costs, most importantly, a medical fee schedule as listed below.**
2. **Adopt a medical fee schedule for PIP, set at a specified percentage above the Medicare fee schedule.**
3. **Eliminate or limit the contingency risk multiplier for attorney fee awards in PIP cases.**

Committee staff makes the following recommendations related to PIP fraud and health care clinics:

1. **Increase funding to the Division of Insurance Fraud to equalize salaries comparable to investigators with the Florida Department of Law Enforcement and provide for insurance fraud prosecutors in Orlando and Tampa.²² The total funding for FY 2006-2007 would be: \$774,161.**
2. **Increase the criminal penalty to a second degree felony with a 2-year minimum mandatory sentence (as current law provides for staging a**

²² The Division has recommended other resources in its 2006-2007 budget request; however, these requests are beyond the parameters of this report.

vehicle accident) for creating documentation of a motor vehicle accident that did not occur (i.e., “paper” accidents where no actual crash takes place).

3. Criminalize the solicitation of bribes in return for accepting health care treatment.
4. Restrict access to police accident citation logs.
5. Narrow the provision allowing “victim services programs” to access crash reports.
6. Require clinics that accept PIP reimbursement and qualify for a license exemption to obtain an exemption from AHCA and authorize AHCA to inspect such clinics.
7. Require that motor vehicle insurance fraud crimes under Part I of Chapter 817, F.S., be disqualifying offenses for clinic licensure.
8. Mandate that clinics post anti-fraud reward signs.

Committee staff offers the following recommendations to address additional problems in the no-fault law:

1. Reorganize the statutory provisions of the no-fault law in a more logical, understandable fashion.
2. Remove the requirement that a person be convicted, or plead guilty or nolo contendere for insurance fraud in order for a PIP insurer to have a civil action for insurance fraud. Allow an insurer to bring a fraud civil action if a person presents a claim and the court determines the person knew or should have known that the claim is false or fraudulent.
3. Clarify that medical payments (MP) coverage and PIP benefits above the \$10,000 minimum are subject to PIP benefit requirements.
4. Require self-employed persons to produce reasonable proof to demonstrate loss of gross income and earning capacity to insurers.
5. Increase the number of days an insurer has to respond to a pre-suit demand letter from 15 to 21 days.

6. Clarify that if an insured elects to have disability benefits reserved for lost wages, the insured must notify the insurer in writing.
7. Clarify the priority of payment of PIP claims involving multiple insurance carriers.
8. Reduce the number of days for a health care provider to submit charges to an insurer from 75 to 50 days, if the provider notifies the insurer within 21 days of first treatment.
9. Require PIP medical providers to give patients a written bill disclosing the treatment rendered and charges for such treatment in plain language at the time of service and to maintain a copy as part of the patient’s medical records.
10. Require insurers to provide policyholders and medical providers, upon request, with a written report itemizing all payments made with a copy of the insurance declarations page and insurance policy.
11. Clarify the requirements for a valid assignment of benefits and for priority of payment.
12. Require that all amounts repayable to an insurer include an interest penalty.
13. Require that providers produce medical records at the time of request in order to be admissible in court.
14. Clarify which persons are subject to an examination under oath and specify the hourly rate.
15. Require insureds to attend independent medical examinations (IMEs).
16. Require that notice to an insurer of the existence of a claim must be reported within 1 year of the accident.
17. Restrict venue for a PIP lawsuit to the jurisdiction where the injured party resides or where the accident occurred. If an assignment of benefits has been made, venue would be where the health care services were performed or the accident occurred.