

A New Crash Test: The Rise and Fall of Florida Motor Vehicle No-Fault Law

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A NEW CRASH TEST:
THE RISE AND FALL OF FLORIDA MOTOR VEHICLE NO-FAULT LAW

by

JAMES A. COLQUITT

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
in the College of Health and Public Affairs
and in The Burnett Honors College
at the University of Central Florida
Orlando, Florida

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Thesis Chair: Dr. Kathy Cook

ABSTRACT

Florida is one of 12 states that have a no-fault law. The first party benefit coverage is known as personal injury protection (PIP). Every policy sold in the state must include at least \$10,000 in personal injury protection. This law went into effect in 1971 and is now being challenged. Changes in consumer, lawyer, and doctor behavior as well as changes in the legal and economic environment have diminished the positive impact of the no-fault law.

This thesis will focus on the diminished effectiveness of the no-fault law in Florida. It will be based on research from primary sources. Other legal resources including law review articles and journal publications were consulted for persuasive scholarly views. Published work from insurance institutes and journals were included since they guide practitioners on the application of the law.

Insurers, insureds and policymakers face serious challenges regarding Florida Motor Vehicle No-Fault Law. The purpose of this thesis is (1) to review the legislative history of Florida Motor Vehicle No-Fault Law, (2) to assess how well the current system is working (3) examine solutions to compensation from other states and provide relevant data and (4) make recommendations for future legislation. This thesis will recommend proposed changes with guidelines for future legislation to effect the changes necessary to balance the needs of the insurance companies, plaintiffs and defendants.

DEDICATION

For my committee members,
Kathy Cook, Lee Ross, and David Slaughter,
for your guidance, time and patience

For my family,
for giving me love and support

For my friends,
for giving me time to complete this process

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INTRODUCTION

Florida vehicle insurance policies are sold on a partly no-fault basis. Florida motorists who get into minor accidents file claims with their own insurers as opposed to filing a tort claim. Every policy sold in the state must include at least \$10,000 in personal injury protection as well as \$10,000 in property damage liability coverage.¹ This is necessary to cover injuries and repairs. Insurers offer deductibles to each claimant. The deductible amounts are \$250, \$500, and \$1,000.² The deductible is applied to 100 percent of expenses and losses.³ After the deductible is met, each claimant is able to receive a minimum of \$10,000 in total benefits.⁴ These insurance policies keep minor accidents out of the court. Likewise, those who sustain serious or very expensive injuries may typically sue the tortfeasor for excess expenses. This system that went into effect in 1971 is now being challenged.

In some respects, the current (Personal Injury Protection) system serves the state well. Nearly all automobile insurance carriers write insurance in the State of Florida. Consumers injured in minor accidents are directly compensated by their own insurer, thus, reducing the time for payment of claims compared to tort states or states that require a tort lawsuit for injured parties to be compensated. In an effort to keep costs down for claimants, various policies have been developed. These include optional coverage's such as bodily injury liability (BI), uninsured motorist (UM), collision and comprehensive

¹ Fla. Stat. §627.736 (2013).

² Fla. Stat. §627.739(2) (2013).

³ Id.

⁴ Id.

coverage. Despite these advantages, Florida lawmakers may limit recovery or even eliminate this coverage in the future.

The original goals of no-fault legislation were to reduce litigation, lower automobile insurance costs and compensate accident victims fairly and swiftly.⁵ However, these goals have been weakened because of fraud, inappropriate medical treatment, inflated claims, inadequate compensation to victims, and increased litigation. Proponents of modified no-fault laws have suggested that the primary benefit is to provide individuals with quick payment for first-party losses, such as medical expenses and lost wages, while maintaining the right to sue the responsible party for pain and suffering in the case of serious injuries or death.⁶ There was an expectation that claims, costs and court congestion would be reduced by limiting the right to sue for pain and suffering to only cases of serious injury or death. This would result in cost savings to insureds.

Initial studies did find that no-fault legislation was somewhat effective in meeting these goals. No-fault lowered litigation costs and it also has been successful in reducing the time for payment of claims. The costs for bodily injury liability were lower in no-fault states than in tort states. However, over time, changes in consumer, lawyer, and doctor behavior as well as changes in the legal and economic environment appear to have diminished the positive impact of the initial legislation.⁷

⁵ Committee on Banking and Insurance. (2005, November). *Florida's Motor Vehicle No-Fault Law*. Retrieved May 19, 2013, from Florida Senate: http://archive.flsenate.gov/data/publications/2006/senate/reports/interim_reports/pdf/2006-102bilong.pdf

⁶ Cole, C. R., Eastman, K. L., Maroney, P. F., & McCullough, K. A. (2004, September). *A Review of the Current and Historical No-Fault Environment*. Retrieved May 16, 2013, from EBSCO HOST Connection: <http://connection.ebscohost.com/c/articles/15764932/review-current-historical-no-fault-environment>

⁷ Supra note 6.

This thesis focuses on the diminished effectiveness of the no-fault law in Florida. It examines changes in the law from no fault's inception to its current state. The "Laws of Florida" from previous legislative sessions were reviewed and relevant background information regarding personal automobile insurance was considered. Additionally, the Florida Office of Insurance Regulation website was used to find current news releases, court cases and other informational resources regarding Personal Injury Protection (P.I.P). Court cases citing no-fault statutes were also examined. This thesis discusses cases and statutes in Florida as well as other states for comparison and to provide considerations for any perceived changes. Other legal resources including law review articles and journal publications were consulted for persuasive scholarly views. Published work from insurance institutes and journals were included since they guide practitioners on the application of the law.

The purpose of this thesis is (1) to review the legislative history of Florida Motor Vehicle No-Fault Law, (2) to assess how well the current system is working (3) examine solutions to compensation from other states and provide relevant data and (4) make recommendations for future legislation.

Insurers, insureds and policymakers face serious challenges regarding Florida Motor Vehicle No-Fault Law. While insureds wait for their automobiles to be repaired, the automobile insurance system needs to be repaired as well. Florida's no-fault Law has been in effect since 1971 and has been reformed by nearly every legislative session since. It is apparent from the constant flux of reform measures that there are unresolved problems within the no-fault system. This thesis will recommend proposed changes with

guidelines for future legislation to effect the changes necessary to balance the needs of the insurance companies, plaintiffs and defendants.

BACKGROUND

This section will consist of background information relating to Florida Motor Vehicle No-Fault Law, including definitions and explanations of terms used in this paper. These terms include personal injury protection, bodily injury liability coverage, tort threshold, claims cost and other complementary terms. This section will also establish abbreviations for common terms to be used throughout this thesis and sets the stage for the research that follows.

Personal Injury Protection

Personal Injury Protection (PIP) provides coverage in motor vehicle accidents for medical, surgical, funeral, and disability benefits without regard to fault. This law requires motor vehicles registered in the state to secure these benefits in their auto insurance policies. Florida Motor Vehicle No-Fault Law requires motorists to carry at least \$10,000 of PIP insurance and \$10,000 of property damage liability coverage.⁸

Economic and Noneconomic damages

Economic damages are monetary losses that occur because of an injury. These include but are not limited to, medical expenses and disability benefits. Noneconomic damages are not monetary in nature but they occur because of an injury. These include but are not limited to, pain and suffering, disfigurement, inconvenience and mental anguish.

⁸ Supra note 5.

Tort Threshold

The driver of the motor vehicle is immune from tort actions. They also can't bring suit to recover noneconomic damages except in cases of: (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.⁹ These provisions are known as the verbal threshold since they are based upon terminology rather than monetary amounts of damage. Claimants must meet one of these specific criteria to file a liability claim for non-economic damages. However, a party may sue for the 20 percent of medical bills not covered by PIP and economic damages that exceed the limit.¹⁰

Personal Injury Protection Deductible

Policyholders may elect a deductible. The amounts are \$250, \$500, and \$1,000.¹¹ The policyholder must pay the deductible amount before an insurance company will pay any benefits. The deductible amount is applied to all of the expenses and losses.¹² Deductibles are used to deter excessive trivial claims. They are generally restricted to events incurring large costs. By using deductibles, the insurer expects to pay out smaller amounts much less frequently. The policyholder also pays a smaller premium as a result.

Emergency Medical Condition

Florida Statute Section 627.732 (2013) defines an emergency medical condition as a medical condition with severe symptoms, which may include severe pain, and in the absence of immediate medical attention, could result in serious jeopardy to a patient's

⁹ Supra note 5.

¹⁰ Supra note 5.

¹¹ Id. §627.739(2) (2013).

¹² Id. §627.739(2) (2013).

health, serious impairment to bodily functions and or serious dysfunction of any bodily organ or part.¹³

Medically Necessary

Florida Statute Section 627.732 (2013) defines medically necessary as a medical service or supply that a physician would provide for the purpose of preventing, diagnosing, or treating an injury.¹⁴ The service or supply must be clinically appropriate and not just for the convenience of the patient.

Broker

Florida Statute Section 627.732 (2013) defines broker as any person not possessing a license that charges or receives compensation for any use of medical equipment and is not the 100 percent owner of the equipment.¹⁵

Independent Medical Examination

A claimant may have to submit to a physical or mental examination if his or her medical condition is material to any claim. A majority of insurance companies use paper independent medical examinations to decide whether or not to pay a PIP claim. The insurance company hires a physician to review the medical records of a claimant. The insurance company then determines whether the treatment was reasonable, related or necessary.¹⁶

¹³ Fla. Stat. §627.732(16) (2013).

¹⁴ Fla. Stat. §627.732(2) (2013).

¹⁵ Fla. Stat. §627.732(1) (2013).

¹⁶ Delegal, M. K., & Pittman, A. P. (2002). *Florida No-Fault Insurance Reform: A Step in the Right Direction*. Retrieved May 16, 2013, from Florida State University Law Review: <http://www.law.fsu.edu/journals/lawreview/downloads/293/Pittman.pdf>

Demand Letter

This is a formal letter containing notice of intent to start litigation. This letter is written by an attorney for his or her client. The letter demands payment or action from another party. The letter is sent to settle the issue without litigation. It also puts pressure on the other party to comply or else a lawsuit will be initiated.

Bodily Injury Liability Coverage

This coverage provides protection for motorists involved in vehicular accidents who are at fault and cause bodily injury to third parties. Bodily Injury Liability coverage pays for serious and permanent injury or death to others.¹⁷ Bodily injury coverage pays for the medical bills and lost wages of third parties. If an insured is sued by a third party then bodily injury coverage will provide legal representation and payment of attorneys' fees.¹⁸

Claims Cost

Severity of claims and frequency are concepts used in calculating premium rates. Claim severity is the average cost per claim. Severity is the size of the loss. Claim frequency is the number of claims made per year. Frequency is the number of times a loss occurs. Premium is the amount paid to an insurer for the issuance or delivery of a policy. Premiums must rise to cover expected losses.

¹⁷ Supra note 5.

¹⁸ Supra note 5.

HISTORY OF FLORIDA MOTOR VEHICLE NO-FAULT LAW

Before providing an assessment of Florida's no-fault environment, it is important to review its history. Policymakers have been seeking a better way to allocate the costs of accidents and compensate victims since the automobile's inception. Beginning in 1919, insurance companies lobbied for an approach to compensation that did not rely on tort litigation.¹⁹ As automobile accidents increased between 1920 and 1940, scholars began to research new approaches to compensating accident victims.²⁰ Between 1940 and 1970, as automobile accident costs started to rise, studies began to call for a no-fault workers compensation approach to auto insurance.²¹

Insurance companies wanted to reduce or eliminate compensation for noneconomic losses, such as pain and suffering. The new approach would compensate accident victims for monetary damages regardless of fault. Proponents of this approach argued that it would reduce the costs of the current system and increase the amount of money that goes to injured claimants. This new approach was also expected to speed up compensation and reduce the inequities of recovery. The legislature, however, did little to change the traditional fault based compensation law until reforms were made in the early seventies.

¹⁹ Carman, Ernest C., "Is a Motor Vehicle Accident Compensation Act Advisable?" *Minnesota Law Review*, Vol. 4, No. 1, December 1919, pp. 1-13.

²⁰ Anderson, J. M., Carroll, S. J., & Heaton, P. (2010). *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective*. Santa Monica: RAND Corporation.

²¹ *Supra* note 20.

Automobile Repairs Reform Act of 1971

During the 1971 session of the legislature, the automobile accident crisis was at its peak, so the legislature enacted the “Florida Automobile Repairs Reform Act”.²² This statute contains the basic concepts of the no-fault law. The basic concepts of the law include personal injury protection (P.I.P.) benefits which continue under present insurance law. These are paid by one’s own insurer. The benefits are coupled with a threshold requirement to file a suit against a negligent party. Claimants must meet either a \$1,000 monetary threshold or verbal threshold to file a liability claim for non-economic damages. The verbal threshold is met if the plaintiff dies or suffers an injury or disease consisting of: (1) a permanent loss of a bodily function; (2) permanent disfigurement; (3) a bone fracture; or (4) inability to use a particular body part.²³

The legislative objectives of the law were established by the Supreme Court of Florida in *Lasky v. State Farm Insurance Company*.²⁴ Appellant Ann Lasky was injured in a car accident.²⁵ She was struck by a vehicle operated by the respondent. The accident was determined to be a total loss. The market value of her car did not meet the threshold requirement to sue for property damage.²⁶ Her injuries weren’t serious enough to allow her to recover damages for pain and suffering. She also failed to meet the \$1,000 medical expense threshold as well.²⁷ She filed suit seeking recovery for pain and suffering and property damage. However, the defendant filed a motion to dismiss the suit. The trial court dismissed the case on grounds that the aforementioned statutes prevented recovery.

²² Lazega, R. (2012). *FLORIDA MOTOR VEHICLE NO-FAULT LAW*. Eagan: WEST’S FLORIDA PRACTICE SERIES.

²³ Supra note 5.

²⁴ *Lasky v. State Farm Insurance Company*, 296 So.2d 9 (Fla. 1974).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The motion was granted. The trial court found the statutes were constitutionally valid. The plaintiff appealed this motion. Appellants contended that the no-fault insurance law was unconstitutional because it violated the Due Process Clauses in Article I, Section 9, of the Florida Constitution. The test used to determine whether an act violates the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.²⁸ The court wrote that the objectives of no-fault included ending the inequities of the tort system, reducing litigation, reducing automobile insurance premiums and assuring that accident victims would directly receive uncontested economic benefits.²⁹

Prior to the passage of the no-fault law, people injured in auto accidents could bring suit against an at-fault party. They could claim compensation from the at-fault party for all monetary damages suffered, including medical expenses, lost wages, pain and suffering and mental anguish. The traditional tort system led to inequalities of recovery. Minor claims were being overpaid and major claims were being underpaid. The system was extremely slow, inefficient and costly. The necessity of paying medical bills often forced an injured party to accept a smaller settlement of his or her claims.³⁰ By passing the no-fault law, the legislature wanted to distinguish between major and minor types of injuries. They wanted to eliminate minor injuries from the tort system.

The provisions of the 1971 no-fault reform required each driver to be insured for 100 percent of his or her reasonably necessary medical expenses up to \$5,000.³¹ PIP

²⁸Harrell v. Schleman, 36 So.2d 431 (1948)

²⁹Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974).

³⁰Supra note 5.

³¹Ch. 71-252, Laws of Fla.

benefits also included 85 percent of lost income and disability benefits.³² Funeral expenses were provided up to \$1,000 per claimant.³³ A plaintiff could sue for pain and suffering only if (a) the PIP benefits payable for the injury, or payable but for a policy deductible, exceeded \$1,000, or, (b) the plaintiff either died or suffered an injury or disease consisting in whole or in part of: (1) permanent disfigurement; (2) a fracture to a weight-bearing bone; (3) a compound, comminuted, displaced, or compressed fracture; (4) loss of a body member; (5) permanent injury within reasonable medical probability; or (6) permanent loss of a bodily function.³⁴

Insurance companies were required under the no-fault law to pay PIP benefits to claimants within 30 days of receipt of the claim. Medical providers were authorized to charge claimants only a reasonable amount for their services. An independent medical examination could be used whenever the condition of an insured is material to a claim. Fifteen percent premium reductions were also mandated by statute for insureds.³⁵

The financial responsibility law's liability insurance coverage was made compulsory to all owners and vehicles subject to the law. The coverage requirements were \$10,000 for bodily injury or death of one person in any one accident, \$20,000 for bodily injury or death of two or more persons, and \$5,000 for damage or destruction of the property of others.³⁶ In 1972, the bodily injury liability requirement increased from \$20,000 to \$25,000.³⁷ A year later it increased from \$15,000 to \$30,000.³⁸ The coverage requirements were now \$15,000 for bodily injury or death of one person in any one

³²Ch. 71-252, Laws of Fla.

³³ Id.

³⁴ Supra note 5.

³⁵Ch. 71-252, Laws of Fla.

³⁶ Id.

³⁷ Id.

³⁸ Id.

accident and \$30,000 for bodily injury or death of two or more persons. In any accident, no more than \$30,000 was to be paid for PIP under this law.

Insurance premiums were lowered for a two year period after the passage of Florida's modified no-fault law.³⁹ However, in the beginning of 1974, premiums increased substantially. Additionally, there were a number of deficiencies in the 1971 law. The \$1,000 threshold was an ineffective obstacle for plaintiffs seeking to recover noneconomic damages. The threshold encouraged bill-padding and overutilization of medical benefits. These strategies were used to pierce the threshold. The frequency and severity of claims increased substantially. There was also potential for accident victims to receive double recovery.⁴⁰ The victim could recover under their own PIP benefits as well as damages from the tortfeasor. The law was eventually modified to prevent this unless the claimant was required to reimburse the insurance company.

1976 - 1982 Legislative Changes

The 1976 Legislature corrected some of these problems by replacing the monetary threshold of \$1,000 with a verbal threshold requirement. Under the verbal threshold requirement, an injured party could sue only if (1) he or she died or suffered loss of a bodily member, (2) he or she suffered permanent loss of a bodily function, (3) he or she suffered permanent injury within a reasonable degree of medical probability and/or (4) he or she suffered significant and permanent scarring or disfigurement or serious nonpermanent injury which had a material bearing on the victim's activity and lifestyle during substantially all of the ninety days following the accident.⁴¹

³⁹ Supra note 5.

⁴⁰ Supra note 5.

⁴¹ Ch. 76-266, Laws of Fla.

Florida's verbal threshold has resulted in a reduction in automobile insurance costs between 1977 and 1980. In a report done by the U.S. Department of Transportation, the adoption of a verbal threshold resulted in the percentage of automobile negligence suits to total cases decreasing 58.3 percent in Dade County and 39.3 percent in Duval County for the four-year period ending in 1980.⁴² The 1976 law also rolled back the bodily injury insurance requirement to \$10,000/\$20,000.⁴³ Although the Legislature did not require premium reductions as part of the law, it did authorize the Insurance Department to review automobile insurance rates to ensure that premium or rate reductions are passed on to policyholders.⁴⁴

Significant anti-fraud criminal provisions were included in the 1976 law. Automobile insurance claims fraud is now a third degree felony.⁴⁵ In addition, a Division of Fraudulent Claims was created within the Department of Insurance to enforce the criminal provisions of the insurance code.⁴⁶ In 1977, Insurance Commissioner Gunter campaigned to reduce automobile premiums. He proposed the elimination of compulsory bodily injury and property damage liability coverage.⁴⁷ These two sets of coverage accounted for 73 percent of each premium dollar.⁴⁸ The Legislature responded by eliminating the requirement for all motor vehicle owners to carry liability bodily injury and property damage insurance. They also reduced first party no-fault benefits, strengthened the anti-fraud language, and increased no-fault deductibles.⁴⁹ The effect of

⁴² U. S. Department of Transportation, *Compensating Auto Accident Victims: A Follow-Up Report on No-Fault Insurance Experiences* (May 1985).

⁴³ Ch. 76-266, Laws of Fla.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Ch. 77-468, Laws of Fla.

⁴⁸ *Supra* note 5.

⁴⁹ Ch. 77-468, Laws of Fla.

this requirement was that claimants now risked being in an accident with a driver who didn't have liability coverage.

A year later, the Legislature directed the Department of Insurance to review the rates of all automobile insurers. They wanted to establish a uniform statewide reporting system. The system would classify risks for evaluating rates and premiums. The purpose was to evaluate competition and availability of motor vehicle insurance in the market. The 1978 Legislature further tightened the verbal threshold by eliminating the right to sue for certain serious, nonpermanent injuries.⁵⁰ For example, a claimant could no longer sue for pain and suffering because of a broken arm. Therefore, a) permanent injury, b) significant and permanent loss of an important bodily function, c) significant and permanent scarring or disfigurement, and d) death became the only bases for tort suits for pain and suffering.⁵¹ These verbal threshold requirements remain in effect today.

Verbal threshold requirements have caused ambiguity and litigation. In *Giles v. Luckie*, the appellants brought a negligence action against the appellee for injuries sustained in an automobile accident. They requested that the jury be instructed that it could award damages for loss of capacity for the enjoyment of life, loss of consortium, disability, and disfigurement, even if it found that the verbal threshold requirement was not satisfied. The trial court denied the requested instruction. The jury ultimately returned a verdict in favor of the appellant. However, because the jury found that she did not suffer a permanent injury, it awarded her only the amount of her unpaid medical expenses. The appellants filed an appeal, asserting that the trial court erred by denying their requested instruction.

⁵⁰ Ch. 78-374, Laws of Fla.

⁵¹ *Id.*

The appellants asserted that a plain reading of the statute establishes that noneconomic damages are not included in the tort exemption of *Florida Statutes* section 627.737(1). Therefore, they argued that the threshold requirements in section 627.737(2) apply only to those four noneconomic damages specifically listed. This list included pain, suffering, mental anguish and inconvenience. All other noneconomic damages available at common law and not listed in the statute are recoverable without a threshold injury. Florida's Second and Fourth District Courts of Appeal addressed and rejected this argument.

The second district reasoned that the tort exemption in section 627.737(1) extends to all damages. This includes both economic and noneconomic damages. The fourth district agreed with the second district that an injured party must satisfy the threshold requirements of section 627.737(2) in order to recover any noneconomic damages. Based on previous reasoning, the first district concluded that section 627.737(2) exempts a covered defendant from liability for all noneconomic damages unless a threshold injury is established. This exemption includes noneconomic damages that aren't specifically listed as well. The final judgment of the trial court was affirmed.

Additionally, the 1978 Legislature increased the PIP maximum benefit from \$5,000 to \$10,000.⁵² Four years later, the 1982 Legislature made relatively minor changes during its review of the no-fault law. Funeral benefits were increased from \$1,000 to \$1,750 and optional PIP deductibles were reduced to \$250, \$500, \$1,000 and \$2,000.⁵³

⁵² Ch. 78-374, Laws of Fla.

⁵³ Ch. 82-243, Laws of Fla.

1988 Motor Vehicle Insurance Task Force

The 1988 law created the Motor Vehicle Insurance Task Force to examine motor vehicle insurance issues.⁵⁴ On April 1, 1989, the Task Force issued its findings in a report to the Senate President and Speaker of the House of Representatives. The Task Force found that the availability of motor vehicle insurance was deemed to be adequate. Motor vehicle premiums were affordable, even though premiums had not decreased. The average premium increase was not excessive and was within the national average.⁵⁵

Subsequent Reforms

In 1989, various amendments were made to the law. However, the basic foundation of the no-fault provision didn't change. Funeral benefits were increased to \$5,000 and renamed death benefits.⁵⁶ Death benefits became a set amount of \$5,000 per individual.⁵⁷ The benefits may be paid to relatives of the deceased or the personal representative of the estate.⁵⁸

With the increase in the use of alternative dispute settlements, in 1990, insurers were mandated to include a binding arbitration provision in PIP policies for claim disputes between insurers and providers of medical services or supplies.⁵⁹ PIP mediation of claims was also provided. Arbitration and mediation became popular because they were thought to save time and money. Public policy favors arbitration because it conserves judicial resources. However, the Florida Supreme Court struck this arbitration provision as a denial of access to the courts.

⁵⁴ Ch. 88-370, Laws of Fla.

⁵⁵ *Supra* note 5.

⁵⁶ Chapter 89-243, Laws of Fla.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Ch. 90-119, Laws of Fla.

Another trend, the use of preferred providers, was legislated in 1991. Insurers were allowed to provide an option for insureds to utilize preferred providers for medical benefits.⁶⁰ In 1993, the Legislature repealed the collateral source provision which required a jury to deduct from its verdict the value of all benefits received by the injured claimant from any other collateral source.⁶¹ However, the primary PIP collateral source provision was left intact which required the court to deduct the amounts rather than the jury. The court was then required to reduce the damage award by the amount of collateral sources for which no subrogation rights exist. Thus, the jury determines the total amount of damages and the court then determines the amount of collateral source benefits and deducts that amount from the jury's verdict. Evidence of collateral sources may not be presented to the jury unless there are PIP benefits which must be presented to the jury. The jury then deducts the PIP benefits from the verdict but not benefits from other sources. PIP benefits must be presented to the jury because they can't be subrogated

The 1998 legislature established provisions for provider billing limits. A statement of charges must be furnished to an insurer. The statement may not include charges for services rendered more than 30 days before the statement's postmark date.⁶² However, if the provider submits a notice of initiation of treatment within 21 days after the first examination then the statement may include charges for services rendered up to 60 days before the statement's postmark date.⁶³ The provisions also revised geographical requirements for independent medical examinations. The examination will be conducted within the city in which the insured resides, or any location within 10 miles of the

⁶⁰ Ch. 91-106, Laws of Fla.

⁶¹ Ch. 93-245, Laws of Fla.

⁶² Fla. Stat. §627.736(2)(c) (1998).

⁶³ Fla. Stat. §627.736(5)(b) (1998).

insured's residence.⁶⁴ The location has to be within the county in which the insured resides. The provisions also established a 20 day time period for medical records requests by insurers after receiving notice of the amount of a covered loss. If there is a dispute, the insurer will pay the amount or partial amount of the covered loss.⁶⁵ The provisions also established methods for determining a prevailing party entitled to attorney's fees when a dispute between an insurer and a medical provider is arbitrated.

2000 Grand Jury Report and 2001 Reforms

The Legislature enacted major no-fault reforms in 2001, which were largely in response to the findings of rampant PIP fraud in Florida by the Fifteenth Statewide Grand Jury.⁶⁶ As a result of the 2000 Grand Jury's investigation, a report was issued containing seven legislative recommendations which included (1) prohibiting the release of accident crash reports except to specified persons, (2) increasing the penalties for persons who unlawfully obtain accident reports, (3) requiring the regulation/licensure of medical facilities, (4) adopting a medical fee schedule for PIP reimbursement similar to the workers' compensation fee schedule, (5) providing insurers more time to review fraudulent claims, (6) making charges for magnetic resonance imaging unenforceable, unless such charges are billed/collected by the 100 percent owner/lessee of the equipment and (7) providing that an insurer or PIP accident victim does not have to pay for services rendered by any provider or attorney who has solicited the victim.⁶⁷

The first recommendation was to prohibit the release of accident reports except to certain categories of people such as the victims, their insurance company, or news

⁶⁴ Id.

⁶⁵ Fla. Stat. §627.736(6)(b) (1998).

⁶⁶ Supra note 5.

⁶⁷ Supra note 5.

agencies.⁶⁸ Second, the statewide grand jury suggested increasing the penalty for using information gathered from police reports to a third-degree felony.⁶⁹ Both of these recommendations were designed to stop the practice of victim solicitation. To regulate accident and pain clinics, the next recommendation suggested a mandatory registration and licensing system for all medical facilities. The fifth recommendation was to allow insurers an extra thirty days to pay PIP claims when the insurer certified that the claim was being investigated for possible fraud. The extra thirty days would allow the insurance companies more time to properly investigate suspicious claims.⁷⁰ To prevent MRI brokering, the next recommendation was to make MRI charges unenforceable unless they were billed and collected by one hundred percent owners or one hundred percent lessees of the equipment used to perform the test. The final recommendation prevented anyone from paying for services rendered by a medical or legal professional who illegally solicited or caused victims to be illegally solicited. This last restriction, in particular, should reduce the incentive of attorneys and chiropractors to solicit accident victims and the consequential false claims.

The 2001 legislative session introduced legislation to prevent fraud and abuse in PIP claims. At its focal point, the 2001 amendments took additional measures to; (1) require the registration of and qualifications for most non-physician owned clinics; (2) provide insurers with a defense to payment of improperly solicited P.I.P. claims or claims submitted by unregistered non-physician owned clinics; (3) place limitations on

⁶⁸ Supra note 16.

⁶⁹ Supra note 16.

⁷⁰ Supra note 16.

reimbursements for certain diagnostic tests; and (4) empower insurers with a virtually absolute defense to payment of any claim made on behalf of a broker.⁷¹

2003 Reform

Finding that the 2001 legislature did not go far enough, Senate President, James King, issued a mandate in 2003: “fix” P.I.P. or “flush it.”⁷² A select committee was formed to study the possible fixes and after heated debate, 60-plus pages of revisions to the P.I.P. statute were drafted and passed. The highlights of these revisions included; (1) tougher penalties for insurance fraud and staged accidents; (2) even greater restrictions on access to police reports; (3) much more stringent licensure, regulation and inspection of clinics; (4) new verifying documentation to be signed by patients and physicians; (5) strengthened defenses against payment of claims connected to fraud and improved civil remedy rights for insurers to get reimbursement of claims paid that are later found to be fraudulent; (6) financial incentives for patients to report fraud; and (7) expanded demand letter provisions.⁷³

Despite the good intentions of the Florida Legislature, no-fault insurance has created PIP insurance fraud throughout the state. The legislature intended no-fault insurance to lower premiums, but state officials report that Florida drivers are paying as much as \$246 more per family because of PIP insurance fraud.⁷⁴ The Insurance Research Council conducted a study showing that overall PIP claims dropped eight percent in no-fault states from 1995-2000, but Florida showed only a one percent drop.⁷⁵ The report

⁷¹ Lazega, R. (2012). *FLORIDA MOTOR VEHICLE NO-FAULT LAW*. Eagan: WEST'S FLORIDA PRACTICE SERIES.

⁷² Supra note 71.

⁷³ Supra note 71.

⁷⁴ Supra note 16.

⁷⁵ Supra note 16.

also stated that claim severity in Florida rose nineteen percent in 2000.⁷⁶ Moreover, the report found that Florida claimants typically have similar injuries as claimants in other no-fault states, but Florida claimants receive more extensive and more expensive medical treatment. Another study by the Insurance Information Institute found that Florida has the second highest rate of increase in PIP claims in the nation.⁷⁷

2007 Sunset of PIP

In Special Session A of the 2003 Legislative Session, a sunset provision for no fault insurance was passed. The law would be repealed unless the Legislature reenacted the law prior to October 1, 2007. The Legislature didn't reenact the law and no-fault expired. A new minimum automobile insurance requirement was adopted a few days later but because insurers and insurance regulators needed time to process new rates and product approvals, the law reinstating mandatory coverage was not set to take effect until January 1, 2008. This left a gap period between October 1, 2007 and December 31, 2007, where claimants without P.I.P. generally operated under a pure tort system with no apparent tort threshold. Effective January 1, 2008, drivers of non-exempted motor vehicles once again became required to carry no-fault coverage.⁷⁸ The new no-fault law added broader medical fee schedules, limitations on certain providers' participation in P.I.P., and enlargement of demand letter time frames.⁷⁹

⁷⁶ Supra note 16.

⁷⁷ Supra note 16.

⁷⁸ Supra note 71.

⁷⁹ Supra note 71.

2012 PIP Law

The 2007 law did not go far enough to drive down insurance costs and combat fraud.⁸⁰ Therefore the legislature renovated the P.I.P. system again in 2012 creating reduced coverage for certain non-emergency conditions, new clinic licensing requirements for providers, a 14-day time limit to seek treatment, the elimination of coverage for massage and acupuncture, and requirements for insureds to submit to examinations under oath.⁸¹ Insurers are authorized to take examinations under oath of a claimant. However, the examination must be reasonable. Examinations under oath are submitted prior to receiving benefits. Claimants must comply with the examination to receive benefits. All of these new provisions are meant to reduce fraud and lower insurance costs.

⁸⁰ Supra note 71.

⁸¹ Supra note 71.

PROBLEM: CLAIM BEHAVIOR

Florida is one of 12 states that have a no-fault law. The first party benefit coverage is known as personal injury protection (PIP). The terms no-fault and PIP coverage are used interchangeably. These terms indicate any auto insurance program that allows policyholders to recover financial loss from their own insurer.⁸² PIP pays for medical care and other benefits after the occurrence of an auto accident and is designed to reduce the need for people to sue to cover costs of injuries. However, the \$10,000 minimum requirement for PIP coverage in Florida has become a dollar target for medical expenses by those who take advantage of the system. Inflation has eroded the \$10,000 requirement enacted in 1979. Florida also has a verbal threshold which is intended to reduce the incentive to inflate claims. However, the effectiveness of the verbal threshold has diminished due to its judicial interpretation.

It is alleged that Florida's no-fault auto insurance system is under stress because of increasing fraud and abuse. These two factors are responsible for higher insurance premiums. The cost to insurers covering expenses connected to no-fault fraud has increased, and these costs will ultimately be passed to Florida drivers.⁸³ Figures 1-3 display PIP fraud referral statistics. Some of the factors that may contribute to the increasing cost of insurance are staged accidents, excessive or unnecessary medical treatment and inflated or questionable claims.⁸⁴ Supposedly, both the severity and frequency of automobile personal injury claims are increasing at a rapid pace even

⁸² McChristian, L. (2011, January). *NO-FAULT AUTO INSURANCE IN FLORIDA: TRENDS, CHALLENGES & COSTS*. Retrieved June 5, 2013, from Florida Health: <http://www.doh.state.fl.us/demo/BrainSC/AdvCouncil/NoFaultPaper0125111.pdf>

⁸³ Supra note 82.

⁸⁴ Supra note 82.

though the number of traffic accidents has been decreasing. It is alleged that if steps are not taken to address these factors contributing to rising no-fault fraud, Florida's no-fault fraud tax is expected to approach \$1 billion in 2011.⁸⁵

Claimants and trial lawyers argue that there are a variety of other reasons for the problems surrounding the current no-fault system. Fraud and abuse are only partially responsible for the diminished effectiveness of no fault. The possible other reasons for problems with the current system include changes in claimant behavior, attorney and physician behavior, interpretations of thresholds, and an increased potential for bad faith lawsuits.⁸⁶ To solve these problems the legislature should consider shifting medical costs from automobile insurance to health insurance. This is a possible solution because more Americans are expected to have access to quality health care under the Affordable Care Act.

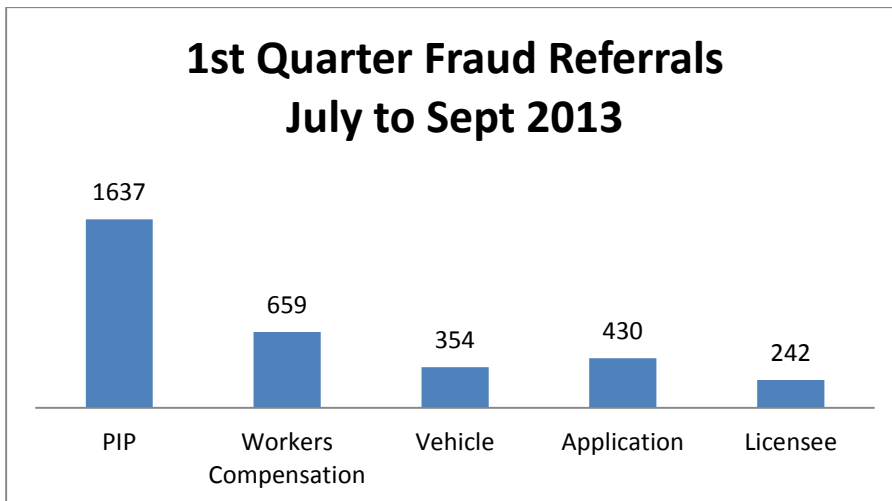


Figure 1: 1st Quarter Fraud Referrals July to Sept 2013⁸⁷

⁸⁵ Supra note 82.

⁸⁶ Supra note 6.

⁸⁷ Florida Division of Insurance Fraud. (2013). *Annual Report 2012/2013*. Tallahassee: Florida Department of Financial Services.

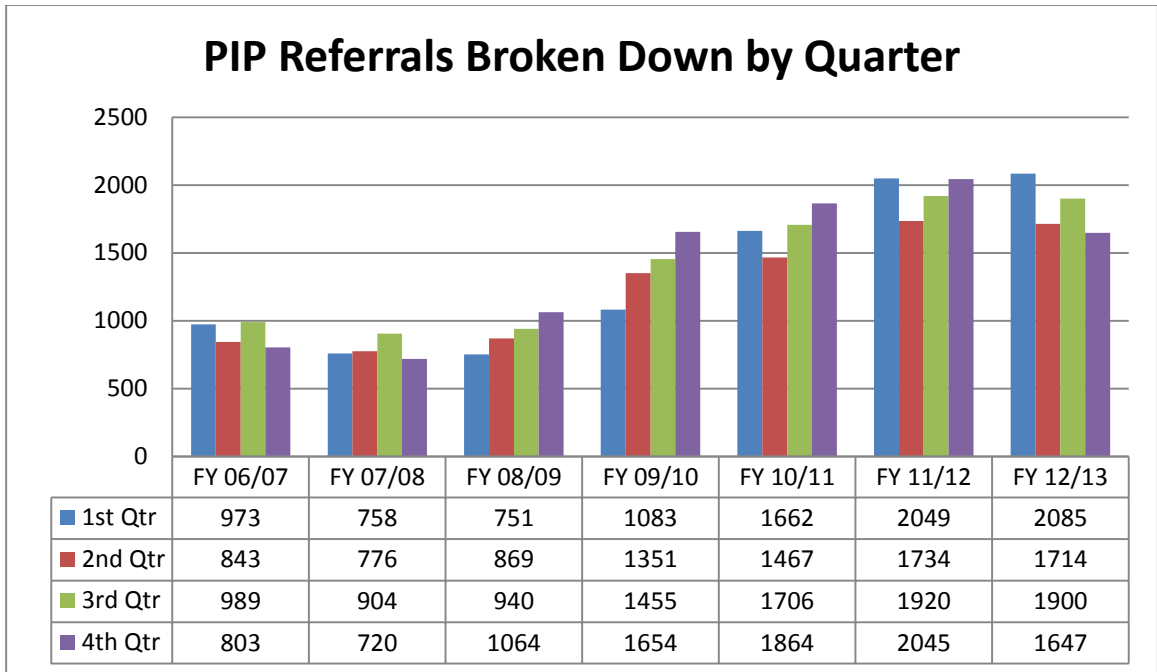


Figure 2: PIP Referrals Broken Down by Quarter⁸⁸

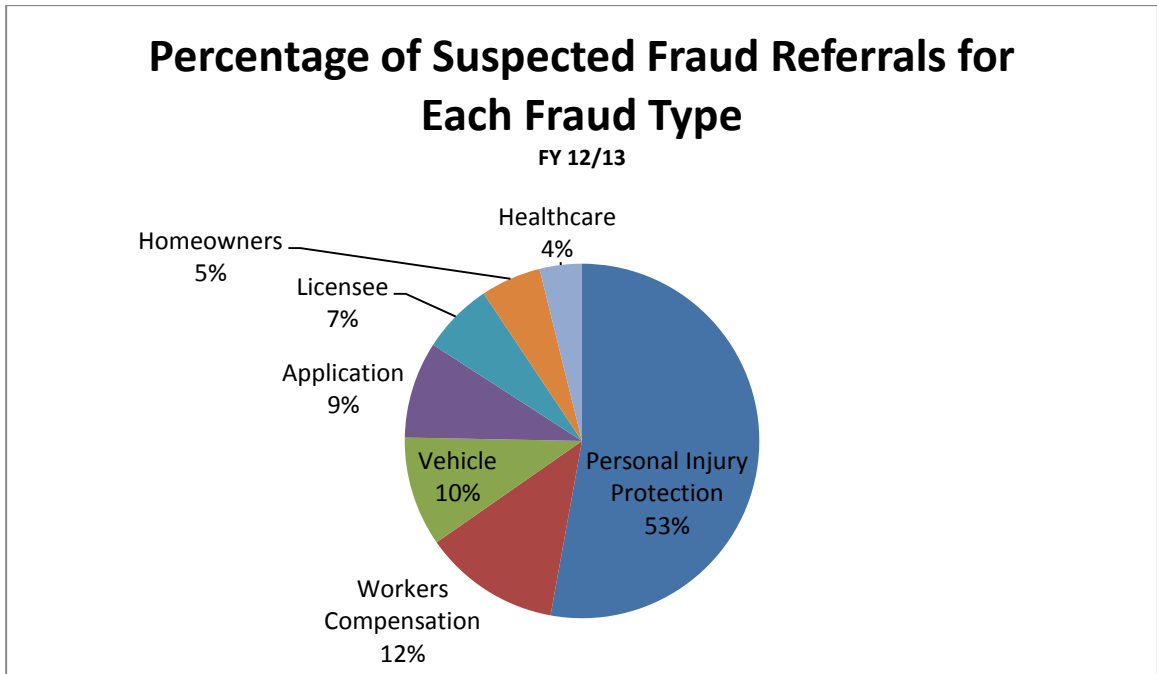


Figure 3: Percentage of Suspected Fraud Referrals for Each Fraud Type⁸⁹

⁸⁸ Supra note 87.

⁸⁹ Supra note 87.

Solicitation

PIP insurance fraud has several different forms. It usually begins with the solicitation of accident victims. Every time the police are called to the scene of an accident, a crash report must be filed with the local police station. Runners pick up copies of the crash reports in bulk. They use them to solicit victims. They also can sell the list to a third party. The information used to solicit accident victims by telephone or by visiting the victim's home. Either way, the runner leads the victim into believing that the runner is an insurance agent and that the victim needs to visit a doctor or chiropractor. Some medical professionals are willing to pay the runner up to \$500 for each patient referral.⁹⁰ Runners can make up to \$20,000 in a week simply by calling names on accident reports and referring the victims to chiropractors and doctors.⁹¹ Some runners publish accident journals. These journal's list names, addresses, and phone numbers of recent automobile accident victims culled from police reports.⁹² Runners sell these journals to medical and legal professionals as a direct mailing tool.⁹³

Unethical Medical Professionals

Medical professionals also add to PIP insurance fraud. Some chiropractors pad bills, charge inflated fees for tests, charge for services never provided, or order unnecessary tests. Part of the problem in the medical field comes from accident or pain clinics that are not owned by physicians. These clinics often hire doctors for up to \$60 per hour to rubber stamp billings sent to insurance companies.⁹⁴ Law enforcement

⁹⁰ Supra note 16.

⁹¹ Supra note 16.

⁹² Supra note 16.

⁹³ Supra note 16.

⁹⁴ Supra note 16.

records show that of the sixty-four Miami-Dade County clinics that have been cited in police reports, most are owned by lay entrepreneurs.⁹⁵ Medical professionals favor no-fault laws because they can profit from both the generosity of the benefits as well as the broad services provided by the coverage. If an injured claimant is able to treat excessively then that person could benefit from generous first-party coverage.

In 2003, the Legislature moved to register and license clinics through the Agency for Health Care Administration, and gave them the ability to enter these clinics at any time to review documentation. However, in the following year, numerous exemptions were enacted. In Miami-Dade County there was an explosion in the number of clinics which filed exemptions from licensure. From 2008-2011, nearly 150 to 450 exemptions were filed.⁹⁶ Massage therapists sought the greatest number of exemptions.

In April 2009, the Division of Insurance Fraud and the Office of the Attorney General began to investigate criminal activities at a Naples accident clinic. The clinic was named Cardinal Chiropractic Center. The total amount of fraudulent billing discovered was in excess of \$100,000.⁹⁷ The investigation exposed an organized scheme to defraud insurance companies. This was done by submitting false medical treatment forms for treatments that were either not administered or were administered by employees who did not possess a valid Florida Department of Health license. The fraudulent billings were related to motor vehicle accidents and the claims filed to the insurance companies for personal injury protection coverage. The investigation revealed that the true owner of

⁹⁵ Supra note 16.

⁹⁶ Florida Division of Insurance Fraud. (2012). *Mission to Combat & Reduce PIP Fraud*. Tallahassee: Florida Department of Financial Services.

⁹⁷ Supra note 96.

Cardinal Chiropractic Center was Feghens Delva.⁹⁸ He allegedly paid two licensed chiropractors a monthly fee to pose as owners of the clinic. He wanted to avoid the Florida Agency for Health Care Administration licensing requirements. These licensed chiropractors enabled this criminal enterprise to flourish.

Florida Chief Financial Officer Jeff Atwater announced the arrest of a licensed massage therapist, a physician's assistant and 15 massage clinic patients for insurance fraud and grand theft.⁹⁹ An example of the fraud is shown by the arrest of Judith Gonzalez. Judith Gonzalez, owner of Flamingo Health Corp in Miami, allegedly billed Allstate and State Farm nearly \$250,000 in fraudulent insurance claims.¹⁰⁰ She also coached patients on how to commit insurance fraud.

The Florida Department of Financial Services' Division of Insurance Fraud and the Miami-Dade Police Department Public Corruption Investigations Bureau conducted an undercover investigation that revealed the ongoing insurance fraud scheme.¹⁰¹ Gonzalez directed undercover officers posing as patients to sign blank treatment forms. She coached them in preparation for any questions they might be asked by their insurance company. Gonzalez billed Allstate more than \$17,000 for treatment that the undercover patients did not receive.¹⁰² Fifteen other patients were arrested for signing blank treatment forms. Patients were being fraudulently billed for treatments they didn't receive. Figures 4-5 display statistics for PIP fraud arrests and convictions.

⁹⁸ Supra note 96.

⁹⁹ Supra note 96.

¹⁰⁰ Supra note 96.

¹⁰¹ Supra note 96.

¹⁰² Supra note 96.

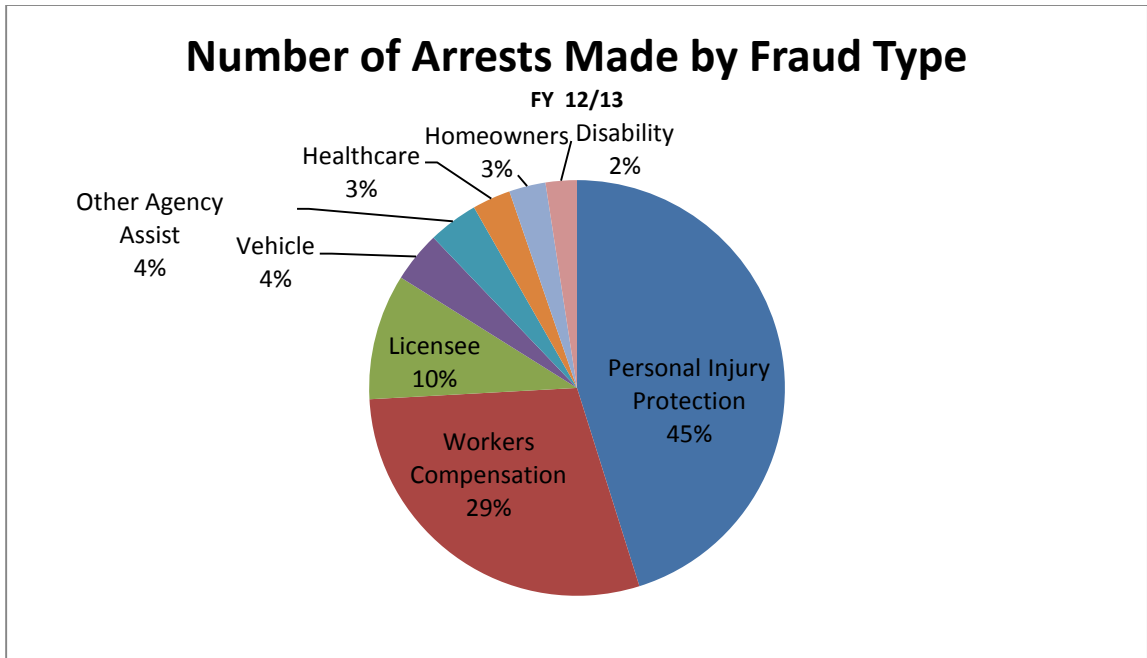


Figure 4: Number of Arrests Made by Fraud Type¹⁰³

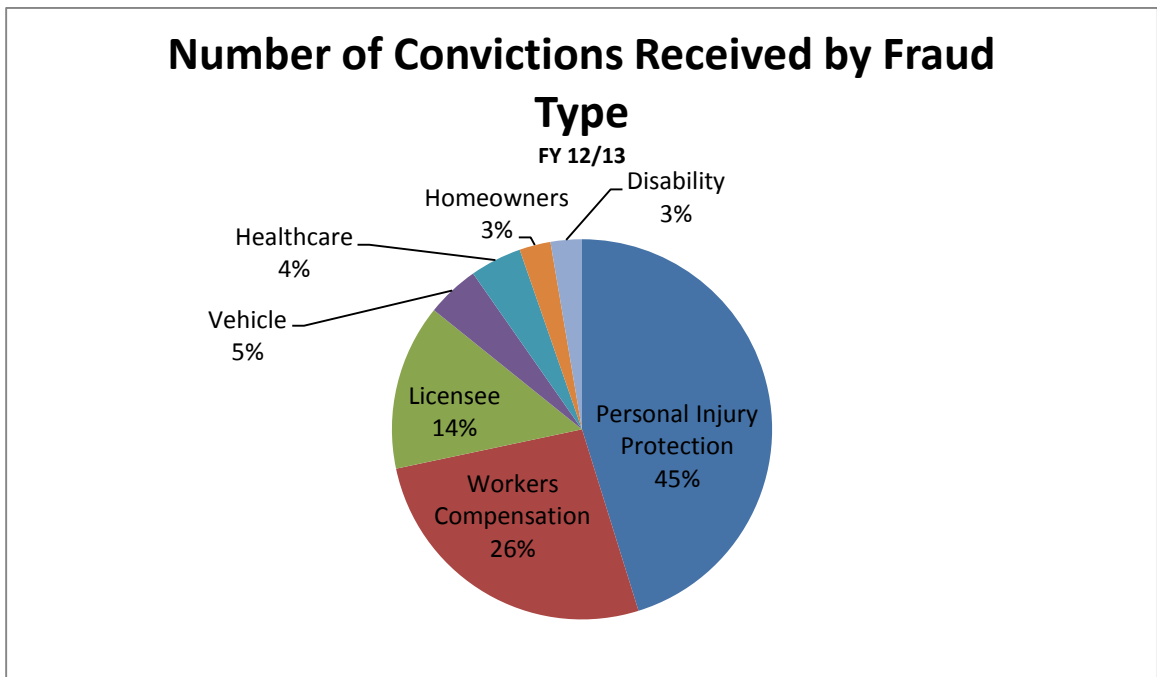


Figure 5: Number of Convictions Received by Fraud Type¹⁰⁴

¹⁰³ Florida Division of Insurance Fraud. (2013). *Annual Report 2012/2013*. Tallahassee: Florida Department of Financial Services.

¹⁰⁴ Supra note 103.

Inappropriate Medical Treatment

Many chiropractors administer certain diagnostic tests, such as video fluoroscopy and range of motion tests performed on a Metrecom, even though doctors question the effectiveness of those tests in diagnosing accident victims.¹⁰⁵ Unfortunately, patients often do not realize the size of their medical bill. The specialist will require patients to sign over their coverage so the office can bill the insurer directly. Furthermore, some offices have treatment protocols that require the specialists to administer the same tests on every patient that is injured in an accident, regardless of the individual's symptoms.¹⁰⁶

Some chiropractors lease testing equipment. They hire technicians required for each test. Then they bill insurers for a technical component. One chiropractor testified that he hired a technician to conduct nerve conduction studies at \$100 per patient and billed the insurance company \$900 for the test.¹⁰⁷ Another test commonly used by chiropractors is a video fluoroscopy. This is a motion picture X-ray that many doctors believe is dangerous because patients are subjected to gamma rays for up to fifteen minutes in one session.¹⁰⁸ The test appeals to unethical chiropractors because the machine can be leased for \$1,500 per month, while the tests are billed at over \$650 for each session.¹⁰⁹

Medical Imaging

Increased use and abuse of other technologies also push up the number of claims. Magnetic Resonance Imaging brokers also contribute to PIP insurance fraud. Brokers set up appointments for claimants at diagnostic clinics. Then they bill the insurance company

¹⁰⁵ Supra note 16.

¹⁰⁶ Supra note 16.

¹⁰⁷ Supra note 16.

¹⁰⁸ Supra note 16.

¹⁰⁹ Supra note 16.

for their services. The broker typically purchases unused time at a MRI diagnostic center for \$350 to \$400 per test and schedules referred patients during the purchased time slots.¹¹⁰ The broker will then charge the insurance company \$1,500 to \$1,800 for each scan.¹¹¹ Moreover, some brokers will indicate on billing documents that their own facility administered the test. As seen in Figure 7, MRI's are involved in 54 percent of health care provider litigation.

Attorney Involvement

Unethical attorneys also contribute to the problem of insurance fraud. Attorneys purposely have injured drivers treat their injuries excessively. The insurer will then question the treatment and refuse payment. This unethical refusal paves the way for a bad faith lawsuit. Some personal injury attorneys will also refer their clients to a chiropractor who will find that the injured party has some permanent disability. This finding allows the injured party to sue the insurer for pain and suffering. Some chiropractors have an attorney draft an agreement. This agreement guarantees that the deductible amount will be paid to the chiropractor before the accident victim receives any part of the settlement. Additionally, *Florida Statutes* section 627.736(4)(b), requires that all PIP claims be paid within thirty days of the claim or the insurer will be liable to the insured in a suit to recover benefits.¹¹² If a claim has not been paid, some attorneys file suit against the insurance company on the thirty-first day. Attorneys have an added incentive to sue the insurance company because Florida law grants attorney's fees to any insured party that wins a suit against the insurer.

¹¹⁰ Supra note 16.

¹¹¹ Supra note 16.

¹¹² Fla. Stat. §627.736(4)(b) (2013).

In 2004, the Insurance Research Council conducted a study of closed auto injury claims for Florida. It analyzed attorney involvement in PIP and BI cases. The IRC found that approximately one-third of all Florida PIP claimants hired attorneys in 2002.¹¹³ Attorney involvement in PIP claims correlated with claimants visiting a greater number of different medical professionals in Florida. The IRC survey showed that PIP claimants represented by an attorney were more likely to be treated by several medical providers as opposed to one or two. Also, charges for certain medical professionals appeared more often with attorney involvement in PIP claims. In Florida, more than half of represented PIP claimants went to a chiropractor.¹¹⁴

In 2002, the percentage of BI claimants in Florida who hired an attorney was 68 percent.¹¹⁵ Medical costs for represented Florida BI claimants tend to be higher. Represented BI claimants also visit more medical professionals and average more diagnostic procedures. Attorneys are more likely to represent claimants who have more serious injuries requiring medical treatment from a greater number of medical providers. As seen in Figure 6, the greater use of chiropractors by represented PIP claimants may be

¹¹³ Supra note 5.

¹¹⁴ Supra note 5.

¹¹⁵ Supra note 5.

an indication of cost build up associated with attorney representation.

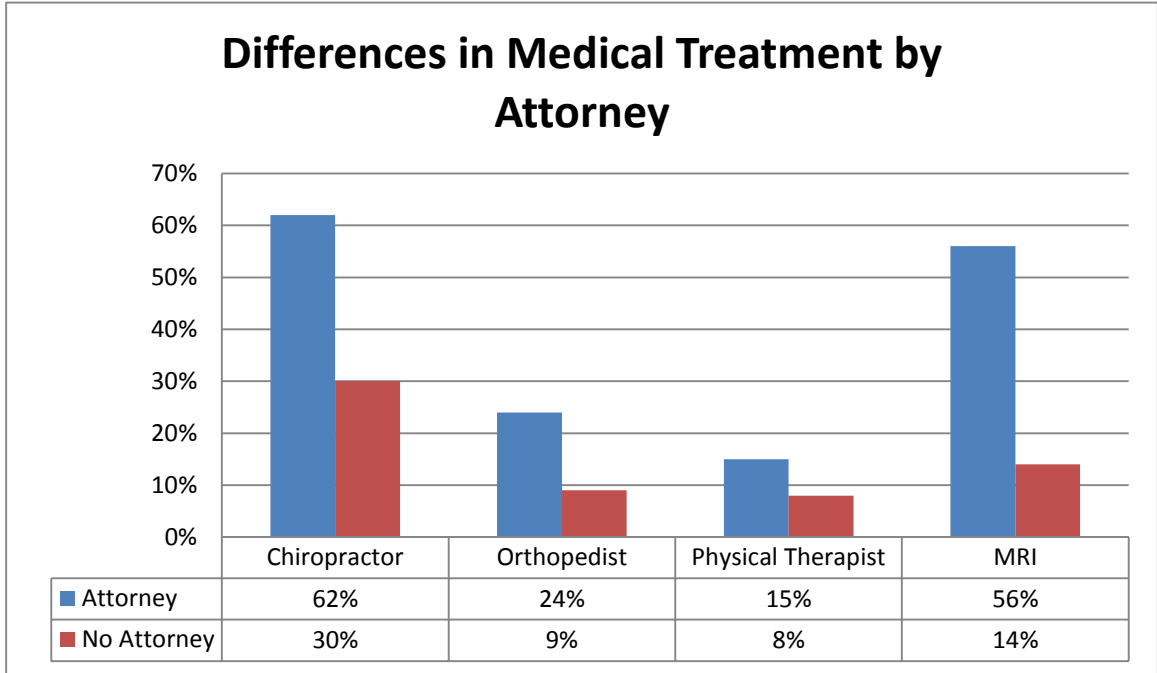


Figure 6: Differences in Medical Treatment by Attorney¹¹⁶

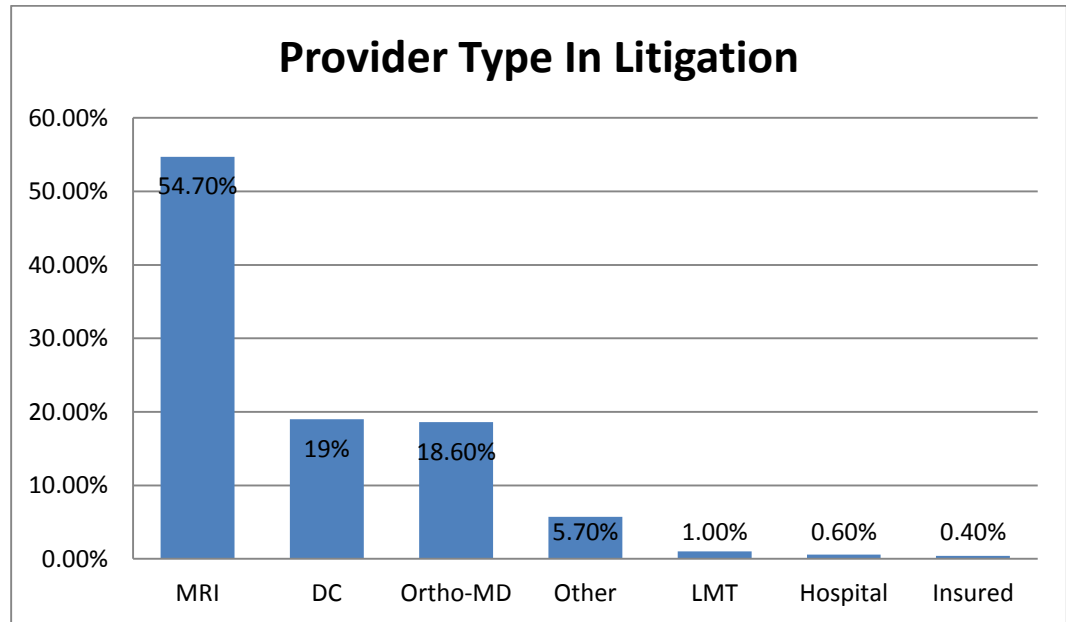


Figure 7: Provider Type in Litigation¹¹⁷

¹¹⁶ Westcott, R. S. (2011, December). *Florida Motor Vehicle No-Fault Insurance*. Retrieved from Office Of THE Insurance Consumer Advocate: <http://www.myfloridacfo.com/ica/docs/PIP%20Working%20Group%20Report%2012.14.2011.pdf>

Staged Accidents

The number of suspicious auto accidents that were staged or deliberately caused by criminals in Florida has increased dramatically the past several years, and is expanding throughout the state. Insurance fraud scammers have turned Florida into the top state for staged accidents, particularly in the Miami and Tampa areas. Questionable auto insurance claims in Florida rose by 34 percent between 2008 and 2010. Miami, Tampa and Orlando rank among the top five cities in the nation for questionable claims. The Insurance Information Institute has estimated that fraud could cost Florida up to \$1 billion in 2014.¹¹⁸ The majority of crashes are unintentional, but there are some committed purposely for the purposes of collecting PIP benefits. Criminals see staged crashes as an easy way to obtain money from insurance companies. They use paid witnesses, unethical attorneys and corrupt medical providers to promote and gain from the fraud.

Staged accidents generally occur in three methods: (1) swoop and squat, (2) drive down, and (3) panic stop.¹¹⁹ During the swoop and squat method, the driver of vehicle 1, who is in on the scheme, purposely drives a short distance in front of an innocent driver, when the driver of Vehicle 2, also in on the scheme, suddenly swoops in front of Vehicle 1. The driver of Vehicle 1 hits his brakes and causes a rear-end collision with the victim behind him. During the drive down method, when a driver is trying to merge into traffic, a scheming driver slows down and waves the victim forward. Once the victim proceeds, the schemer crashes into the victim's vehicle and denies to law enforcement that he

¹¹⁷ Supra note 116.

¹¹⁸ Supra note 96.

¹¹⁹ Supra note 96.

waved the other driver through and blames the crash on the other driver. During the panic stop, the scheming driver of a vehicle drives in front of a victim. An observer in the schemer's vehicle waits for the victim to take his eyes off the road, for example to text or talk to a passenger, then signals the driver to slam the brakes to create a rear-end collision.

Eleven defendants, including a licensed chiropractor and massage therapist, were charged in a multi-million dollar staged accident fraud scheme in Palm Beach County.¹²⁰ In total, the U.S. Attorney's Office has charged 26 defendants in less than 12 months as part of Operation Sledgehammer.¹²¹ Each charged with one count of conspiracy to commit mail fraud. The defendants allegedly unlawfully profited by submitting fraudulent PIP claims for chiropractic and massage therapy treatments for individuals who had participated in staged automobile accidents. The defendant's recruited individuals to participate. They instructed them on how to conduct accidents and what to tell responding police officers, insurance company representatives and independent medical examination physicians. They also instructed them on how to collect police reports and what clinic to go to for treatment, even though the participants did not need treatment.

Another investigation involved staged accidents in the Cape Coral, Florida area. In April 2012 the Cape Coral Police Department wrapped up an undercover investigation into PIP fraud and staged crashes with 12 arrests.¹²² In the 13-month investigation, detectives went undercover and infiltrated a sophisticated insurance fraud scheme.

¹²⁰Supra note 96.

¹²¹Supra note 96.

¹²²Supra note 96.

Participants staged traffic crashes, feigned injuries and sought medical treatment at a clinic, which would bill the insurance company for thousands of dollars per crash.¹²³ The investigation discovered that two clinics, Xtreme Care Rehabilitation Center and C & A Family Rehab Center were allegedly operating in Cape Coral as unlicensed health care clinics since 2009.¹²⁴ Neither clinic had been issued an exemption by the Agency for Health Care Administration.

Interpretation of Threshold

Some argue that the effectiveness of verbal threshold has diminished due to the wording of the threshold as well as some courts interpretations of the threshold. For example, an individual in the state of Florida had permanent subjective complaints of pain but had not sustained any objectively demonstrated permanent organic injury as the result of a motor vehicle accident.¹²⁵ The court ruled that the injury was a permanent injury. As a result, the individual met the verbal threshold requirement and regained the right to sue the negligent party. Additionally, in Florida, a study found that 82 percent of injured parties pierced the verbal threshold due to a disability.¹²⁶ However, in more than 70 percent of those cases the disability rating was 10 percent or less.¹²⁷

Increased Claims Cost

Numerous states have developing issues in their no-fault systems. Florida has the fourth highest average claim cost in the United States.¹²⁸ This is known as claim severity. Severity is the size of the loss. This factor is used in computing premium rates. No-fault

¹²³ Supra note 96.

¹²⁴ Supra note 96.

¹²⁵ Supra note 6.

¹²⁶ Supra note 6.

¹²⁷ Supra note 6.

¹²⁸ Supra note 5.

claim severity in Florida has increased by 23.7 percent since 2006.¹²⁹ Insurance companies analyze their own claims history and use that information to determine the premium rates necessary to cover future losses. The average severity in 2006 was \$6,344.¹³⁰ As seen in Figures 8-9, by the third quarter of 2010, the average severity of a no-fault claim was \$7,847.¹³¹ This increase in claims severity could be caused by a number of factors. Although Florida has the fourth highest average claim costs in the U.S., it also has the fourth highest population in the U.S. Since Florida's population increases each year, its no-fault claim severity is expected to increase as well. A high population density could possibly result in more frequent automobile accidents. Additionally, it could also result in more expensive vehicles being driven.

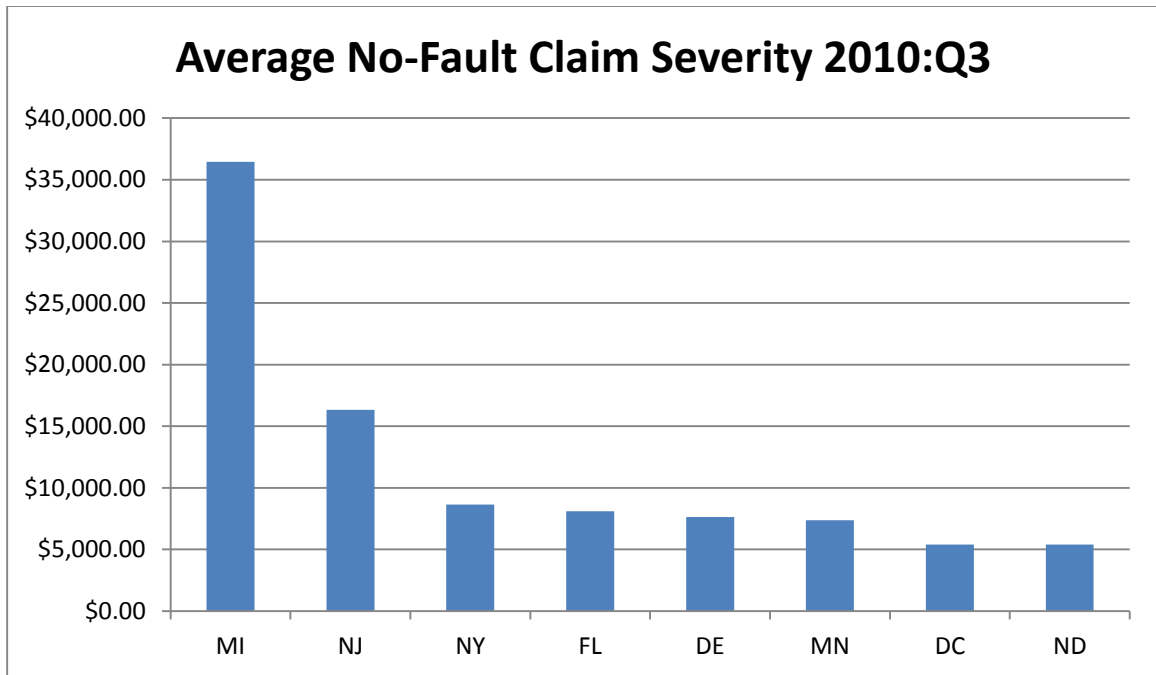


Figure 8: Average No-Fault Claim Severity 2010: Q3¹³²
 Q = Yearly Quarter

¹²⁹ Supra note 5.

¹³⁰ Supra note 5.

¹³¹ Supra note 82.

¹³² Supra note 82.

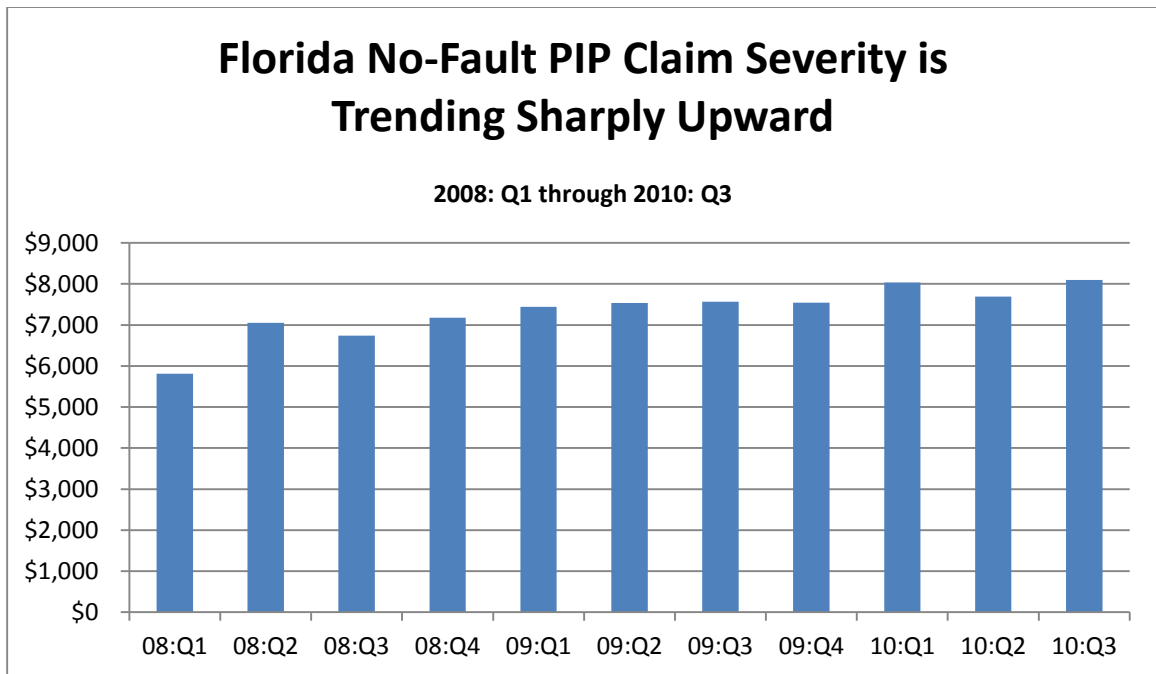


Figure 9: Florida No-Fault PIP Claim Severity is Trending Sharply Upward from 2008-2010: Q3¹³³

Claim Severity

Insurers also examine claims frequency. This is the number of times a loss occurs. This is also a factor used in calculating premium rates. Figure 10 below illustrates the increase in Florida's claims between 2008 and 2010. There was a significant decline in frequency in 2008. This could be attributed to the PIP reforms of 2007. The 2007 reforms established a medical fee schedule to help combat fraud.¹³⁴ However in 2009, the frequency spiked more than 16 percent and increased by nearly 21 percent in 2010.¹³⁵ No-fault claim frequency surged by 46.2 percent between the second quarter of 2008 and the third quarter of 2010.¹³⁶ The combined impact of rising frequency and severity of

¹³³ Supra note 82.

¹³⁴ Supra note 82.

¹³⁵ Supra note 82.

¹³⁶ Supra note 82.

claims is driving up the cost of pure premium, which is defined as the premium needed to pay for anticipated losses without considering other costs of doing business.¹³⁷

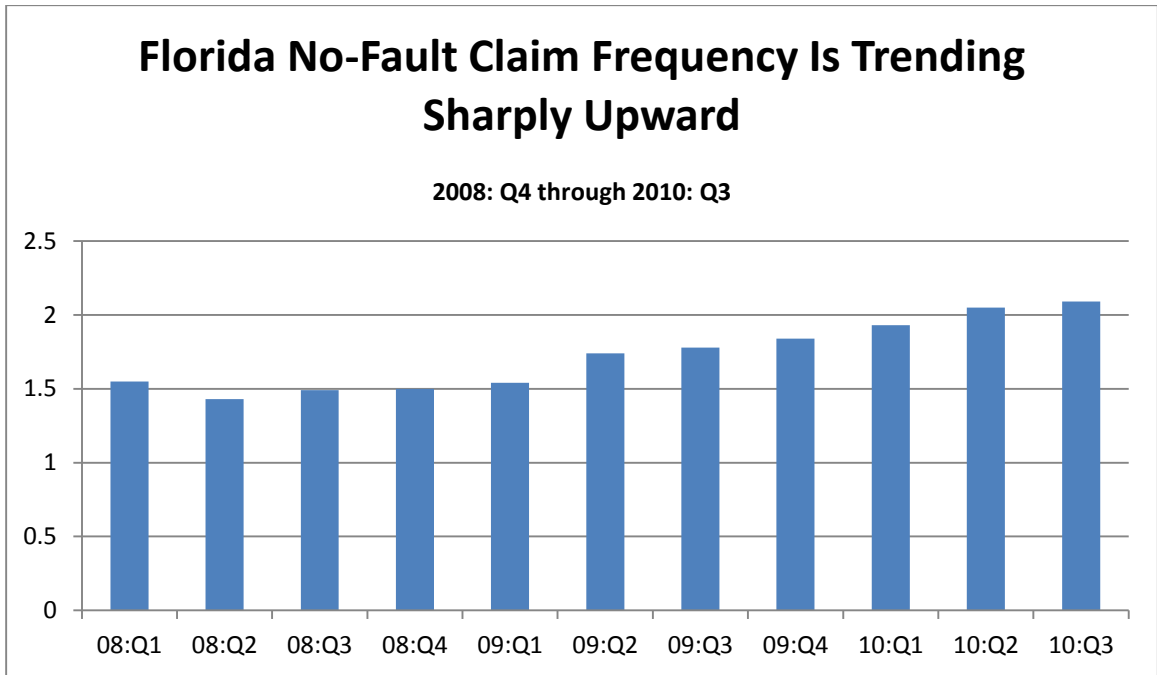


Figure 10: Florida No-Fault Claim Frequency is Trending Sharply Upward¹³⁸

Automobile Insurance Premiums

Even as incomes have ceased and even fallen in Florida, auto insurance rates have increased dramatically. Although premiums, which average \$1,457, are not particularly high by national standards, they have been rising very quickly on a statewide basis.¹³⁹ Premiums have risen about 20 percent in Florida since 2008.¹⁴⁰ As seen in Figure 11, the PIP portion of the premium has risen nearly 66 percent during the same period.¹⁴¹ The

¹³⁷ Supra note 82.

¹³⁸ Supra note 82.

¹³⁹ Lehrer, E., & Lehmann, R. (2012, February). *Workable Solutions for Florida’s Challenging Insurance Problems*. Retrieved May 24, 2013, from The James Madison Institute: <http://www.jamesmadison.org/issues/february-2012-backgrounder-no-70-workable-solutions-for-floridas-challenging-insurance-problems.html>

¹⁴⁰ Supra note 139.

¹⁴¹ Supra note 139.

PIP portion is on pace to double every three years.¹⁴²

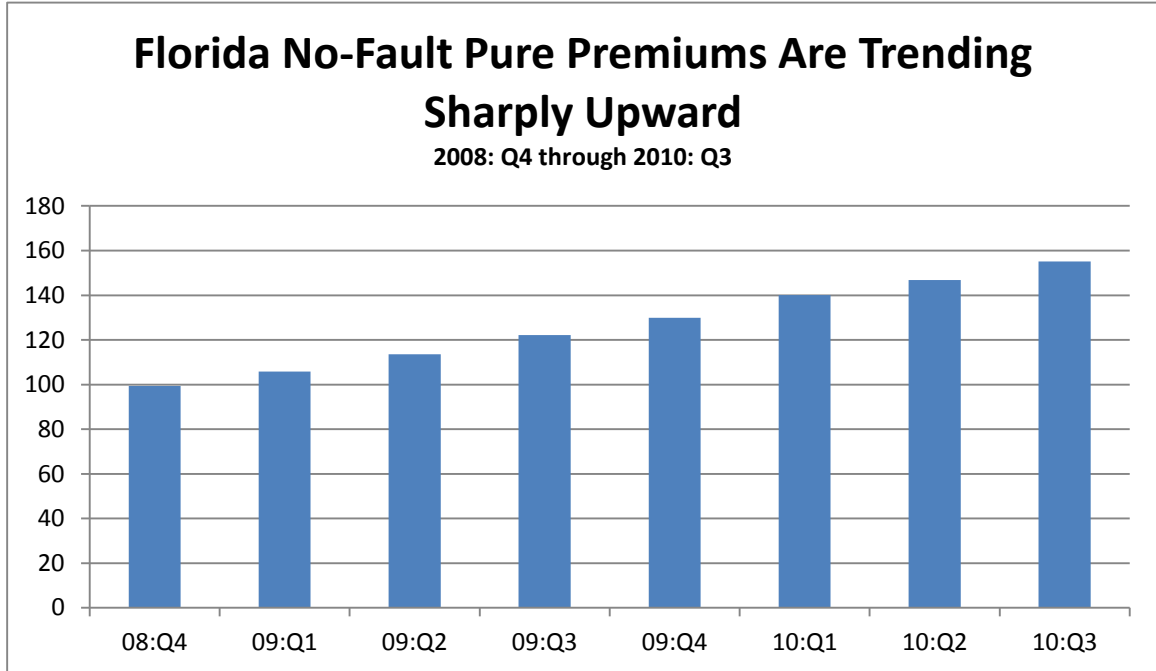


Figure 11: Florida No-Fault Pure Premiums Are Trending Sharply Upward¹⁴³

This increase is even steeper in certain parts of the state. For example, the average premium for a retired couple in Tampa has increased from \$249 in 2008 to \$627 in 2011.¹⁴⁴ A family with teen drivers in the same zip code has seen its premium rise from \$1,267 to \$1,997.¹⁴⁵ Other portions of the state have seen steep increases in insurance rates. This can't be attributed to a large increase in traffic crashes or a shift in demographics because the external risk factors in Florida have actually declined. The number of vehicle crashes per 100 drivers has fallen from nearly 2 per 100 drivers in 1996 to 1.52 per 100 in 2011, a decline of about 25 percent.¹⁴⁶ Demographic factors also

¹⁴² Supra note 139.

¹⁴³ Supra note 82.

¹⁴⁴ Supra note 139.

¹⁴⁵ Supra note 139.

¹⁴⁶ Supra note 139.

have changed very little. Florida's population has grown more slowly than during previous decades and it has become only slightly younger since 2000. So these trends can only explain a small part of the increase in rates.

Instead, it appears that dramatic increases in fraud and overuse of medical services explain a large part of the increase in rates. Between 2009 and 2010 alone, Figure 12 illustrates that activities strongly correlated with fraud, excessive treatments by medical providers and faked injuries all rose by more than 70 percent in a single year.¹⁴⁷ Likewise, between 2008 and 2010, Figure 13 illustrates that the number of staged crashes increased from 1,268 to 2,779.¹⁴⁸ In early 2011, Miami-Dade County alone had more than 16 potentially staged vehicle crashes per week and 427 through the first two quarters of the year.¹⁴⁹ And medical providers may also be encouraging overuse of their services. Since 2007, the number of medical procedures performed in the course of a typical no-fault claim has increased from about 60 to 100.¹⁵⁰ This steep increase has not been seen anywhere else in the country. Florida ranks above the national average in provider charges per claim and average number of medical procedures per claim.¹⁵¹ Chiropractic care, physical therapy and massage therapy were the services most frequently billed.

This increase in procedures provides indirect proof that medical providers have made up for the imposition of a fee schedule in 2007 by doing more procedures. Most significantly, Florida has the most suspicion claims of any no-fault state. Insurance has

¹⁴⁷ Supra note 82.

¹⁴⁸ Kevin McCarty, "Frequency of Auto Crashes Has Decreased," in "Cabinet Presentation: Personal Injury Protection," August 2011, 8.

¹⁴⁹ Supra note 139.

¹⁵⁰ Supra note 139.

¹⁵¹ Supra note 116.

become very expensive in Florida. Among no-fault states, Florida has the third highest PIP-related claims rate, even though it has one of the lowest mandatory benefits.¹⁵²

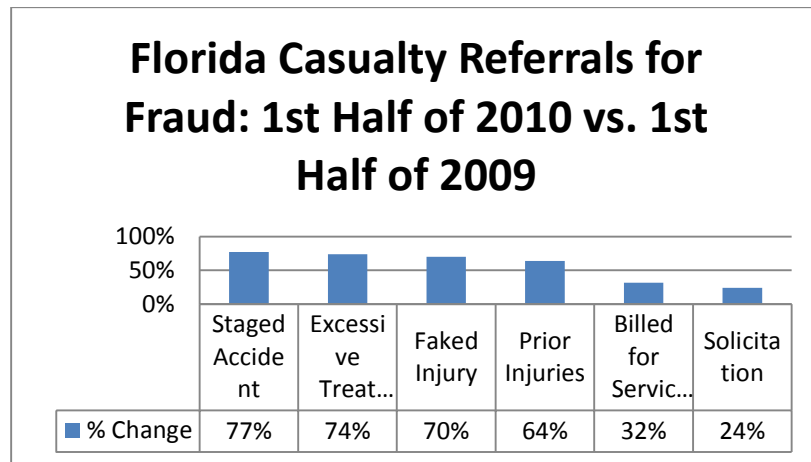


Figure 12: Florida Casualty Referrals for Fraud: 1st Half 2010 vs. 1st Half 2009¹⁵³

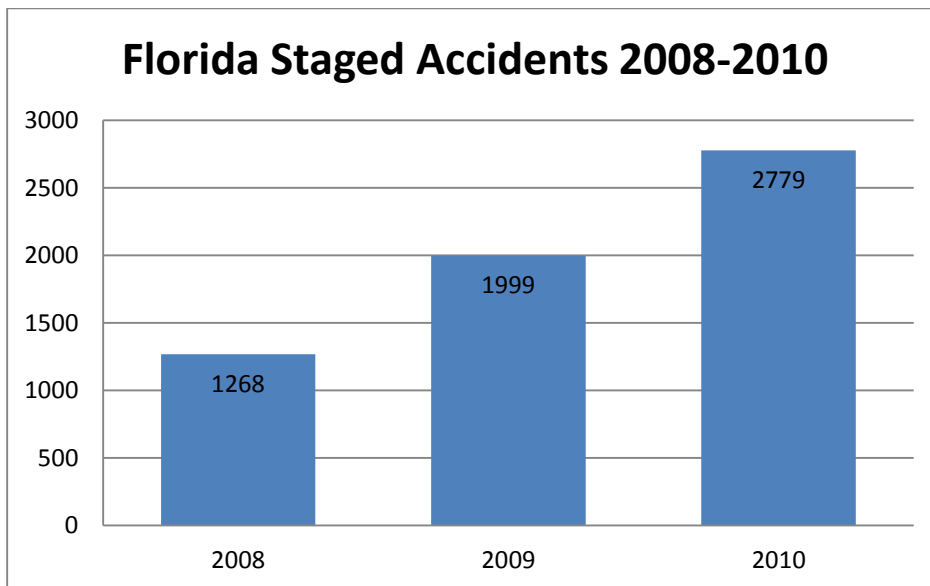


Figure 13: Florida Staged Accidents 2008-2010¹⁵⁴

Lawsuits

The number of lawsuits filed as a result of vehicle crashes has increased in recent years. The number of PIP-related lawsuits has increased 110 percent between 2010 and

¹⁵² Supra note 148.

¹⁵³ Supra note 82.

¹⁵⁴ Supra note 116.

2011. In addition, 95 percent of cases involved providers and primarily clinics. In 2011, it was estimated that motorists would sue in 4 percent of crashes.¹⁵⁵ From 2008 through the third quarter of 2011, total attorneys' fees have represented approximately 5 percent of total no-fault losses and loss adjustment expenses.¹⁵⁶ From 2009 to 2011, the amounts paid to plaintiff attorneys have increased faster than amounts paid to defense attorneys. Attorneys have an incentive to increase the number of lawsuits since their income is directly related to the number of cases they take. No fault insurance was devised to decrease litigation but has inadvertently increased it. A no-fault system is supposed to keep cases out of court but the current system isn't working.

Bad faith lawsuits

Many insurers are unable and unwilling to deny first-party claims because of the potential for bad faith lawsuits. The increase in bad faith claims and the possibility of large punitive damage awards have made insurers more likely to pay first-party claims, even in cases in which the insurers suspect the claims are fraudulent. For example, a recent verdict against State Farm Insurance awarded an insured \$25 million in punitive damages for alleged bad faith and intentional infliction of emotional distress. Since these suits can be costly and result in significant and potentially permanent effects on the company's reputation, some insurers believe the potential long-term claims costs savings do not outweigh the potential long-term loss of customers. Common situations that could result in bad faith lawsuits include the failure to promptly process first-party claims as well as the denial of certain treatments.

¹⁵⁵ Supra note 139.

¹⁵⁶ Supra note 116.

Automobile insurance company losses and expenses

The number of closed no-fault claims increased by 40 percent between 2006 and 2010. Simultaneously, the amount paid on all claims during that same period increased 66 percent. Insurance companies reported losses exceeding \$2.2 billion.¹⁵⁷ This is an increase from average losses of \$1.6 billion each year from 2006 to 2007. Insurers also paid \$2.7 billion in 2010 for losses and expenses. However this figure does not include overhead expenses. For every dollar earned in premiums by insurers, \$1.15 was paid out in losses and expenses.¹⁵⁸ Insurers as a whole need to break even to remain in the state. They receive revenues only from insureds and will not continue writing policies if they aren't profiting. This means they will either increase premiums further or withdraw from the Florida market.

Inadequate Compensation

The \$10,000 PIP benefit, enacted in 1978, has lost value due to inflation. The \$10,000 PIP benefit is worth \$36,009 in 2014. The \$10,000 PIP benefit was never adjusted for inflation. The cost of goods and services has increased but the PIP benefit hasn't. Gradually it has become easier for claimants to reach the maximum PIP benefit. Claimants that exceed the limit are able to sue the at-fault party for excess expenses. This can increase the number of lawsuits that no-fault coverage sought to reduce. Increasing required PIP limits will help claimants receive the full dollar value of the benefit. However this will increase premiums for all vehicle owners.

¹⁵⁷ Supra note 116.

¹⁵⁸ Supra note 116.

Solutions have problems

In *Myers v. McCarty*, the plaintiffs filed a motion for temporary injunction. The plaintiffs are chiropractic physicians, massage therapists and acupuncturists. They filed a complaint for declaratory and injunctive relief. The complaint challenged the constitutionality of the 2012 no-fault law. A hearing was held February 1, 2013 for the plaintiffs' motion.

The issue in this case is whether the revised no-fault law is constitutional. Under the new law, an injured party who does not receive initial services or care within 14 days of an accident is not covered. If a claimant does seek medical care within that time frame but it is later determined that the claimant's injuries were not an emergency medical condition, the recovery under the policy is limited to \$2,500. Furthermore, a person cannot be covered under PIP for medical benefits provided by a licensed massage therapist or licensed acupuncturist.

The judge ruled that the motion should be granted because the act violates Article I, Section 21 of the Florida Constitution in that it restricts the right of access to courts. The act violates the rights of people to seek compensation for their injuries in court. The injunction temporarily blocks a portion of the law. This portion requires a finding of an emergency medical condition in order to receive payment for PIP benefits. It also blocks reimbursement for services provided by acupuncturists, chiropractors and massage therapists.

The 1971 legislation limited the right of a person to seek compensation in court for automobile injuries. By instituting a no-fault system, everyone who operated a motor vehicle was required to purchase insurance to cover medical and other expenses. This

limitation upon the rights of an individual to seek recovery was justified by asserting that no-fault was providing a reasonable alternative to the tort system. However, the judge found that the revised 2012 no-fault law is not a reasonable alternative to the tort system.

However, the PIP injunction was reversed by the First District Court of Appeal on October 23, 2013. The Court found the provisions to be constitutional. The Court held that the plaintiffs did not have proper standing to bring a lawsuit. The Court found that the plaintiff was not a proper party in interest with a case in controversy to proceed with the lawsuit. The temporary injunction stopped the prohibitions on massage therapy and acupuncture services. The injunction also prohibited the \$2,500 limitation for those patients deemed to have a non-emergency medical condition. The Court lifted this injunction and the law is now in full effect.

Failures of PIP

The existence of PIP doesn't lessen court congestion. The volume of PIP litigation increases yearly. PIP hasn't resulted in a reduction of automobile insurance premiums. Florida's premiums continue to rise and remain among the highest in the country. Eliminating PIP would probably result in overall lowered automobile insurance premiums.

PIP doesn't provide prompt compensation reimbursement since the benefits may be contested indefinitely and paid years later. Insurers will have to pay interest and penalties but they have the financial resources to do so. For example, a nonstandard

insurer in Florida reported that during 2002, the insurer received over 6,034 new open PIP claims but as of December 2003 only 88 of these claims had been paid.¹⁵⁹

It can be argued that the Florida no-fault law no longer serves a valid rational governmental purpose. Florida's no-fault law has failed to meet the goals it intended to accomplish. The ability of insurers to contest claims without limitation slows down the process of compensation. Accident victims and health care providers aren't compensated promptly and this causes an increase in litigation. Claimants that do receive payment are being undercompensated while fraudsters are being overcompensated. Automobile insurance companies increase premiums to cover costs associated with litigation and fraud. The no-fault law was meant to resolve these issues but has failed to do so. Florida's no-fault law needs further examination by the 2014 legislature.

¹⁵⁹ Florida Senate Interim Project Report No. 2006-102, Florida's Motor Vehicle No-fault Law at 1 (2005)

CONCLUSIONS AND RECOMMENDATIONS

Florida's motor vehicle no-fault law was enacted in 1971 and has been revised by nearly every legislature since. The latest reform to the law was in 2012. The 2012 Florida legislative session amended laws governing PIP benefits and laws related to PIP motor vehicle insurance fraud. The new bill includes changes to medical benefits, death benefits, medical fee schedules, attorney fees, payment of claims and PIP insurance fraud provisions. These new provisions have glaring issues that need to be examined by the 2014 legislature. It's apparent from the constant flux of reform measures that there are unresolved problems within the no-fault system. The 2014 legislature faces a difficult decision. The legislature could either repeal no-fault or keep it and make new reforms.

New No-fault Provisions

The new bill applies two different coverage limits for PIP medical benefits. These limits are based upon the severity of the medical condition. An individual may receive up to \$10,000 in medical benefits for services and care if a physician has determined that the injured person had an emergency medical condition. For an individual who is not diagnosed with an emergency medical condition, the PIP medical benefit limit is \$2,500. The new bill eliminates massage and acupuncture from PIP medical benefits. Individuals seeking PIP medical benefits are required to receive initial services and care within 14 days after the motor vehicle accident. PIP offers \$5,000 in death benefits in addition to \$10,000 in medical and disability benefits. The bill has provisions related to the PIP medical fees schedule in an effort to resolve alleged ambiguities in the schedule that have led to conflicts and litigation between claimants and insurers.

Provisions relating to the investigation of PIP claims by insurers have been revised. Insurers are currently authorized to take an examination under oath of an insured. Compliance is a condition precedent for receiving benefits. If a person unreasonably fails to appear for an independent medical examination, the carrier is not responsible for benefits until the claimant complies. Furthermore, refusal or failure to appear for two IMEs raises a rebuttable presumption that the refusal or failure was unreasonable and the claimant then has the burden to show why he or she did not comply with this requirement.

The bill would amend provisions related to attorney fee awards in No-Fault disputes. Previously, in certain cases a fee multiplier would be applied to an award of attorney fees. The court was allowed to multiply an attorney's fee award by 2.5 times the initial amount. The multiplier depended on the likelihood of success for an attorney at the beginning of trial. Now the application of attorney fee multipliers is prohibited. Florida's offer of judgment statute is also applied to No-Fault cases. The statute provides authority for insurers to recover fees if the plaintiff's recovery does not exceed the insurer's settlement offer by a statutorily specified percentage. It also provides authority for insured's to recover fees if the defendant's recovery does not exceed the insured's settlement offer by 25 percent.

The new bill contains numerous provisions designed to curtail PIP fraud. A healthcare practitioner found guilty of insurance fraud loses his or her license for 5 years and may not receive PIP reimbursement for 10 years. Insurers are provided an additional 60 days from the original claim for a total of 90 days to investigate suspected fraudulent claims. However, an insurer that ultimately pays the claim must also pay an interest

penalty. All entities seeking reimbursement under the no-fault law must now obtain health care clinic licensure except for entities licensed or registered by the state.

The bill requires law enforcement to complete a long-form crash report when there is an indication of pain or discomfort by any party to a crash. All crash reports completed by law enforcement must identify the vehicle in which each party was a driver or passenger. A long-form crash report is required if the accident rendered a vehicle inoperable, involved a commercial vehicle or if it resulted in death or personal injury to any of the parties. For all crashes that do not require a law enforcement report, the vehicle driver must submit a report on the crash to the Department of Highway Safety and Motor Vehicles within 10 days of the crash. The bill also creates the Automobile Insurance Fraud Strike Force, for the purpose of preventing, investigating, and prosecuting motor vehicle insurance fraud.

Issues with new no-fault provisions

The latest no-fault provisions still have major issues that will need to be addressed in the 2014 legislative session. The use of the long form traffic crash report will have a marginal impact on controlling fraud since these forms are often already done today. Fraud perpetrators will learn how to circumvent the new provisions. The new law hurts the efforts of the insurance companies to control fraud. The insurer has only 30 days to make a fraudulent claim determination. This will have minimal impact on reducing fraud because of the short time allotted for making a determination.

The elimination of massage therapy and acupuncture will have a minimal impact on cost savings for insurers. These costs will just be shifted to other procedures or to physical therapy. Medical providers will still charge insurers. This elimination will also

cause litigation from massage and acupuncture lobbyist. The \$2500 non-emergency treatment limit will not be effective either. Whether or not something is an emergency is a difficult decision for health care providers. Doctors will normally resolve this issue in favor of treating the patient or risk medical malpractice issues. Clinics that have historically profited from the manipulation of the PIP system are more likely to do so under this new provision. This treatment limit will cause excess litigation.

The provision requiring insureds to submit to an examination under oath prior to receiving benefits should have a marginal benefit on cost savings. The new statutory language may be ambiguous and signing such an oath is self serving. Insurers will probably have to litigate more lawsuits regarding this requirement. It would be more beneficial if the bill required physician examination under oath in addition to insureds.

These PIP reforms will not have a major impact on PIP cost drivers. The corruption of the PIP system by solicitation, criminals, lawyers and clinics is very difficult to overcome through legislative changes. Even with comprehensive reform, the incidence of fraud will remain high. The cost savings expected from this reform will not materialize. This reform had great intentions but great intentions do not always generate expected results. People will find loopholes to work around these reforms.

Possible resolutions to no-fault issues

The 2014 Florida legislative session has two options. This session could either repeal no-fault or keep it and make new reforms. The legislature should keep no-fault and shift medical costs from automobile insurance to health insurance. Health insurance should be the primary payer for medical costs in auto accidents. With the implementation of universal health insurance it is should be unnecessary for automobile insurance to

cover medical cost. The Affordable Care Act is expected to provide more Americans access to affordable quality health insurance. This act will change the economics of automobile insurance. Medical costs can now shift from automobile insurance to health insurance. All automobile insurers should still offer medical payments coverage for those who don't have health insurance to cover the insureds and their families. PIP retained as a secondary payer would reduce the costs of universal health care. Medical insurance would be prioritized over PIP as a primary method of medical compensation for automobile accidents. Medical providers would bill the insureds health insurance before billing any other source. PIP's main purpose under this new hybrid system is to compensate the injured claimant for lost wages and death benefits. PIP insurance carriers will only be billed for medical cost if the person doesn't have health insurance. People without health insurance can also sue for economic damages in excess of their PIP benefit. Non-economic damages would still have a threshold to recovery in case of a pain and suffering lawsuit. The PIP benefit should also be increased to its 1978 purchasing power since medical costs have increased faster than inflation.

Automobile insurance medical costs, PIP litigation costs and fraud should be reduced under this new system of compensation. Reduction in costs will result in increased profit for insurance companies. Insurance companies that make profit will be more likely to stay in Florida's market and lower premiums. This new system of compensation should help mitigate problems from previous reform efforts. It should help balance the needs of insurance companies, claimants, medical providers and lawmakers. This new system of compensation should be considered by the 2014 Florida Legislature.

It may not be the complete answer to Florida's automobile insurance problems but it's a step in the right direction.

APPENDIX: AUTOMOBILE INSURANCE LIABILITY CHART

State by State Automobile Insurance Liability Requirements¹⁶⁰

State	Insurance required (1)	Minimum liability limits (2)	State	Insurance required (1)	Minimum liability limits (2)
AL	BI & PD Liab	25/50/25	MT	BI & PD Liab	25/50/10
AK	BI & PD Liab	50/100/25	NE	BI & PD Liab	25/50/25
AZ	BI & PD Liab	15/30/10	NV	BI & PD Liab	15/30/10
AR	BI & PD Liab, PIP	25/50/25	NH	FR only, UM	25/50/25
CA	BI & PD Liab	15/30/5	NJ	BI & PD Liab, PIP, UM, UIM	15/30/5
CO	BI & PD Liab	25/50/15	NM	BI & PD Liab	25/50/10
CT	BI & PD Liab, UM, UIM	24/40/10	NY	BI & PD Liab, PIP, UM	25/50/10
DE	BI & PD Liab, PIP	15/30/10	NC	BI & PD Liab, UM, UIM	30/60/25
DC	BI & PD Liab, UM	25/50/10	ND	BI & PD Liab, PIP, UM	25/50/25
FL	PD Liab, PIP	10/20/10	OH	BI & PD Liab	12.5/25/7.5
GA	BI & PD Liab	25/50/25	OK	BI & PD Liab	25/50/25
HI	BI & PD Liab, PIP	20/40/10	OR	BI & PD Liab, PIP, UM, UIM	25/50/20
ID	BI & PD Liab	25/50/15	PA	BI & PD Liab, PIP	15/30/5
IL	BI & PD Liab, UM, UIM	20/40/15	RI	BI & PD Liab, UM	25/50/25
IN	BI & PD Liab, UM, UIM	25/50/10	SC	BI & PD Liab, UM	25/50/25
IA	BI & PD Liab	20/40/15	SD	BI & PD Liab, UM	25/50/25
KS	BI & PD Liab, PIP, UM, UIM	25/50/10	TN	BI & PD Liab	25/50/15
KY	BI & PD Liab, PIP	25/50/10	TX	BI & PD Liab	30/60/25
LA	BI & PD Liab	10/20/10	UT	BI & PD Liab, PIP	25/65/15
ME	BI & PD Liab, UM, UIM	50/100/25	VT	BI & PD Liab, UM, UIM	25/50/10
MD	BI & PD Liab, PIP, UM, UIM	20/40/15	VA	BI & PD Liab, UM	25/50/20
MA	BI & PD Liab, PIP, UM	20/40/5	WA	BI & PD Liab	25/50/10
MI	BI & PD Liab, PIP, PPI	20/40/10	WV	BI & PD Liab, UM	20/40/10
MN	BI & PD Liab, PIP, UM, UIM	30/60/10	WI	BI & PD Liab, UM	25/50/10
MS	BI & PD Liab, UM	25/50/25	WY	BI & PD Liab	25/50/20
MO	BI & PD Liab,	25/50/10			

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