The Fraud of Florida No Fault

by Sean Fowler

Like other states Florida originally adopted No Fault Personal Injury Protection Coverage (PIP) as a way to control the rising cost of auto insurance, particularly bodily injury liability coverage and reduce legal disputes. Unfortunately it has failed its intended purpose. It has failed because of fraudsters, cheaters and profiteers, costing Florida auto insurance consumers and taxpayers billions of dollars. From the inception of Florida No Fault four decades ago, the Florida legislature has made several attempts to fix the law. The most recent focus of their efforts was to strengthen provisions to fight fraud and further define what is payable in order to control rising medical cost and reduce potential legal disputes. In a competitive pricing market these changes would also encourage insurers to ultimately pass the anticipated cost savings on to Florida auto insurance consumers.

In 2007, the legislature considered whether to let Florida No Fault sunset and replace it with a traditional tort based system. This consideration included a provision that would require mandatory bodily injury coverage, a coverage that most Florida auto insurance consumers already have. Conversely they also considered reinstating No Fault with changes purported to contain rising medical cost and ultimately reduce No Fault premiums. Some of the proposed changes included the inclusion of a fee schedule to determine the amount payable for an individual medical service along with treatment protocols stipulating the number of treatments payable for a given injury diagnosis. These considerations are similar to what you find in all other types of medical coverage including Medicare, workers compensation and private health care coverage. There was also a failed effort to cap attorney fees awarded on disputed amounts to a sum consistent with the amount of money in a given disagreement.

Effective January 2008 the legislature decided in favor of reinstatement of No Fault and included a treatment fee schedule. The adopted fee schedule appeared to define amounts payable for medical services under No Fault, thereby eliminating disputes in this regard between the insurers and providers. Initially, insurers applied the fee schedule and the providers accepted those amounts for their services. Despite the application of the fee schedules insurer average payouts remained relatively flat compared to prior years and there is evidence that because the law did not include treatment protocols providers simply treated more for the same injuries in order to make up for losses caused by the fee schedule.

Then in 2009 two things occurred in Florida that caused a significant rise in No Fault claim cost. First there was a significant rise in fraudulent claim activity as evidenced by increased accident and no fault claim frequency and subsequent arrests of fraudsters by state agencies. Second, attorneys representing treatment providers as assigned insureds began filing lawsuits contending that insurers could not use the legislated fee schedules unless they included the specific statutory language in their policy. The attorneys sought additional payments for their actual clients the treatment providers, chiropractors, therapist, physicians, etc. claiming their cause was to merely force insurers to pay the full policy benefits owed the insured. In fact they did not represent the best interest of the policyholder or family member who paid premium and their client's do not pay for the extra payments they sought. Their cause on behalf of their clients is contrary to that interest. By seeking more payout for individual treatments there is less dollar benefit available for the policyholder who paid for the coverage because of the $10,000 limit. Additionally, the extra cost for treatment and litigation is eventually passed to Florida auto insurance consumers. Under the current system the policyholder who paid the premium is

essentially paying more because of the increased cost for less real benefit to them. Though based on the contentions insurers could have prevented these lawsuits had they simply included the fee schedule language in their policies. The true motive of these lawsuits is to profit from a poorly written law and take advantage of the lack of clarity and enforcement of legislative intent from the courts. Most insurers have since added the language to their policies.

When considering their response to this issue insurers face a dilemma. Should they defend their position that the statutory language did not need to be included in the policy in order to apply the no fault fee schedules or simply settle. Even if they defended and won the cost to defend would be great. If they lost the cost would be tremendous and judges would award inflated fees to the attorneys representing the providers in part to punish insurers for defending themselves. If insurers decided to settle these lawsuits they would owe the additional amounts sought by the medical providers and fees to the providers' attorney which much of the time exceeded the amount in controversy. In any case this extra cost is eventually paid by the Florida auto insurance consumer, as evidenced by the rise in No Fault premiums, additional money that in large part goes directly into the pockets of attorneys.

The problem with defending is that in the lower courts getting either a favorable or unfavorable decision is a crap shoot. It essentially depends on luck and the individual judge's inclination. In reality the courts do not provide guidance until a case reaches the district level and eventually the Florida Supreme Court. By this time great expense has already been incurred and the loss exposure significantly increases. Three years after the first case on this issue was filed the Florida Supreme Court received Geico General Insurance Company vs. Virtual Imaging Services Inc., etc. The Florida Supreme Court decided in favor of Virtual Imaging and in their decision they gave further opinion that the statutory fee schedule was merely one consideration for determining reasonable charges. In effect, it appears that the Florida Supreme Court circumvented the intent of the Florida Legislature to contain medical charges to a certain amount and brought us back to the largely subjective determination of what is payable under No Fault for a medical service. The reasonable standard that existed prior to a fee schedule is subject to dispute. The ruling certainly puts doubt as to whether or not insurers who changed their language to meet the requirements of the statute can use the fee schedules to determine amounts payable under No Fault. The ruling was the best result that attorneys who specialize in No Fault litigation could ever hope for. It was the worst decision for Florida auto insurance consumers and tax payers whose best interest were not adequately considered by the court.

The result is that the same attorneys who successfully argued that insurers could not use the fee schedule unless the statutory language was included in their policy, and previously accepted the use of those fee schedules if the language was in the policy, have now changed their position. They have filed thousands of lawsuits against insurers contending that the amounts payable for their client's services based on the fee schedule are not the reasonable amount owed. The beauty of this argument for them is that they do not even need to get the total amount they are seeking for their client in order to prevail. They only need to prove that the insurer should have paid one cent more and they will be entitled to their entire fees. The fees sought in most cases exceed the amounts in controversy. One South Florida attorney who specializes in filing No Fault lawsuits has already filed thousands of lawsuits on this issue. He knows that because of uncertain outcomes in the courts that insurers face the same decisions as before concerning whether to defend or settle. On the other hand he faces very little risk and stands to make tens of millions of dollars in fees. Dollars paid for by Florida auto insurance consumers. Florida taxpayers also lose because their tax dollars will likely need to be diverted

from things like improving schools and roads to pay for additional resources needed by the courts to deal with these lawsuits. These lawsuits cause backlogs and delay everyone's access to the courts which result in increased cost to litigate cases. As a consequence of its findings, the court has succeeded in greasing the gears for attorneys to the obvious detriment of Florida citizens.

Admitting to their failure in 2008, the Florida Legislature in 2012 again attempted to fix No Fault. They increased fraud fighting tools, strengthened licensing requirements for medical providers and put further limitations on payable medical treatment. They also included some expectations for insurer premium reductions based on anticipated cost savings. However before the changes were even enacted lawsuits were filed by medical providers against the State of Florida claiming the treatment limitations were unconstitutional. Again the courts have shown a lack of clarity and have indicated doubt concerning whether or not the statutory limitations are enforceable. The likely result is more years of litigation and more of Florida auto insurance consumer money spent on attorneys instead of the benefits they purchased. Florida Auto Insurers will have no choice but to continue to raise rates, restrict their growth or in some cases leave Florida entirely. Thanks to the legislature and recent judicial outcomes Florida Auto Insurance is in crisis. Florida insurance consumers who already pay some of the highest property rates in the country now also pay some of the highest auto rates.

So why do legislators persist in trying to fix what is clearly unfixable. One reason is that there are those who believe that going back to a tort based system will result in more litigation of liability claims. Yet research comparing No Fault states to tort states shows that the difference in the amount of liability litigation is relatively small. Conversely, Florida's No Fault law has generated thousands of lawsuits. In addition, Florida insurance consumers do not pay less for liability coverage as intended with a no fault system. According to the National Association of Insurance Commissioners (NAIC) Florida consumers pay some of the nation's highest auto liability rates and total auto insurance expenditures. This is despite the fact that bodily injury liability coverage is not required in Florida and Florida allows insurers to sell one of the lowest bodily injury liability limits in the country. Florida instead has a financial responsibility law that requires motorists who are at fault in an accident and cause bodily injury to show they are able to respond to the loss or be subject to penalties. One way to comply with this requirement is by purchasing bodily injury liability coverage. However because this coverage is not mandatory, motorist are not penalized until after they cause injury to someone else and are unable to pay for the damages. Florida motorist who do not purchase bodily injury coverage are also the least likely to respond. For this reason Florida motorist are encouraged to buy uninsured motorist coverage at their own expense. Florida consumers pay for mandatory No Fault coverage with rates that have more than doubled in the last five years.

Another argument for No Fault is that it is needed so that folks who do not have healthcare insurance will have coverage if injured in an auto accident. This contention was made before Obamacare, so it may no longer be relevant. Still this argument never considered those who already pay premiums for healthcare and were also forced to pay for No Fault coverage they neither wanted nor needed. It has also been argued that Florida's emergency healthcare system is stronger with No Fault. This is because No Fault assures that most people injured in auto accidents have coverage. No Fault pays more for emergency care than most other healthcare coverages, up to the $10,000 limit. This is why some in the legislature who favor a tort system with mandatory bodily injury liability coverage also advocate mandatory emergency care coverage to pay for the initial emergency care up to a small limit sufficient to cover the average

emergency bill resulting from an auto accident which is around $2,000. There is also a concern that without No Fault healthcare cost will rise. However, unlike No Fault, healthcare coverage does have enforceable fee schedules and treatment protocols which will eliminate the problem of overcharges and over treatment inherent with No Fault. There would be none of the legal cost currently inflating No Fault losses. So the impact on healthcare would be mitigated. Given all the fraud, cheating and profiteering inflating losses and associated premiums there really is no apparent reason to keep No Fault.

The true reason the legislature keeps trying to repair what they cannot fix is that with No Fault they created a large pool of funds for distribution to special interest. There are certainly plenty of special interest groups who greatly profit from No Fault, who strongly encourage their allies in the legislature to keep No Fault. Despite this there are new efforts by some of our representatives to abolish No Fault in favor of a tort system with mandatory bodily injury liability. The only chance they have of succeeding is for Florida citizens to demonstrate their outrage at a current No Fault system by making their voices heard, use the power of their votes and demand change.

Sean Fowler is an assistant vice president of claims for the IAT Insurance Group and has handled Florida automobile claims for the last 27 years. You can contact him at sfowler@ofc-wic.com.

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