

AIA 2012 RECOMMENDED NO-FAULT LEGISLATIVE OPTIONS

Florida's no-fault law has been in effect since January 1, 1972. Notwithstanding several legislative reforms of the law, personal injury protection (PIP) premiums continue to be unnecessarily high because there are few cost controls for medical services and few effective measures to reduce rampant claims of fraud and abuse. Given the sordid history of PIP reform—in which every reform is greeted with ever new schemes by the unscrupulous--repeal appears to be the most meaningful option to fully address Florida's failed no-fault system.

2011 PIP legislation, the latest reform effort, was opposed by a coalition of interests whose income would have been negatively impacted if the bill had passed. The opposition coalition included certain PIP-only clinics, PIP claimant attorneys, non-medical healthcare providers, doctors, and hospitals. Support from a broad-based coalition including state officials, consumer and business organizations, insurance industry organizations, compelling data as to the need for reform, and an aggressive public information campaign were not enough to overcome the opposition. The 2011 reform legislation was approved by only three of the seven committees to which it was referred to in the House and Senate. Membership and Chairs of these committees are essentially the same for the 2012 Session. A 2012 reform bill with all of these same referrals will likely have the same fate as the 2011 legislation.

In 2003, legislation was enacted to repeal the state's motor vehicle no-fault law effective on October 1, 2007. The repeal took effect on October 1, 2007, since the no-fault law was not re-enacted prior to that date. Thus, Florida reverted to a tort or fault-based automobile insurance system for three months until January 1, 2008, the effective date of legislation amending and re-enacting the law passed during a Special Session called by Governor Crist.

Attached is Senate Banking and Insurance Committee Report # 2008-102 "The Effect of Repealing the Florida No-fault Law" (*B&I Report*) which analyzes the actual impact of the 2007 repeal on rates and other factors. The repeal did not include mandatory bodily injury (BI) or med pay (Med Pay) coverage. Following are excerpts from the B&I Report with AIA comments as to the potential mitigation of negative impacts, if BI and Med Pay are required.

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The great majority of Florida drivers carry the two mandated coverages (PIP and PD) according to estimates by the Department of Highway Safety and Motor Vehicles (DHSMV) which maintains data as to the number and percentage of vehicles that have at least the minimum required coverages. There are an estimated 12,386,222 private passenger, non-commercial vehicles registered in Florida and 94.51

percent (11,706,218) of these vehicles have the requisite PIP and PD insurance, while 5.49 percent (680,004) are uninsured. Committee staff estimate that about 87 percent of vehicles (10,752,161) are currently covered for BI liability, even though it is not mandated.

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The most direct effect of repealing no-fault and returning to a tort system is eliminating the requirement that motorists purchase PIP and that insurers provide this coverage. Removing this coverage can be viewed as a “savings” (by deducting the PIP premium), but it is a savings due to a loss of coverage. However, many motorists believe that PIP is duplicative of their own health insurance and its elimination will lower their overall insurance premiums.

Another effect of switching to a tort system is that premiums for bodily injury liability (BI) and uninsured motorist (UM) coverages will increase. This is attributable to the shifting of costs or losses from PIP coverage to these two coverages. Property damage liability (PD) of \$10,000 will still be required for all Florida vehicle owners under tort. Florida does not mandate bodily injury liability (BI) insurance, unless triggered by the Financial Responsibility Law due to certain accidents or violations.

AIA Comments

The PIP medical coverages could be replaced with a more efficient Med Pay health insurance coverage for an insured and family. Like PIP, the Med Pay would cover medical costs before health insurance, UM, and recovery from a third party at fault driver's BI coverage. In other jurisdictions, historic Med Pay premiums have been substantially less than a PIP premium and more of the premium goes to actual medical treatment. Thus, with mandatory Med Pay, repeal will likely have reduced cost impact and yet preserve elements of a first party medical coverage in auto.

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There will likely be a larger percentage of motorists who will not be covered for their own bodily injuries when PIP sunsets, because there will be no alternative requirement to carry Med Pay, BI or UM (unless an accident or traffic violation triggers the requirement to carry BI under the Financial Responsibility Law). Currently, approximately 94.5 percent of vehicles (11,706,218) have the mandated PIP and PD coverages, while 5.49 percent (680,004) are uninsured. The repeal of the no-fault law does not repeal the requirement for vehicle owners to obtain \$10,000 of property damage liability coverage, as recently confirmed by the Department of Highway Safety and Motor Vehicles (DHSMV).

AIA Comments

Mandatory Med Pay would provide coverage for a motorist's own bodily injuries.

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Effect on Auto Premiums and Coverages Due to Repeal of No-Fault
Private passenger auto insurers are in the process of making rate and form filings with the Office of Insurance Regulation (OIR) as a result of no-fault's sunset. According to officials with OIR, 30 auto insurers (representing a statewide combined market share of 45.1 percent) have currently made rate filings (as of September 1, 2007) and the overall average premium reduction is -13.8 percent (Table 5). This estimate includes the state's two largest auto insurers, State Farm (21.5 percent market share) and Allstate (14.3 percent market share). The average BI premium for the 30 carriers is increased by 21.2 percent and the average premium for UM coverage is increased by 12.5 percent. The premium impact for PIP is decreased by 100 percent since it is no longer in effect. The overall premium decrease (-13.8 percent) is attributable to the elimination of PIP coverage. If the policyholder elects optional Med Pay coverage to replace PIP, this savings would be substantially lowered or even eliminated, which will vary by insurer, territory, limits purchased, and other rate factors.

AIA Comments

Any overall premium decrease would seemingly be less reflecting the cost of mandatory Med Pay coverage with health insurance cost control features but should be greater than that for existing Med Pay without such features. The owners of the approximate 13% of vehicles without BI coverage cited in the *B&I Report* would incur additional cost of BI if that coverage were mandated. However, mandated BI would seemingly have an offsetting impact on the cost of UM coverage as more people would be insured.

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The increase in BI premiums is also due to an increase in additional lawsuits that are now eligible for tort recovery and payments for non-economic damages, i.e., pain and suffering, given that the no-fault verbal threshold is repealed.

AIA Comments

Property damage liability (PD) of \$10,000, which is currently and will continue to be required along with Mandatory Med Pay, will mitigate against minor economic damage liability suits. Additionally, AIA members believe the current verbal threshold's

effectiveness in reducing payments for non-economic damages has been substantially eroded since it was first enacted by adverse decisional law.

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Certain injuries now compensated by PIP will instead be compensated by UM. These are the injuries for which the at-fault driver either is uninsured (does not have BI coverage) or is underinsured (does not have sufficient BI coverage to cover damages).

AIA Comments

Medical costs resulting from injuries now compensated by PIP would be paid by Med Pay, if mandated. In addition, there will be a substantially reduced number of at-fault drivers' uninsured if BI is mandated.

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The new Med Pay coverage will contractually limit coverage to medical expenses that are reasonable. In defining what constitutes "reasonable expenses," the State Farm policy provides that the term means the lowest of the following charges: 1) The usual and customary fees charged by a majority of healthcare providers providing similar medical services; 2) The fee specified in any fee schedule; 3) The fees agreed to by both the insured's healthcare provider and State Farm; or 4) The fees agreed upon between the insured's healthcare provider and a third party when State Farm has a contract with such third party. Allstate will withdraw its PIP and Excess Med Pay coverages and introduce two new auto coverages: Automobile Medical Payments (MED) and Extended Injury Protection (EIP). The scope of MED coverage will not be as broad as PIP, but the premium will be considerably lower for this coverage according to statements contained in its filing. The Allstate rate for \$10,000 of MED coverage is approximately 50 percent of the cost for \$10,000 of PIP coverage.

AIA Comments

The above are examples of Med Pay policies with cost controls actually filed prior to or during the 10/1/2007-1/1/2008 period no-fault was repealed and Florida reverted to a tort or fault-based automobile insurance system.

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Health Care System

Medical costs previously paid by PIP will not only be transferred to other auto coverages as explained above, but shifted to some extent to the

health care system, e.g., health insurers, health care providers, government programs (Florida's State Group Health Insurance program, Medicare, Medicaid), to employers and consumers. Currently, PIP provides primary medical coverage for persons injured in auto accidents. With no-fault's sunset, for those circumstances in which the other auto coverages are not applicable, the injured party's health insurance coverage would become primary.

The costs that are ultimately transferred to the health care system will likely increase health insurance premiums and may make it more costly for employers to offer health insurance to their employees. According to the OIR, four health insurer rate filings have been approved (as of September 2007) by the agency in anticipation of PIP's repeal (Blue Cross and Blue Shield of Florida and its health maintenance organization (HMO), Health Options; Aetna Health Inc. and Aetna Life Insurance Company). The four companies represent 42 percent of the small employer group health insurance market (1 to 50 eligible employees) in the state and the individual rate increases range from 0.7 to 1.7 percent. Insurers must provide policyholders with a 30-day notice of premium change before a rate change may be implemented. Blue Cross and Blue Shield (BC/BS) filed for an increase of 1.7 percent to its base rate due to projected increased claims resulting from PIP's sunset.

The impact of PIP's repeal will affect other medical services. Representatives with the Agency for Health Care Administration estimate that the maximum annual amount that could be shifted from PIP losses to Medicaid would be \$26,700,000. This calculation is based on multiplying the number of Medicaid recipients (2,670) by the \$10,000 PIP coverage amount and assumes that all PIP losses would be absorbed into the Medicaid system (for persons injured in accidents who are Medicaid recipients). This estimate appears to be too high given that Agency representatives admitted that they did not consider shifting any of the PIP costs to other auto coverages because they were not knowledgeable as to how to do that calculation. They assumed that each Medicaid recipient would be involved in an auto accident, be the at-fault driver, not carry any auto insurance and would utilize the full \$10,000 benefit amount.

The Division of State Group Insurance administers the state group health insurance plan for the state's employees and dependents enrolled in the plan. The sunset of PIP is expected to shift some costs to the State Employee Health Insurance Program. Medical claims of participants in the preferred provider organization (PPO) portion of the State Employee Health Insurance Program are estimated to increase by \$7.4 million on an annualized basis. This represents an increase of less than 0.9 percent of the total PPO medical care expenditures (roughly \$811.1 million) of the program. In addition, risks will be shifted to the (health maintenance

organization) HMO's participating in the State Employee Health Insurance Program, resulting in HMO costs increasing by \$5.6 million (roughly a 0.9 percent increase statewide). Combined, these increased costs equate to a 1 percent premium increase for covered employees. These cost estimates did not take into consideration any shifting of PIP costs to other auto coverages.

There will be an impact of the tort system on hospitals, particularly emergency departments and trauma centers, as to payment delays, administrative costs for billing and collections, and higher patient default rates.

AIA Comments

These figures examined a straight repeal of PIP. The purported increased cost impact for the health care system will be substantially reduced, if Med Pay and/or BI are mandated. Moreover, of course, we have already examined the historically lower premiums associated with Med Pay elsewhere. Consequently, an examination of the projected costs is, of course, a projection. It is without doubt that removing a mandated coverage, like PIP, will reduce the costs associated with that coverage while, of course, most residents already have health insurance and the potential of Med Pay and greater BI provides a more complete picture of the true potential costs.

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Health care provider fraud and abuse, and costs associated therewith, will likely be reduced under a tort system, as compared to a no-fault. The PIP requirements for timely payment of any "reasonable" charge, regardless of fault, provides an easier opportunity for health care fraud and abuse than a liability situation where fault of a third party must be established and claims payments are not subject to statutory time frames, interest penalties, and attorney fee awards. Collecting up to \$10,000 in PIP benefits acts as an incentive for unscrupulous health care providers, in collusion with dishonest attorneys and others, to commit various types of health care fraud according to representatives with the Division of Insurance Fraud. Examples of such crimes include creating bogus health care clinics where providers fabricate their credentials, bills or the office itself, provide treatments that are non-existent or not medically necessary, purposely miscode diagnosis, inflate bills, or create "doc in the box" schemes where often older medical providers are paid for the use of their license. While health care fraud and abuse can occur under any system, the rewards are much easier to obtain under PIP than under a tort system.

AIA Comments

Agree

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Auto insurers would be relieved from paying (or the threat of paying) attorneys' fees in most auto injury liability cases, if no-fault is repealed. The statutory requirement to pay attorneys' fees applies only if the insured (or his assignee) successfully sues his own insurer. An insurer must pay attorney's fees under s. 627.428, F.S., if it loses in court to its insured or beneficiary under an insurance policy or contract. However, if the insurer prevails, its fees are not paid by the losing side. In a third-party liability suit, the insurer is generally not required to pay attorney's fees to the plaintiff, unless it is determined that the insurer acted in bad faith in denying the claim. Therefore, even though BI costs will increase if PIP is repealed, the costs associated with payment of attorney fees in PIP cases will generally not be transferred to BI.

AIA Comments

Agree

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It is likely that litigation will increase, due to the ability to sue for non-economic damages, even for minor injuries, and for economic damages that are currently covered by PIP.

AIA Comments

Property damage liability (PD) of \$10,000, which is currently and will continue to be required along with Mandatory Med Pay, will mitigate against minor economic damage liability suits. Additionally, AIA members feel the current verbal threshold effectiveness in reducing payments for non-economic damages has substantially eroded since it was first enacted. If Florida can reduce fraud and "build up" now attendant in no fault and trade one perfunctory litigation for tort litigation that allows greater scrutiny and challenge of damages, many insurers believe that will produce a more efficient system while recognizing there will be some initial delay and bumps on the road. Colorado offers just the latest example where the transition to tort has been successfully managed and has realized real savings for consumers.

The *B&I Report* provides a framework of the issues which need to be considered as to the impact of repealing Florida's automobile no-fault law. While the data utilized in the report needs to be updated, many of its conclusions remain valid today. Any new study needs to consider further the potential impact of Med Pay and BI on the potential overall cost picture as those coverages may ameliorate potential "cost shifts" that were previously postulated.