Personal Injury Protection (PIP) Insurance Gone Wrong:

How a System Meant to Provide Greater Compensation for the Injured and Reduce Premiums for Florida Drivers Has Instead Led to Extraordinary Profit for Lawyers and Among the Highest Premiums in the Country

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Victor E. Schwartz
Cary Silverman
Shook, Hardy & Bacon L.L.P.
1155 F Street NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211
E-Mail: vschwartz@shb.com
csilverman@shb.com

Executive Summary

Through eliminating the inefficiency of lawsuits and attorneys fees, no fault insurance, also known as "personal injury protection" (PIP), was supposed to provide more money for injuries, more quickly, with fewer lawsuits, for a lower insurance premium. Between adoption of this system in 1972 and today, something went terribly wrong in Florida. Lawsuits over medical bills are rampant and becoming only more frequent. Under the PIP system, attorneys routinely receive extraordinary fees to fight over nominal recoveries for their clients. Lawyers literally sue over single dollars and change because they are enticed by the promise of huge fees. Florida drivers pick up the tab with the fourth-highest automobile insurance premiums in the nation.

There are several contributing factors to the poor state of Florida's PIP system. This white paper focuses on one key element – excessive attorneys' fees. Although those who are injured in accidents are limited to recovering $10,000 under the PIP system for such out-of-pocket losses as medical bills and lost wages, their attorneys operate under no such constraint. Florida courts routinely permit lawyers to charge for hundreds of hours of work, at rates in the $400 to $500 per hour range, for noncomplex PIP cases that are determined without consideration of fault. To make matters worse, some Florida courts "enhance" an attorneys' fee that already dwarfs the client's compensation through applying a "contingency risk multiplier." This multiplier, typically a figure between 1.5 and 2.5, is supposedly for the purpose of compensating an attorney for the risk that he or she will not receive any recovery. In other words, it provides compensation for PIP cases that were found to be without merit. Contingency fee risk multipliers were meant for high-risk cases such as those that break new legal ground or are evidence-intensive. It was not intended for no-fault cases with predictable outcomes. When applied in the PIP context, the multiplier rewards the bringing of meritless cases and provides a windfall to prevailing plaintiffs' attorneys.

For these reasons, this white paper recommends that the Florida Legislature consider eliminating the availability of contingency risk multipliers in PIP litigation and constrain attorneys' fees in a manner than places them in proportion to their client's recoveries.

No-Fault Insurance

The Purpose of No Fault or "PIP"

No fault automobile insurance systems, also known as "personal injury protection" (PIP), are intended to ensure that accident victims receive prompt compensation for their medical bills by eliminating the need to prove who caused the crash. No fault was also driven by a desire to increase compensation by reducing the need for individuals who are injured to sacrifice one third or more of their recovery to their attorneys as a contingency fee and to reduce automobile insurance premiums for all drivers by reducing the cost of litigation. Under these automobile insurance programs, policyholders first recover their medical expenses, up to a certain level, from their own insurers, before resorting to civil litigation against the other party's insurer for any additional liability.

Law Professor Jeffrey O'Connell, who was one of the most forceful advocates for adoption of no-fault systems both in the states and by Congress, held up PIP as a means to eliminate the waste and uncertainty inherent in the tort system. In an article co-authored with Peter Kinzler of the Coalition for Auto-Insurance Reform, Professor O'Connell repeatedly emphasized attorneys' fees as a substantial contributor to a system that they described as "the exact opposite of what injured people need."[1] They observed that "[a]lthough plaintiffs attorneys are free to reduce their fees in order to provide more for their clients, the literature is devoid of any such instances, even where the victim's loss is great and the attorney's time is insubstantial."[2] "[A]ttorneys and quick-buck artists are getting rich," while motorists are paying excessive premiums for too little compensation, they said.[3]

Nearly 28.4 cents of each dollar of premium goes to plaintiffs and defense lawyers to handle claims, while only 14.5 cents goes toward medical bills, lost wages, and other economic loss, O'Connell and Kinzler indicated. The remainder goes to non-economic loss (16.9 cents) and fraudulent and excessive claims (12.6 cents). In advocating adoption of PIP, they understandably asked, "Can anyone possibly give a passing grade to a system that pays twice as much for attorneys as it does for the economic loss of victims, and more than three times as much for attorneys and pain and suffering combined as for economic loss?"[4]

O'Connell and Kinzler concluded that PIP would "achieve substantial increases in economic loss benefits and lower premiums the hard way (at least politically)—by transferring dollars from people who make a living off the tort system to injured people. The money saved

by eliminating most lawsuits, along with the attendant attorneys' fees on both sides, pain and suffering damages, and the fraud generated by the pain-and-suffering incentives of the tort system, would indeed enable motorists to enjoy both lower premiums and better coverage of economic loss."[5]

Adoption Nationally

Twelve states, including Florida, have adopted a no-fault system and mandate first-party PIP coverage for medical benefits, wage loss, and death benefits, with a limitation on pain and suffering.[6] Each jurisdiction varies in its PIP system with respect to the minimum coverage amount, deductibles, tort thresholds for pain and suffering claims, and the use of fee schedules or treatment protocols. Three of these twelve states provide drivers with a choice between purchasing PIP coverage or traditional tort liability coverage that does not include PIP benefits.

Florida's PIP System

When Florida's PIP system went into effect in 1972, it became the second state to adopt a no-fault automobile insurance plan.[7] Under Florida law, all drivers are required to carry PIP insurance. This portion of an automobile insurance policy is intended to provide prompt payment of up to $10,000 from the plaintiff's own insurer regardless of fault for the insured, relatives residing in the same household, persons operating the insured vehicle, passengers inside the insured vehicle, and persons struck by the insured vehicle. The PIP system pays for 80 percent of reasonable medical expenses, 60 percent of loss of income, 100 percent of replacement services, plus a $5,000 death benefit. PIP constitutes about a quarter of a Florida driver's total insurance premium.

Florida law requires PIP claims to be paid within thirty days of an accident. If a claim is not paid within this time period, or the insured believes that the insurer did not pay the full amount to which he or she is entitled, then the insured may file a lawsuit in county court, which handles small claims. A prevailing plaintiffs' lawyer is entitled to recover his or her fees.[8]

Under the PIP system, an accident victim can sue the at-fault driver in the tort system only if he or she sustains (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or

disfigurement; (c) significant and permanent scarring or disfigurement; or (d) death.[9] Otherwise, the owner, registrant, operator, or occupant of a PIP-insured vehicle is immune from tort actions (and, conversely, may not sue to recover damages) for pain, suffering, mental anguish, or inconvenience arising out of the accident.

In 2006, the Florida Legislature voted to extend the PIP law, which was scheduled to sunset on October 1, 2007, for two additional years with no significant changes.[10] Governor Jeb Bush vetoed the bill due to its lack of inclusion of needed reform. On October 5, 2007, the Florida Legislature passed, and Governor, Charles Crist signed, House Bill 13-C1 to revive the PIP law. The Act, which went into effect on January 1, 2008, made several modest changes to the PIP system including permitting insurers to impose a medical fee schedule that limits most fees to twice the amount payable under Medicare, hospital charges for emergency care to 75 percent of the hospital's usual and customary charges, and emergency services and care provided by a physician or dentist in a hospital to the usual and customary charges in the community. The law extended the period for an insurer to pay an overdue claim without being subject to a lawsuit from fifteen to thirty days. The law also subjected insurers that fail to pay valid PIP claims with such frequency as to indicate a general business practice to liability for committing an unfair or deceptive practice under the Insurance Code.

The Nature of the PIP Problem

The cost of PIP insurance in Florida is rising. Last year, Progressive called PIP "the driving factor" behind its request for a rate increase of 8.5 percent statewide (14.5 percent in Miami-Dade county), "due to both worsening loss trends and increased fraud activity."[11] State officials, such as Robin Westcott, the Office of Insurance Regulation's Director of Property and Casualty Financial Oversight, recently predicted that "you will see carriers leave the state," if the abuse continues unchecked.[12] There are four elements of the problem.

1. ***Lawyers bill excessive fees.*** John Askins, director of Florida's Division of Insurance Fraud, notes that "[b]ehind every clinic are the lawyers."[13] When a clinic does not receive full compensation for its bill from an insurer within thirty days, lawyers send a demand letter to the insurer demanding that they pay within an additional thirty days. Then they sue. As described below, if they prevail, even for

an amount as small as $1, the attorneys are entitled to receive their legal fees at a rate that may exceed $400 or $500 per hour. If an insurer is suspicious about the validity of charges and fails to pay, it risks such a lawsuit. It is also common for an insurer to face multiple lawsuits with respect to a single policyholder because each treatment provider may separately sue the insurer. The patients, however, may not even know that a lawsuit was filed. The issue of attorneys' fees in PIP suits is addressed in greater depth in the following section.

2. ***Loose licensing and oversight of clinics.*** Under current law, clinics owned by certain professions already licensed in the state, such as massage therapists, are exempt from additional licensing. There are reportedly thousands of fly-by-night healthcare clinics operating in Florida with no government oversight, providing a means to perpetrate fraudulent records of medical procedures that never occurred or for injures that are greatly exaggerated. Some have called these clinics "PIP mills."[14] Attorneys specializing in accident cases refer their clients to these clinics.

3. ***Insufficient time to fully investigate fraudulent claims.*** Insurers have criticized the current system in which they are requested to pay claims within thirty days as not allowing them enough time to investigate whether a claim is legitimate.

4. ***Outright fraud.*** The National Insurance Crime Bureau (NCIB) lists Florida as the number one state for staged accidents (3,006), with nearly the combined total of the next two highest states, New York (1,680) and California (1,619).[15] Three of the top five cities for staged auto accidents are in Florida – Tampa, Miami, and Orlando.[16] The basic scam involves a fake crash in which loads of people – who may or may not have been in the car – are supposedly injured. The accident "victims" go to clinics that are complicit in the fraud. They fill out paperwork indicating the individuals received treatment for their injuries, even if they were not. Those who are recruited to take part as fake victims may be the unemployed, recent immigrants, and others in need of money. They sign over their legal rights to the clinic to collect the medical expenses on their behalf.[17] In other cases, a

clinic may simply demand that an insurer pay for diagnostic tests that were unnecessary or treatment that never occurred.[18]

Unsuspecting Floridians also get caught up in this racket. In December 2010, the *Miami New Times* provided an expose on the case of a Trinidad immigrant, Ganesh Sohan, who called "411-PAIN," after a car accident based on television ads claiming that those who are injured are entitled to $10,000, but claims he ended up with unnecessary tests and treatment, legal fees, and debt.[19] Sohan now has brought a class action lawsuit against the service alleging false advertising, deceptive practices, and civil conspiracy.

A Core Problem: Excessive Attorneys' Fees in PIP Suits

While the purpose of no-fault insurance is to reduce litigation and put more money into the hands of those who are injured in car accidents with less going toward legal fees, PIP has had the opposite result in Florida. Attorneys routinely recover fees that dwarf the maximum $10,000 that their client's receive through PIP coverage for medical bills and lost wages. Attorneys fees in PIP litigation are not only high as a result of prolonged litigation over nominal amounts, but also because some Florida courts award attorneys as much as 2.5 times what is already a fee computed at $400 or $500 per hour through what is known as a "contingency risk multiplier."

How Fees Are Computed in Florida in PIP Cases

In a typical PIP case, a person who is injured in a car accident enters a legal services agreement with an attorney in which the lawyer only receives a fee if his or her client recovers, either through a settlement or verdict. This contingency fee agreement may provide that the lawyer is to receive 30% of the client's recovery as a fee. When awarding fees in PIP cases, however, Florida courts are not constrained by this arrangement. Rather, the first step Florida courts take to determine a fee award for a prevailing plaintiffs' lawyer is to apply the

"lodestar approach." The lodestar approach determines a fee based on the number of hours that the plaintiffs' attorney reasonably expended on the litigation times a reasonable hourly rate. For example, a typical calculation of fees in a PIP case might be 150 hours times $400 per hour = $60,000 in fees.

Although a fee in the $60,000 range might seem to be more than fair (some might say excessive) compensation for a no-fault claim with a value that cannot exceed $10,000, some Florida courts will nevertheless "enhance" the fee by applying a "contingency risk multiplier." This step involves the judge multiplying the fee reached by the lodestar approach by a factor of between 1 and 2.5 – the contingency risk multiplier – theoretically applying a higher multiplier based on the level of risk of nonpayment in the type of case. The Florida Supreme Court has provided the following guidance on the appropriate size of the multiplier based on the trial court's determination of the plaintiffs' likelihood of success at the outset of the case:

Chance of Success	**Multiplier**
More likely than not	1.0 to 1.5
Approximately even	1.5 to 2.0
Unlikely	2.0 to 2.5[20]

Thus, if the trial court finds a contingency fee case was in the middle range in likelihood of success, then it may turn a $60,000 lodestar fee into a $90,000 to $120,000 award to the plaintiffs' attorney. At such rates, plaintiffs' attorneys receive about ten times as much compensation as their clients from PIP lawsuits.

The philosophy underlying overcompensating an attorney is that lawyers who work on contingency-fee agreements "win some and lose some." The multiple, therefore, is effectively supposed to compensate the attorney for cases that he or she lost and received no recovery. While permitting contingency risk multipliers, the Florida Supreme Court has cautioned that they should be reserved for cases in which a plaintiff can show that he or she would have faced substantial difficulty finding counsel absent the potential for such an enhancement.[21]

There is some confusion in Florida law as to when a contingency risk multiplier should apply in PIP cases. In a 2007 case, attorneys for an individual who was injured in an automobile accident sued to recover a $1,315.30 balance for chiropractic services.[22] The parties amicably resolved payment of the expense except for payment of the plaintiff's attorneys' fees. Plaintiffs' counsel claimed he worked 193.75 hours on the case. The county court multiplied this amount by a rate of $400 per hour to reach $77,500 in fees – an amount already near sixty times that which was disputed in the lawsuit. Then, the trial court applied a

2.5 contingency risk multiplier, yielding the plaintiffs' counsel a grand total of $193,750 in fees – a rate of $1,000 per hour. Ultimately, an appellate court found the multiplier improper because there was no showing that the plaintiff would have found difficulty obtaining a competent lawyer to take his case without such compensation. More recently, however, other Florida courts have permitted use of multipliers in PIP cases, even when the plaintiff does not testify that he or she actually had difficulty finding representation without such a fee arrangement.[23]

Contingency Risk Multipliers are Inconsistent With PIP Lawsuits

The fundamental flaw in application of a contingency risk multiplier in the context of PIP litigation is the nature of such suits – which, by definition, are "no fault." There is a negligible chance of "losing" such suits when the evidence is carefully screened by the plaintiffs' law firm that evaluates the case. The primary question in PIP cases is the amount of compensation due to the client for covered expenses up to the $10,000 policy limit. In fact, PIP claims are precisely the "kind of work that the lawyers want to do."[24] Their outcome is predictable, damages are relatively certain, the work involved is routine, not research intensive, and the attorneys are guaranteed recovery of their fees by statute. Advertisements along Florida's roadways remove any doubt that Florida attorneys are ready and willing to handle such ligation. These were among reasons why a Seminole County judge considered contingency risk multipliers inappropriate in PIP cases, which he found "should probably be reserved to apply to those situations where it was originally intended (the patient who is on unequal economic terms with their insurance company and has to look high and low to find that rare lawyer willing to take these kind of cases).[25]

Moreover, in many cases, it is not even the person injured in the accident who looks for an attorney, but instead the medical services provider to whom the patient-insured assigned his or her right to recovery. Such corporate plaintiffs typically have arrangements with law firms or individual attorneys to bring PIP lawsuits. As the authors of a 2005 *Florida Bar Journal* article observed:

> Plaintiffs' firms may be as large, if not larger, than the defense counterparts representing the insurance carriers in these cases. These plaintiffs' firms have the assets and manpower to outlast their smaller predecessors in extended litigation. Many of the cases before Florida courts are brought . . . by corporate plaintiffs, utilizing P.I.P. litigation as much as for bill collection as for litigation. With this in mind, most litigants in P.I.P. cases have the same

> access to the courts as insurers. Because the risk to plaintiff's attorneys has decreased so significantly, the contingency fee multiplier creates more problems than it solves.[26]

In addition to the lack of need for a contingency risk multiplier in PIP cases, legal commentators have also criticized their use as inconsistent with the purpose of Florida's no-fault law. Douglas H. Stein and Donald A. Blackwell note that the one-way shifting of the cost of attorneys' fees onto a losing insurer in PIP cases are designed as a penalty for failing to pay a valid claim and to discourage insurers from contesting valid claims. A contingency risk multiplier, however, serves to compensate the plaintiffs' attorneys for the PIP cases in which they *did not* prevail, i.e. where the insurer was warranted in contesting a claim. Thus, Stein and Blackwell note that the risk multiplier has the effective of encouraging plaintiffs to file non-meritorious cases and yields fee awards that do not have a reasonable relationship to the matter being litigated.[27]

Suing Over Pennies, But Collecting Attorneys' Fees in the Thousands

Insurers have documented numerous cases of improper billing practices in which attorneys' fees are inflated.[28] But the most frequent abuse is the filing of a lawsuit for a nominal amount to receive attorneys' fees that dwarf the underpayment. Application of a contingency risk multiplier further allows such fees to soar. The *Sun-Sentinal* recently reported the following fees in PIP cases:[29]

- In Palm Beach County, a lawsuit ended in a judgment of $1, but the prevailing attorneys collected $5,500 in fees.
- In Miami-Dade County, a lawsuit ended in a $2.53 judgment for the plaintiff when the insurer had miscalculated the interest owed. The personal injury lawyers who brought the $2 suit received $13,370 in fees. While County Judge Robin Faber agreed it was a "minimal amount," he said, "that's what the statute requires has to have been paid and I can't help that, you know."
- Another Miami-Dade lawsuit came down to one cent, where United had paid a chiropractor for treating an auto accident victim but was short a penny due to a rounding error. When asked if anyone alerted United, the attorney responded, "It is not our job. . . if they don't pay, we get to file suit." In that instance, the lawyer went too far. The judge dismissed the case and awarded United $3,065 in fees.

- A Palm Beach County lawsuit resulted in a 2009 judgment against Progressive Auto Pro Insurance of just $1 for failing to provide an explanation of benefits, or EOB, on the claim. The lawyers received $5,500 in fees.
- In an infamous Seminole County case stemming from a 1995 car accident, a $12,000 award for a denied claim for jaw discomfort resulted in $600,000 for the claimant's attorneys.
- In Broward County, a $3,700 dispute yielded about $90,000 in fees for the prevailing attorneys.
- Two other Broward County PIP judgments for $2,000 and $6,000 resulted in fee awards of $160,000 and $139,000, respectively. Regulators agree that even if there is some truth that insurers dragged out the cases, when lawyers receive twenty to sixty times more than their clients, something is wrong with the system.

These cases are not exceptions. One in three of the more than 23,500 PIP-related suits filed against insurance companies since 2006 in Broward County sought to recover losses of less than $500.[30]

PIP Lawsuits Are Big Business

Despite a drop in reported car crashes and reduced injuries due to improved vehicle safety features, lawsuits are on the rise.

Recognizing the lucrative nature of PIP suits, an industry has developed within the legal community for bringing such claims. The *Sun Sentinel* has found that in Broward County, just five law firms are responsible for 40 percent of the PIP suits filed in the past five years – more than 9,500 cases. One North Miami lawyer, Christopher Tuccitto, who has written a textbook on PIP, has filed 3,300 PIP suits alone since 2006. Another, Steven Lander of Fort Lauderdale, filed more than 1,600 claims. He acknowledges that attorneys' fees can "dwarf the amount of damages" and candidly notes that such suits are "lucrative." "If there wasn't the attorneys' fees, I agree there wouldn't be the amount of litigation," Landers said.[31]

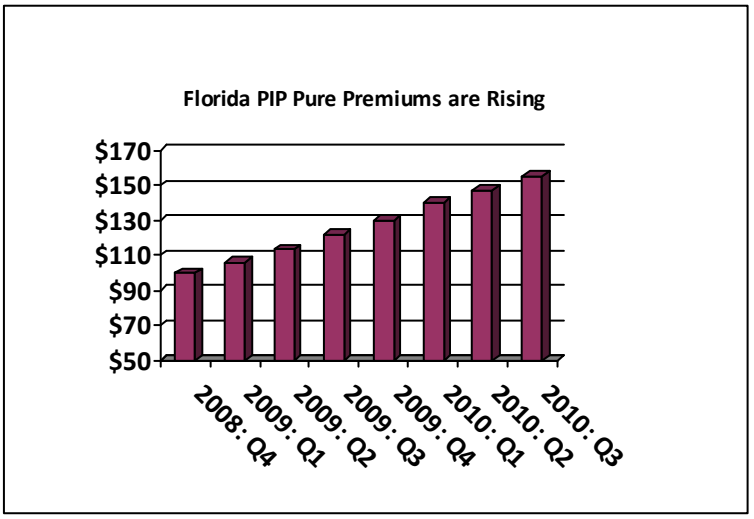
PIP lawyers often have alliances with a handful of clinics that serve as their clients. A medical billing and collection agency, Gulfstream Medigroup of Palm Beach Gardens, had the most – nearly 1,200 suits through early November 2010, some for as little as $3.10. An attorney, Brian LaBovick, actually owns the company and his firm handles the suits. In

Broward County, just nine medical providers – seven MRI centers, a doctor and a chiropractor – filed more than 3,600 PIP lawsuits since 2006. Boca Raton lawyer Stephen Deitsch has filed hundreds of cases on behalf of Med-Manage, which received the $1 recovery discussed above, and Florida Injury Centers, a chain of clinics.[32]

Florida's largest auto insurer, State Farm, is "seeing more suits than we ever have," said Russ Kile, a claim section manager.[33] United Automobile Insurance Co. has spent about $80 million fighting lawsuits over the past four years, costs that are passed on to the public.[34] According to a 2007 Insurance Research Council report, the percentage of PIP claimants in Florida who hire attorneys rose from 33 percent to 45 percent between 1997 and 2005, while the severity of the injury at issue became less serious.[35] Ron Poindexter, director of the National Insurance Crime Bureau, an industry-funded group, calls the PIP situation in Florida a "public feeding trough."[36]

Florida insurance regulators say that the filing of lawsuits is out of control. "Lawyers and other people in this field have found ways to make some money here," said Deputy Insurance Commissioner Belinda Miller. "The lawsuits are increasing because this has become a fairly well-oiled machine on the side of the people that bring those cases, and it's lucrative."[37]

As a result, PIP premiums charged by Florida's top ten auto insurers have substantially increased over the past two years. The large number of PIP lawsuits and resulting legal expenses are factors contributing to the steep rise in insurance rates. As noted in the chart to the right, the amount of pure premium required to cover the expected costs of the PIP system, soared 55.4 percent between 2008 and the third quarter of 2010.[38]



A Potential Solution to Curb Excesses in the PIP System

Florida needs to return to what PIP was all about – providing speedy recovery for basic injuries from car accidents with low transaction costs, and, consequently, providing Florida drivers with lower insurance premiums.

How Other States With PIP Determine Attorneys' Fees

Some of the few states that have mandatory PIP insurance have taken steps to control attorneys' fees. At least three states, Kansas, Kentucky, and Pennsylvania, provide for awards of attorneys' fees to claimants only when it is found that the insurer "unreasonably refused to pay" or the insurer's denial of the claim was "without reasonable foundation."[39] Such limitations would appear to preclude awards of attorneys' fees in cases in which there were legitimate questions about the validity of a claim. In addition, some PIP states place a claimant at risk of being required to pay the legal expenses of his or her insurer if a claim is found to be "excessive" or "fraudulent."[40] This risk may deter claims against insurers due to errors involving nominal miscalculations. Pennsylvania law explicitly prohibits recovery of attorneys' fees on a contingency-fee basis in no-fault automobile insurance cases, which would preclude use of contingency risk multipliers.[41]

New York provides a detailed fee schedule for resolution of no-fault automobile insurance coverage disputes. The applicable statute provides that a claimant is "entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations."[42] Pursuant to this law, the New York State Insurance Department has promulgated Regulation No. 68 (11 NYCRR 65), which provides closely regulates attorneys' fees in PIP cases:

> (a) If an arbitration was initiated or a court action was commenced by an attorney on behalf of an applicant and the claim or portion thereof was not denied or overdue at the time the arbitration proceeding was initiated or the action was commenced, no attorney's fees shall be granted.
>
> (b) If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited as follows:
>
> (1) If the resolved claim was initially denied, the attorney's fee shall be $80.

(2) If the resolved claim was overdue but not denied, the attorney's fee shall not exceed the amount of first-party benefits and any additional first-party benefits, plus interest thereon, which the insurer agreed to pay and the applicant agreed to accept in full settlement of the dispute submitted, subject to a maximum fee of $60.

(3) In disputes solely involving interest, the attorney's fee shall be equal to the amount of interest which the insurer agreed to pay and the applicant agreed to accept in full settlement of the dispute submitted, subject to a maximum fee of $60.

(4) Notwithstanding the limitations of this subdivision, the insurer may, at its discretion, offer a higher attorney's fee, subject to the limitations of subdivisions (d) or (e) of this section, in order to resolve the dispute during conciliation.

(c) Except as provided in subdivisions (a) and (b) of this section, the minimum attorney's fee payable pursuant to this subpart shall be $60.

(d) For disputes subject to arbitration by the No-Fault Arbitration forum where one of the issues involves a policy issue as enumerated on the prescribed denial of claim form (NYS form N-F-10), subject to the provisions of subdivisions (a) and (c) of this section, the attorney's fee for the arbitration of all issues shall be limited as follows:

(1) for preparatory services relating to the arbitration forum or court, the attorney shall be entitled to receive a fee of up to $70 per hour, subject to a maximum fee of $1,400; and

(2) in addition, an attorney shall be entitled to receive a fee of up to $80 per hour for each personal appearance before the arbitration forum or court.

(e) For all other disputes subject to arbitration, subject to the provisions of subdivisions (a) and (c) of this section, the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or court, subject to a maximum fee of $850. If the nature of the dispute results in an attorney's fee which could be computed in accordance with the limitations prescribed in both subdivision (d) and this subdivision, the higher attorney's fee shall be payable. However, if the insurer made a written offer pursuant to section 65-4.2(b)(4) of this Subpart and if such offer equals or exceeds the amount awarded by the arbitrator, the attorney's fee shall be based upon the provisions of subdivision (b) of this section.

(f) Notwithstanding the limitations listed in this section, if the arbitrator or a court determines that the issues in dispute were of such a novel or unique nature as to require extraordinary skills or services, the arbitrator or court may award an attorney's fee in excess of the limitations set forth in this section. An excess fee award shall detail the specific novel or unique nature of the dispute which justifies the award. An excess award of an attorney's fee by an arbitrator shall be appealable to a master arbitrator.

(g) If a dispute involving an overdue or denied claim is resolved by the parties after it has been forwarded by the Insurance Department or the conciliation center to the appropriate arbitration forum or after a court action has been commenced, the claimant's attorney shall be entitled to a fee which shall be computed in accordance with the limitations set forth in this section.

(h) No attorney shall demand, request or receive from the insurer any payment of fees not permitted by this section. 1

(i) Notwithstanding any other provision of this section and with respect to billings on and after the effective date of this regulation, if the charges by a health care provider, who is an applicant for benefits, exceed the limitations contained in the schedules established pursuant to section 5108 of the Insurance Law, no attorney's fee shall be payable by the insurer. This provision shall not be applicable to charges that involve interpretation of such schedules or inadvertent miscalculation or error.

Lessons Learned from Florida's Workers' Compensation Law

Florida's experience with workers' compensation may provide the legislature with guidance for gaining better control of costs in the PIP system. Similar to PIP, workers'

compensation is a type of no-fault system intended to provide quick and fair compensation for injuries without the need for costly, time-consuming litigation.

Prior to 2003, attorneys representing workers' compensation claimants received tens of thousands of dollars in fees in cases in which their clients sought far less, much like PIP litigation. Florida employers consistently paid among the highest workers' compensation premiums in the nation.

In 2003, the Florida Legislature enacted comprehensive workers' compensation reform, the main thrust of which was to rein in excessive litigation and attorneys' fees that rendered the system so expensive.[43] The 2003 law required attorneys to base their fees on the value of benefits they secured for their clients. It limited attorneys' fees to 20 percent of the first $5,000 of benefits secured, 15 percent of the next $5,000 of benefits secured, 10 percent of the remaining amount of benefits secured to be provided during the first 10 years after the claim is filed, and 5 percent of the benefits secured after 10 years. At least 30 days prior to the final hearing, if the carrier provides a written settlement offer addressing each pending issue and the injured employee refuses the offer, attorney fees paid by the carrier are calculated only on the amount secured above those specified in the offer to settle. The law also provided that, as an alternative to the contingency fee schedule, a judge of compensation claims may, for medical only cases, approve an attorney's fee not to exceed $1,500, only once per accident, based on a maximum rate of $150 per hour if the judge determines that the fee schedule, based on benefits secured, fails to fairly compensate the attorney. The new rule encouraged reasonable settlement offers and discouraged attorneys from litigating cases where their work was likely to add little value for the claimant.

Between October 1, 2003, the date the reform took effect, and July 1, 2010, workers' compensation rates in Florida declined by 64.7 percent.[44] Florida's workers' compensation rates became among the lowest in the country.[45] The only rate increase came in April 2009, in response to a Florida Supreme Court ruling that nullified the caps on attorneys' fees in the 2003 reforms and ruled that attorneys may be paid a "reasonable" fee.[46] The Florida Legislature promptly responded by passing legislation to reinstate the strict fee caps on workers' compensation claimant attorneys in 2009.[47]

A Solution for PIP Reform in Florida

It is apparent that the PIP system has lost its way in Florida. A system that was intended to reduce the costs of litigation has come to result in one that primarily benefits attorneys while providing little to Florida drivers who pay among the highest automobile insurance rates. Some may believe that it is in the best interests of Florida drivers to abandon the PIP system altogether. Others may favor more moderate reform. For the reasons discussed above, Florida might begin by taking two simple steps:

1. Provide that attorneys' fees in PIP cases are to be determined without the use of a contingency risk multiplier; and
2. Limit attorneys' fees to the lesser of $10,000 (the maximum amount his or her client may receive through PIP benefits) or three times the disputed amount recovered by the attorney.

ABOUT THE AUTHORS

VICTOR E. SCHWARTZ is Chairman of the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy & Bacon L.L.P. Mr. Schwartz, a former Dean at the University of Cincinnati College of Law, co-authors Comparative Negligence (4th ed. 2002 & Supp. 2009), the principal text on the subject. He also authors the most widely used torts casebook in the United States, PROSSER, WADE AND SCHWARTZ'S TORTS (12th ed. 2010). Mr. Schwartz has served on the Advisory Committees of the American Law Institute's RESTATEMENT OF THE LAW OF TORTS: PRODUCTS LIABILITY, APPORTIONMENT OF LIABILITY, and GENERAL PRINCIPLES projects. He received his B.A. *summa cum laude* from Boston University and his J.D. *magna cum laude* from Columbia University.

CARY SILVERMAN is Of Counsel in Shook, Hardy & Bacon L.L.P.'s Public Policy Group, where he has authored numerous articles and *amicus* briefs on issues related to tort law. He received his J.D. and M.P.A. with honors from The George Washington University and his B.S. from the State University of New York College at Geneseo.

Endnotes

[1] Jeffrey O'Connell & Peter Kinzler, *More for Less Under Auto Choice: Fewer Dollars for Lawyers, Fraud, Pain and Suffering, and Insurance Companies Mean Lower Premiums and Better Compensation for Motorists*, in Edward L. Lascher & M. Powers, eds., The Economics and Politics of Choice No-Fault Insurance 306 (Kluwer, 2001).

[2] *Id*.

[3] *Id*.

[4] *Id*. at 307.

[5] *Id*. at 323-24.

[6] States with mandatory PIP include Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania and Utah. The District of Columbia and Puerto Rico are also no-fault jurisdictions.

[7] Fla. Stat. § 627.730 *et seq*.

[8] *See* Fla. Stat. Ann. § 627.428.

[9] Fla. Stat. Ann. § 627.737(2).

[10] S.B. 2114 (Committee Substitute).

[11] Nirvi Shah, *PIP: The Insurance that Crooks Can't Stop Scamming*, Miami Herald, Jan. 15, 2011, *available at* http://www.miamiherald.com/2011/01/15/v-print/2018389/pip-the-insurance-that-crooks.html#ixzz1Enl9oC3v.

[12] *Id*. (quoting Robin Westcott, Director of Property and Casualty Financial Oversight with the Office of Insurance Regulation).

[13] Sally Kestin & John Maines, *For Some Florida Lawyers, Small Courtroom Wins for Clients Mean Huge Fees for Themselves: Lawsuits Against Auto Insurers Can be Lucrative*, Sun Sentinel, Jan. 16, 2011, *available at* http://articles.sun-sentinel.com/2011-01-15/news/fl-lawsuit-attorney-fees-20101215_1_florida-insurance-regulators-lawsuits-personal-injury-protection-insurance.

[14] Kenric Ward, *Florida Drivers Are Paying $1 Billion 'Fraud Tax': Insurance Industry Says Staged Auto Accidents are Boosting Premiums*, Sunshine State News, Jan. 31, 2011, *available at* http://www.sunshinestatenews.com/story/florida-drivers-are-paying-1-billion-fraud-tax (quoting William Stander, Property Casualty Insurance Association).

[15] Press Release, National Insurance Crime Bureau, *NICB® and State Farm® Launch Florida Insurance Fraud Awareness Campaign*, Feb. 11, 2011, *at* https://www.nicb.org/newsroom/news-releases/nicb-and-state-farm-launch-florida-campaign; Press Release, National Insurance Crime Bureau, *Suspicious Staged Accident Claims Soar in Florida*, June 28, 2010, *at* https://www.nicb.org/newsroom/news-releases/florida-staged-accidents.

[16] *See* Robert Trigaux, *Tampa Speeds by Miami as Florida's New Capital for Staged Auto Accidents*, St. Petersburg Times, June 29, 2010, *available at* http://www.tampabay.com/news/tampa-speeds-by-miami-as-floridas-new-capital-for-staged-auto-accidents/1105584.

[17] For example, Ricardo Uranga Guemes and Yamzilka Turino were recently arrested in Miami-Dade for recruiting five people to stage an accident that was the source of $78,000 in fake PIP claims. Nirvi Shah, *6 Face Insurance Fraud Charges*, Miami Herald, Jan. 13, 2011, *available at* http://www.miamiherald.com/2011/01/13/2013668/6-face-insurance-fraud-charges.html. Florida's Chief Financial Officer, Jeff Atwater, recently observed that auto insurance fraud costs the average Florida family an additional $400 per year. Atwater notes that "[o]rganized fraud rings recruit willing participants, fake an accident in which no one is injured, and send the participants to medical clinics or chiropractic offices for treatments that never occur. The clinics fraudulently bill auto insurance companies the maximum $10,000 limit on the participants' Personal Injury Protection or PIP." Florida CFO Jeff Atwater's EViews Newsletter, vol. 8, no. 2, Jan. 14, 2011, *at* http://www.myfloridacfo.com/PressOffice/Newsletter/2011/011411/January_1411text.htm.

[18] For example, seven times in the summer of 2010, the Fort Myers Chiropractic Center billed Direct General insurance for treating William Perez-Leon's injuries from a car accident with massages and ultrasounds. Mr. Perez-Leon was in jail for a DUI at the time.[18] In another recent case, massage therapist Serenity Toler of Naples was arrested for submitting more than $10,000 in fraudulent PIP claims for two patients who were never treated. Nirvi Shah, *6 Face Insurance Fraud Charges*, Miami Herald, Jan. 13, 2011, *available at* http://www.miamiherald.com/2011/01/13/2013668/6-face-insurance-fraud-charges.html.

[19] Lisa Rab, *Crash Course: 411-PAIN Network Will Line Their Pockets With Your Insurance Money*, Dec. 9, 2010, *available at* http://www.miaminewtimes.com/2010-12-09/news/crash-course-411-pain-network-will-line-their-pockets-with-your-insurance-money/. According to the article, 411-PAIN, which calls itself a "medical and legal referral service" sent him to a clinic that quickly burned through $15,000 through an array of tests, doctors visits, and therapy sessions that in some cases worsened his back pain. He never received a bill, as treatment was always billed directly to the insurer. When he finally viewed a bill months later, it included tests he never received, including 19 ultrasounds though he only receive one or two, and 17 charges for therapeutic exercises for $150 each, which he says he never did. The clinic also referred him to a Pompano Beach lawyer who only encouraged him to continue the unhelpful therapy as the rehab clinic exhausted and exceeded his insurance benefits. *See id.*

[20] *Standard Guaranty Ins. Co. v. Quanstrom* , 555 So. 2d 828, 834 (Fla. 1990).

[21] *See Lane v. Head*, 566 So. 2d 508, 513 (Fla. 1990) (Overton, J., concurring); *Standard Guaranty Ins. Co. v. Quanstrom* , 555 So. 2d 828, 834 (Fla. 1990).

[22] *Progressive Express Insurance Co. v. Schultz*, 948 So. 2d 1027 (Fla. 5th DCA 2007).

[23] *See, e.g., Massie v. Progressive Express Ins. Co.*, 25 So. 3d 584 (Fla. 1st DCA 2009), rev. dismissed, 32 So. 3d 60 (Fla. 2010).[23]

[24] Aaron Leviten, Michael Olexa & Robert Sheesley, *Rethinking the Application of Contingency Risk Multipliers in Fee Awards: Should Florida Courts Recede from Quanstrom?*, Fla. B.J. 75 (Oct. 2005).

[25] *Id*. (quoting *Peter J. Godleski d/b/a Central Florida Orthopedic & Neurology Specialists a/a/o Stefany Groover v. Nationwide Gen. Ins. Co.*, 11 Fla. Weekly Supp. 855(a) (18th Jud. Cir., Seminole County, July 8, 2004)).

[26] Leviten, *supra*.

[27] *See* Douglas H. Stein & Donald A. Blackwell, *Putting the Lid Back on Pandora's "Jar": A Clarion Call for the Elimination of Contingency Risk Multipliers in Florida PIP Litigation*, 84 Fla. B.J. 24 (July/Aug. 2010).

[28] Lawyers seeking recovery of their attorneys' fees in PIP lawsuits have "billed for interviews with the dead, meetings with clients that never took place, and work on cases that exceeded 24 hours in a day." Sally Kestin & John Maines, *On Attorneys' Bills: Charges for Meeting with the Dead, Workdays that Exceed 24 Hours*, Sun Sentinel, Jan. 16, 2011, *available at* http://articles.sun-sentinel.com/2011-01-16/news/fl-pip-lawyer-bills-20110111_1_dawn-jayma-lawyers-bills.

[29] Sally Kestin & John Maines, *For Some Florida Lawyers, Small Courtroom Wins for Clients Mean Huge Fees for Themselves: Lawsuits Against Auto Insurers Can be Lucrative*, Sun Sentinel, Jan. 15, 2011, *available at* http://articles.sun-sentinel.com/2011-01-15/news/fl-lawsuit-attorney-fees-20101215_1_florida-insurance-regulators-lawsuits-personal-injury-protection-insurance.

[30] *Id*.

[31] *See id.*

[32] *See id.*

[33] *Id*.

[34] *Id*.

[35] Insurance Research Council, Florida Auto Injury Insurance Claim Environment, 2007 Final Report (2007).

[36] Kestin & Maines, *For Some Florida Lawyers, Small Courtroom Wins for Clients Mean Huge Fees for Themselves, supra.*

[37] *Id*.

[38] Kenric Ward, *Florida Drivers Are Paying $1 Billion 'Fraud Tax': Insurance Industry Says Staged Auto Accidents are Boosting Premiums*, Sunshine State News, Jan. 31, 2011, *available at* http://www.sunshinestatenews.com/story/florida-drivers-are-paying-1-billion-fraud-tax. Pure premium is defined as the amount required to pay only expected losses. It does not include expenses and other costs of doing business.

[39] Kan. Stat. Ann. § 40-3111; Ky. Rev. Stat. § 304.39-220; Pa. Stat. tit. 75, § 1798.

[40] *See, e.g.,* Kan. Stat. Ann. § 40-3111; Pa. Stat. tit. 75, § 1798.

[41] Pa. Stat. tit. 75, § 1798.

[42] N.Y. Ins. Code § 5106.

[43] S.B. 50-A (Ch. 2003-412, Laws of Florida). The 2003 legislation also included revisions to the medical fee schedule, increased limits on chiropractic services, redefined eligibility standards for permanent total disability benefits, revised permanent partial disability benefit amounts, and limits on the number of independent medical examinations.

[44] Thomas J. Maida & Leonard Schulte, *What's Ahead for Workers' Comp?*, Florida Underwriter, Oct. 2010, *at* http://www.propertycasualty360.com/2010/10/01/whats-ahead-for-workers-comp-#.

[45] *See* N. Michael Helvacian, *How Tort Reform Cut Florida Workers' Compensation Costs*, Nat'l Ctr. For Policy Analysis, Brief Analysis No. 673, Aug. 25, 2009.

[46] *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008); *Florida Signals 6.4% Workers' Comp Rate Hike to Pay for Court Ruling*, Ins. J., Jan. 26, 2009, *available at* http:// www.insurancejournal.com/news/southeast/2009/01/26/97288.htm; Asjylyn Loder, *Workers' Comp Ruling May Affect Lowered Rates*, St. Petersburg Times, Oct. 23, 2008, *available at* http://www.tampabay.com/news/business/article868045.ece.

[47] H.B. 903 (Fla. 2009).