

# FLORIDA NO-FAULT INSURANCE REFORM: A STEP IN THE RIGHT DIRECTION

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## INTRODUCTION

Florida is one of many states with legislation compelling its residents to carry some form of no-fault automobile insurance.<sup>1</sup> Florida requires its drivers to carry a certain amount of personal injury protection insurance. This Note examines Florida's original no-fault in-

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1. FLA. STAT. § 627.736 (2001); *see also* ARK. CODE ANN. § 23-89-202 (Michie 1999); D.C. CODE ANN. § 35-2104 (1998); HAW. REV. STAT. ANN. § 431:10C-103.5 (Michie 2000); KAN. STAT. ANN. § 40-3107 (2000); KY. REV. STAT. ANN. § 304.39-040 (Banks-Baldwin 2001); MASS. GEN. LAWS ANN. ch. 90, § 34M (West 2000); MD. CODE ANN., INS. § 19-505 (2000); MICH. COMP. LAWS ANN. § 500.3105 (West 2000); N.J. STAT. ANN. § 39:6A-3.1 (West 2000); N.Y. INS. LAW § 5103 (McKinney 2000); OR. REV. STAT. § 742.520 (1999); TEX. INS. CODE ANN. § 5.06-3 (Vernon 1999); UTAH ADMIN. CODE § 31A-22-309 (2000); WASH. REV. CODE ANN. § 48.22.085 (West 2000).

insurance statutes and the logic behind them, and also takes a brief look at the current requirements of Florida's no-fault insurance laws.

Unfortunately, Florida faces a growing problem of automobile insurance fraud, especially in the area of personal injury protection (PIP) insurance. This Note discusses the wide range of participants in PIP fraud and the many forms PIP fraud takes, and summarizes some of the laws already in place to prevent insurance fraud. After concluding that these laws do not provide enough protection, this Note reviews the recommendations for the Florida Legislature outlined in the recent Fifteenth Statewide Grand Jury Second Interim Report, which reported on insurance fraud related to PIP. This Note then explores the PIP reform bill passed by the Florida Legislature during the 2001 legislative session and discusses the major provisions of the bill and how they alter the current state of the law. Next, this Note discusses the new public records bill and how it alters the accessibility of police reports, which was determined to be a major contributing factor to PIP fraud. Finally, this Note examines the effectiveness of these bills in preventing personal injury protection fraud in Florida.

## I. THE BEGINNING OF FLORIDA'S NO-FAULT LAWS

Florida passed its first no-fault insurance law in 1971 to replace the traditional tort system that was used for recovery in automobile accidents.<sup>2</sup> Under the old tort recovery system, parties involved in an accident could not recover unless they proved that the other party was at fault.<sup>3</sup> Upon proving that the other party was at fault, the injured party could recover damages for pain and suffering and economic damages.<sup>4</sup>

### A. Purpose and Intent of the Original No-Fault Law

The legislature believed that the system that used tort reparations for recovery was too slow and inefficient,<sup>5</sup> so it decided to enact no-fault insurance laws to ensure that injured parties were compensated quickly and that the parties would be able to return to life without undue "financial interruption."<sup>6</sup> Moreover, the legislature wanted to lower automobile insurance premiums and reduce congestion in the courts by removing small injury claims from the tort sys-

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2. Act effective Jan. 1, 1972, ch. 71-252, §§ 1-12, 1971 Fla. Laws 1355-70.

3. Warren R. Todd, *Financial Responsibility and Compulsory Insurance Laws*, in FLORIDA AUTOMOBILE INSURANCE LAW 1-1, 1-3 (4th ed. 1998) [hereinafter FLORIDA AUTOMOBILE INSURANCE LAW].

4. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974).

5. *See id.* at 16.

6. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683-84 (Fla. 2000) (citing *Gov't Employees Ins. Co. v. Gonzalez*, 512 So. 2d 269, 271 (Fla. 3d DCA 1987)).

tem.<sup>7</sup> No-fault insurance laws also ensured that every driver and passenger in Florida was at least minimally insured.<sup>8</sup> Furthermore, the no-fault laws alleviated taxpayers from “shouldering the burden” of caring for injured drivers or passengers without health care insurance.<sup>9</sup> In exchange for the loss of the right to recover in a tort action, no-fault insurance guaranteed injured parties quick payment of medical bills and compensation for lost wages from the injured parties’ insurers.<sup>10</sup>

### B. Current No-Fault Law

Florida requires all drivers to carry a minimum of \$10,000 in PIP coverage with a maximum deductible of \$2,000.<sup>11</sup> PIP insurance provides coverage for the owner of the vehicle, residents in the same household, anyone driving the vehicle with the owner’s permission, and passengers and pedestrians involved in the accident that do not have their own insurance.<sup>12</sup> The insurer is responsible for eighty percent of certain medical expenses, sixty percent of any loss of gross income and loss of earning capacity, and death benefits of \$5,000 per person.<sup>13</sup> To bring a tort action, a plaintiff must show either a permanent loss of a bodily function, permanent injury other than scarring or disfigurement, significant and permanent scarring or disfigurement, or death.<sup>14</sup>

## II. PERSONAL INJURY PROTECTION FRAUD IN FLORIDA

Despite the good intentions of the Florida Legislature, no-fault insurance has created the problem of PIP insurance fraud throughout the state. The legislature intended no-fault insurance to lower premiums,<sup>15</sup> but state officials report that Florida drivers are paying as much as \$246 more per family because of PIP insurance fraud.<sup>16</sup> The

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7. *Lasky*, 296 So. 2d at 16.

8. FIFTEENTH STATEWIDE GRAND JURY REPORT, REPORT ON INSURANCE FRAUD RELATED TO PERSONAL INJURY PROTECTION (Aug. 2000) (on file with Clerk, Fla. Sup. Ct.), available at <http://legal.firn.edu/swp/jury/fifteenth.html> [hereinafter GRAND JURY REPORT].

9. *Id.*

10. FLORIDA AUTOMOBILE INSURANCE LAW, *supra* note 3, at 1-3 (quoting *Lasky*, 296 So. 2d at 15).

11. FLA. STAT. § 627.736.

12. Fla. S. Comm. on Crim. Just. & S. Comm. on Banking & Ins., CS for SB 1092 (2001) Staff Analysis 5 (rev. Apr. 24, 2001) (on file with comm.), available at <http://www.leg.state.fl.us/data/session/2001/senate/bills/analysis/pdf/2001s1092.ap.pdf> [hereinafter Comm. on Crim. Just. Staff Analysis].

13. FLA. STAT. § 627.736(1)(a)-(c) (2001).

14. *Id.* § 627.737(2)(a)-(d).

15. *Lasky*, 296 So. 2d at 16.

16. Fred Schulte & Jenni Bergal, *Accidents Injure Some, Scare Others: Higher Premiums Passed on to All Drivers*, S. FLA. SUN-SENTINEL, Dec. 17, 2000, at 22A, available at LEXIS, News Library, Sun Sen File.

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.<sup>17</sup> The report also stated that claim severity in Florida rose nineteen percent in 2000.<sup>18</sup> 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.<sup>19</sup> Another study by the Insurance Information Institute found that Florida has the second highest rate of increase in PIP claims in the nation.<sup>20</sup> The problem of PIP insurance fraud in Florida is so serious that the statewide grand jury met to examine the issue.<sup>21</sup>

The statewide grand jury found that the \$10,000 minimum PIP coverage has been turned into a "personal slush fund" for legal and medical professionals.<sup>22</sup> PIP insurance fraud takes many forms in Florida, but it usually starts with the solicitation of patients by "runners."<sup>23</sup> Every time the police are called to the scene of an accident, a crash report must be filed with the local police station.<sup>24</sup> Runners pick up copies of the crash reports in bulk and use them to solicit accident victims or sell the list to a third party for the purpose of solicitation.<sup>25</sup> Usually, the runners keep the information and solicit the victims either by telephone or by visiting the victim's home.<sup>26</sup> Either way, the runner misleads the victim into believing that the runner is an insurance agent and that the victim needs to visit a doctor or chiropractor.<sup>27</sup> Some medical professionals are willing to pay the runner up to \$500 for each patient referral.<sup>28</sup> 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.<sup>29</sup> Some runners publish "accident journals" from the information gathered at local police stations.<sup>30</sup> An accident journal is a list of the names, addresses, and phone numbers of recent automobile accident victims culled from

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17. David Pilla, *Report Finds Expensive Auto Injury Claims in Florida Rising*, BEST'S INS. NEWS, Apr. 9, 2001, available at 2001 WL 4366118.

18. *Id.*

19. *Id.*

20. *New York Takes on Auto Fraud Costs*, INS. ACCT., Apr. 19, 2001, available at 2001 WL 2523738. Florida is second only to New York in the rate of increase in PIP claims.

21. See GRAND JURY REPORT, *supra* note 8.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

police reports.<sup>31</sup> Runners sell these journals to medical and legal professionals as a direct mailing tool.<sup>32</sup>

Unethical medical professionals contribute to the problem of PIP insurance fraud. Some chiropractors pad bills, charge inflated fees for diagnostic tests, charge for services never rendered, or order unnecessary tests.<sup>33</sup> Part of the problem in the medical field comes from accident or pain clinics that are not owned by physicians.<sup>34</sup> These clinics often hire doctors for up to \$60 per hour to rubber stamp billings sent to insurance companies.<sup>35</sup> Law enforcement records show that of the sixty-four Miami-Dade County clinics that have been cited in police reports, most are owned by “lay entrepreneurs.”<sup>36</sup> Because the current law regarding PIP benefits in Florida does not define what is a “reasonable” amount for most medical tests, the area is susceptible to fraud.<sup>37</sup> Moreover, PIP claims do not follow a fee schedule, so medical professionals may charge any amount they deem necessary for services and tests.<sup>38</sup> Due to the lack of guidelines, some chiropractors charge excessive amounts for medical supplies and diagnostic tests.<sup>39</sup> 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.<sup>40</sup> Unfortunately, patients often do not realize the size of their medical bill because the specialist will require the patients to sign over their coverage so the office can bill the insurer directly.<sup>41</sup> 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.<sup>42</sup>

Some chiropractors lease testing equipment, hire the technicians required for each test, and then bill the insurers for a “technical

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31. *Id.*

32. *Id.*

33. Fred Schulte & Jenni Bergal, *Auto Insurers Allege Costly Billing Abuses: Test, Treatments Needless, Investigators Say*, S. FLA. SUN-SENTINEL, Dec. 18, 2000, at 1A, available at LEXIS, News Library, Sun Sen File [hereinafter *Auto Insurers*].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. GRAND JURY REPORT, *supra* note 8. A lumbar MRI would be billed at \$1,700 to a PIP insurer, but Medicare would only pay \$592 and workers compensation only pays \$546 for the same test. Even a preferred patient plan would pay only \$653 for the MRI. *Id.*

39. *Auto Insurers*, *supra* note 33. For example, chiropractors may charge \$38 for a \$3.50 cervical collar or \$52 for a \$10.95 neck pillow. One chiropractor admitted to charging \$495 for a transcutaneous nerve stimulation unit that cost him under \$125, plus an extra \$75 for the instructions on how to use the device. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

component.”<sup>43</sup> 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.<sup>44</sup> Another test commonly used by chiropractors is a video fluoroscopy, which is a motion picture X-ray that many doctors believe is dangerous<sup>45</sup> because patients are subjected to gamma rays for up to fifteen minutes in one session.<sup>46</sup> 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.<sup>47</sup>

Magnetic Resonance Imaging (MRI) brokers are another player in Florida PIP insurance fraud scams. Brokers set up appointments for patients at diagnostic clinics and bill the insurance company for their services.<sup>48</sup> 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.<sup>49</sup> The broker will then charge the insurance company \$1,500 to \$1,800 for each scan.<sup>50</sup> Moreover, some brokers will go as far as to indicate on the billing documents that the broker’s own facility administered the test.<sup>51</sup>

Unethical attorneys also contribute to the problem of insurance fraud. Some personal injury attorneys will refer their clients to a chiropractor who will find that the injured party has some permanent disability.<sup>52</sup> This finding allows the injured party to sue the insurer for pain and suffering.<sup>53</sup> Some chiropractors have an attorney draft an agreement that guarantees that the amount of the deductible will be paid to the chiropractor before the injured party receives any part

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43. Fred Schulte & Jenni Bergal, *Crash Allies Tap Auto Insurance System: Practice Involves Chiropractors, Lawyers, and “Runners,” People Who Solicit Patients*, S. FLA. SUN-SENTINEL, Dec. 19, 2000, at 1A, available at LEXIS, News Library, Sun Sen File [hereinafter *Crash Allies*].

44. GRAND JURY REPORT, *supra* note 8.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Crash Allies*, *supra* note 43.

49. Fred Schulte & Jenni Bergal, *Medical Tests Can Yield Big Profits*, S. FLA. SUN-SENTINEL, Dec. 19, 2000, at 27A, available at LEXIS, News Library, Sun Sen File.

50. *Id.*

51. GRAND JURY REPORT, *supra* note 8. The owner of a clinic in New Port Richey, Florida, is an example of this type of behavior. The owner was arrested on twenty-three counts of insurance fraud for billing insurance companies for MRIs that he did not perform. The owner billed \$1,050 for MRI tests and \$200 for MRI readings when he did not even own the equipment to perform the tests. Investigators determined that the actual tests were performed by an outside MRI service at a cost of \$400 for the test and \$45 for the reading. The owner changed the letterhead of the original radiologist reports to make it appear that the owner performed the tests. DOI Releases, 2000-2001 Top 10 Fraud List to Kick Off Florida Insurance Fraud Prevention Week (June 11, 2001) (DOI Media Release), available at <http://www.doi.state.fl.us/Consumers/Alerts/press/indextest.html>.

52. *Crash Allies*, *supra* note 43.

53. *Id.*

of the settlement.<sup>54</sup> Additionally, section 627.736(4)(b), *Florida Statutes*, 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.<sup>55</sup> Some attorneys file suit against the insurance company on the thirty-first day if the claim has not been paid.<sup>56</sup> 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.<sup>57</sup>

### III. CURRENT PROTECTIONS AGAINST AUTO INSURANCE FRAUD

Since the inception of Florida's no-fault laws, insurance fraud has been a concern of the Florida Legislature.<sup>58</sup> In 1976, the legislature created the Division of Insurance Fraud within the Department of Insurance.<sup>59</sup> The division is responsible for investigating workers' compensation schemes, unethical insurance agents, and automobile insurance fraud.<sup>60</sup> The Division of Insurance Fraud has the highest number of auto insurance fraud arrests in the nation.<sup>61</sup> Moreover, the Florida Legislature has also passed laws to prevent the practice of insurance fraud.

In an effort to prevent PIP fraud, Florida enacted a statute designed to prevent accident reports from being used for commercial solicitation of the victims.<sup>62</sup> The provision restricting the use of accident report information for commercial solicitation is not being enforced, however, because of a preliminary injunction granted by the United States District Court for the Southern District of Florida.<sup>63</sup> The court found that the law interfered with the First Amendment right of freedom of speech.<sup>64</sup> As a result of this ruling, runners continue to have free access to accident reports and accident victims.

Section 817.234(8), *Florida Statutes*, prohibits patient solicitation and makes the violation of the statute punishable by a third-degree felony.<sup>65</sup> In *Bradford v. State*, the Fourth District Court of Appeal found that section 817.234(8) required the prosecution to prove that

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54. *Id.*

55. FLA. STAT. § 627.736(4)(b) (2001).

56. GRAND JURY REPORT, *supra* note 8.

57. FLA. STAT. § 627.428(1).

58. Fred Schulte & Jenni Bergal, *Cracking Down on Insurance Cheats an Ongoing Battle*, S. FLA. SUN-SENTINEL, Dec. 20, 2000, at 1A, available at LEXIS, News Library, Sun Sen File [hereinafter *Cracking Down*].

59. *See id.*

60. *Id.*

61. *Id.*

62. FLA. STAT. § 119.105.

63. *Pellegrino v. Satz*, No. 98-7356-CIV-FERGUSON, 1998 WL 1668786, at \*3 (S.D. Fla. Dec. 22, 1998).

64. *Id.*

65. FLA. STAT. § 817.234(8).

the defendant had the intent to file a fraudulent PIP claim in order to obtain a conviction.<sup>66</sup> However, the court reversed itself in a later case holding that intent was never a requirement to prove the unlawful solicitation of an accident victim.<sup>67</sup> On review of *Bradford*, the Supreme Court of Florida held that fraudulent intent was not an element of section 817.234(8); therefore, the statute unconstitutionally infringed on the First Amendment right to commercial speech.<sup>68</sup> The court found that the restriction did not directly and materially prohibit solicitation that resulted in fraudulent PIP claims because it prohibited all forms of solicitation, not just solicitation for the purposes of filing fraudulent claims.<sup>69</sup>

Section 456.054, *Florida Statutes*, prohibits the use of kickbacks by any health care provider.<sup>70</sup> The statute defines kickback as any payment of a portion of the charges received by a health care provider for services rendered to a referring health care provider as an incentive to refer patients for future services.<sup>71</sup> The statute makes it unlawful for any health care provider to “offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients.”<sup>72</sup> Any violation of section 456.054 shall be considered patient brokering<sup>73</sup> and is punishable as a third-degree felony.<sup>74</sup>

A person commits insurance fraud when that person, with the intent to “injure, defraud, or deceive,” presents or prepares any statement in conjunction with a claim for payment, pursuant to an insurance policy, that the person knows contains “false, incomplete, or misleading information concerning any [material] fact.”<sup>75</sup> Moreover, any physician licensed in Florida that “knowingly and willfully” assists a person in violating section 817.234 is guilty of committing insurance fraud.<sup>76</sup> If a physician is found guilty of insurance fraud, the appropriate licensing authority shall have an administrative hearing to consider imposing sanctions against the physician.<sup>77</sup> Additionally, any attorney who “knowingly and willfully assists” a claimant in committing insurance fraud or benefits from the fraud is guilty of

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66. *Bradford v. State*, 740 So. 2d 569, 571 (Fla. 4th DCA 1999), *quashed and remanded by* 787 So. 2d 811 (Fla. 2001).

67. *Hansbrough v. State*, 757 So. 2d 1282, 1283 (Fla. 4th DCA 2000), *quashed by* 791 So. 2d 1084 (Fla. 2001).

68. *Bradford*, 787 So. 2d at 814.

69. *See id.* at 824.

70. FLA. STAT. § 456.054(2).

71. *Id.* § 456.054(1).

72. *Id.*

73. *Id.* § 456.054(3).

74. *Id.* § 817.505(4).

75. *Id.* § 817.234(1)(a).

76. *Id.* § 817.234(2)(a).

77. *Id.*

committing insurance fraud.<sup>78</sup> The punishment for insurance fraud varies depending upon the value of the property involved in the fraud.<sup>79</sup> If the value of the property is less than \$20,000, then the crime is punishable as a third-degree felony.<sup>80</sup> If the value of the property is between \$20,000 and \$100,000, then the crime is punishable as a second-degree felony.<sup>81</sup> If the property is worth more than \$100,000, then the person commits a felony of the first degree.<sup>82</sup>

Despite the existence of these laws and the efforts of the Division of Insurance Fraud, Florida still has a growing problem with automobile insurance fraud. The problem is fed by a lack of manpower in the Division of Insurance Fraud;<sup>83</sup> twenty-five percent of all cases are closed due to a lack of manpower and over ninety percent are closed without an arrest.<sup>84</sup> Adding to the problem, some of the statutes cannot be enforced because of constitutional concerns. The current laws addressing insurance fraud are not enough to stop PIP fraud in Florida; in response, a statewide grand jury convened to investigate the problem.

#### IV. FIFTEENTH STATEWIDE GRAND JURY RECOMMENDATIONS ON AUTO INSURANCE FRAUD

After finishing its study, the statewide grand jury developed seven recommendations for the Florida Legislature.<sup>85</sup> In its report, the statewide grand jury found that runners were a major contributing factor to PIP fraud.<sup>86</sup> The first recommendation was to amend section 119.105, *Florida Statutes*, to prohibit the release of accident reports except to certain categories of people such as the victims, their insurance company, or news agencies.<sup>87</sup> Second, the statewide grand jury suggested increasing the penalty for using information gathered from police reports in violation of section 119.105 to a third-degree felony.<sup>88</sup> Both of these recommendations were designed to stop the practice of victim solicitation by runners. To regulate accident and pain clinics, the next recommendation suggested a mandatory registration and licensing system for all medical facilities.<sup>89</sup> The statewide grand jury also recommended a fee schedule similar

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78. *Id.* § 817.234(3).

79. *Id.* § 817.234(11).

80. *Id.* § 817.234(11)(a).

81. *Id.* § 817.234(11)(b).

82. *Id.* § 817.234(11)(c).

83. *Cracking Down*, *supra* note 58.

84. *Id.*

85. GRAND JURY REPORT, *supra* note 8.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

to the one used in workers' compensation cases to reduce the possibility of inflated charges for tests.<sup>90</sup> 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.<sup>91</sup> The extra thirty days would allow the insurance companies more time to properly investigate suspicious claims. 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.<sup>92</sup> The final recommendation was to amend section 817.234(8) so that no one will be obligated to pay for services rendered by a medical or legal professional who illegally solicited or caused victims to be illegally solicited.<sup>93</sup> This restriction should reduce the incentive of attorneys and chiropractors to solicit accident victims.

#### V. SENATE BILL 1092—MOTOR VEHICLE INSURANCE

In response to the statewide grand jury report, Senate Bill 1092 was enacted to help prevent PIP fraud. The legislative findings state: "The Legislature finds that the Florida Motor Vehicle No-Fault Law is intended to deliver medically necessary and appropriate medical care quickly, and without undue litigation or other associated costs."<sup>94</sup> The legislature adopted the findings of the statewide grand jury regarding PIP insurance fraud.<sup>95</sup> Among other provisions, the legislature found it necessary to increase the penalty for certain offenses related to solicitation of accident victims, require registration for certain clinics, create maximum reimbursement allowances for some diagnostic tests, prohibit MRI brokering, extend the amount of time for providers and insurers to bill and pay claims, mandate notification of intent to sue insurers, and create a civil cause of action for insurance fraud.<sup>96</sup> The legislature found that PIP fraud is a matter of "great public interest and importance to public health, safety, and welfare," and that the measures taken in Senate Bill 1092 are "the least-restrictive reasonable means" to solve Florida's insurance fraud problem.<sup>97</sup>

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Fla. CS for CS for SB 1092, § 1 (2001).

95. *Id.*

96. *See id.*

97. *Id.*

### A. Registration and Licensing of Medical Facilities

Senate Bill 1092 created section 456.0375, *Florida Statutes*, entitled “Registration of certain clinics; requirements; discipline; exemptions.”<sup>98</sup> The bill defines clinic as “a business operating in a single structure or facility, or in a group of adjacent structures or facilities operating under the same business name or management, at which health care services are provided to individuals and which tender charges for reimbursement for such services.”<sup>99</sup> A “clinic” must register with the Department of Health unless it is otherwise licensed, registered, or certified as an abortion clinic, mental health facility, hospital, nursing home, pharmacy, optometry, dental, electrolysis, massage, or optical office.<sup>100</sup> A clinic that is exempt from federal taxation or is a group practice, partnership, or corporation with licensed health care practitioners, which is owned entirely by licensed health care practitioners or the spouse, parent, or child of a licensed health care practitioner, does not have to register with the Department of Health.<sup>101</sup>

The new statute also requires every clinic to have a licensed physician serving as medical director.<sup>102</sup> The medical director is responsible for posting signs in visible locations that identify the medical director; ensuring that all health care practitioners maintain current and unencumbered licenses; reviewing all patient referrals; ensuring that all health care practitioners have appropriate licenses for the level of care they are providing; serving as the clinic’s record holder; ensuring compliance with record keeping, office surgery, and adverse incident reporting requirements; and conducting reviews of billing to ensure that the charges are not fraudulent.<sup>103</sup>

### B. Fee Schedule for PIP Insurers

Previously, in the area of PIP insurance, the only diagnostic test that was subject to the workers’ compensation fee schedule was a thermogram.<sup>104</sup> The Florida Legislature decided to amend section 627.736(5)(b)2, *Florida Statutes*, to add spinal ultrasounds, extremity ultrasounds, video fluoroscopy, and surface electromyography to the list of tests that are subject to the workers’ compensation fee schedule.<sup>105</sup> Moreover, the amount charged to a PIP insurer for nerve con-

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98. Fla. CS for CS for SB 1092, § 2 (proposed FLA. STAT. § 456.0375).

99. *Id.* (proposed FLA. STAT. § 456.0375(1)).

100. Comm. on Crim. Just. Staff Analysis, *supra* note 12, at 8.

101. *Id.* at 9.

102. Fla. CS for CS for SB 1092, § 2 (proposed FLA. STAT. § 456.0375(3)(a)).

103. *Id.* (proposed FLA. STAT. § 456.0375(3)(b)(1)-(7)).

104. FLA. STAT. § 627.736(5)(a)(2) (2001).

105. Fla. CS for CS for SB 1092, § 5 (proposed amendment to FLA. STAT. § 627.736(5)(b)(2)).

duction testing when done with a needle electromyography procedure and when both procedures are performed by a licensed physician shall not be more 200% of the amount allowable under Medicare Part B for the year 2001.<sup>106</sup> If the nerve conduction testing does not meet the conditions outlined in the statute, then the charge for the test may not exceed the workers' compensation fee schedule.<sup>107</sup>

For charges before November 1, 2001, the amount billed to the PIP insurer shall not exceed 200% of the amount allowable under Medicare Part B for MRI services.<sup>108</sup> Beginning November 1, 2001, the amount charged for MRIs shall not exceed 175% of the amount allowable under Medicare Part B, except that charges for services rendered in facilities accredited by the American College of Radiology or the Joint Commission on Accreditation of Healthcare Organizations shall not exceed 200% of the amount allowed under Medicare Part B.<sup>109</sup> The fee schedules for MRIs and nerve conduction testing do not apply to hospitals and those facilities licensed under chapter 395, *Florida Statutes*.<sup>110</sup>

### C. MRI Brokers

The Florida Legislature defined "broker" to mean: "any person not possessing a license . . . who charges or receives compensation for any use of medical equipment and is not the 100-percent owner or the 100-percent lessee of such equipment."<sup>111</sup> Lessee is defined as being "a long-term lessee under a capital or operating lease, but [not] a part-time lease."<sup>112</sup> The term broker does not include a hospital or physician management company, a debt collection agency, or an entity that has contracted with the insurer for a discounted rate.<sup>113</sup> Moreover, the term broker does not include a management company whose compensation is not related to the usage or frequency of usage of the medical equipment or an entity that is 100% owned by one or more physician or hospital.<sup>114</sup> Senate Bill 1092 also added a new section that provides that the insurer is not required to pay any claims made by a broker.<sup>115</sup> These changes effectively prohibit the practice of MRI brokering.

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106. FLA. STAT. § 627.736(5)(b)(3).

107. *Id.* § 627.736(5)(b)(4).

108. *Id.* § 627.736(5)(b)(5).

109. *Id.*

110. *Id.*

111. Fla. CS for CS for SB 1092, § 4 (proposed amendment to FLA. STAT. § 627.732(1)).

112. *Id.*

113. *Id.*

114. *Id.*

115. FLA. STAT. § 627.736(5)(b)(1).

#### D. Civil Action for Insurance Fraud

The legislature created a civil cause of action for insurers against any person convicted of, or who, regardless of adjudication of guilt, pleads guilty or nolo contendere to insurance fraud, patient brokering, or kickbacks associated with a claim for PIP benefits.<sup>116</sup> If an insurer prevails under this statute, then the insurer may recover compensatory damages, consequential damages, punitive damages, and attorney's fees.<sup>117</sup> This amendment creates a greater threat of prosecution for anyone who chooses to violate the antifraud statutes.

#### E. Increased Penalties and Unlawful Charges

Section 119.105, *Florida Statutes*, prohibits the use of information contained in police reports for commercial solicitation of the victims or the victims' relatives.<sup>118</sup> The legislature increased the penalty for violating section 119.105 to a third-degree felony for a "willfull and knowing" violation.<sup>119</sup> A third-degree felony is punishable by up to five years imprisonment<sup>120</sup> or a \$5,000 fine.<sup>121</sup>

Section 456.0375(4), *Florida Statutes*, makes the establishment, operation, or management of an unregistered clinic unlawful and punishable as a third-degree felony.<sup>122</sup> Any licensed health care professional who operates an unregistered clinic will be subject to discipline.<sup>123</sup> Additionally, the newly enacted statute also requires the Department of Health to revoke the license of any clinic violating the statute.<sup>124</sup> Moreover, any charges or claims made by an unregistered clinic are unenforceable and noncompensable as a matter of law.<sup>125</sup>

Section 817.234(8), *Florida Statutes*, was amended to make it unlawful for any person to solicit or "cause to be solicited" any business from a car accident victim, by any means other than advertising directed at the general public.<sup>126</sup> The amendment also makes any charges for services rendered by a person who violates this statute unenforceable as a matter of law and noncompensable.<sup>127</sup> However, the Supreme Court of Florida held this section to be unconstitutional after the bill was passed by the Florida Legislature.<sup>128</sup> Section

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116. *Id.* § 627.736(12).

117. *Id.*

118. *Id.* § 119.105.

119. *Id.* § 119.10(3).

120. *Id.* § 775.082(3)(d).

121. *Id.* § 775.083(1)(c).

122. *Id.* § 456.0375(4)(b).

123. *Id.* § 456.0375(4)(c).

124. *Id.* § 456.0375(4)(d).

125. *Id.* § 456.0375(4)(a).

126. *Id.* § 817.234(8).

127. *Id.*

128. See discussion on *State v. Bradford*, 787 So. 2d 811 (Fla. 2001), *infra* Part VII.

817.234(9) was amended to make it unlawful for an attorney to solicit any business relating to the representation of a person involved in a car accident, not just a person injured in a car accident.<sup>129</sup> Both of these offenses are punishable as a third-degree felony.<sup>130</sup>

#### F. Medical Benefits

Currently, PIP insurance has been interpreted to cover a broad scope of benefits.<sup>131</sup> In *Palma v. State Farm Fire & Casualty Co.*,<sup>132</sup> the court commented on the broad scope of medical services and procedures covered by PIP insurance when the court noted that PIP insurance covers “remedial treatment and services for an injured person who relies upon spiritual means through prayer alone for healing in accordance with his religious beliefs.”<sup>133</sup> However, Senate Bill 1092 amended section 627.736(1)(a), *Florida Statutes*, to allow recovery for “medically necessary” benefits, not “necessary” benefits.<sup>134</sup> Moreover, the bill amended the section to make it clear that the benefits for spiritual healing do not affect how other services or procedures are determined to be medically necessary. Therefore, the proposed amendment would narrow the scope of coverage of medical services and benefits. Additionally, the legislature amended section 627.732, *Florida Statutes*, to define “medically necessary” as “a medical service or supply that a prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease or symptom.”<sup>135</sup> The treatment must be in harmony with generally accepted standards, clinically appropriate, and not solely for the convenience of the patient, physician, or health care provider.<sup>136</sup>

#### G. Payment of Claims

Section 627.736(4)(b) was further amended to provide that the defenses that the claim was unrelated, not medically necessary, and unreasonable may be asserted at any time, including after payment of the claim or after the thirty-day time period for payment has expired.<sup>137</sup> This change invalidated the ruling in *Perez v. State Farm Fire & Casualty Co.*<sup>138</sup> In *Perez*, the Third District Court of Appeal held that for an insurer to not be responsible for a claim, the insurer

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129. FLA. STAT. § 817.234(9).

130. *Id.* § 817.234(8), (9).

131. *Id.* § 627.736(1)(a).

132. 489 So. 2d 147 (Fla. 4th DCA 1986), *quashed in part and remanded in part* by 629 So. 2d 830 (Fla. 1993).

133. *Id.* at 149.

134. FLA. STAT. § 627.736(1)(a).

135. *Id.* § 627.732(2).

136. *Id.* § 627.732(2)(a)-(c).

137. *Id.* § 627.736(4)(b).

138. 746 So. 2d 1123 (Fla. 3d DCA 1999).

must obtain a medical report within thirty days.<sup>139</sup> The court implicitly stated that the failure to obtain a report caused the insurer to lose its right to contest the claim.<sup>140</sup> In *United Automobile Insurance Co. v. Viles*, the Third District Court of Appeal interpreted section 627.736(7)(a), *Florida Statutes*, to require an insurer to obtain a physician's report before withdrawing or denying further PIP payments.<sup>141</sup> These decisions severely limited the insurer's ability to challenge PIP claims. However, the amendment to section 627.736(4)(b) returns to the insurer the right to challenge claims that are not related, medically necessary, or reasonable.<sup>142</sup>

The Florida Legislature also changed the interest rate insurers are subject to for overdue claims. The insurer is still required to pay interest on all overdue claims, but instead of the flat rate of ten percent, the insurer will pay the simple interest rate under section 55.03, *Florida Statutes*, or the rate established in the insurance contract, whichever is higher.<sup>143</sup> The Comptroller sets the interest rate "by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate."<sup>144</sup>

In cases where the insurer pays only a portion of the claim or rejects the claim altogether, the insurer is required to provide an itemized list of each charge that the insurer reduced, omitted, or refused to pay, and any information that the insurer wants the claimant to consider related to the medical necessity of the denied treatment or the reduction of a charge.<sup>145</sup> The insurer must include the name and address of a contact person and the claim number for reference.<sup>146</sup> The new statute allows medical services billed by a hospital or other provider for emergency services or inpatient services rendered at a hospital owned facility to include any treatment on the statement not rendered more than thirty-five days before the postmark date of the statement.<sup>147</sup> An exception is made when the health care provider notifies the insurer of an intention to treat the insured twenty-one days after the provider's first examination of the insured, then the statement may include any charges not rendered more than seventy-five

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139. *Id.* at 1125-26.

140. *See id.*

141. 726 So. 2d 320, 320 (Fla. 3d DCA 1999).

142. FLA. STAT. § 627.736(4)(b)(2).

143. *Id.* § 627.736(4)(c).

144. Comm. on Crim. Just. Staff Analysis, *supra* note 12. The interest rate calculated for 2001 was eleven percent. *Id.*

145. FLA. STAT. § 627.736(4)(b).

146. *Id.*

147. *Id.* § 627.736(5)(c). The previous statute only allows for any treatment not rendered more than thirty days before the postmark. *Id.* § 627.736(5)(b) (2000).

days before the postmark of the statement.<sup>148</sup> If the insured provides an incorrect name or address of the insured's PIP insurer to the provider, then the provider has thirty-five days from the time that the provider obtains the correct information to send the insurer a statement of charges.<sup>149</sup> However, the insurer is not required to pay the charges unless the provider demonstrates that the provider reasonably relied on the incorrect information from the insured.<sup>150</sup> The provider may demonstrate reasonable reliance by furnishing the insurer with a denial letter from an incorrect insurer or proof of mailing the statement to an incorrect address or insurer.<sup>151</sup>

#### *H. Demand Letters*

Another major provision of Senate Bill 1092 requires a claimant to send a demand letter to the insurer as a condition precedent to filing suit for an overdue claim.<sup>152</sup> A demand letter is not required where the insurer has denied or reduced a claim or if the insurer has been provided with documentation or information at the insurer's request.<sup>153</sup> The demand letter may not be sent until after the claim is overdue,<sup>154</sup> and it must specifically state certain information.<sup>155</sup> The letter must be sent to the insurer at the address specified by the insurer for the purpose of receiving demand letters.<sup>156</sup> If the claim and applicable interest are paid within seven business days after the insurer receives the letter, then no action for nonpayment or late payment may be brought against the insurer.<sup>157</sup> The mailing of a demand letter tolls the applicable statute of limitations for fifteen business days.<sup>158</sup> However, any insurance company that makes a habit of not paying valid claims until receiving the demand letter is guilty of engaging in an "unfair trade practice under the insurance code."<sup>159</sup>

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148. *Id.* § 627.736(5)(c). The previous statute only allows any charges not rendered more than sixty days before the postmark. *Id.* § 627.736(5)(b) (2000).

149. *Id.* § 627.736(5)(c) (2001).

150. *Id.*

151. *Id.*

152. *Id.* § 627.736(11)(a).

153. *Id.*

154. *Id.*

155. *Id.* § 627.736(11)(b). The demand letter must state the name of the insured, the claim or policy number, the name of any medical provider who rendered treatment or supplies to the insured, the date of treatment, service or accommodation, and the type of benefit claimed to be due. *Id.*

156. *Id.* § 627.736(11)(c).

157. *Id.* § 627.736(11)(d).

158. *Id.* § 627.736(11)(e).

159. *Id.* § 627.736(11)(f).

### I. *Two Magic Questions*

The legislature added requirements to the written report that providers must submit upon the insurer's request.<sup>160</sup> These requirements commonly have been referred to as the "two magic questions" that insurance company adjusters may ask. Along with an explanation of the "history, condition, treatment, dates, and costs of such treatment," the provider must explain why the items were "reasonable in amount and medically necessary."<sup>161</sup> That is, the insurer may ask why the service was medically necessary and why the amount of the charge is reasonable. If the insurer requests this information within thirty days after receiving notice of the amount of a covered loss, the amount that is the subject of the insurer's request will be overdue if the insurer does not pay the amount in accordance with section 627.736(4)(b), *Florida Statutes*, or within ten days—whichever is later.<sup>162</sup> If an insurer requests documentation under this statute as a general business practice, without a reasonable basis, the insurer is guilty of engaging in an unfair trade practice.<sup>163</sup>

### J. *Independent Medical Examinations*

Under the current law, many insurers use paper independent medical examinations to determine whether to refuse to pay a PIP claim.<sup>164</sup> Paper independent medical examinations occur when the insurance company hires a physician to review the medical records of a claimant and determine whether the treatment was "reasonable, related or necessary."<sup>165</sup> The enactment of Senate Bill 1092 requires insurers to obtain a "valid report" before denying payment.<sup>166</sup> The legislature defined a valid report as

one [that is] prepared and signed by the physician examining the injured person or, in the alternative, reviewing the treatment records of the injured person and such report is factually supported by the examination and treatment records if reviewed and that has not been modified by anyone other than the physician.<sup>167</sup>

Moreover, the physician who prepares the report must be in "active practice," which means the physician must have devoted professional time to the active clinical practice of evaluation, diagnosis, or treatment of medical conditions, or the instruction of students in specified

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160. *Id.* § 627.736(6)(b).

161. *Id.*

162. *Id.*

163. *Id.*

164. Comm. on Crim. Just. Staff Analysis, *supra* note 12.

165. *Id.*

166. *Id.*

167. *Id.*

accredited health, residency, or clinical programs three years prior to the date of the physical exam or review of the record.<sup>168</sup> This amendment validates the current practice of paper independent medical examinations.

### K. *Miscellaneous Provisions*

The Florida Legislature expanded immunity from civil liability for individuals covered under section 626.989, *Florida Statutes*, who report persons suspected of insurance fraud to the Department of Insurance or to any local, state, or federal enforcement official.<sup>169</sup> The legislature also removed the requirement that medical payment insurance must cover the twenty percent of medical bills not covered under PIP insurance.<sup>170</sup> This is a common sense change that will result in self-utilization management by the PIP insured. In other words, the PIP insured will be responsible for the twenty percent co-payment on medical costs, and the PIP insurer will make payment for eighty percent of the medical costs. PIP insureds will now self-police their utilization through the payment of the twenty percent co-payment.

## VI. HOUSE BILL 1805—PUBLIC RECORDS/MOTOR VEHICLE CRASHES

House Bill 1805 was designed to stop PIP fraud in the early stages by making it more difficult to obtain information from police accident reports. Article I, Section 24(a) of the Florida Constitution states that “[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . .”<sup>171</sup> The public records laws do allow for the exemption of certain records, but the exemption must include a specific statement of public necessity.<sup>172</sup>

### A. *Prohibition on the Release of Accident Reports*

The Florida Legislature amended section 316.066(3)(c), *Florida Statutes*, to make crash reports “confidential and exempt” from section 119.07(1), *Florida Statutes*, and Article I, Section 24(a) of the Florida Constitution for sixty days after the report is filed.<sup>173</sup> The crash reports will be available to the parties of the accident, their le-

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168. FLA. STAT. § 627.736(7)(a). The requirement that the physician be in active practice does not apply to disabled physicians. *Id.*

169. *Id.* § 626.989(4)(c).

170. *Id.* § 627.736(4).

171. FLA. CONST. art. I, § 24.

172. *See* FLA. STAT. § 119.07.

173. *Id.* § 316.066(3)(d).

gal representatives, relevant insurance agents, prosecutorial authorities, radio and television stations, and newspapers.<sup>174</sup> The amendment also provides a definition of what is not a qualifying newspaper for the purposes of the statute.<sup>175</sup> The classification “confidential and exempt” requires a higher level of responsibility on the part of the state agency than information that is deemed to be “exempt.”<sup>176</sup> If information is classified as “confidential and exempt,” the agency may not use the information in internal documents.<sup>177</sup> Moreover, “confidential and exempt” information may only be released to individuals expressly exempted by the statute.<sup>178</sup>

### B. *Penalty for Violation*

Any employee of a state or local agency who knowingly discloses confidential information to a person not listed in section 316.066(3)(d) is guilty of a third-degree felony.<sup>179</sup> Moreover, any person who knows that he or she is not entitled to such information and who tries to obtain such information is guilty of a third-degree felony.<sup>180</sup>

### C. *Statement of Necessity*

The legislature found it necessary to make crash reports confidential and exempt because of the correlation between the illegal solicitation of accident victims and the commission of PIP fraud.<sup>181</sup> The legislature stated that “[m]otor vehicle insurance fraud is fueled by early access to crash reports, which provides the opportunity for the filing of fraudulent insurance claims.”<sup>182</sup> The legislature believed that the personal information of accident victims needs to be confidential and exempt to “protect the privacy” of those persons.<sup>183</sup> The legislature relied heavily on the findings of the statewide grand jury to make its determination.<sup>184</sup>

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174. *Id.*

175. “Newspaper” does not include: papers printed primarily for members of a professional or occupational group; papers primarily for advertising; and papers whose primary purpose is to publish the names and personal information concerning parties involved in a motor vehicle accident. *Id.*

176. Fla. H.R. Comm. on Ins., HB 1805 (2001) Staff Analysis 3 (rev. Mar. 23, 2001) (on file with comm.), available at <http://www.leg.state.fl.us/data/session/2001/house/bills/analysis/pdf/2001h1805.in.pdf>.

177. *Id.*

178. *Id.*

179. FLA. STAT. § 316.066(3)(d) (2001).

180. *Id.*

181. *Id.* § 316.066.

182. *Id.*

183. *See id.*

184. *See id.*

## VII. WILL THESE NEW BILLS PREVENT AUTO INSURANCE FRAUD?

Due to the enactment of these bills, the PIP insurance companies should notice a significant drop in the amount of money they lose to automobile insurance fraud.<sup>185</sup> The insurance companies' savings could translate into lower premiums for Florida drivers<sup>186</sup> or, at a minimum, reduce the level of rate increases that might otherwise occur. However, these bills are not the complete answer to Florida's insurance fraud problem.

A. *Senate Bill 1092*

The required registration process for clinics will help the Department of Health keep an accurate record of the number of clinics operating in Florida. Currently, the Department has no record of how many clinics are in the state.<sup>187</sup> Furthermore, the requirement of a licensed medical director should prevent the problem of rubber stamping statements of charges to insurance companies.<sup>188</sup> Requiring medical directors to be responsible for reviewing patient referrals should reduce the number of kickbacks paid to runners for patient referrals. Moreover, the requirements of registration and hiring a medical director add barriers to opening clinics in Florida and should reduce the amount of clinics opened for the sole purpose of filing fraudulent PIP claims.

The new fee schedule was directed at lowering the cost of the tests most frequently used by chiropractors to inflate PIP claims. The fee caps should help consumers by limiting the amount that their treating physician can charge their insurance company. This limitation will help preserve part of consumers' PIP coverage for any future medical treatment that might be necessary. Additionally, the MRI fee cap will limit charges to about \$1,000.<sup>189</sup> The MRI fee cap is still more than other insurers pay, but it is better than the \$1,700 currently being charged to PIP insurers by unethical doctors and chiropractors.

The amendment to section 817.234(8), *Florida Statutes*, would remove the current loophole in the statute.<sup>190</sup> While medical and legal professionals are already barred from soliciting accident victims by their respective canons of ethics, some unethical members of these

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185. Comm. on Crim. Just. Staff Analysis, *supra* note 12.

186. *Id.*

187. *Id.*

188. See *generally Auto Insurers*, *supra* note 33 (discussing questionable practices at clinics operating without such a requirement).

189. Sam Miller, *PIP Fraud Package is the Most Significant Auto Insurance Reforms in Florida Since Mid-1970s*, FIR: Late-Breaking Insurance News, May 7, 2001, available at <http://www.flains.org/newfic/mediapublic/latebreakingnews/piprelease57.html>.

190. See FLA. STAT. § 817.234(8) (2001).

professions continue to use runners to solicit accident victims. The amendment would have allowed these unethical professionals to be charged with a third-degree felony for causing the victims to be solicited.<sup>191</sup> Moreover, the amendment would have removed the incentive to solicit victims using runners by making any charges for patients or clients that were solicited in violation of the statute unenforceable and noncompensable. However, a recent decision by the Supreme Court of Florida held section 817.234(8) unconstitutional.<sup>192</sup> The Florida Supreme Court examined the legislative history and plain meaning of section 817.234(8) and concluded that the legislature never intended fraud to be an element of the offense of unlawful insurance solicitation.<sup>193</sup> Because the statute restricted commercial speech, the court applied the *Central Hudson* test,<sup>194</sup> which allows the state to regulate misleading commercial speech and commercial speech that promotes illegal activities.<sup>195</sup> However, *Central Hudson* still allows commercial speech to be regulated if the state has a substantial interest to support the restriction, the restriction directly and materially advances that interest, and the restriction is narrowly tailored.<sup>196</sup> The Supreme Court of Florida found that the interests asserted by the state were substantial enough to satisfy the first prong of the *Central Hudson* test.<sup>197</sup> However, the court found that the restriction prohibited all forms of solicitation, not just solicitation for the purpose of filing fraudulent claims.<sup>198</sup> Therefore, section 817.234(8) has been held unconstitutional as an infringement of the First Amendment right to commercial speech.<sup>199</sup> Consequently, these changes will not take effect unless the United States Supreme Court reverses the decision. A separate section of the amendment prohibits an attorney from soliciting people involved in a car accident, not just people injured in a car accident.<sup>200</sup> This change should cut down on the filing of fraudulent lawsuits.

By defining “medically necessary” and clarifying the spiritual healing portion of section 627.736(1)(a), insurers will not be responsible for paying claims on such a wide range of tests.<sup>201</sup> This should save the insurance companies some money. Moreover, these new provisions should prevent chiropractors and physicians from ordering

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191. *Id.* § 817.234(8), (9).

192. *State v. Bradford*, 787 So. 2d 811, 814 (Fla. 2001).

193. *Id.*

194. *Id.* at 820-23; *see also* *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

195. *Central Hudson*, 447 U.S. at 563-64.

196. *Id.* at 564-66.

197. *Bradford*, 787 So. 2d at 821.

198. *See id.* at 823.

199. *Id.* at 828.

200. FLA. STAT. § 817.234(9) (2001).

201. *Id.* § 627.736(1)(a).

experimental tests or non-medically necessary tests because medical professionals will no longer have the same assurance that PIP insurance will cover the costs of the tests. Medical providers may not be entitled to as much reimbursement for PIP claims as under the previous law, but the providers will have a longer time to file a statement of charges with the insurer.<sup>202</sup> Under certain circumstances, providers will have up to seventy-five days to file charges.<sup>203</sup>

The legislation requires insurance companies to provide clearer reasons why the company is refusing to pay a claim or only paying a reduced amount, and it requires insurers to provide consumers with a telephone number and the name of a person to contact for further information about the consumer's claim.<sup>204</sup> Senate Bill 1092 should reduce the incentive to be a broker by making all charges from brokers noncompensable and unenforceable.<sup>205</sup> Moreover, under Senate Bill 1092, the insurance company will not be able to terminate treatment without a valid report by an active physician.<sup>206</sup> When the legislature repealed section 627.736(4)(f), *Florida Statutes*, it removed the requirement that medical payments insurance cover the twenty percent of medical costs not covered by PIP insurance.<sup>207</sup> This coverage requirement allowed a person with medical payment insurance to see a doctor without having to pay any up front costs, which may have increased the number of frivolous doctor visits and raised the price of the policies. Therefore, the new law should help reduce the price of these policies since insureds will have to cover some of the cost of their visits instead of insurance companies picking up the whole bill.

The legislature did not provide an extra thirty days for insurers to pay claims that were certified as being investigated for fraud as recommended by the statewide grand jury, but the legislature did preserve the defenses that the claim was unreasonable, not medically necessary, or unrelated, even after the thirty day time period to obtain a physician's report expires and after payment is made. This preservation of defenses allows the insurer to continue to investigate suspected fraudulent claims without forfeiting the right to refuse payment. By adding the requirement that providers must explain why charges are reasonable and necessary upon the request of the insurer, the legislature provided another way for insurers to investigate suspicious claims. These two questions will serve as a strong

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202. Comm. on Crim. Just. Staff Analysis, *supra* note 12.

203. FLA. STAT. § 627.736(5)(c).

204. *Id.* § 627.736(4)(b).

205. Fla. S. Comm. on Crim. Just. & S. Comm. on Banking & Ins., CS for CS for SB 109212 (2001) Staff Analysis (Apr. 23, 2001) (on file with comm.).

206. *Id.*

207. FLA. STAT. § 627.736(4).

weapon against fraud, overutilization, and overcharging by providers.

*B. House Bill 1805*

The amendment to section 316.066(3)(c), *Florida Statutes*, will probably be challenged on constitutional grounds as a violation of the First Amendment right to freedom of speech.<sup>208</sup> Recently, California and Kentucky altered their public records laws concerning police reports to prevent the release for commercial purposes of names and addresses listed in police reports.<sup>209</sup> Both of the statutes were quickly challenged on First Amendment grounds.<sup>210</sup>

The amended California statute requires that a party swear under the penalty of perjury that the information released to them will not be used for commercial purposes.<sup>211</sup> The statute was facially challenged by a publishing company that specialized in compiling the names and addresses of recently arrested individuals in a journal and selling the publication to lawyers, insurance companies, counselors, and driving schools.<sup>212</sup> The United States District Court for the Southern District of California held that the statute as amended was unconstitutional, and the Ninth Circuit Court of Appeals affirmed the district court's opinion.<sup>213</sup> However, the United States Supreme Court found that United Reporting Publishing should not have won on the grounds of a facial attack of the statute.<sup>214</sup> The Court stated that the statute was not an abridgement of the right to free speech, but a restriction on the access of information held by the police department.<sup>215</sup> Justice Rehnquist stated that the amended statute was "nothing more than a governmental denial of access to information in its possession."<sup>216</sup> The Court went on to state that California could withhold all information regarding arrestees without violating the Constitution.<sup>217</sup>

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208. *See id.* § 316.066.

209. CAL. GOV'T CODE § 6254(f)(3) (West 2000); KY. REV. STAT. ANN. § 189.635(5) (Banks-Baldwin 2000).

210. *See Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 36 (1999); *Amelkin v. McClure*, 205 F.3d 293, 295 (6th Cir. 2000).

211. CAL. GOV'T CODE § 6254(f)(3) (West 2000).

212. *United Reporting Pub. Corp.*, 528 U.S. at 34, 36.

213. *United Reporting Pub. Corp. v. Lungren*, 946 F. Supp. 822 (S.D. Cal. 1996), *aff'd*, 146 F.2d 1133 (9th Cir. 1998), *rev'd by* 528 U.S. 32, *on remand and remanded by* 231 F.3d 483 (9th Cir. 2000).

214. *United Reporting Pub. Corp.*, 528 U.S. at 38.

215. *Id.* at 40, 41.

216. *Id.* at 40.

217. *Id.* The case is currently on remand to the district court to develop the record further as regarding the as-applied challenges. *See United Reporting Pub. Corp. v. Cal. Highway Patrol*, 231 F.3d 483 (9th Cir. 2000).

Kentucky amended its statute regarding accident reports because attorneys and chiropractors were using the reports to solicit potential clients through direct mail.<sup>218</sup> The Kentucky statute was amended to make accident reports confidential and exempt except to the parties to the accident, their insurers, the attorney of the parties, and news organizations for the purpose of publishing or broadcasting the news.<sup>219</sup> Originally, the Sixth Circuit Court of Appeals held that the amended statute was a violation of the First Amendment right to freedom of expression.<sup>220</sup> The United States Supreme Court reversed and remanded the decision to be considered in light of its holding in *Los Angeles Police Department v. United Reporting Publishing Corp.*<sup>221</sup> On remand, the Sixth Circuit Court of Appeals held that the Kentucky statute was “not subject to a facial challenge because it does not carry the threat of prosecution for violating the statute and it does not restrict expressive speech, but simply regulates access to the state’s accident reports.”<sup>222</sup>

Amended section 316.066(3)(c) may not survive a facial attack. In both decisions, the Court stated that the reason that the restriction was not a violation of the Constitution was because it did not impose a threat of criminal prosecution.<sup>223</sup> However, Florida’s amendment states that a violation of section 316.066(3)(c) is punishable as a third-degree felony.<sup>224</sup> A court may find that the threat of criminal punishment has a chilling effect on speech; therefore, a facial challenge would be appropriate. Moreover, the cases in California and Kentucky are on remand to consider the as-applied challenges to the statutes, and it is unclear how any of the statutes will withstand such an attack. If amended section 316.066(3)(c) survives a constitutional challenge, it will help prevent insurance fraud right where it starts by preventing access to police reports by runners.

#### CONCLUSION

There is no way to deny that Florida has a serious problem with PIP fraud. The most recent estimate, made by the National Coalition Against Insurance Fraud, indicates that the cost of insurance fraud

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218. See *Amelkin v. McClure*, 168 F.3d 893, 895 (6th Cir. 1999), *vacated and remanded*, 528 U.S. 1059 (1999), *rev’d, vacated in part, and remanded by* 205 F.3d 293 (6th Cir. 2000).

219. KY. REV. STAT. ANN. § 189.635(5)-(6) (Banks-Baldwin 2000).

220. *Amelkin*, 168 F.3d at 902.

221. *Amelkin*, 528 U.S. at 1059.

222. *Amelkin*, 205 F.3d at 296. The case was remanded to the district court to consider the as-applied challenge. *Id.* at 297.

223. See *United Reporting Pub. Corp. v. Lungren*, 528 U.S. 32, 40-41 (2000); *Amelkin*, 205 F.3d at 296.

224. FLA. STAT. § 316.066(3)(d) (2001).

in Florida was \$1.1 billion in 1997.<sup>225</sup> During the 2001 legislative session, the legislature drafted two bills to fight the problem of insurance fraud. Florida should notice a reduction in PIP insurance fraud and consumers should notice reduced automobile insurance premiums, or at least lower rate increases than would otherwise occur, due to the enactment of these bills. The bills provide for increased penalties for certain offenses related to the solicitation of accident victims, registration of clinics, fee caps for certain diagnostic tests, the prohibition of MRI brokering, an extended period for providers and insurers to bill and pay claims, the sending of a demand letter before suing an insurance company, the ability of a PIP insurer to discover why the service was medically necessary and the cost was reasonable, the creation of a civil action for insurance fraud, and the restriction of accident reports to only certain categories of people.

Senate Bill 1092 is a step in the right direction to help lower the rate of PIP fraud in Florida. The bill addresses many of the contributing factors to PIP fraud such as pain clinics operated by lay entrepreneurs, inflated charges for common tests, and MRI brokering. However, many of these contributing factors would not be as prevalent if runners did not have free access to accident reports. House Bill 1805 attempts to prohibit runners from having access to the reports. If the new law withstands a likely constitutional challenge, then Florida insurers should notice a dramatic drop in the amount of PIP fraud. However, if the law is found unconstitutional, the practice of using runners to solicit victims will continue unencumbered.

These bills are part of the answer to reducing PIP fraud, but not the complete solution. A more complete solution would have sought to place a reasonable limit on the amount of attorney's fees that insurance companies are responsible for paying. The current attorney's fee provision in section 627.428, *Florida Statutes*, unfortunately deters insurers from legitimately resisting fraudulent claims, overutilization, and unreasonably high charges for medical services. Moreover, PIP insurance is the last fee-for-service plan.<sup>226</sup> All other forms of insurance either have a negotiated price for services or a fee schedule for charges. PIP insurance fraud will always be a problem as long as it is a fee-for-service plan because of the ease of inflating charges for tests and the ability to charge for unnecessary medical

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225. Comm. on Crim. Just. Staff Analysis, *supra* note 12.

226. A fee-for-service plan is one where the provider sets the fee and the patient or insurance carrier is responsible for paying that amount. Michael K. Beard, *The Impact of Changes in Health Care Provider Reimbursement Systems on the Recovery of Damages for Medical Expenses in Personal Injury Suits*, 21 AM. J. TRIAL ADVOC. 453, 466 (1998).

treatment.<sup>227</sup> The Florida Legislature should consider requiring a more complete fee schedule for PIP insurance. The no-fault insurance reforms passed by the legislature will help alleviate the problem of PIP insurance fraud, but the reforms are not the complete answer.

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227. See Jeffery O'Connell & James F. Neale, *HMO's, Cost Containment, and Early Offers: New Malpractice Threats and a Proposed Reform*, 14 J. CONTEMP. HEALTH L. & POL'Y 287, 290-91 (1998).