

No-Fault Insurance at 40: The Experience in Florida

Jeffrey O’Connell, Peter Kinzler, and Dan Miller

EDITOR’S NOTE: This year marks the 40th anniversary of the first state (Massachusetts) to implement a no-fault law. Between 1971 and 1975, the District of Columbia and 15 additional states – including Florida – followed suit. To commemorate the anniversary, the authors have written a major public policy paper analyzing the history and potential future of no-fault. The paper is being published by the National Association of Mutual Insurance Companies and will be available in December 2011. This Issue Brief, which is drawn from the larger paper, specifically examines the no-fault experience in Florida.

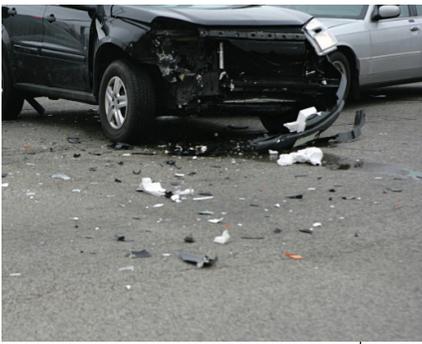
When law professors Robert E. Keeton and Jeffrey O’Connell proposed no-fault auto insurance in 1965,¹ the idea was that it would embody two features: provide for (some) no-fault compensation for economic loss and eliminate (some) compensation for noneconomic loss (commonly called “pain and suffering”). Much of the impetus for adopting state no-fault laws at the time had to do with a growing recognition about the failures of the traditional tort liability system. It failed to compensate about half of all injured people; overpaid those with minor injuries while underpaying those with serious injuries; paid more for lawyers and pain and suffering than for medical bills and lost wages, paid benefits too slowly and was too costly. No-fault was a way to change that by allowing drivers to recover for economic losses from their own insurance company (often called personal injury protection or “PIP” benefits) without regard to fault, and by limiting their ability to sue for pain and suffering, reducing the costs of attorneys’ fees and pain and suffering enough to reduce insurance premiums somewhat.

The Keeton-O’Connell proposal led to a model state law² and consideration of no-fault proposals by most state legislatures in the early to mid-1970s. The trial bar engaged in aggressive campaigns to defeat or, failing that, to undermine those legislative efforts. As a consequence, only 16 states adopted no-fault laws, with only one (Michigan) that was close to the ideas put forth by Professors Keeton and O’Connell and the model state law. The most glaring deficiency was that the limits on pain and suffering (the “thresholds” intended to limit suits) permitted too many lawsuits, thereby undermining the ability to lower premiums.

Florida was the second state to adopt a no-fault law, which went into effect on January 1, 1972.³ Since then, the law has undergone many changes, including going from a dollar threshold to a verbal threshold in 1976. On the PIP side, the level of benefits increased from \$5,000 to \$10,000 in 1978. How has the law worked?

PIP Claims

A recent RAND study includes compelling data to demonstrate greater utilization of, and higher reimbursement rates for, PIP medical benefits than for similar health insurance benefits.⁴ Why? Florida and other no-fault laws did not keep up with changes in cost control mechanisms. In addition, auto insurers lacked the clout that health insurers had to negotiate deep discounts for hospital and medical services.



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Peter Kinzler worked on no-fault insurance legislation as a staff member of the House Interstate and Foreign Commerce Committee in the 1970s and on auto choice as president of the Coalition for Auto-Insurance Reform during the 1990s and 2000s. He also was a consultant on insurance and other financial issues, including to NAMIC. He is now retired.

Dan Miller is a congressional staff economist who wrote several papers on auto choice for the Joint Economic Committee of the U.S. Congress during the 1990s and 2000s.

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Through the years, Florida's PIP coverage has been plagued by "escalating claims costs, high utilization rates for expensive diagnostic services, high chiropractor utilization rates, high rates of attorney involvement, and high rates of apparent claim fraud and claim buildup."⁵ For example, in 2007, PIP claimants utilized:

- Expensive MRI procedures at a significantly higher rate than that for PIP claimants countrywide (33 percent versus 22 percent);
- More chiropractors (43 percent versus 22 percent); and
- More pain clinics (27 percent versus 20 percent).⁶

Further, in a system designed to deliver medical benefits promptly without the need for attorneys, Florida claimants also use attorneys far more often than claimants in other no-fault states, resulting in much higher PIP claims:

- Attorneys in Florida are involved in 41 percent of PIP claims versus 31 percent nationally; and
- Where the most severe injury is neck or back sprain or strain, the average PIP claim for people who retain an attorney is \$11,677, 62 percent higher than the \$7,217 claim for people with similar injuries in Florida who do not retain an attorney.⁷

It is not surprising that claims adjusters estimate a much higher appearance of claims fraud and buildup (unnecessary or excessive treatment):

- The appearance of fraud was noted in 10 percent of claims in Florida versus 6 percent nationally; and
- The appearance of claims buildup in 30 percent of claims in Florida versus 20 percent nationally.⁸

The Florida Legislature has reacted to each surge in no-fault premiums with efforts to reform the PIP system. Among the controls adopted during major legislative battles in 1998, 2001, 2003, and 2007 were a workers' compensation fee schedule for certain medically necessary procedures, a medical fee schedule for some providers, and more funding for anti-fraud efforts.

More stringent changes were defeated, as was a 2011 effort by some Florida legislators to make further changes, including increased penalties for medical providers who knowingly submit false and fraudulent applications for clinics that treat crash victims. The most recent effort failed despite a run-up of PIP pure premium costs (the cost of these losses to the insurer) from \$100 in the fourth quarter of 2008 to approximately \$150 in the fourth quarter of 2010.⁹

For all of its efforts, the Florida Legislature has always seemed a step behind trying to combat the latest healthcare tactics. The result, over time, has been runaway increases in PIP costs:

- Between 1995 and 2003, PIP pure premium in Florida rose an average of 6.73 percent, nearly twice the 3.51 percent rate of the Consumer Price Index – Medical Inflation Index;
- Between 1997 and 2007, the average total payment rose 70 percent versus an increase of 50 percent in the CPI – Medical Inflation Index;¹⁰ and

- From the fourth quarter of 2008 through the first quarter of 2010, PIP costs rose 40 percent, and the Insurance Research Council estimates the increase will be 50 percent measured to the fourth quarter of 2010.¹¹

The Threshold Question

The original no-fault model envisioned a “verbal” or descriptive threshold as an essential component of a good no-fault law. The rationale was that a threshold that permitted suits for pain and suffering only in cases of both “serious” and “permanent” injury would eliminate most lawsuits, thus offsetting the costs of PIP benefits. It would also make sure that pain and suffering damages would be available only to people in the greatest need.

As previously noted, Florida adopted a verbal threshold in 1976. However, the Florida law failed to combine the terms “serious” and “permanent,” thereby leaving enough wiggle room for lawyers to argue, and juries to find, that relatively minor injuries crossed the threshold.

As a result, even with the large PIP increases, NAIC Fast Track data,¹² which reports comprehensive data for private passenger automobile insurance, show tort bodily injury costs in Florida were *higher* than PIP costs (55 percent versus 45 percent) in the first quarter of 2010, indicating that effective reform must address both PIP and tort bodily injury costs. It is also important to note the connection between the two parts of the system, because a loose threshold also results in higher PIP claims through the padding of such claims in an effort to meet the threshold test.

Ways to Fix the Florida No-Fault Law to Meet Its Intended Purposes

Here are some specific ideas Florida lawmakers might consider that would retain the compensation benefits of no-fault while lowering premiums dramatically by reducing the excessive costs caused by PIP and threshold abuses.

■ How to lower PIP costs

The easiest way to reduce PIP costs is to make the PIP system identical to the insured’s health insurance. The RAND findings and the data suggest there would be significant savings. Here are three ways that can be done:

- Health primacy, i.e., having health insurers pay for losses in auto accidents. The advantage would be a clean and simple system, to the extent a PIP insured had sufficient health insurance to cover the losses. This change would lower PIP costs significantly while increasing healthcare costs minimally.
- Health primacy with subrogation against PIP benefits. This approach would retain the cost restraints under health insurance but the costs of auto accidents would be internalized within the auto system. Of course, the savings would be diluted by the costs of subrogation between the health and auto insurers.
- Application of the insured’s health insurance constraints to PIP claims. PIP insureds would be permitted to save money by having their PIP medical benefits mirror restraints on benefits applicable under a PIP payee’s own health insurance.

■ Give motorists the option to limit suits for pain and suffering beyond existing law in return for lower premiums

The Joint Economic Committee (JEC) of the U.S. Congress identified the huge savings in 2003 that could accrue to motorists by allowing them a choice between the current system in their state versus a system with PIP benefits plus a waiver by PIP insureds of *all* claims for pain and suffering. The study estimated the aggregate potential national savings at \$33.7 billion for private passenger vehicles.¹³ Dan Miller, the author of the JEC study, estimates the savings in 2011 would be \$34 billion.¹⁴ While Miller did not break out his savings estimates by states for this paper, he did provide such estimates in 2003. For Florida, the estimated savings would have been \$4.11 billion per year if all drivers elected the tighter threshold option (the second highest of any state), with an average per vehicle savings of \$328. The key to this approach is that it avoids the pitfalls associated with verbal thresholds, and the vicissitudes of courts and legislatures impairing the thresholds.

These two immediate reforms would allow Florida consumers to save billions of dollars on the cost of insurance.

In the final analysis, it is a question of whether, when families are squeezed by governments’ efforts to rein in deficits and debt, legislators see a different political calculus that will enable them to defy the players invested in the present wasteful system, and permit citizens to take advantage of opportunities to help offset the new economic burdens.

Endnotes

¹ Robert E. Keeton and Jeffrey O’Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Boston, MA: Little, Brown and Company, 1965).

² Roger C. Henderson and William Cohen, co-reporters, *Uniform Motor Vehicle Accident Reparations Act* (Chicago, IL: National Conference of Commissioners on Uniform State Laws, August 1972).

³ See, Fla. Stat. ch. 627, §§ 730 to 7407.

⁴ James M. Anderson, Paul Heaton, Stephen J. Carroll, *The U.S. Experience with No-Fault Automobile Insurance: A Retrospective* (Santa Monica, CA: RAND Institute for Civil Justice, 2010), pp. 120 – 130.

⁵ Insurance Research Council, *PIP Claiming Behavior and Claim Outcomes in Florida* (Malvern, PA: February 2011), p. 1.

⁶ *Ibid*, pp. 12-14.

⁷ *bid*, pp. 15-16.

⁸ *Ibid*, p. 17.

⁹ *Ibid*, p. 4

¹⁰ *Ibid*, p. 7.

¹¹ *Ibid*, p. 3.

¹² These PIP and bodily injury pure premium figures come from *Fast Track Monitoring System – Automobile Report, Private Passenger, First Quarter, 2010* collected by the Independent Statistical Service, Inc., Insurance Services Office, Inc., and National Independent Statistical Service. These statistical reports are prepared quarterly reflecting multi-year trends. They provide data on a state-by-state basis for the different automobile insurance coverages as well as on a nationwide aggregate basis

¹³ Joint Economic Committee, *Choice in Auto Insurance: Updated Savings Estimates for Auto Choice*, (U.S. Congress, Washington, DC, July 2003), pp. 7, 12.

¹⁴ Estimate of Dan Miller using the most recent data from the same sources he used in 2003 to estimate savings from adoption of the federal Auto Choice Act. For a detailed description of Miller’s methodology, see footnote 13, pp. 8-9.