TO REFORM OR REPUDIATE? AN ARGUMENT ON THE FUTURE OF NO-FAULT AUTO INSURANCE

Trevor M. Gordon*

I. Introduction

The advent of the automobile heralded a tremendous shift in the lifestyles of most Americans.[1] As vehicle ownership slowly became available to the masses, the promise of inexpensive personal transportation connected the vast, disparate corners of this country in a way that was previously impossible.[2] The inconveniences of travel and inefficiencies of long distance shipping melted away, permitting hundreds of new towns to spring up between the existing major population centers.[3] But even as Americans romanticized Route 66,[4] the human cost of this newfound freedom became slowly apparent. Horrific automobile accidents became increasingly commonplace as more Americans crowded the roads with larger and faster cars, creating an ever-

* J.D Candidate, Quinnipiac University School of Law, 2014; B.A, Stetson University, 2009. I am grateful for the assistance of my father, Robert Gordon, for acting as a sounding board for my ideas and drafts. I would also like to thank the staff of the Quinnipiac Health Law Journal for their tireless efforts in preparing this Note for publication.

[1] *See* LeisureLife, *The Automobile - Effects / Impact on Society and Changes in Cars Made by Generation*, HUBPAGES, http://leisurelife.hubpages.com/hub/Affects-of-the-Automobile-on-Society-and-Changes-Made-by-Generation (last updated Apr. 25, 2012).

[2] *Id.*

[3] *Id.*

[4] *See generally* Ethan Hays, *Must-See Roadside Attractions of Route 66*, Uptake (Apr. 22, 2011, 10:43 AM), http://attractions.uptake.com/blog/route-66-must-see-roadside-attractions-13344.html.

expanding legion of injured motorists demanding justice from the courts.[5] Nowadays, motor vehicle accidents are one of the most common causes of emergency room admissions in the country.[6]

The flood of resulting litigation began to expose the inefficiencies (and sometimes, injustices) inherent in the traditional tort system. Legislators and legal scholars began seeking alternatives to the tort system in order to streamline the process and ensure that more accident victims were compensated.[7] The rise of automobile related tort litigation was finally taken seriously by many states beginning in the early 1970s, and No-Fault insurance was conceived as a possible solution.[8] Intended to rein in spiraling litigation costs and provide faster and more generous compensation to injured motorists, No-Fault insurance borrowed its core innovation from workers compensation schemes already in place.[9] In its modern incarnation, No-Fault insurance covers the medical treatment of an injured driver regardless of which party was responsible for causing the accident, and bars potential plaintiffs from the tort process unless the severity or expense of their injury exceeds a threshold.[10]

The idea behind No-Fault insurance was to streamline the claims process, and eliminate the need for litigation over minor injuries.[11] In most instances, No-Fault insurance would cover medical expenses up to a certain cap, such as $10,000 in Florida.[12] In exchange for this coverage, the injured motorist would be

---

[5] *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 303 (2012).

[6] *See* OFFICE OF STATISTICS AND PROGRAMMING, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CTR. FOR DISEASE CONTROL AND PREVENTION, NAT'L ESTIMATES OF THE 10 LEADING CAUSES OF NONFATAL INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS, UNITED STATES-2011 (2012), *available at* http://www.cdc.gov/injury/wisqars/pdf/10LCI_Nonfatal_InjuryTreated_In_Hospital%20Emergency_Dept_2011-a.pdf.

[7] For an in depth discussion of the history of No-Fault automobile insurance regimes, and the various alternatives that were proposed during the early to mid-nineteenth century as a result of the increase in automobile accidents, *see* JAMES M. ANDERSON, PAUL HEATON & STEPHEN J. CARROLL, RAND INST. FOR CIVIL JUSTICE, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 23-39 (RAND Corp. 2010), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG860.pdf.

[8] *Id.* at 39.

[9] *See id.* at 23-27.

[10] *Id.* at 11-12.

[11] *See id.* at 11-13.

[12] FLA. STAT. ANN. § 627.736(1) (West 2013).

barred from suing in tort unless his or her injury was particularly severe, or the treatment excessively expensive.[13] However, the implementation of No-Fault insurance varies widely.[14] For example, in Michigan, No-Fault insurance provides lifetime coverage of medical expenses arising from an automobile accident.[15]

The No-Fault insurance model quickly gained popularity between 1971 and 1976, resulting in 16 states enacting mandatory No-Fault systems.[16] However, this momentum petered out within ten years, and the 1980s and 1990s saw four states repeal their No-Fault insurance laws.[17] The primary reason behind this sudden reluctance to embrace what was once heralded as a nationwide inevitability[18] is simple – No-Fault insurance was considerably more expensive than previously anticipated.[19] There is a myriad of reasons for this result, both empirical and speculative. This Note will attempt to address the most convincing arguments on the path to its ultimate conclusion – that the time has come for states to give up on the No-Fault "experiment" and return to the fold of tort liability.

This Note will analyze the effectiveness of No-Fault automobile insurance as it is currently implemented in two exemplar states, and compare the result with the legislative and public policy goals behind the implementation of the No-Fault model. This Note is divided into seven parts, several of which contain subsections. Part I refers to the foregoing introduction. Part II discusses the background of No-Fault automobile insurance, including the historical circumstances in which it was conceived. Part III illustrates how the No-Fault concept has been implemented in two states – Michigan and Florida. Part IV

---

[13] J. Marshall Wolman & Saba B. Hashem, *Will Health Care Reform Hasten the Demise of No-Fault Insurance?*, 14 TORTSOURCE, no. 3, 2012, at 1.

[14] *Id.*

[15] *See* MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2013); *see also Purpose*, Michigan Catastrophic Claims Ass'n., http://www.michigancatastrophic.com (last updated Oct. 10, 2013).

[16] ANDERSON ET AL., *supra* note 7, at 2.

[17] *Id.* at 3.

[18] Engstrom, *supra* note 5, at 304. It is worth mentioning at this point that a great deal of Engstrom's historical discussion of No-Fault insurance concerns the seminal book on the topic, "Basic Protections for Accident Victims," by Professors Keeton and O'Connell, published in 1965.

[19] ANDERSON ET AL., *supra* note 7, at 3.

provides a detailed analysis of empirical data concerning the effectiveness of No-Fault automobile insurance at achieving its goals. Part IV also attempts to explain the causes behind the unexpectedly high costs associated with the system. Part V discusses several efforts and proposals to reform the No-Fault system, including a recent attempt by the Florida legislature. Part V also contemplates the nexus between the recently enacted Patient Protection and Affordable Care Act ("ACA") and the No-Fault model. After concluding that the No-Fault concept is fundamentally flawed, Part VI presents an argument in favor of abandoning the system in favor of mandatory bodily injury liability coverage. Finally, Part VII concludes with a summary of findings, as well as a recap of the ultimate policy proposal in favor of abolishing No-Fault automobile insurance.

II. Background

A. Conception of No-Fault Insurance

The genesis of the No-Fault concept is rooted in the stifling factories of the industrialization era.[20] With the increased productivity offered by new manufacturing technologies came increased injuries to workers, and progressive reformers fought to implement safeguards to protect this socio-politically disadvantaged class.[21] The financial uncertainty that surrounded tort liability for on-the-job injuries prompted some employers to band together with reformers to institute the first "liability without fault" model in the realm of workers compensation.[22]

By the 1930s, dissatisfaction with the tort system was also growing in the realm of automobile accident compensation.[23] In 1932, the Committee to Study Compensation for Automobile Accidents found that motorists injured by uninsured drivers stood only a 25 percent chance of receiving compensation under the prevailing tort regime.[24] Automobile ownership increased dramatically after the Second World War, and the compensation

---

[20] *Id.* at 21.
[21] *Id.*
[22] *Id.* at 21.
[23] *See id.* at 23-24.
[24] ANDERSON ET AL., *supra* note 7, at 26.

of injuries stemming from motor vehicle accidents began threatening to swallow tort law whole.[25] Professors Robert Keeton and Jeffrey O'Connell proposed a solution to this dilemma in their seminal book entitled, "Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance."[26] Keeton and O'Connell articulated a multi-pronged broadside against the shortcomings of the status quo.[27] The traditional tort system, they argued, failed to provide any compensation whatsoever for as many as 63 percent of accident victims.[28] Furthermore, those who did recover damages typically received too little, too late.[29] Their solution was to abolish the tort system for run-of-the-mill automobile injuries, and implement a system where "the burden of providing traffic victims' basic protection would fall on motorists as a cost of driving."[30]

B. Contemporary Arguments Supporting and Opposing the No-Fault Model

Proponents of No-Fault compensation had several goals. First, it was believed that compensating accident victims from mandatory first-party insurance would ensure that a much larger percentage of injured motorists actually received adequate compensation (or any compensation at all).[31] Second, supporters of No-Fault anticipated dramatic reductions in cost as the result of reduced administrative and legal expenses.[32] Third, the reduction in such costs would inevitably lead to faster compensation to the injured motorists.[33]

Keeton and O'Connell's proposal of a No-Fault insurance model quickly gained support.[34] Many legal academics advocated

---

[25] Engstrom, *supra* note 5, at 303 ("[Automobile accident litigations] practical influence on tort law is unparalleled, accounting for the majority of all injury claims and three-quarters of all injury damage payouts.").

[26] *Id.* at 318.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Engstrom, *supra* note 5, at 318.

[31] ANDERSON ET AL., *supra* note 7, at 2.

[32] *Id.*

[33] *Id.*

[34] Engstrom, *supra* note 5, at 318-19.

in its favor, alongside unions and consumer groups.[35] The proposal even gained Presidential endorsement when Richard Nixon described it as "a vast improvement and a genuine reform."[36] However, such a radical proposal inevitably provoked opposition from other powerful entities, including the American Bar Association.[37] Plaintiff's attorneys were one of the groups most hostile to No-Fault, believing (incorrectly, it would turn out) that the reforms would decimate their bread-and-butter caseload.[38]

C. The "No-Fault" Movement – Initial Wave of Adoption and Backlash

On January 1, 1971, the Massachusetts state legislature provided the opening kickoff of the "No-Fault era" by becoming the first state to codify a variant of Keeton and O'Connell's proposal into law.[39] The Massachusetts law signaled a paradigm shift in the realm of automobile accident compensation, and many other states quickly followed Massachusetts' lead.[40] The result was a diverse menagerie of varying interpretations on the basic No-Fault premise, with each state attempting to brew an ideal potion combining the innovations of No-Fault, tempered by comforting familiarity of the tort system as a fall-back.

In her 1987 treatise on the origins, coverage and trends of No-Fault law, Professor Josephine King describes some of the differences of such statutes, dividing them into two primary

---

[35] *Id.* at 322.

[36] Carroll Kilpatrick, *Nixon Suggests States Approve No-Fault Plans*, WASH. POST, June 8, 1972, at A27.

[37] Engstrom, *supra* note 5, at 323, 327.

[38] *Id.* at 323.

[39] *See* Alan I. Widiss, *Accident Victims Under No-Fault Automobile Insurance: A Massachusetts Survey*, 61 IOWA L. REV 1, 3-4 (1975); *see also* Engstrom, *supra* note 5, at 321-22. The initial Massachusetts legislation required motorists to carry $2,000 in Personal Injury Protection ("PIP") to cover injuries sustained by the insured, members of the insured's household, authorized passengers and operator's of the insured's vehicle, and any pedestrian hit by the insured vehicle. Parties with damages in excess of the $2,000 coverage could sue in tort for the remainder (a "monetary threshold"). *See* Widiss, *supra* note 39, at 4. However, non-economic damages like pain and suffering could only be awarded if the plaintiff's injury was sufficiently serious and disabling (a "verbal threshold"). *Id.*

[40] ALAN WIDISS, NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 7 (1977). The Massachusetts law was a "significant breakthrough" because other states immediately followed Massachusetts in adopting similar no-fault models. *Id.*

groups.[41] States in Group I[42] are considered "substantial no fault plans,"[43] but they do allow for tort actions for general pain and suffering damages where the accident victim meets certain thresholds.[44] In contrast, Group II states[45] are considered "quasi-no fault programs"[46] because they do not modify the tort system by granting tort immunities or by imposing limitations on tort actions.[47] The major difference between Group I and Group II systems is the limitation of tort liability in Group I systems and the retention of that liability in Group II systems.[48] This Note focuses only on the states within Group I. Notably, no state has ever implemented a "pure No Fault system," which would completely bar all tort actions for damages in excess of the No-Fault coverage.[49]

All No-Fault states share a general commonality of coverage in the types of expenses that first party insurance covers. Medical expenses, lost wage reimbursement, funeral or burial expenses, and substitute service costs are regularly encompassed benefits of No-Fault systems.[50] While some states (such as Florida) place restrictions on the types of medical care that may be reimbursed, the most notable difference between the states is the monetary cap and the nature of the tort threshold.[51]

Tort thresholds are one of the most critical aspects of No-Fault regimes because they act as an initial barrier that a plaintiff must cross in order to bring suit.[52] One of the purposes of requiring

---

[41] JOSEPHINE Y. KING, NO FAULT AUTOMOBILE ACCIDENT LAW 357 (1987).

[42] Group I states include Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Utah. *Id.* at 357, n.1.

[43] *Id.*

[44] *Id.* at 9.

[45] Group II states include Arkansas, Delaware, District of Columbia, Maryland, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, and Virginia. *Id.* at 358, n.2.

[46] King, *supra* note 41, at 358.

[47] *Id.* at 357, n.1, 358, n.2, 9.

[48] *Id.* at 10, 12.

[49] *Id.* at 3.

[50] *Id.* at 10-11.

[51] KING, *supra* note 41, at 11-12.

[52] *See generally id.*, at 372-79; *see also* 59 AM. JUR. TRIALS 347, § 2 (2013) (Most statutory No-Fault regimes "permit tort actions for recovery for nonpecuniary loss, such as pain and suffering, only when a certain threshold level of serious injury is met . . . Satisfaction of this threshold is a challenge for counsel representing plaintiffs and a weapon in the arsenal of defense counsel looking to defeat a plaintiff's claims."); *see also* John W. Chandler,

plaintiffs to meet certain thresholds is to limit access to the tort system only to the most seriously injured motorists.[53] The very existence of thresholds demonstrates the uneasiness in which states have embraced the notion of restricting access to the courts.

Generally speaking, thresholds are extremely important because an accident victim whose case exceeds such threshold, and can show fault, may recover noneconomic damages (e.g., pain and suffering).[54] No-Fault regimes in the U.S. limit suit by imposing two categories of thresholds. "Monetary thresholds," also known as "dollar thresholds" require the insured to plead economic damages in excess of a specific amount in order to sue in tort.[55] For example, a motorist whose total medical bills added up to $9,500 would be barred from recovering in tort if the threshold was set by statute at $10,000. In contrast, "verbal thresholds" eschew looking at the patient's expenses in favor of judging whether the injuries meet a certain degree of seriousness, as defined by statute and case law.[56]

Early reviews of the No-Fault compensation system were extremely positive, and after Massachusetts adopted the first No-Fault system in 1971, many other states quickly followed.[57] The apogee of No-Fault's popularity arrived in 1977, when the Department of Transportation released the results of its own research, and confidently declared that "[n]o-fault automobile insurance works."[58] This ringing endorsement ironically marked the end of an era for No-Fault adoption. Since 1976, no state has enacted a No-Fault system.[59] Instead, a growing backlash led to the repeal of No-Fault statutes in four states during the 1980s and 1990s, and No-Fault proposals in several other states went down in flames.[60]

Overcoming the no-fault threshold—Substantive barriers, *in* HANDLING MOTOR VEHICLE ACCIDENT CASES TREATISES AND FORMS 2D § 15:9 (Westlaw, 2013) ("It is incumbent upon the attorney evaluating an automobile tort claim in a state with a tort threshold to explore, at the very earliest juncture, his or her client's ability to satisfy the threshold.").

53 KING, *supra* note 41, at 374-75.

54 ANDERSON ET AL., *supra* note 7, at 13.

55 *Id.* at 12.

56 *Id.*

57 *Id.* at 19.

58 Engstrom, *supra* note 5, at 328.

59 *Id.*

60 ANDERSON ET AL., *supra* note 7, at 3.

III. Exemplar States: Florida and Michigan

A. Florida

Florida was the second state to implement a No-Fault system, with a goal to "reduce the number of lawsuits associated with auto crashes by creating a quick and efficient system where the insurers could compensate accident victims directly."[61] As originally implemented in 1971, the statute featured a "dollar threshold," where claimants were barred from the tort system unless their economic damages exceeded a specified amount.[62] However, the law has undergone many substantive alterations since its original incarnation,[63] and has since switched to a "verbal threshold" model for noneconomic damages.[64] In contrast to the wide-ranging reform efforts undertaken by the Florida Legislature in 2012, which were aimed at reducing the costs associated with its No-Fault system,[65] this section will focus on the law as it stood prior to March 2012.

No-Fault coverage in Florida is relatively stingy, and has gotten more so since the 2012 reforms. All drivers are required to carry $10,000 of "Personal Injury Protection" ("PIP") coverage, which covers "80% of reasonable, medically necessary, and related medical expenses, 60% of loss of gross income and earning capacity, 100% of replacement services, and $5,000 in death benefits."[66]

Perhaps in recognition of such conservative benefits, the Florida Legislature has imposed only minor obstructions to accessing the tort system. Liability for economic damages is barred "to the extent that benefits are payable for such injury."[67] As such, the tortfeasor may be liable for any medical expenses or lost wages

---

[61] HOUSE INS. COMM., REVIEW OF FLORIDA'S NO-FAULT AUTOMOBILE INSURANCE LAW, at 1 (Fl. 2006), *available at* http://www.myfloridahouse.gov/SEctions/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Reports&FileName=Review%20of%20FL%20auto%20ins%20law.pdf [hereinafter HOUSE INS. COMM.].

[62] *Id.*

[63] *See id.*

[64] *Id.* at 2.

[65] *See infra* Section V.

[66] *Florida no-fault summary*, *in* 4 AUTOMOBILE LIABILITY INS § 74:2 (4th ed. 2013).

[67] *Id.*

not covered by PIP, as well as those in excess of the statutory limits, "without regard to threshold requirements . . . ."[68] Since PIP only covers 80 percent of medical expenses and 60 percent of lost wages, literally every PIP claimant has a valid and actionable tort claim for the uncompensated excess economic damages.

Noneconomic damages (e.g., pain and suffering) are more difficult to recover. Florida's No-Fault implementation employs a "verbal threshold" to limit access to tort damages, imposing liability for noneconomic loss only upon proof that the plaintiff has suffered: "(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."[69] The plaintiff may establish a prima facie case of permanent injury by presenting expert testimony of the same, after which the burden shifts to the defendant to either impeach the expert, or offer evidence to the contrary.[70]

B. Michigan

Michigan jumped on the No-Fault bandwagon in 1972 – one year after Florida.[71] Several attempts to enact No-Fault regimes based on Keeton and O'Connell's proposals were made before this, but failed to gain sufficient support.[72] In fact, one of the early proposals closely resembled Florida's model, with mandatory $2,000 first party coverage for medical costs, and access to the tort system for any damages exceeding that amount.[73] After this proposal failed to reach critical mass, the Michigan legislature was able to reach consensus on a much "purer" version of No-Fault that provided unlimited coverage for medical expenses as a tradeoff for a complete bar on tort liability for bodily injury.[74]

Michigan's implementation of No-Fault has the distinction of

---

[68] Bennett v. Fla. Farm Bureau Cas. Ins. Co., 477 So. 2d 608 (Fla. Dist. Ct. App. 1985).

[69] FLA. STAT. ANN. § 627.737(2) (West 2013).

[70] Wald v. Grainger, 64 So. 3d 1201, 1204 (Fla. 2011).

[71] James T. Mellon & David A. Kowalski, *The Foundations and Enactment of Michigan Automobile No-Fault Insurance*, 87 U. DET. MERCY L. REV. 653, 655 (2010).

[72] *Id.* at 674-75.

[73] *Id.* at 675.

[74] *Id.* at 678-79.

being the most generous in the country[75] – a circumstance which is speculated to be the result of strong support by organized labor.[76] The mandatory PIP coverage pays for all "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."[77] Unlike other No-Fault states, there is no monetary cap or temporal cap on benefits[78] – effectively providing unlimited lifetime coverage for medical expenses related to an automobile accident.[79] Lost wages resulting from an accident are also compensated,[80] although in a more restricted fashion. The insured is entitled to receive 85 percent[81] of the wages they would have earned if they had not been injured for a period of three years.[82] The maximum payout for lost wages is annually adjusted and is limited to an amount determined by the Commissioner of the Office of Financial and Insurance Regulation.[83] The maximum payout for lost wages through September 30, 2014 is $5,282 per month.[84]

It may be surprising to some that Michigan does not impose an absolute bar on tort liability for automobile accidents, especially considering the generous nature of Michigan's PIP benefits. The Michigan statute purports to abolish liability arising from the "ownership, maintenance, or use of a motor vehicle . . . ,"[85] but nevertheless provides relatively easy access to the tort system through several important exceptions. An injured party may recover economic damages in excess of the No-Fault coverage for

---

[75] KING, *supra* note 41, at 54.

[76] *Id.* at 4.

[77] MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2013).

[78] KING, *supra* note 41, at 51.

[79] Tony Dearing, *Opinion: Michigan's no-fault car insurance system needs reform, but HB 4936 is not the answer*, ANN ARBOR, Nov. 13, 2011, http://www.annarbor.com/news/opinion/michigans-no-fault-car-insurance-policy-needs-reform-but-house-bill-4936-is-not-the-right-way/.

[80] MICH. COMP. LAWS ANN. § 500.3107(1)(b) (West 2013).

[81] *See id.* The statute calls for a 15 percent reduction to avoid unjust enrichment, since the insurance payments are not taxable.

[82] *Id.*

[83] *Id.*

[84] R. Kevin Clinton, Department of Insurance and Financial Services, Bulletin 2013-16-INS, Informational Statement and Procedural Guidelines Issued Pursuant to Act 306 of the Public Acts of 1969 as Amended (2013), *available at* http://www.michigan.gov/documents/difs/Bulletin_2013_16_INS_433413_7.pdf.

[85] MICH. COMP. LAWS ANN. § 500.3135(3) (West 2012).

medical expenses (defined as the aforementioned "allowable expenses"), lost wages, and survivor's benefits[86] – the equivalent of a monetary threshold. Tortfeasors with the good fortune to be Michigan residents may breathe a little easier knowing that their liability for excess "allowable expenses" is essentially nullified by the unlimited coverage provided by section 500.3107(1)(a) of the Michigan Compiled Laws Annotated.[87] Nonresidents, however, are liable for any excess "economic loss"[88] – a much broader term that may include medical costs that are not considered "allowable expenses."[89]

Exposure to liability for excess economic damages is the least of a potential tortfeasor's worries because Michigan continues to hold tortfeasors responsible for noneconomic damages.[90] Michigan tempers this liability with a verbal threshold limiting access to noneconomic damages to instances where the victim has died, or suffered "serious impairment of body function, or permanent serious disfigurement."[91] The legislature went on to define "serious impairment of body function" as an "objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[92] As is common with verbal thresholds, these amorphous "standards" resulted in a flood of litigation and confusion as trial courts attempted to apply them to real world injuries.[93]

IV. Analysis

Cost containment was one of the many motivations for implementing a No-Fault insurance system.[94] In this respect, there is little doubt that the experiment has failed rather spectacularly. For decades, insurance premiums have been consistently higher in

---

[86] *Id.* § 500.3135(3)(c).

[87] MICH. COMP. LAWS ANN. § 500.3107(1)(a) (West 2013).

[88] MICH. COMP. LAWS ANN. § 500.3135(3)(d) (West 2012).

[89] *Id.*

[90] *Id.* § 500.3135(3)(c).

[91] *Id.* § 500.3135(1).

[92] *Id.* § 500.3135(5).

[93] David Perlow, *It's Time for a Tune Up: Torquing Michigan's "Faulty" Automobile-Insurance System*, 24 T.M. COOLEY L. REV. 281, 307 (2007).

[94] *See* ANDERSON ET AL., *supra* note 7, at 63 ("Many no-fault proponents claimed that no-fault would reduce claim costs.").

No-Fault states than tort states, with the disparity running into the hundreds of dollars.[95] Even more surprising is that cost increases are not limited to the Personal Injury Protection portion of insurance policies. The underlying assumption in No-Fault was that savings could be achieved by shifting the burden of compensation from third party to first party insurance.[96] Accordingly, we should expect the average premium for Bodily Injury ("BI")[97] coverage to drop after the implementation of a No-Fault regime. Instead, the opposite has occurred. BI premiums are now *higher* in No-Fault states in comparison to tort states.[98]

Moreover, the experience of states that returned to the tort regime after experimenting with various No-Fault implementations also shows that No-Fault failed in its goal of cost containment. Georgia repealed their No-Fault law in 1991, followed by Connecticut in 1994, and Colorado in 2003.[99] All three states experienced a "striking pattern of substantial cost decreases" in the wake of repeal.[100] For example, the Colorado repeal resulted in a decrease in excess of $100 for the average premium within a year of returning to a tort regime.[101] While such cost decreases are striking, these states all employed dollar thresholds set at very low levels, which would have been ineffective at removing cases from the tort system.[102]

---

95 *Id.* at 66.

96 *Id.* at 69.

97 *Id.* at 10. BI insurance is a third-party insurance, which is in contrast to a first-party insurance where the insured's own insurance pays benefits directly to him. BI insurance pays for the liabilities incurred by the automobile operator that has insurance for any damages that he or she owes for injuring another person. It may include economic and noneconomic damages. *Id.*

98 *Id.* at 69.

99 ANDERSON ET AL., *supra* note 7, at 74.

100 *Id.*

101 *Id.*

102 *See* JEFFREY O'CONNELL, PETER KINZLER & DAN MILLER, NAT'L ASS'N OF MUT. INS. CO., NO-FAULT INSURANCE AT 40: DUSTING OFF AN OLD IDEA TO HELP CONSUMERS SAVE MONEY IN AN AGE OF AUSTERITY 4-5 (2011), *available at* http://www.namic.org/pdf/publicpolicy/120111NoFaultIssueAnalysis.pdf. The number of lawsuits that are barred by a dollar threshold is correlated with the amount of monetary damages the plaintiff must sustain before overcoming the threshold. *Id.* If the amount is set too low, virtually any injury will produce sufficient damages to overcome the threshold. Because of this, Professor O'Connell argues that the RAND Institute "missed the point" when citing these three states as examples of No-Fault's ineffectiveness. *Id.*

A. Litigation Costs

Even though one of the major goals of No-Fault was to lower litigation costs,[103] there is now evidence suggesting that No-Fault has failed in this goal. In Florida, the Office of the Insurance Consumer Advocate estimated that in 2011, 39 lawsuits would be filed per 100 automobile accidents.[104] In 2005, 45 percent of Florida PIP claimants were represented by attorneys – an increase of 11 percent since 2002.[105] In Michigan, the promise of unlimited lifetime coverage for medical expenses largely eliminates the need for litigation over economic damages. However, the current law has been criticized for incentivizing litigation over noneconomic damages due to judicial inconsistency while applying the verbal threshold.[106]

Objectively measuring the impact of No-Fault insurance on litigation is no easy task. The vast majority of automobile claims are settled before trial,[107] and settlement rates are influenced by a myriad of factors unrelated to the prevailing insurance regime.[108] Nevertheless, the RAND Institute attempted to quantify the impact of No-Fault on litigation rates using several approaches. First, the authors of the study compared the per capita volume of new automobile case filings between the three largest tort states (California, Arizona, and North Carolina) and No-Fault states (Florida, Michigan, and New York).[109] Second, the authors looked

---

[103] *See* ANDERSON ET AL., *supra* note 7, at 92 ("A key premise of no-fault was that it would reduce costs by reducing auto litigation. By diverting all but the most-serious cases from the third-party tort liability system to resolution between the victim and his or her insurer, proponents of no-fault believed that expensive and time-consuming auto-related litigation would be dramatically reduced."); *see also* Perlow, *supra* note 93 ("One major goal of no-fault automobile insurance is to limit lawsuits.").

[104] ROBIN SMITH WESTCOTT, OFFICE OF THE INS. CONSUMER ADVOCATE, REPORT ON FLORIDA MOTOR VEHICLE NO-FAULT INSURANCE (PERSONAL INJURY PROTECTION) 38 (2011).

[105] *See* Michael Walsh, *Florida Personal Injury Protection: Hot Topics, Strategies and the Defense Perspective*, 26 TRIAL ADVOC. Q., no. 7, 2007, at 7.

[106] Perlow, *supra* note 93, at 308 ("[I]nconsistency is resulting in huge amounts of litigation because plaintiff's attorneys do not have a good visualization of injuries a potential client should have before the attorney takes the case. Along the same line, because plaintiff's attorneys are not clear on which types of injuries should be litigated, defense attorneys are also in the dark as far as the knowledge of what types of injuries suffered by a claimant should be settled quickly and which injuries should be litigated.").

[107] ANDERSON ET AL., *supra* note 7, at 92.

[108] *Id.*

[109] *Id.* at 94-96. It is important to note that the data relied on in the RAND study is

at the percentage of cases involving automobile accidents that were actually litigated at trial.[110] Third, they compared the likelihood that an automobile accident victim would hire an attorney to prosecute their claim.[111]

The findings paint a mixed picture, and suggest that while No-Fault was initially successful at reducing litigation, this advantage has eroded over time. No-Fault states enjoyed a substantially lower volume of automobile case filings until around 1990, when the number of new claims in tort states began to drop precipitously.[112] By 1993, the three largest No-Fault states found themselves in the awkward position of surpassing the tort states in automobile litigation volume.[113]

Paradoxically, the opposite occurred in relation to automobile cases that were disposed of at trial. In 1992, the percentage of cases closed through trial involving automobile accidents was roughly the same between No-Fault states and tort states.[114] By 2001, the percentage of cases closed through trial in tort states saw an overall increase that was not experienced amongst No-Fault states.[115] Thus, it appears that accident victims in No-Fault states are both more likely to file a lawsuit, *and* subsequently settle before trial.[116]

This finding contradicts a seemingly logical criticism of No-Fault – that the system prolongs litigation by removing the economic incentive for plaintiffs to settle quickly. For example, Nora Engstrom describes this argument saying, "[t]he reason is this: PIP payments, by tiding victims over, strengthen accident victim's hand vis-à-vis insurers . . . . PIP payments give accident victims the economic wherewithal to litigate claims to the hilt."[117] With their medical bills and lost wages paid under the No-Fault system, an injured plaintiff is free to push for a higher settlement value, and would presumably be more willing to gamble on a jury

---

now very outdated. Most of the data used came from the 1990s and early 2000s.

110 *Id.* at 92-93.

111 *Id.* at 93-94.

112 ANDERSON ET AL., *supra* note 7, at 96.

113 *Id.* at 95 fig. 5.2.

114 *Id.* at 93.

115 *Id.*

116 *Id.* at 96.

117 Engstrom, *supra* note 5, at 346.

trial. RAND's data seems to refute this criticism, at least in regards to an accident victim's willingness to proceed to trial. In actuality, the devil is probably in the details. A state like Michigan, for example, which has unlimited PIP benefits, is more likely to see prolonged litigation and higher instances of plaintiffs gambling on trial than a state like Florida, where PIP benefits are minimal.

The theme of No-Fault's decreasing efficacy is mirrored in the findings regarding attorney retention. Automobile victims in No-Fault states were found to be slightly less likely to hire an attorney during the late 1980s and early 1990s.[118] However, this difference was virtually erased by the turn of the millennium as larger numbers of No-Fault insured began to retain attorneys to prosecute third party claims.[119] As the RAND Institute study proclaimed, "[o]ver time, no-fault became less effective in delivering on one of its original promises: minimizing the need for lawyer involvement in resolving claims."[120]

B. Medical Costs

One of the original motivations of No-Fault insurance was to increase victim access to medical treatment.[121] No-Fault advocates believed that the tort system was doing an inadequate job compensating injured motorists, which in turn reduced the quantity and quality of treatment they were able to obtain.[122] Given this purpose, it shouldn't be surprising that motorists in No-Fault states utilize medical services at higher rates compared to tort states. It also follows that increased medical utilization would drive up premium costs to a certain degree. However, No-Fault advocates may not have anticipated the full extent to which their regime has distorted the healthcare marketplace. In recent years, ballooning medical costs have played an important role in the increasing cost of No-Fault coverage.

By examining data collected by the RAND Institute, we can understand the extent of No-Fault's impact on medical utilization over time. The following chart is an abridged version of a table

---

118 ANDERSON ET AL., *supra* note 7, at 94.
119 *Id.*
120 *Id.*
121 *Id.* at 126.
122 *Id.*

provided in the Rand Institute study, which highlights the fact that there is undoubtedly a higher claimed usage of many types of specialized physicians in No-Fault states in comparison to tort states.

Figure 1: Percentage of Claimants Utilizing Medical Services[123]

Type of Treatment	Year	Tort	No-Fault
Emergency Room Visit	1987	32.4	47.2
	1992	35.1	44.7
	1997	44.4	47.5
	2002	44.9	46.9
	2007	47.1	48.7
Overnight Hospital Stay	1987	8.95	10.3
	1992	6.53	7.21
	1997	5.35	5.57
	2002	5.44	6.34
	2007	4.52	5.09
Visit to Chiropractor	1987	13.3	15.4
	1992	21.4	25.8
	1997	30.6	33.8
	2002	32.7	34.3
	2007	31.5	37.3
Visit to Physical Therapist	1987	7.18	6.95
	1992	12.3	13.0
	1997	15.7	21.3
	2002	16.0	27.1
	2007	13.4	22.9

At first glance, it would appear that there was not much difference between tort and No-Fault states because claimants in both utilized emergency room visits almost equally. As the chart highlights, in 2007, 48.7 percent of claimants in No-Fault states visited the emergency room as compared to 47.1 percent in tort states.[124] However, the real difference lies in non-emergency room treatment. Across the board, claimants in No-Fault states have been utilizing chiropractors, physical therapists, dentists, and even

[123] For a full and unabridged version of this chart, *see* ANDERSON ET AL., *supra* note 7, at 121-22 tbl.5.8.

[124] *Id.* at 121 fig.5.8.

psychotherapists in greater numbers as compared to tort states.[125]

A number of reasons may explain why the foregoing numbers are higher in No-Fault states. First and foremost, the relative certainty of compensation under No-Fault likely encourages injured motorists to seek out elective treatment when they may have been deterred by the claims process in a tort state. Second, some increased utilization may be attributed to fraud, particularly in the case of chiropractors.

This national trend is reflected in Florida, where the average cost of medical services per PIP claimant among the top five counties in Florida increased 91.3 percent between 2005 and 2010.[126] Part of this increase is driven by dramatically increased utilization of treatments by providers such as chiropractors, general practitioners, and physical therapists. The following is an abridged version of a chart provided by Robin Westcott in the Report on Florida Motor Vehicle No-Fault Insurance.

Figure 2: Percentage of Florida PIP claimants visiting particular providers[127]

Type of Provider	1997	2002	2005	2007
Chiropractor	30%	33%	44%	43%
General Practitioner	27%	32%	26%	25%
Physical Therapist	14%	16%	11%	9%

As of 2007, 43 percent of all PIP claimants visited a chiropractor.[128] Massage therapists also did their part in driving up costs, with a 51 percent increase in average charges per claimant in a five year time period.[129]

One of the largest and most notable differences across tort and No-Fault regimes is the use of chiropractors. On average, No-Fault patients make ten more trips to the chiropractor than tort patients.[130] Physical Therapists are a close second, receiving

---

125 *See generally* ANDERSON ET AL., *supra* note 7, at 121-22.
126 WESTCOTT, *supra* note 104, at 19.
127 *Id.* at 20.
128 *Id.*
129 *Id.* at 24.
130 ANDERSON ET AL., *supra* note 7, at 124-26.

around eight additional visits from the typical No-Fault patient.[131] In short, accident victims in No-Fault states claim the use of more medical care and are more likely to visit medical providers than those located in tort states.

Disturbingly, it also appears that medical care in general is more expensive in No-Fault states than tort states.[132] While medical cost inflation has been skyrocketing at a national level, the inflation rate in No-Fault states has consistently grown faster relative to tort states.[133] Over time, this has resulted in a tremendous gap in the cost of medical care between the insurance regimes. For example, in 1987, an accident victim in a No-Fault state was on average expected to report expenses that were just under six percent higher than a victim in a tort state.[134] By 1997 this number had grown to 51 percent, before settling down to 42 percent in 2007.[135]

This disparity is not uniform amongst the various No-Fault states, and seems to be correlated to population size and tort threshold type.[136] While the disparity between medical inflation was roughly comparable in 1987, the larger verbal-threshold states (such as New York, Michigan and Florida) have had dramatic increases in disparity while the smaller dollar-threshold states have regressed back towards the tort states.[137] By 2007, the cost of medical care in the smaller, dollar-threshold states differed from tort states by just over four percent, while the larger, verbal-threshold states differed by as much as 60 percent.[138]

C. Reasons for Higher Costs

The evidence suggests that there are many reasons behind the disparity between expectations and results. As Keeton and O'Connell envisioned, No-Fault auto insurance would act as a secondary insurance to the victim's health insurance.[139] However, it may be argued that one of the major contributions to the cost

---

131 *See id.* at 125 fig.5.9.
132 *Id.* at 127.
133 *Id.* at 127-30.
134 *Id.* at 128.
135 ANDERSON ET AL., *supra* note 7, at 129 fig.5.10.
136 *Id.*
137 *Id.* at 130.
138 *Id.* at 130 fig.5.11.
139 *Id.* at 38.

disparity was the decision to deviate from Keeton and O'Connell's original proposal, by making automobile insurance the primary payer for accident related medical expenses. When a person is injured in an automobile accident, there might be several entities that are obligated to pay for treatment. A negligent tortfeasor might be liable, with his automobile insurer contractually obligated to indemnify him to a certain extent.[140] If the injured person has health insurance, that company may also be contractually obligated to pay for treatment.[141] If the injured person is poor, Medicaid might be available.[142] If they are elderly, Medicare may be an option.[143] If the injury happened during the course and scope of the person's employment, worker's compensation might also be part of the picture.[144]

With so many potential payers in the game, the question of primacy becomes critical. Under Keeton and O'Connell's original plan where No-Fault insurance would be secondary to the injured parties' health insurance, the automobile insurers would only be responsible for covering costs that health insurance did not, such as deductibles or exclusions.[145] According to the RAND Institute, this was opposed by the automobile insurers themselves, who feared that such an arrangement would allow the health insurers to "swallow their entire business."[146]

Primary payer status is determined on a state-by-state basis, using a combination of statutory requirements, insurance policy language, and case law.[147] In Florida, the statute mandates that PIP shall be the primary payer in all cases, except when worker's compensation or Medicaid is available.[148] Moreover, any benefits received under worker's compensation must be credited against PIP.[149] In the case of the latter, Medicaid shall make the initial

---

140 ANDERSON ET AL., *supra* note 7, at 117.

141 *Id.*

142 Ctr. for Medicaid and CHIP Services, *Eligibility*, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html (last visited Jan. 21, 2014).

143 ANDERSON ET AL., *supra* note 7, at 117.

144 *Id.*

145 *Id.* at 118, n. 42.

146 *Id.*

147 *Id.* at 117.

148 FLA. STAT. ANN. § 627.736(1) (West 2013).

149 *Id.* § 627.736(4).

payments, but is entitled to reimbursement from the automobile insurer within 30 days.[150]

Michigan takes a different approach by permitting the insured to optionally "coordinate" his or her automobile and health insurance policies by shifting primacy to the health insurer.[151] In exchange, the insured receives a reduced premium on his or her automobile insurance.[152] In response to this, many health insurers have begun to add policy exclusions for automobile related injuries,[153] effectively eliminating this option for many Michigan residents.

The question of "who pays" is not just a matter of determining who shoulders the burden of payment – it also influences the magnitude of the burden itself. Other sources of coverage, such as health insurance and Medicare/Medicaid, typically pay significantly less than the actual billed amount for medical services.[154] Health insurance companies negotiate steep discounts with providers.[155] Automobile insurers have no comparable arrangements, thus they are usually stuck paying the full bill.[156] For example, Michigan auto insurers can pay up to $3,278 for an MRI which costs a workers compensation carrier just $765.[157] In attempting to explain why there are higher reimbursement rates for PIP medical benefits than for similar health insurance benefits, Professor O'Connell notes that "auto insurers are generally much less experienced and adept in controlling healthcare costs than health insurers" and, in addition, "auto insurers lacked the clout that health insurers had to negotiate deep discounts for hospital and medical services."[158] Consequently, resolving a claim through No-Fault is significantly more expensive than doing so through

---

150 *Id.* The Medicaid reimbursement requirement is the functional equivalent of No-Fault primacy, but reduces costs by allowing the automobile insurer to pay providers at the much lower Medicaid reimbursement rates.

151 MICH. COMP. LAWS ANN. § 500.3109(a) (West 2013).

152 *Id.*

153 ANDERSON ET AL., *supra* note 7, at 118 n.42.

154 *Id.* at 119; *see also* O'CONNELL ET AL., *supra* note 102, at 7 ("The RAND study includes compelling data to demonstrate greater utilization of, and higher reimbursement rates for, PIP medical benefits than for similar health insurance benefits.").

155 Uwe E. Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind A Veil of Secrecy*, 25 HEALTH AFFAIRS, no. 1, 2006, at 57, 61.

156 *Id.*

157 Dearing, *supra* note 79.

158 O'CONNELL ET AL., *supra* note 102, at 7.

health insurance.

The reason why automobile insurers have failed to secure cost-saving agreements that are so prevalent in the healthcare insurance industry is not entirely clear. In Florida, insurers are explicitly authorized by statute to enter into "preferred provider" relationships, subject to minor conditions.[159] If an insurer elects to use preferred providers, it must give customers a choice between policies which utilize preferred providers and those which do not, and must provide the customer with a list of "in network" providers.[160] Despite this legislative blessing, it does not appear that any Florida insurers are offering a "preferred provider policy."[161] Since the companies are surely aware of this option, presumably their failure to take advantage of this cost-saving mechanism is a deliberate business decision.

The effectiveness of tort thresholds is another perennial source of criticism and debate. Professor O'Connell argues that weak variants of the "verbal" threshold pushed by trial lawyers have seriously undermined the cost-savings potential of No-Fault laws by allowing too many plaintiffs to sue in tort for noneconomic damages.[162] The model No-Fault statute called for a strong threshold, which barred tort claims except in cases where economic damages exceeded $5,000, and the plaintiff sustained "significant permanent injury" or "serious permanent disfigurement."[163] For early No-Fault advocates like Professor O'Connell, marrying the concepts of "serious[ness]" and "permanen[ce]" was the key to effectively filtering unnecessary lawsuits.[164]

No plan ever survives first contact, and tort thresholds were no exception. Weaker thresholds were substituted during the legislative process, "decoupl[ing] the concept of 'serious[ness]' and 'permanen[ce],' thereby reducing the effectiveness of the threshold . . . ."[165] This enabled plaintiffs to recover noneconomic

---

159 FLA STAT. ANN. § 627.736(9) (West 2013).

160 *Id.*

161 Email from Melissa Lewis, Esq., Associate at the Law Firm of Gordon & Donor, to author (Jan. 23, 2013) (on file with author).

162 *See* O'CONNELL ET AL., *supra* note 102, at 5.

163 Unif. Motor Vehicle Accident Reparations Act § 5(a)(7) (1972).

164 *See* O'CONNELL ET AL., *supra* note 102, at 4.

165 *Id.*

damages for temporary injuries deemed sufficiently serious by a jury, as well as permanent injuries that cannot be reasonably described as "serious."[166] Professor O'Connell argues forcefully that weak thresholds are responsible for a great deal of No-Fault's cost overruns, and criticizes the RAND study for failing to recognize the importance of thresholds in controlling costs.[167]

All types of thresholds are vulnerable to criticism in one way or another. Monetary thresholds are particularly problematic for several reasons. First, making tort access contingent on the quantity of the plaintiff's medical expenses creates a predictable incentive to intentionally inflate medical costs. This incentive is not unique to No-Fault, as it exists in a lesser form under a traditional tort system. However, the pressure to use inflationary tactics is amplified when a client's status as a plaintiff hangs in the balance. Modern medicine offers many different avenues for driving up costs, and a strong temptation exists to "[k]eep taking X-rays till you jump the threshold or you glow in the dark."[168] Monetary thresholds also require periodic reconsideration from the legislature to ensure they keep up with medical cost inflation. Without regular increases to compensate for the growing costs of medical care, the threshold will steadily devalue until it presents little barrier to tort access.[169]

On the other hand, verbal thresholds present an entirely different set of challenges revolving around the interpretation and application of the restrictive language. Exactly how serious is a "serious injury"? Does it have to be a permanent injury? Does it have to be a disability? Each patient is unique, and an identical injury may impact the lives of two plaintiffs in dramatically different ways. While verbal thresholds appear to offer an objective way of measuring the severity of an injury, it quickly morphs into a subjective exercise once judges begin applying it to real world scenarios.[170]

Fraud is also a major concern in a No-Fault system. This is particularly true in Florida, where a family might pay a $3,500

---

166 *Id.*

167 *Id.* at 4-5.

168 Engstrom, *supra* note 5, at 342.

169 ANDERSON ET AL., *supra* note 7, at 12.

170 *See* Roumiana Velikova, *Theorizing the Automobile No-Fault Tort Threshold*, 42 TORT TRIAL & INS. PRAC. L.J. 1043, 1048 (2007).

annual premium for a mere $10,000 in PIP coverage.[171] No-Fault was originally expected to reduce the prevalence of fraudulent insurance claims.[172] Reformers reasoned that tort thresholds, which impeded access to noneconomic damages, would remove the incentive to exaggerate injuries.[173] Instead, decades of experience have shown that the No-Fault paradigm incentivizes a variety of unsavory practices, ranging from inflated medical expenses to outright fraud.[174]

One allegedly commonplace form of PIP fraud is "staged accidents."[175] Corrupt chiropractors or pain management clinics recruit accomplices to pile into inexpensive vehicles and attempt to cause low velocity collisions.[176] Scheming drivers have developed several different methods of provoking an accident. Florida's Division of Insurance Fraud has succinctly explained one such method, called the "Swoop and Squat," explaining:

> The driver of Vehicle 1, who is in on the scheme, purposely drives a short distance in front of an innocent driver, when the driver of Vehicle 2, also in on the scheme, suddenly swoops in front of Vehicle 1. The driver of Vehicle 1 hits his brakes and causes a rear-end collision with the victim behind him.[177]

The "Panic Stop" is an even simpler variation on the same idea. The fraudsters will merely drive in front of an uninvolved vehicle and unexpectedly hit their brakes, triggering a rear end collision.[178] A former Florida deputy Attorney General described his experience with a "Panic Stop" to the Miami Herald:

> All of a sudden they just plain stopped . . . . and because I was going so slow, I basically hardly touched them. They immediately got out of the car, and I tried to tell them we

---

171 WESTCOTT, *supra* note 104, at 5.

172 *See* ANDERSON ET AL., *supra* note 7, at 97.

173 *See* Engstrom, *supra* note 5, at 343. For a more in depth discussion of the "multiplier effect," which helps to explain why victims have a strong incentive to exaggerate the amount of economic losses claimed, *see* ANDERSON ET AL., *supra* note 7, at 99.

174 *See generally* ANDERSON ET AL., *supra* note 7, at 97-133.

175 THE DIV. OF INS. FRAUD, MISSION TO COMBAT & REDUCE PIP FRAUD 5 (2012), *available at* http://www.myfloridacfo.com/Division/Fraud/Resources/documents/Aug2012_PIPReport.pdf.

176 *See id.*

177 *Id.*

178 *Id.*

> better call the police department and get a report on this. They said no. They pulled the car across the highway and walked right into a chiropractor's office.[179]

The Florida Office of the Insurance Consumer Advocate ("FOICA") has characterized the impact of PIP fraud as an almost $1 billion "fraud tax" on Florida drivers.[180] Attempting to ascertain the basis for this seemingly astronomical sum reveals an underlying problem – the only available data comes from insurance industry sources and involves a great deal of imprecise speculation about what claims ought to be considered fraudulent.[181]

The pervasiveness of insurance fraud cannot be measured directly, so researchers must extrapolate by examining claims data for "fraud indicators."[182] Factors that might lead to a particular claim being designated as fraudulent include "hard-to-verify injuries" and "claimed losses just above tort thresholds."[183] The FOICA relied heavily on "questionable claims" data from the National Insurance Crime Bureau ("NICB"),[184] which is an insurance industry entity set up to study fraud.[185] According to the NICB, "[q]uestionable claims (QC) are those claims that NICB member insurance companies refer to NICB for closer review and investigation based on one or more indicators of possible fraud."[186] Given the speculative nature of this data combined with the self-interested sources, it is possible that estimates of fraudulent activity are over-inclusive.

---

[179] Gina Jordan, *PIP insurance fraud explained*, MIAMI HERALD BLOG (Jan. 29, 2012, 3:49 PM), http://miamiherald.typepad.com/nakedpolitics/2012/01/pip-insurance-fraud-explained.html.

[180] WESTCOTT, *supra* note 104, at 8.

[181] *See* Katie Sanders, *Rick Scott says PIP fraud costs $1 billion*, POLITIFACT FLORIDA (Mar. 9, 2012, 6:03 PM), http://www.politifact.com/florida/statements/2012/mar/09/rick-scott/rick-scott-says-pip-fraud-1-billion/.

[182] ANDERSON ET AL., *supra* note 7, at 98.

[183] *Id.*

[184] WESTCOTT, *supra* note 104, at 29.

[185] NAT'L INS. CRIME BUREAU, *About NICB*, NICB.ORG, https://www.nicb.org/about-nicb (last visited Dec. 19, 2013).

[186] NAT'L INS. CRIME BUREAU, *NICB: New Jersey Questionable Claims Rise 26 Percent 2009-2011*, NICB.ORG, https://www.nicb.org/newsroom/news-releases/nj-2009-2011-qc-report (last visited Dec. 19, 2013).

D. Advantages of the No-Fault Insurance System

While it is clear that the No-Fault system has serious issues, it is entirely unfair to write the idea off as an unmitigated failure. Early advocates of the No-Fault system hoped that it would herald a new age of lower costs, faster claims processing, increased compensation,[187] and improved access to medical care.[188] We have seen that the first of these four goals, to lower costs, has failed miserably. This is partially due to the success of the last goal of improving access to medical care. However, what happened with the remaining two goals of the No-Fault system – a faster claims processing system and increased compensation? Can it be said that the early advocates of this system were successful in implementing these two goals?

The evidence shows that No-Fault has lived up to its promise of offering accident victims higher reimbursement rates for their economic losses than other systems.[189] In order to measure this aspect of No-Fault's performance, the RAND Institute looked at the "extent to which individuals report paying out of pocket for economic expenses incurred as a result of motor-vehicle accidents."[190] Accident victims in No-Fault states reported receiving reimbursements five to eight percent higher than those in tort states.[191] Assuming a median claim size of $3,000, this represents a $150 improvement over the reimbursement offered by a tort system.[192] This indicates that No-Fault is working as intended, at least when it comes to offering higher reimbursements to victims than the traditional tort system. While higher reimbursement rates obviously contribute to increased premiums, the rates themselves have remained remarkably stable over the years.[193] This indicates that rising premiums are more a function of the increased quantity of claims, rather than increasing reimbursement rates.

---

187 ANDERSON ET AL., *supra* note 7, at 2.

188 *Id.* at 126.

189 *Id.* at 87.

190 *Id.*

191 *Id.*

192 ANDERSON ET AL., *supra* note 7, at 87 ($3,000 was the median claim amount in 2002, which was the last year included in this unfortunately outdated information).

193 *Id.* at 87.

No-Fault has also shown its value in processing claims more quickly in comparison to the tort system.[194] This was a major goal of early No-Fault advocates because slow processing of claims places a tremendous burden on a financially insecure accident victim.[195] It was believed that third-party insurance companies used this as leverage to force desperate claimants to accept smaller settlements.[196] Under the No-Fault system, No-Fault advocates hoped that because the claimant is the insurer's customer, the insurer would be encouraged to process claims faster in the interest of customer satisfaction.[197]

The effect of No-Fault on claims processing speed can be roughly measured by comparing the likelihood of a claim settling within three months of submission to the insurer. By examining these numbers, the RAND Institute found that first-party claims in No-Fault states were around 23 percent more likely to be settled within three months than third-party claims in tort states.[198] Surprisingly, third-party claims in No-Fault states were also found to be settled faster than those in tort states.[199] In short, the evidence clearly shows that No-Fault has been successful at speeding up claims processing in comparison to the tort regime.

We have seen that the No-Fault system has been successful in some aspects by increasing reimbursement rates, improving claims processing speeds, and expanding access to medical care. However, we have also seen that it has failed at reducing premium costs. How does this mixed record translate into customer satisfaction? In a survey of customer satisfaction, respondents in No-Fault states were four percent more likely to report being satisfied with their automobile insurance.[200] For all its expense, No-Fault is only able to gain a nominal advantage over the tort system in terms of customer satisfaction.

---

194 *Id.* at 89.
195 *Id.* at 88-89.
196 *Id.*
197 ANDERSON ET AL., *supra* note 7, at 88.
198 *See id.* at 90 fig. 5.5.
199 *Id.* at 90.
200 *Id.* at 91.

V. Reform Efforts

A. Florida PIP Reform

The Florida PIP reform of 2012 made several fundamental alterations to the state's No-Fault system.[201] First, the new statute stipulates that an accident victim must seek "initial care and services" for his or her injuries within 14 days of the accident.[202] The new statute "defines 'initial services and care' as treatment provided by a licensed medical doctor, dentist, or chiropractor, or treatment provided in a hospital or emergency transportation."[203] Going to any authorized provider satisfies this requirement, and one can subsequently go to other providers for the first time outside of the 14 day window.[204] This "statute of limitations" is probably aimed at reducing fraud or discouraging malingerers. But it may just as easily exclude legitimate claimants with busy schedules and relatively minor injuries, or doctor-adverse individuals who hope their pain will subside with the passage of time.

Perhaps the most important change is that the insured must be diagnosed with an "emergency medical condition" ("EMC") in order to qualify for the entire $10,000 in PIP benefits.[205] Without this diagnosis, the insured will only be eligible to receive a maximum of $2,500.[206] The statute defines an EMC as a:

> [M]edical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following: (a) Serious jeopardy to patient health. (b) Serious impairment to bodily functions. (c) Serious dysfunction of any bodily organ or part.[207]

A licensed medical doctor, dentist, physician's assistant, or

---

201 *See* Mark J. Rose, *Florida's No-Fault Law and the 2012 Statutory Amendments*, 31 TRIAL ADVOCATE Q., no. 3, at 23 (2012).

202 *Id.* at 24.

203 *Id.*

204 *Id.*

205 *Id.*

206 Rose, *supra* note 201, at 24.

207 FLA. STAT. ANN. § 627.732(16) (West 2013).

advanced registered nurse practitioner must make the diagnosis.[208] Notably, chiropractors are excluded from diagnosing an EMC for the purposes of the statute.[209]

Additionally, the reform takes the unusual step of prohibiting PIP benefits from being used to pay for treatment by massage therapists or acupuncturists,[210] which is notable not only because it involves the legislature dictating acceptable forms of medical treatment, but also because massage therapy was previously identified as having increased in cost as much as 51 percent between 2005 and 2010.[211] This prohibition on reimbursement for therapeutic massage and acupuncture applies regardless of whether the patient's injuries qualify as an EMC,[212] and appears to represent a legislative judgment that such treatment is ineffective or cost inefficient.

The legislature also took steps to strengthen the insurance companies' power to investigate claims they believe to be questionable. The primary tools for these investigations are Examinations Under Oath ("EUO") and Independent Medical Examinations ("IME").[213] An EUO is a formal interview of the insured, conducted under oath, for the purposes of determining whether the claim falls within the scope of insurance coverage.[214] The EUO is typically conducted by the insurance adjuster or defense attorney, and is often recorded or transcribed.[215]

Insurance policies frequently include provisions requiring the insured to submit to an EOU at the insurer's request, and until recently, the case law held that compliance with such a provision was a condition precedent to receiving coverage.[216] This was recently called into question by a footnote in *Custer Medical Center v. United Automobile Insurance Co.*, which said that "[a] purported verbal exam under oath without counsel in the PIP context is invalid and more restrictive than permitted by the statutorily

---

208 FLA. STAT. ANN. § 627.736(1)(a)(3) (West 2013).

209 *See id.*

210 Rose, *supra* note 201, at 25.

211 WESTCOTT, *supra* note 104, at 21.

212 Rose, *supra* note 201, at 25.

213 *See id.*, at 25-26.

214 Russel Lazega et al., *Examination Under Oath of Insured or Claimant*, *in* 7 WEST'S FLA. PRACTICE SERIES § 7:15 (2012).

215 *Id.*

216 *Id.*

mandated coverage and the terms and limitations permitted under the statutory provisions."[217] The Florida Legislature directly clarified the matter by specifying that an insured must submit to an EOU as a condition precedent to coverage.[218]

The other investigative tool available to insurers is the IME. Pursuant to section 627.736(7)(b) of the Florida Statutes, insurers may require the insured to submit to a medical examination as a condition precedent to receiving coverage.[219] The expense of the IME is born entirely by the insurer.[220] If a person "unreasonably refuses" to attend the examination, the insurer is no longer liable for subsequent PIP benefits.[221] The 2012 amendments added teeth to this provision by creating a rebuttable presumption that missing two scheduled examinations is unreasonable as a matter of law.[222]

The Legislature's reform efforts make it clear that Florida is determined to fight against the causes of No-Fault cost overruns. For the time being, Florida appears committed to repairing the No-Fault model instead of joining other states that have chosen to revert to a tort system. However, whether Florida's recent effort to rein in costs will succeed is subject to debate. Perhaps more importantly, it remains an open question whether Florida has defeated the original purpose of No-Fault in its zeal to make it affordable.

The bifurcation of PIP benefits contingent on the diagnosis of an EMC is a novel idea, but it raises many questions about its effectiveness and equity. Forces are already aligning to undermine the requirement. A Tampa based healthcare company began advertising its services to chiropractors before the bill was even signed into law, sending fliers to chiropractors that read, "'Chiropractors. Don't miss out on your $7,500 . . . We Have The Medical Doctors You Need.'"[223] Medical providers are encouraged to contact the company to obtain an EMC diagnosis, which entitles

---

217 *See* Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1089 n.1 (Fla. 2010).

218 FLA. STAT. ANN. § 627.736(6)(g) (West 2013).

219 *Id.* § 627.736(7)(b).

220 *Id.* § 627.736(7)(a).

221 *Id.* § 627.736(7)(b).

222 *Id.*

223 *See* Associated Press, *Tampa company looks at end run around new PIP law*, TAMPA BAY TIMES (Apr. 4, 2012, 9:12 PM), http://www.tampabay.com/news/business/autos/article1223530.ece.

the insured to the entire $10,000 in coverage.[224] Without further regulation, there may be little to prevent "diagnosis mills" from setting up shop to circumvent the limitation.

Additionally, these reforms may prove to be the tipping point where the necessities of "fixing" the problems inherent to No-Fault destroy any remaining benefits to the insured. Florida drivers are not required to carry BI liability insurance,[225] increasing the possibility that the injured driver's own policy might be the only coverage available in the event of an accident. Prior to the 2012 amendments, Florida's $10,000 PIP coverage was already the lowest in the nation among states without mandatory BI coverage.[226] Now, it is easy to imagine a scenario where an injured driver is left with substantial medical expenses and only $2,500 in available coverage.

Constitutionally speaking, the 2012 amendments may be the straw that broke the camel's back for Florida's No-Fault regime. Shortly after passage, a coalition of medical providers, including an acupuncturist, a chiropractic physician, and a licensed massage therapist, sued to block implementation of the amendments, specifically section 627.736(1).[227] The trial court granted a temporary injunction against the EMC requirement, as well as the prohibition on reimbursement to massage therapists and acupuncturists on the grounds that those provisions violated their state constitutional right to access the courts.[228]

In his order, Trial Court Judge Lewis recounted the history of past constitutional claims against PIP.[229] In *Lasky v. State Farm*, the Florida Supreme Court upheld the tort immunity provisions of PIP on the basis that the law provided a "reasonable alternative" to the tort system.[230] Eight years later, the court in *Chapman v. Dillon* gave

---

224 *Id.*

225 *Florida no-fault summary*, *in* 4 AUTOMOBILE LIABILITY INS. § 74:2 (4th ed. 2013).

226 *See* HOUSE INS. COMM., *supra* note 61, at 26-28.

227 Myers v. McCarty, No. 2013 CA 73 (Fla. 2nd Jud. Cir Mar. 15, 2013) (order granting in part motion for temporary injunction), *available at* http://www.wlclaw.com/PIPTempInjunctionSTATE.pdf.

228 *Id.* at 2. The plaintiffs' state constitutional right to access to the courts is derived from Article 1, Section 21 of the Florida Constitution, which states that, "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.

229 *Myers*, No. 2013 CA 73, at 4-6.

230 Lasky v. State Farm Ins. Co., 296 So. 2d 9, 14 (Fla. 1974).

the law a second stamp of approval after the legislature enacted reforms which lowered PIP benefits.[231] However, in *Chapman*, Justice Sunberg, dissenting in part, warned that the law was "perilously close to the 'outer limits of constitutional tolerance.'"[232] After observing that the law now placed substantial limitations on PIP reimbursement, Judge Lewis concluded that the law, as newly reformed, no longer provided a "reasonable alternative" to the tort system.[233]

The State of Florida immediately appealed the injunction, arguing that the plaintiffs lacked standing.[234] The First District Court of Appeals agreed, observing that Florida law required that plaintiffs challenging the constitutionality of a statute must assert a violation of their *own* constitutional rights.[235] The court held that the providers' attempt to bootstrap the standing requirement by joining the fictional "Jane Doe" to represent Florida No-Fault policyholders was not sufficient to confer standing.[236] The injunction order was reversed, allowing implementation of the No-Fault amendments to proceed.[237]

However, this is likely just a temporary setback for opponents of the 2012 reforms. The reversal was based entirely on standing grounds, leaving the trial court's substantive reasoning untouched. Once the reforms are fully implemented, it won't take long for a proper plaintiff to materialize.

The trial court's original ruling has triggered a legislative effort to repeal No-Fault in Florida.[238] The effort is spearheaded by Senator David Simmons, who chairs the Senate Banking and Insurance Committee.[239] On April 17, 2013, his committee voted unanimously to abolish No-Fault and transition to a mandatory BI

---

231 *See generally* Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982).

232 *Id.* at 19.

233 Myers v. McCarty, No. 2013 CA 73, at 6-7 (Fla. 2nd Jud. Cir Mar. 15, 2013) (order granting in part motion for temporary injunction).

234 McCarty v. Myers, 125 So. 3d 333 (Fla. Dist. Ct. App. Oct. 23, 2013).

235 *Id.* at 336.

236 *Id.* at 337.

237 *Id.*

238 *See* Kathleen Haughney, *Senate to pitch repeal of PIP coverage*, SUN SENTINEL (Mar. 26, 2013), http://articles.sun-sentinel.com/2013-03-26/news/fl-senate-pip-bill-20130326_1_personal-injury-protection-insurance-auto-insurance-law-massage-therapists.

239 *Id.*

insurance regime.[240] However, no further action was taken on the matter before the end of the legislative session. Senator Simmons told The Palm Beach Post that "[t]he Senate is now in a position to take action should we get further direction from the courts regarding the unconstitutionality of PIP, or further indication from the House and governor as to whether they desire to move forward this spring to repeal of PIP."[241] As of the writing of this Note, the fate of Florida's No-Fault system is shaky and uncertain.

B. Nexus Between No-Fault and the Affordable Care Act

The ACA was passed in 2010[242] and was an immediate lightning rod for controversy, spawning fevered accusations of socialism and "death panels."[243] The most significant and controversial provision of this mammoth legislation is the "individual mandate."[244] When it takes effect in 2014, the mandate will expand health insurance coverage to as much as 94 percent of Americans.[245] Despite the controversy, the legislation has survived all constitutional challenges,[246] and its implementation is now assured following President Obama's reelection. As such, any analysis of the future of No-Fault must also consider the impact of near universal health insurance coverage.

Some scholars have raised questions about whether mandatory No-Fault automobile insurance has a place in a country

---

[240] Charles Elmore, *Despite panel vote, time running out to scrap state's no-fault car insurance system*, PALM BEACH POST (Apr. 17, 2013, 4:50 PM), http://www.palmbeachpost.com/news/news/despite-panel-vote-time-running-out-to-scrap-state/nXPd6/.

[241] *Id.*

[242] *See* GARY CLAXTON & LARRY LEVITT, KAISER FAMILY FOUNDATION, PATIENT COST-SHARING UNDER THE AFFORDABLE CARE ACT (2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8303.pdf.

[243] Andy Barr, *Sarah Palin doubles down on 'death panels'*, POLITICO (Aug. 13, 2009, 7:05 AM), http://www.politico.com/news/stories/0809/26078.html.

[244] *Id.*

[245] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to John Boehner, Speaker, U.S. House of Representatives 9 (Jan. 6, 2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12040/01-06-ppaca_repeal.pdf.

[246] The constitutionality of the "individual mandate" in the ACA was challenged in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), where it survived Supreme Court scrutiny because it was found to be a valid exercise of Congress's power under the Taxing Clause.

with ubiquitous health insurance.[247] The individual mandate is "inherently a no-fault system that requires individuals to maintain, in the face of a tax penalty, minimum coverage for the payment of medical expenses."[248] Once the ACA has been fully implemented, most motorists in No-Fault states will be compelled to purchase overlapping coverage.[249] While a small minority will be exempted from the individual mandate,[250] this is hardly a persuasive justification for requiring across the board No-Fault medical coverage. Even Professor O'Connell recognizes that "it makes little sense to have both health and auto insurance cover the same losses. How then to rationalize the two systems?"[251]

Professor O'Connell offers several possibilities. First, he proposes giving health insurance payment primacy over No-Fault, which would be relegated to the status of an excess payer.[252] This would lower the cost of accident-related medical care by leveraging the health insurance industry's greater experience and bargaining power.[253] Costs would be further reduced by eliminating the inherent inefficiencies of forcing health insurers to recover paid benefits from auto insurers through subrogation.[254]

Alternatively, the co-existence of the individual mandate and No-Fault could be reconciled by making health insurers the primary payers, with rights of subrogation against the auto insurers.[255] Obviously, this would effectively institutionalize an already inefficient system. However, savings could still be realized by requiring payments to pass through the health insurers.[256] This allows the auto insurers to take advantage of the health insurer's expertise and contractual relationships with medical providers.

Of course, both proposals suffer from substantial drawbacks. Any solution that shifts the costs of treating automobile injuries

---

247 *See* Wolman & Hashem, *supra* note 13, at 6.

248 *Id.*

249 *Id.*

250 Timothy Jost, *Implementing Health Reform: Exemptions From The Individual Mandate*, HEALTHAFFAIRS BLOG (June 27, 2013), http://healthaffairs.org/blog/2013/06/27/implementing-health-reform-exemptions-from-the-individual-mandate/.

251 O'CONNELL ET AL., *supra* note 102, at 14.

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

256 O'CONNELL ET AL., *supra* note 102, at 14.

onto the health insurance industry will inevitably result in increased premiums[257] – right in the middle of an ongoing national debate on how to drive down healthcare costs. Politicians may not have the stomach for a proposal that appears to reverse any progress they have made, even if they are able to point to reduced costs in a separate industry as a justification.[258] Additionally, permitting auto insurers to benefit from the lower payments made by health insurers would reduce revenue for many types of medical providers.[259] We should expect to see them try to compensate for these losses by charging more elsewhere.

Such proposals seem reasonable and workable, but they beg the question of why the individual mandate and No-Fault must co-exist in the first place. Professor O'Connell never really addresses why the imminent reality of ubiquitous health insurance coverage is not fatal to the arguments in favor of retaining or reforming No-Fault. Ensuring that injured motorists receive prompt medical attention was one of the cornerstone rationales behind the inception of No-Fault.[260] Thanks to the ACA, this concern will soon be a specter of the past for the great majority of Americans.

C. Allowing the Insured to Forgo Noneconomic Damages in Exchange for Lower Premiums

Professor O'Connell has also championed giving motorists the option of waiving the right to recover some noneconomic damages like pain and suffering in exchange for a reduction in No-Fault premiums.[261] This approach has the benefit of sidestepping the vexing issues that surround proposals to strengthen verbal thresholds, and enjoys the appealing prospect of giving the customer more discretion over his or her coverage. Professor O'Connell points to the experiences of New Jersey and Pennsylvania, which allow motorists to choose whether they want to surrender claims for noneconomic loss, except above a threshold.[262] In both states, large majorities elect to waive the right

---

257 *Id.*
258 *See id.* at 15.
259 *Id.* at 14.
260 *See* ANDERSON ET AL., *supra* note 7, at 88-89.
261 O'CONNELL ET AL., *supra* note 102, at 15.
262 *Id.*

to recover noneconomic damages.[263] According to the Congressional Joint Economic Committee, a total of $47.7 billion could be saved if every motorist elected to forgo pain and suffering claims in return for PIP benefits.[264]

While permitting this sort of choice may be effective at reducing costs, it raises questions about whether the average person is really in a good position to make an informed decision on the matter. "Pain and suffering" is generally an abstract concept, especially in the context of a hypothetical future car accident. It may be difficult for people to place a monetary value on the right to receive compensation for their suffering. Presumably, not everyone is willing to engage in the pessimistic mental exercise of converting degrees of agony into quantities of money. On the other hand, a reduction in their insurance premium has a concrete and immediate value. It is not surprising that the majority of motorists would choose to forgo nebulous noneconomic damages in exchange for more cold hard cash in their pockets every month. However, it is debatable as to whether such a result stemmed from an informed decision-making process.

VI. Argument and Policy Proposal

No-Fault insurance was conceived to address very real problems, which were endemic in the automobile insurance industry at the time. Many of those problems still exist today in states that either decided not to implement a No-Fault regime, or did implement such a regime and later reverted back to a tort system. No-Fault insurance has proven capable of solving some of those problems, but the question now is – at what cost? Do the benefits provided by No-Fault insurance in its current state justify premiums that are hundreds of dollars higher than those in tort states?

The obvious answer to that question is a resounding "no." No-Fault insurance is simply not worth its unanticipated high costs. No-Fault was conceived as a package deal that included faster claims resolution, better victim compensation, and reduced costs in exchange for a bar against tort liability. It was not contemplated

---

263 *Id.*

264 *Id.* at 16.

as a trade-off, where insurance customers receive some benefits at the expense of massively increased premiums. No-Fault is broken, and the question now is whether we can fix it. I believe this to be an impossible task.

Professor O'Connell will forever remind us that the system was not implemented correctly, saying "[n]o-fault was never intended to layer PIP benefits on top of a barely limited tort system."[265] No state ever implemented the strong verbal threshold proposed by model legislation promulgated in 1971, combining the concepts of "seriousness" with "permanence."[266] The political will to implement such a strong verbal threshold never existed, and there is no reason to believe it will suddenly materialize over 40 years later. The courtroom is a potent symbol of justice, and the notion of shutting its doors in the face of the injured and aggrieved is a difficult sell. All of this is true *before* the special interest groups get involved, and only becomes amplified through their megaphones.

Even if legislatures were to enact stronger verbal thresholds, they would continue to fuel litigation as they are subjectively applied to individual facts. Equity minded judges might adopt liberal interpretations of the threshold to prevent a sympathetic plaintiff from being shut out of the courtroom. These instances have a way of becoming precedent, and the cost saving benefits of a stronger threshold may melt away.

Professor O'Connell suggests that weak thresholds can be compensated for with correspondingly limited PIP benefits, pointing to some No-Fault states with ungenerous PIP, which saw premium declines since the 1990s. Professor O'Connell argues "[t]his is because, while the states have thresholds that take relatively few cases out of the tort system, they also have modest PIP benefit levels that do not cost more than the costs eliminated by the threshold. In short, they are in balance."[267] This may be true for the smaller states, which Professor O'Connell is referring to, but it certainly does not work for larger states such as Florida, where PIP premiums are on track to double every three years.[268]

The alternative to stronger thresholds is what we see Florida

---

[265] *Id.* at 6.

[266] O'CONNELL ET AL., *supra* note 102, at 4.

[267] *Id.* at 5.

[268] WESTCOTT, *supra* note 104, at 6.

doing with its recent reforms. This heavy handed approach puts the legislature in the inappropriate position of dictating acceptable forms of medical treatment, and withholds the full benefits of No-Fault insurance from those deemed to be insufficiently hurt. With a flick of the Governor's pen, Florida has perverted the original intent of No-Fault into something that must be unrecognizable to its early advocates. An accident victim can no longer expect even the minimal $10,000 of benefits previously offered unless they can prove a lack of immediate treatment will seriously jeopardize their health or bodily functions.[269] With no requirement that drivers carry BI liability coverage, Florida drivers now face the prospect of treating their injuries with only the $2,500 offered to non-EMC claimants.[270] No-Fault was intended to enhance access to medical treatment and increase victim compensation.[271] By enacting its "reforms," Florida has managed to completely defeat the original purpose of No-Fault insurance.

Fraud is also a serious concern for No-Fault,[272] and efforts to stamp it out have yet to prove their effectiveness. The recent anti-fraud measures in Florida show the potential for fraud prevention techniques to inadvertently jeopardize the availability of benefits for legitimate claimants. However, widespread PIP fraud can breed many evils other than simple cost overruns. Public awareness of unmitigated fraud at their expense erodes trust in the system, and encourages cynicism towards both government and the insurance industry. More serious is the impact of fraud on those involved on a personal level – both voluntarily and otherwise. Fraudsters take advantage of vulnerable, low-income people by offering cash payouts to stage accidents.[273] Not only does PIP fraud involve these people in crime, but potentially exposes them to serious physical injury. Innocent bystanders are at risk as well, if the fraudsters employ methods which involve unwilling participants.

In the face of these challenges, I propose that the system should be scrapped. In its place, states such as Michigan and

---

269 *See* Rose, *supra* note 201, at 24.
270 *Id.*
271 O'CONNELL ET AL., *supra* note 102, at 3.
272 *See* discussion *supra* Part IV, C.
273 *See* discussion *supra* Part IV, C.

Florida should require mandatory BI coverage and health insurance primacy. Recognizing that the imminent implementation of the ACA renders many of the arguments in favor of No-Fault moot strengthens this conclusion.

Mandatory BI coverage is preferable to No-Fault for many reasons beyond premium cost. First, compulsory liability coverage fulfills longstanding public policy of promoting individual responsibility for one's actions. The tort system forces negligent or reckless drivers to internalize the costs of their actions. This is not only attractive from a social justice standpoint, but may also have a deterrent effect that reduces accidents.[274] Second, because liability policies only pay out when the insured is at fault,[275] BI offers insurers more flexibility to personalize premium rates based on an individual driver's risk profile. This leads to lower costs for safer drivers, and incentivizes responsible behavior. Finally, mandatory BI coverage protects victims injured by judgment-proof tortfeasors when their medical costs exceed PIP maximums.

When the ACA enters the equation, the argument in favor of mandatory BI becomes even stronger. Once the ACA comes into full effect in 2014, up to 94 percent of Americans will carry some level of health insurance.[276] The law requires that all health insurance plans adhere to certain guidelines, ensuring that everyone has a minimal level of coverage.[277] Health plans are categorized into "bronze," "silver," "gold," and "platinum" levels depending on the benefits they offer (and correspondingly, premium cost).[278]

While the details of each individual plan will vary depending

---

[274] *See generally* J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427 (2001) (finding that by restricting access to tort, No-Fault insurance weakens incentives for careful driving, thus leading to increases in fatal automobile accident rates). However, *see* ANDERSON ET AL., *supra* note 7, at 79-82 (finding that the results of empirical studies looking at whether No-Fault coverage increases fatal accidents are mixed).

[275] *Liability insurance explained*, 21ST CENTURY INSURANCE, http://www.21st.com/auto-insurance-information/liability-insurance-explained.htm (last visited Jan. 21, 2014).

[276] Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to John Boehner, Speaker, U.S. House of Representatives 9 (Jan. 6, 2011), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12040/01-06-ppaca_repeal.pdf.

[277] *See* CLAXTON ET AL., *supra* note 242, at 1.

[278] *Id.* at 1-2.

on many complex factors, the Kaiser Family Foundation has created estimates for what the average plans will look like. The basic "bronze" plan covers 60 percent of medical expenses with a $4,375 deductible and $6,350 maximum for annual out-of-pocket expenses.[279] However, the Kaiser Family Foundation expects the "silver" plan to be most common, with a maximum $2,050 deductible and 70 percent coverage.[280]

With health insurance as the primary payer, BI costs can be kept low by taking advantage of the health insurer's contractual agreements with medical providers. If the health insurers are permitted to subrogate against the third party BI carrier, it would further offset the increased burden of making the health insurers primary payers. Along with the money saved from lower premiums, auto insurance customers can invest in better health plans, which are useful beyond the limited context of automobile accidents.

For those concerned with the initial financial outlay associated with deductibles and patient coinsurance, the savings could also be used to add medical payments coverage ("MedPay") to their auto insurance plan.[281] MedPay is similar to PIP in that it provides the insured with a limited pool of money to pay first-party medical expenses.[282] Unlike PIP, MedPay usually pays 100 percent of charges, and can be obtained for a very low additional fee.[283] This is because MedPay coverage typically consists of only a few thousand dollars.[284] That amount may not be enough to pay the entire bill, but it will certainly help defray the cost of deductibles and out-of-pocket expenses.[285]

Mandatory BI coupled with mandatory health insurance addresses many of the concerns that led to the original conception of the No-Fault regime. The problem of inadequate compensation for victims becomes far less pressing when health insurance is in

---

279 *Id.* at 3.

280 *Id.*

281 Jay MacDonald, *Why you need MedPay in car insurance*, BANKRATE.COM, http://www.bankrate.com/finance/insurance/why-you-need-medpay-in-car-insurance-1.aspx (last visited Dec. 19, 2013).

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.*

the picture. The ACA's required maximum out-of-pocket cap ensures that a victim's personal financial exposure is limited to manageable levels.[286] Any concerns over victims being pressured to settle for pennies on the dollar due to time constraints are also partially mitigated. For drivers in Michigan, the ACA's prohibition on lifetime limitations[287] will allow their health insurance to mirror the unlimited benefits currently afforded by the state's generous No-Fault implementation.

Rejecting No-Fault will inevitably entail the loss of the positive attributes associated with the system, such as faster claims processing. This is regrettable, but the sting will again be soothed by the individual mandate. Prolonged claims processing was a burden on accident victims primarily because it left them responsible for their medical bills until a settlement was reached. With a combination of health insurance and MedPay covering the immediate medical expenses, an accident victim will be empowered with the patience necessary to press his claim for full value.

VII. Conclusion: The No-Fault Model is Unsalvageable

No-Fault automobile insurance was a bold and innovative idea when it was first proposed in the early 1970s. It addressed serious concerns about the tort system's failure to properly compensate accident victims for their injuries, and sought to reduce the costs of providing restitution while expanding access to medical treatment.[288] However, the notion of shutting most injured victims out of the courts proved too difficult a sell, and legislatures never adopted the tough tort thresholds that were necessary to make the system work.

Instead of controlling costs, No-Fault resulted in skyrocketing premiums fueled by an explosion in medical expenses.[289] While the system was successful at opening up wider access to medical treatment, it did so at tremendous cost. Medical care is

---

[286] CLAXTON ET AL., *supra* note 242, at 2.

[287] *See generally* U.S. Centers for Medicare & Medicaid Services, *How does the health care law protect me?*, HEALTHCARE.GOV, https://www.healthcare.gov/how-does-the-health-care-law-protect-me/ (last visited Dec. 19, 2013).

[288] *See* discussion *supra* Part II.

[289] *See* discussion *supra* Part IV, B.

dramatically more expensive in No-Fault states, and the disparity is not limited to auto accident victims.[290] Meanwhile, the bills are being paid by automobile insurers with little experience or leverage in dealing with medical providers. Auto insurers do not enjoy the same contractual advantages that health insurers do, and end up paying sticker price for expensive medical services. Fraud may also play a part in the rising costs, as criminal organizations partner with corrupt medical providers to bilk the insurers out of millions.[291]

While there are many proposals and legislative efforts underway to reform the No-Fault insurance system, these efforts are unlikely to succeed. In some cases, the political will to enact reforms is absent, and judicial interpretation may undermine the effort in the name of fairness. In Florida, the steps taken to reform the system may have managed to defeat its original purpose. No state should retain No-Fault for the sake of having No-Fault. The system is fundamentally broken, and must be replaced.

The passage of the ACA offers an opportunity to resolve many of the major concerns that No-Fault was created to address. Combined with mandatory BI liability coverage and health insurance primacy, the impending reality of ubiquitous health insurance will ensure that accident victims receive the prompt medical treatment they need without having to put themselves in debt. Once No-Fault is abolished, insurance customers can use the savings to purchase higher quality health insurance plans, and add MedPay to their automobile insurance policies to defray the cost of deductibles or coinsurance.

---

290 *See* discussion *supra* Part IV, B.

291 *See* discussion *supra* Part IV, C.