The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SB 1694

INTRODUCER: Senator Richter

SUBJECT: Motor Vehicle Personal Injury Protection Insurance

DATE: March 27, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Burgess	BI	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

Senate Bill 1694 amends the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7405, F.S.). The bill requires any person seeking personal injury protection (PIP) benefits to comply with the terms of the insurance policy, including submitting to examinations under oath (EUO). The bill also creates a rebuttable presumption that a claimant's failure to appear for an independent medical examination is unreasonable, and specifies that the insurer is not liable for any PIP benefits incurred after the date of the first request for examination.

The bill specifies that the Medicare fee schedule in effect on January 1 applies for the rest of the calendar year. The bill also clarifies the maximum PIP reimbursement for durable medical equipment, care, and services rendered by a clinical laboratory and for medical care and services provided in an ambulatory surgical center.

The bill limits attorney's fees recovered pursuant to a No-Fault dispute to the lesser of $10,000 or three times the amount recovered. In a class action under the No-Fault law, attorney's fees are limited to the lesser of $50,000 or three times the recovery. The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault law.

The bill authorizes insurers to offer motor vehicle insurance policies that require or allow the arbitration of claims disputes over PIP benefits. The policy may require arbitration before filing a lawsuit and require that arbitration be used to resolve disputes in lieu of litigation. The arbitrator's decision is binding on each party, but may be challenged by either party in Circuit Court. The arbitration challenge is limited to a review of the record and not de novo review. If the insurer pays the arbitration award and the insured files a challenge in circuit court, the insured is not entitled to attorney's fees under s. 627.428, F.S., and interest will not accrue on the

amount in dispute during the litigation. The bill gives circuit courts original jurisdiction of all actions involving the No-Fault law that are not resolved through arbitration.

Written requests to a self-insured corporation for insurance policy information must be sent by certified mail to the corporation's registered agent.

This bill substantially amends the following sections of the Florida Statutes: 26.012, 627.4137, 627.731, and 627.736.

II. Present Situation:

Florida Motor Vehicle No-Fault Law

Under the state's no-fault law, owners or registrants of motor vehicles are required to purchase $10,000 of personal injury protection (PIP) insurance which compensates persons injured in accidents regardless of fault. Policyholders are indemnified by their own insurer. The intent of no-fault insurance is to provide prompt medical treatment without regard to fault. This coverage also provides policyholders with immunity from liability for economic damages up to the policy limits and limits tort suits for non-economic damages (pain and suffering) below a specified injury threshold. In contrast, under a tort liability system, the negligent party is responsible for damages caused and an accident victim can sue the at-fault driver to recover economic and non-economic damages.

Florida drivers are required to purchase both personal injury protection (PIP) and property damage liability (PD) insurance. The personal injury protection must provide a minimum benefit of $10,000 for bodily injury to any one person and $20,000 for bodily injuries to two or more people. Personal injury protection coverage provides reimbursement for 80 percent of reasonable medical expenses, 60 percent of loss of income, 100 percent of replacement services, for bodily injury sustained in a motor vehicle accident, without regard to fault. The property damage liability coverage must provide a $10,000 minimum benefit. A $5,000 death benefit is also provided.

In 2007, the Legislature re-enacted and revised the Florida Motor Vehicle No-Fault Law (ss. 627.730-627.7405, F.S.) effective January 1, 2008.[1] The re-enactment maintained personal injury protection (PIP) coverage at 80 percent of medical expenses up to $10,000. However, benefits are limited to services and care lawfully provided, supervised, ordered or prescribed by a licensed physician, osteopath, chiropractor or dentist; or provided by:

- A hospital or ambulatory surgical center;
- An ambulance or emergency medical technician that provided emergency transportation or treatment;
- An entity wholly owned by physicians, osteopaths, chiropractors, dentists, or such practitioners and their spouse, parent, child or sibling;
- An entity wholly owned by a hospital or hospitals;
- Licensed health care clinics that are accredited by a specified accrediting organization.

[1] *See* ch. 2007-324, L.O.F.

Medical Fee Limits for PIP Reimbursement

Section 627.736(6), Florida Statutes, authorizes insurers to limit reimbursement for benefits payable from PIP coverage to 80 percent of the following schedule of maximum charges:

- For emergency transport and treatment (ambulance and emergency medical technicians), 200 percent of Medicare;
- For emergency services and care provided by a hospital, 75 percent of the hospital's usual and customary charges;
- For emergency services and care and related hospital inpatient services rendered by a physician or dentist, the usual and customary charges in the community;
- For hospital inpatient services, 200 percent of Medicare Part A;
- For hospital outpatient services, 200 percent of Medicare Part A;
- For all other medical services, supplies, and care, 200 percent of Medicare Part B;
- For medical care not reimbursable under Medicare, 80 percent of the workers' compensation fee schedule. If the medical care is not reimbursable under either Medicare or workers' compensation then the insurer is not required to provide reimbursement.

The insurer may not apply any utilization limits that apply under Medicare or workers' compensation. Also, the insurer must reimburse any health care provider rendering services under the scope of his or her license, regardless of any restriction under Medicare that restricts payments to certain types of health care providers for specified procedures. Medical providers are not allowed to bill the insured for any excess amount when an insurer limits payment as authorized in the fee schedule, except for amounts that are not covered due to the PIP coinsurance amount (the 20 percent co-payment) or for amounts that exceed maximum policy limits.

Motor Vehicle Insurance Fraud

Recently, Florida has experienced an increase in motor vehicle related insurance fraud. The number of staged motor vehicle accidents received by the Division of Insurance Fraud (Division)[2] has nearly doubled from fiscal year 2008/2009 (776) to fiscal year 2009/2010 (1,461). The Division is also reporting sizeable increases in the overall number of PIP fraud referrals, which have increased from 3,151 during fiscal year 2007/2008 to 5,543 in fiscal year 2009/2010. Florida led the nation in staged motor vehicle accident "questionable claims"[3] from 2007-2009, according to the National Insurance Crime Bureau (NICB).[4]

Motor vehicle insurance fraud is a long-standing problem in Florida. In November 2005, the Senate Banking and Insurance Committee produced a report entitled Florida's Motor Vehicle No-Fault Law, which was a comprehensive review of Florida's No-Fault system. The report noted that fraud was at an "all-time" high at the time, noting that there were 3,942 PIP fraud

[2] The Division of Insurance Fraud is the law enforcement arm of the Department of Financial Services.
[3] The NICB defines a "questionable claim" as one in which indications of behavior associated with staged accidents are present. Such claims are not necessarily verified instances of insurance fraud.
[4] The National Insurance Crime Bureau is a not-for-profit organization that receives report from approximately 1,000 property and casualty insurance companies. The NICB's self-stated mission is to partner with insurers and law enforcement agencies.

referrals received by the Division during the three fiscal years beginning in 2002 and ending in 2005. That amount was easily exceeded by the over 5,500 PIP fraud referrals received by the division during the 2009/2010 fiscal year. Given this fact, the following description from the 2005 report is an accurate description of the current situation regarding motor vehicle insurance fraud:

> "Florida's no-fault laws are being exploited by sophisticated criminal organizations in schemes that involve health care clinic fraud, staging (faking) car crashes, manufacturing false crash reports, adding occupants to existing crash reports, filing PIP claims using contrived injuries, colluding with dishonest medical treatment providers to fraudulently bill insurance companies for medically unnecessary or non-existent treatments, and patient-brokering…

Fraudulent claims are a major cost-driver and result in higher motor vehicle insurance premium costs for Florida policyholders. Representatives from the Division have identified the following sources of motor vehicle insurance fraud:

- Ease of health care clinic ownership.
- Failure of some law enforcement crash reports to identify all passengers involved in an accident.
- Solicitation of patients by certain unscrupulous medical providers, attorneys, and medical and legal referral services.
- Litigation over de minimis PIP disputes.
- The inability of local law enforcement agencies to actively pursue the large amount of motor vehicle fraud currently occurring.

Examinations Under Oath

The standard motor vehicle insurance policy contains a provision requiring the insured or claimant to submit to an examination under oath (EUO) as often as the insurer may reasonably require. When an insurer seeks an EUO of an insured or claimant, it sends a written request setting forth the time, date, and location of the examination and a list of any documents that the insurer is requesting. The examination is similar to a legal deposition as the insured answers questions posed by the insurance company's attorney.

Medical providers and insurers dispute whether an insurer may require a medical provider who has accepted an assignment of benefits to submit to an examination under oath. The Fifth District Court of Appeals ruled in *Shaw v. State Farm Fire and Cas. Co*., 37 So. 3d 329 (Fla. 5th DCA 2010), that a medical provider who was assigned PIP benefits by its insured was not required to submit to an EUO. The court stated that under Florida law, the assignment of contract rights (here, to receive reimbursement for PIP medical benefits) does not entail the transfer of contract duties (to submit to an EUO) unless the assignee agrees to accept the duty. The court noted that the assignment does not extinguish the duty to comply with the insurance contract, but stated that it is the contracting party (the insured) who must comply with contract conditions. The majority decision also found that State Farm attempted to impermissibly alter via contract the state's No-Fault Law, which provides how insurers may obtain information from health care providers. A dissent in the case stated that the *Shaw* policy clearly stated that the medical provider must

submit to an EUO under the State Farm policy because it required each "claimant" to submit to an EUO. The dissent also stated that an assignment of benefits does not remove the assignee from the burden of compliance with contract conditions under Florida law.

Attorney Fee Awards

Pursuant to s. 627.428, F.S., parties that prevail against insurers in court, including PIP claimants, are entitled to an award of reasonable attorney fees. In determining a fee award, a court engages in a "Lodestar" calculation, which is the reasonable number of hours the attorney worked multiplied by a reasonable hourly rate.[5] In determining a reasonable fee, courts should consider the following factors set forth by the Florida Bar[6]:

- Time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged.
- The amount involved and the results obtained.
- The time limitations imposed.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer(s) performing the services.
- Whether the fee is fixed or contingent.

In personal injury cases in which the prevailing claimant's attorney has worked on a contingency fee basis, it is within the court's discretion whether or not to use a contingency risk multiplier of up to 2.5 times the "Lodestar" amount in determining the fee award.[7] In federal cases, the use of a contingency risk multiplier in computing attorney fee awards under federal fee-shifting statutes was effectively eliminated in 1987.[8] A trial court has discretion regarding whether to apply a contingency risk multiplier, using the following criteria to determine whether a multiplier is necessary: (1) whether the relevant market requires a multiplier to obtain competent counsel; (2) whether the attorney could mitigate the risk of nonpayment; and (3) the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.[9] If the trial court determines that a multiplier is necessary, it may apply the following multipliers:

- A multiplier of 1 to 1.5 if success was more likely than not at the outset;
- A multiplier of 1.5 to 2.0 if the likelihood of success was approximately even at the outset;
- A multiplier of 2.0 to 2.5 if success was unlikely at the outset of the case.[10]

[5] See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).
[6] *See* R. Regulating Fla. Bar 4-1.5(b).
[7] See *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).
[8] See *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. 711 (1987).
[9] *See supra* note 8 at 834.
[10] *See id.*

Florida Arbitration Code

The Florida Arbitration Code (ss. 682.01-682.22, F.S.) authorizes two or more parties to agree in writing to resolve controversies between the parties in arbitration proceedings governed by the provisions of the code.[11] Agreements to arbitrate under the Florida Arbitration Code are valid, enforceable, and irrevocable.[12] A party to an arbitration agreement may petition a court for an order directing the parties to proceed with arbitration, and court actions involving issues governed by the arbitration agreement must be stayed upon a request for such an order.[13]

The arbitration agreement governs the method of selecting arbitrators, in which the court selects the arbitrators if the agreement is silent on the issue or the method in the arbitration agreement fails.[14] If multiple arbitrators are selected, an umpire may also be selected that will render the arbitration award if the arbitrators are unable to agree. The arbitration hearing may be governed by the arbitration agreement or the arbitration code, the latter of which directs the arbitrators to provide notice of the hearing, review evidence, and render a decision.[15] The parties are entitled to be heard during the arbitration hearing, to present material evidence, to cross examine witnesses, and to have an attorney present. The arbitration award must be in writing and signed by the arbitrators.[16] Under the Florida Arbitration Code, the arbitration award may only be appealed in limited circumstances[17], and an arbitration award may only be vacated because it was procured by corruption, fraud, or undue means; the arbitrators or umpire were corrupt or partial; the arbitrators or umpire exceeded their powers or improperly refused to continue a proceeding or hear material evidence; or there was no valid agreement to arbitrate.[18]

In 2000, the Florida Supreme Court decided *Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So.2d 55 (Fla. 2000), which invalidated a statutory provision that required medical providers that receive an assignment of benefits under the No-Fault law to enter arbitration and prohibited such providers from pursuing a breach of contract claim in court. The Court declared that the arbitration provision violated the right of medical providers to access courts pursuant to article I, section 21 of the Florida Constitution. The court had previously declared a statute constitutional that directed parties to resolve disputes via arbitration before filing an action in circuit court because the statute provided for a trial de novo[19] in circuit court for a party who appealed the arbitration award.[20] The court also noted that a statutory requirement that the arbitration board's decision be presumed correct in the trial de novo would raise serious concerns regarding the constitutionality of such a provision.[21]

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[11] See s. 682.02, F.S.
[12] *See id.*
[13] *See* s. 682.03, F.S.
[14] *See* s. 682.05, F.S.
[15] *See* s. 682.06, F.S.
[16] *See* s. 682.09, F.S.
[17] *See* s. 682.20, F.S.
[18] *See* s. 682.13, F.S. See *District School Board of St. Johns County v. Timoney*, 524 So. 2d 1129, 1131 (Fla. 5th DCA 1998); See *Prudential-Bache Securities, Inc. v. Shuman*, 483 So. 2d 888 (Fla. 3d DCA 1986).
[19] A "trial de novo" is a new trial on appeal in which the court determines the matter anew, and the prior adjudication has no weight.
[20] See *Chrysler Corporation v. Pitsirelos*, 721 So. 2d 710, 713 (Fla. 1998).
[21] *See supra* note 21 at 714.

III. Effect of Proposed Changes:

Section 1. Amends s. 26.012(2), F.S., which specifies the original jurisdiction of Circuit Courts.

Circuit Court Jurisdiction of PIP Disputes

The bill gives circuit courts original jurisdiction of all actions involving the No-Fault law that are not resolved through arbitration. Pursuant to s. 34.01, F.S., county courts have original jurisdiction of civil actions in which the matter in dispute does not exceed $15,000, not including interest, costs, and attorney's fees, except for disputes that are within the exclusive jurisdiction of the circuit court. Currently, county courts have original jurisdiction over many disputes involving the No-Fault law because the amount in controversy is less than $15,000.

Section 2. Amends s. 627.4137, F.S., which requires liability insurers to disclose coverage information. The bill requires that written requests to a self-insured corporation for insurance policy information must be sent by certified mail to the corporation's registered agent.

Section 3. Amends s. 627.731, F.S., which states the purpose of the Florida Motor Vehicle No-Fault Law.

Legislative Intent of the No-Fault Law

The bill provides a statement of legislative intent regarding the No-Fault Law. Three statements of legislative intent are provided:

- The provisions, schedules, and procedures authorized in the no-fault law are to be implemented by insurers and have full effect regardless of whether they are included in the insurance policy, and thus an insurer is not required to amend its policy form.
- Insurers should properly investigate claims. Accordingly, insurers may obtain examinations under oath and sworn statements from claimants seeking no-fault insurance benefits and may request mental and physical independent medical examinations of persons seeking PIP coverage or benefits.
- The insured's interest in obtaining competent counsel must be balanced with the public's interest in not encouraging PIP litigation because of exorbitant attorney's fees. Courts should limit attorney fee awards in order to eliminate incentives for attorneys to manufacture unnecessary litigation.

Section 4. Amends s. 627.736, F.S., governing PIP benefits. The bill makes the following changes:

Clarification of the PIP Fee Schedule

The PIP fee schedule utilizes the Medicare fee schedule in setting the maximum reimbursement that providers may obtain for many services and treatments. The bill requires use of the Medicare fee schedule in effect on January 1 of the year in which medical services, supplies, or care was provided.

The bill clarifies that the maximum reimbursement for durable medical equipment, care, and services rendered by a clinical laboratory is 200 percent of the Medicare Part B fee schedule. The bill also clarifies that the maximum reimbursement for medical care and services provided in an ambulatory surgical center is 80 percent of the maximum reimbursement available under the workers' compensation fee schedule.

Compliance with Policy Terms and Submission to Examinations Under Oath

The bill requires any person seeking benefits to comply with the terms of the insurance policy, including submitting to examinations under oath (EUO). Compliance with policy terms is a condition precedent to receiving benefits under the No-Fault law. However, insurers are prohibited from, as a general business practice, requesting EUOs in a manner inconsistent with the terms of the applicable insurance policy. When an insurer requests an EUO of a claimant or medical provider that has been assigned benefits by the claimant, the following statutory provisions apply:

- All claimants and medical providers must produce all documents requested by the insurer that are reasonably obtainable and allow them to be inspected.
- A medical provider that is requested to submit to an EUO must produce the persons having the most knowledge of the issues identified by the insurer in the request for examination.
- The EUO may be recorded by audio, video, and court reporter.

The provision is intended to reverse the Florida Third District Court of Appeal's decision in *Shaw*, 37 So.3d 329.

Unreasonable Failure to Submit to a Medical Examination [s. 627.736(7), F.S.]

Current law authorizes an insurer to require that an injured PIP claimant submit to a physical or mental examination conducted by a physician of the insured's choosing. If a person unreasonably refuses to submit to an examination, the insurance carrier is no longer liable for subsequent PIP benefits. The bill clarifies that the carrier is not liable for any PIP benefits incurred after the date of the first request for examination. The bill also creates a rebuttable presumption that the claimant's failure to appear for the examination was unreasonable. The bill makes submission to a physical or mental examination a condition precedent to receiving benefits.

The provision is intended to reverse the Florida Supreme Court's decision in *Custer Medical Center v. United Automobile Insurance Company*, 35 Fla. L. Weekly S640 (Fla. November 4, 2010). In *Custer*, the Court determined that the insurer must provide evidence that an insured's failure to appear (3 times) for a scheduled medical examination pursuant to s. 627.736(7), F.S., is unreasonable. Because an insured may reasonably refuse to attend a medical examination, the insured's failure to attend the medical examination does not establish that it was unreasonable. Under the *Custer* decision, the insurer cannot prevail on a summary judgment motion on the issue and instead must proffer evidence that the refusal was unreasonable.

Limitations on Attorney's Fees

The bill limits attorney's fees recovered pursuant to a No-Fault dispute to the lesser of $10,000 or three times the amount recovered. In a class action under the No-Fault law, attorney's fees are limited to the lesser of $50,000 or three times the recovery.

The bill also prohibits using a contingency risk multiplier to calculate attorney's fees recovered under the No-Fault law.

Arbitration of PIP Disputes

The bill authorizes insurers to offer motor vehicle insurance policies that require or allow the insurer or claimant to demand arbitration of claims disputes over PIP benefits. The policy may require the insurer or claimant to demand arbitration before filing a lawsuit and require that arbitration be used to resolve disputes in lieu of litigation. Arbitration will be subject to the Florida Arbitration Code, except as otherwise provided in the statute.

The arbitration process will be as follows:

- *Demand for Arbitration* – The arbitration demand must be in writing and mailed to the insurer or claimant by certified mail.
- *Timeframe and Location of Arbitration*:
  - Arbitration may not be initiated until 30 days after the request for arbitration is received and 20 days after documents are received from the claimant and insurer.
  - Arbitration shall take place in the county where treatment was rendered. If treatment was rendered outside Florida, arbitration shall take place in the insured's county of residence unless the parties agree to another location.
- *Selection of the Arbitrator* – The parties shall mutually agree to the selection of an arbitrator within 20 days. If the parties cannot agree, the arbitrator will be selected by the chief judge of the circuit in which the arbitration is pending.
- *Document Discovery in Arbitration*:
  - The insurer may request in writing that the claimant make the entire file (including medical records) pertaining to the insured who is the subject of arbitration available for inspection.
  - The claimant may request in writing prior to the arbitration that the insurer make the evidence upon which it is relying in adjusting or rejecting the claim available for inspection or copying. The claimant may only discover items related to insurance coverage. Discovery is not available pertaining to issues of potential bad faith claims handling, nor is discovery available for privileged items, underwriting files, or documents the insurer does not intend to rely on as evidence supporting its adjustment or rejection of the claim.
- *The Arbitration Decision*:
  - The arbitrator's decision is binding on each party, unless challenged. The decision must be furnished in writing to each party.
  - The arbitrator's award may not exceed the applicable coverage limits remaining on the policy.
- *Attorney's Fees* – Attorney's fees may be recovered by the claimant, but are limited to three times the lesser of $10,000 or three times the amount recovered.

- *Circuit Court Challenge of the Arbitration Award* – Either party may challenge the arbitration decision by filing a complaint in circuit court enclosing a copy of the arbitration decision. The arbitration challenge is limited to a review of the record and not de novo review.
- *Limits on Attorney's Fees and Interest During an Arbitration Award Challenge* – If the insurer pays the arbitration award and the insured files a challenge in circuit court, the insured is not entitled to attorney's fees under s. 627.428, F.S. In this circumstance interest on the amount in dispute will not accrue during the litigation.

Section 5. The act is effective upon becoming law.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill's authorization of insurance policies that require PIP disputes be submitted to arbitration may be unconstitutional pursuant to *Pinnacle Medical, Inc.*, 753 So. 2d 55. In *Pinnacle*, the Florida Supreme Court ruled unconstitutional a statute requiring medical providers to resolve PIP disputes through arbitration and prohibiting such providers from filing suit. Though the arbitration provision in this bill does not prohibit filing suit, the extremely limited grounds by which an arbitration award may be overturned (essentially a fraudulent proceeding) likely would be a violation of the right of access to courts guaranteed under the Florida Constitution. If appeal of arbitration via a trial de novo were provided, the arbitration provision should meet the standard articulated in the *Pinnacle* decision.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.