

**BATTLING AGAINST
PERSONAL INJURY PROTECTION (PIP)
FRAUDULENT ACTIVITIES
AND ABUSES IN THE STATE OF
FLORIDA**

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TABLE OF CONTENTS

I. OVERVIEW 1

II. SUMMARY OF THE ISSUE..... 2

III. UPDATE ON STATE OF FLORIDA PIP FRAUD INVESTIGATIONS..... 8

IV. INSURANCE CARRIERS BATTLE BACK..... 15

V. OUR FIRM’S PHILOSOPHY 18

VI. A MULTI-PHASE APPROACH..... 20

 A. Investigation and Documentation 20

 B. Developing the “Florida” PIP Fraud Team..... 21

 C. Florida PIP Fraud “Whiteboard” Meeting 22

 D. Presentation of the Plan 23

 E. Developing Strong Partnerships 24

 F. Policyholder and Claimant Informational and Educational Actions 27

 G. Florida Law Provisions for Recovery 32

 H. Multi-Phase Litigation Plan 41

VII. CONCLUSION..... 49

VIII. APPENDICES (Available upon request)

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I. OVERVIEW

Many of our clients know I began practice as an insurance defense lawyer in Florida in 1985. From my first day as an insurance lawyer, I learned about the Florida PIP Statute and its abuses. Several years later, my wife and I returned to Cincinnati, Ohio to raise our family. Two decades later in April of 2011, our firm opened its first of now two offices in the state of Florida, returning to the original “roots” of my insurance defense practice. Waiting on my return was a much worse PIP problem than I left behind so many years before.

In the twenty-seven ensuing years, the problem of PIP fraud in the state of Florida has grown incredibly to the point insurers can no longer ignore this unfortunate situation. Since the mid-1990’s, our firm has focused predominantly in the fields of bad faith insurance defense and insurance fraud investigations. From a thousand miles away, we routinely monitored the problem associated with medical fraud activities, mostly arising out of the Florida PIP Statute, to make certain we remained fully aware of all types of insurance fraud activity occurring across the United States. We also specifically targeted Florida PIP fraud because of the problems many carriers are aware of with unscrupulous medical and legal providers travelling up the I-75 and I-95 corridors and setting up similar operations in Midwestern and Northern states together with the unfortunate, but well-documented, flow of illegal prescription medication such as Oxycodone and Oxycontin which are being secured unscrupulously through Florida medical providers.

When we opened our first office in Florida last year, one of the first requests we received from several of our long-standing insurance clients was to assist them in the battle against PIP insurance fraud in the Sunshine State. We have worked diligently to compile updated information, statistical reviews and other materials necessary to not only acquaint ourselves with the problems associated with PIP fraud, but to aid and assist our clients in their ongoing duty and responsibility to investigate and attempt to limit fraud.

The document which follows is our effort to provide an overview of the myriad of problems associated with the investigation of PIP fraud occurring throughout Florida combined with a broad-based discussion of actions plans we believe can be undertaken by insurers to battle back against many of these practices. We provide you this information as part of our ongoing commitment to our clients to educate and inform you on issues which affect the insurers we have the privilege to represent.

We hope you find this information to be of benefit, and we welcome the opportunity to discuss with you further a more specific and comprehensive plan geared to your policyholders’ needs and concerns to assist you in your state-mandated duty in Florida to investigate insurance fraud, and to more importantly better serve your policyholders by paying legitimate claims and avoiding payment for fraudulent losses.

Smith, Rolfes & Skavdahl Company, L.P.A.



*Matthew J. Smith
President*

II. SUMMARY OF THE ISSUE

The Florida legislature first adopted what is commonly referred-to as “no fault” automobile insurance in 1971. That year, the legislature passed Florida Statute 627.736, which became law effective January 1, 1972.

In passing this new law, the legislative notes referenced the very good intentions to implement a new program of automobile insurance which would benefit Florida residents and insurance carriers alike, streamline payments for accident-related injuries and decrease the need for legal representation and related litigation. It was not only the legislature which aspired to this supposedly bright new day of no fault automobile insurance.

The first PIP lawsuit to reach the Florida Supreme Court (*Lasky v. State Farm Insurance Company*, 296 So. 2d 9 (1974)) contained an equally optimistic view of the new law as the Florida Supreme Court stated the purpose of the new no fault program was to:

- *Assure persons injured in vehicular accidents would be directly compensated by their own insurer, even if the injured party was at fault, thus avoiding dire financial circumstances with the “possibility of swelling the public relief roles”;*
- *Lessen court congestion and delays in court calendars by limiting the number of lawsuits;*
- *Lower automobile insurance premiums;*
- *End the inequities of recovery under the traditional tort system.*¹

Whatever optimistic visions the Florida legislature and Supreme Court had, nearly four decades of actual implementation of the law have shown the results to be almost entirely the opposite of these goals.

Over the ensuing years, numerous Florida courts have addressed and interpreted F.S. 627.736. By 2003, the problems with the Florida PIP system had become so rampant a special legislative session was called. That year the Florida legislature adopted a “Sunset Provision” which would have eliminated PIP in Florida in its entirety if substantial revisions to the law were not completed by October 1, 2007. This deadline date came and went, and for a brief period of time, the future continuance of the Florida PIP law was in doubt. However, on January 1, 2008, a newly enacted “No Fault” Statute became effective. The new law did include some needed changes, especially in the area of providing guidelines and schedules for medical costs for routine treatments and services. As before, however, the new legislation fell far short of the stated goals

¹ See Appendix D: Florida Office of Insurance Regulation Report on Review of the 2011 Personal Injury Protection Data Call. April 11, 2011.

and expectations to eradicate or reduce insurance fraud, assist consumers and lessen insurance costs.

Four years later the clear reality is insurance fraud and abuse of the Florida PIP system has done nothing but increase from 2008 through the present.

Although no one can predict what the future may hold, there are more efforts underway currently to modify, yet again, Florida's PIP Statute than at any point since the Statute's original adoption. These recent efforts include a statewide Grand Jury investigations conducted by the Office of the Florida Attorney General, a comprehensive report on no fault auto insurance completed by the Insurance Information Institute in January of 2011 and a report in April of 2011 issued by the Florida Office of Insurance Regulation based upon a request of insurers for a "Data Call" to compile information and statistical documentation regarding the problems associated with Florida PIP fraud.

Initiatives currently underway also significantly include involvement by the Office of the Florida Insurance Consumer Advocate, Robin Westcott. Titled the "PIP Working Group," representatives from the insurance industry, multiple state agencies, and members from the medical and legal communities were selected with the goal of this group formulating recommended legislative changes to be considered potentially as early as the 2012 Florida legislative session.

Currently pending in the Florida House of Representative is HB 119 which would mandate anyone claiming injury in an automobile accident to seek treatment at a hospital emergency room within 72 of the accident. While the Bill's sponsor claims this would dramatically reduce fraudulent medical claims, the Bill has come under widespread attack by already overloaded hospital ER's and by insurers who have little interest in paying even more for hospital visits arising out of routine auto accidents. Proposals like this, however, demonstrate the desperate attempts many in Tallahassee are making to find solutions to a system nearly everyone now agrees is broken and in need of reform. Several new Bills have also been introduced in the Florida Senate which include measures such a prohibiting payment for chiropractic services as part of the mandatory PIP policy coverage.

As these legislative efforts demonstrate, there is currently a "groundswell" of support for vastly modifying, or even eliminating, the Florida PIP Statute. In August of 2011 the *Tampa Tribune* published a major article addressing the attempts by Florida Governor Rick Scott and Florida Chief Financial Officer Jeffrey Atwater to correct the abuses arising from the Florida PIP law. Although some evidence exists to question the monetary amount as being too low, the Tampa Tribune article cited Nine Hundred Forty Million Dollars (\$940,000,000.00) of PIP benefits being paid-out to Florida residents just since 2008, even though the actual total number of automobile accidents across the state has decreased considerably.

On January 25, 2012 Florida Governor Rick Scott held a special news conference on the Florida PIP crisis saying “This has to be fixed.” Governor Scott singled out unscrupulous attorneys, referral services and medical providers as the source of Florida’s embarrassing problems with its auto insurance system. Scott called the current system a \$910 million “fraud tax” on Florida insurance consumers.²

While this whirlwind of activity appears to be reaching a crescendo which should result in some type of legislative action being undertaken in the near future, our Firm has cautioned insurers to not rely on a “wait and see” approach in the “hope” of a legislative solution. Statistical evidence has demonstrated repeatedly the problems associated with PIP fraud in Florida are increasing dramatically and past experience has shown legislative corrections should not be relied upon to solve or eliminate the problems which are occurring. Additionally, even if Florida would elect to abandon the PIP system in its entirety, it is highly unlikely the medical clinics and attorneys engaging in these improper activities, nor the persons involved in the accidents giving rise to these practices, will simply cease to make claims for insurance benefits even if the mechanism of recovery changes. Insurers which take a more proactive view and approach will remain “ahead of the curve” in servicing their policyholders and complying with the Florida Statute to investigate and assist in limiting insurance fraud activities.

The question of whether these activities constitute insurance fraud has reached a point where it is no longer truly debatable. The Ten Thousand Dollar (\$10,000.00) minimum required PIP limit, intended to provide for reasonable medical expense coverage for those injured in an accident, ceased to be a reasonable amount for compensation long ago for unscrupulous claimants and providers, and instead has become a “target” dollar figure to reach as soon as possible to maximize profits and recovery. Although the original goal of the PIP program was to reduce medical expenses and legal costs while providing a greater benefit to consumers, the most recent studies have shown the state of Florida has the fourth highest average auto bodily injury claim cost in the United States. More dramatically, the average Florida claim costs for PIP policies have increased by 23.7% since 2006 alone.³

Prior legislative “fixes” have not been successful or, at most, have provided only temporary benefit. Following the most recent statutory revision in 2007, Florida did see a decline in the frequency of PIP claims for one year only, in 2008. By 2009, however, and notwithstanding the legislative changes, the frequency of PIP claims in Florida increased by more than 16% that year, and by 21% in the last reported year of 2010. As noted by the Insurance

² See Appendix E: Scott Says PIP Program ‘Has to be Fixed’. Orlando Sentinel. Deslatte, Aaron. January 26, 2012

³ See Appendix C: Insurance Information Institute No Fault Auto Insurance in Florida: Trends Challenges and Cost Report. January, 2011

Information Institute in its recent report: “Overall, no fault claim frequency surged by 46.2% between the second quarter of 2008 and the third quarter of 2010.”⁴

Equally, many governing agencies of the state of Florida have been remiss on multiple fronts in battling or assisting insurers in the fight against PIP insurance fraud. This is not intended to be a derogatory comment against any state department or individual, and we base this not on opinion, but on investigations done by the state of Florida itself, including the Fifteenth Statewide Grand Jury Report specifically convened in the Supreme Court of the state of Florida by the Florida Attorney General’s Office more than a decade ago.

In one of the most comprehensive reports prepared on PIP fraud, the Grand Jury compiled detailed and specific information regarding tactics used by runners, medical clinics, imaging facilities and personal injury lawyers including detailed case studies. The findings of the Grand Jury, however, regarding the actions of the State itself are perhaps the most telling. In its report, the Grand Jury specifically noted the following critical comments concerning efforts by Florida’s own governing bodies for chiropractors and lawyers:

1. Board of Chiropractic Medicine

Given that there are over four thousand licensed chiropractors in the State of Florida, and given what we know about the level of criminal activity in the field, we find [the] number of disciplinary cases to be grossly inaccurate and under representative. ... This is inconsistent with the Board’s stated position that patient brokering is extremely serious.

2. The Florida Bar

*Since 1989, The Florida Bar has found five attorneys to have been involved in patient solicitation or brokering. In all five cases, the Bar recommended disbarment, but the penalty was ultimately reduced by the Supreme Court. ... We do not think it is a stretch to say that far more than five lawyers have been involved in patient brokering over the past ten years. ... The evidence we have heard strongly suggests a much higher number of lawyers are involved in the practice, and we encourage The Florida Bar to be more vigilant.*⁵

Many different studies have addressed the societal, business and monetary impact of PIP fraud first and foremost on Florida policyholders and secondarily on Florida insurers. One of the

⁴ Id at pages 2 and 3 of Appendix C

⁵ See Appendix B: Statewide Grand Jury Report on Insurance Fraud Related to Personal Injury Protection; IN THE SUPREME COURT OF THE STATE OF FLORIDA – CASE NUMBER 95,746, SECOND INTERIM REPORT OF THE FIFTEENTH STATEWIDE GRAND JURY

most reliable statistical studies we have reviewed is the recent report of April 11, 2011 issued by the Florida Office of Insurance Regulation. In that report, the following dramatic statistics are included:

The total number of PIP claims opened or recorded in 2010 (386,464) increased 28% since 2006 (302,141).

Over the same time period, insurers have made payments totaling \$8.7 Billion for PIP claims.

[The] payment on all claims has increased significantly since 2008, and there is a 66% increase over the entire period 2006-2010.

[T]he number of PIP claims closed with payment increased significantly, especially since 2008. The increase for claims closed with payment was 56% from 2006 (187,560) to 2010 (293,230).

The number of pending and settled PIP-related lawsuits in which the insurer was the defendant has increased significantly from 2006-2010. During that period the number of pending cases at year-end increased by 387%.

[T]here was an increase in the percentage of claims occurring in the first 30 days that a new policy was effective. In 2006, 8.6% of the claims that were reported on a new policy were reported in the first 30 days. In 2010, this percentage increased to 14.4%.⁶

The above statistics are shocking and demonstrate clearly the need for comprehensive reform in Florida and for insurers to no longer simply “sit back” and hope a solution is somewhere on the horizon. Our firm is taking a leadership role in helping insurers rise up and proactively address the issues of fraud and abuse in the Florida PIP system through a combined process of educating your existing policyholders, reaching out and building bridges with various state agencies and departments to partner in the battle against insurance fraud and, where necessary and appropriate, using the state and Federal Courts to seek financial recovery and

⁶ See Appendix D: Florida Office of Insurance Regulation Report on Review of the 2011 Personal Injury Protection Data Call. April 11, 2011.

injunctive relief to prohibit future abuses. The time has come where simply sitting back and hoping the state legislature or government departments in and of themselves will correct the problem is no longer a viable solution or even option. The cost of these fraudulent activities on the legitimate claims and premiums paid by insurance companies and your policyholders is significant and needs to come to an abrupt end.

We realize there is no way to fully solve or eliminate PIP fraud in claims submitted to any insurance carrier. Such a goal, while lofty and well-intentioned, is wholly unreasonable and impractical. There are, however, proven methods and procedures by which insurers can take a strong stand on behalf of their policyholders and battle back against PIP fraud in the state of Florida. These are the type of programs our firm advocates, and we welcome the opportunity to partner with insurers who are interested in pursuing these avenues further.

The economic impact of these types of actions is always difficult, if not impossible, to quantify. We very strongly believe, however, there are effective and well-reasoned ways to move forward cautiously and in incrementally-balanced phases to ensure insurance carriers are acting in the best interest of their policyholders by identifying those claims appropriately which should be paid while also identifying and attempting to limit or eradicate those claims which are fraudulent in nature. Our goal is to partner with insurance companies in reducing significantly payments made on fraudulent insurance claims and, where appropriate, seek recovery of monies which have been improperly paid for fraudulent activities.

We believe the best way for insurance companies to act proactively, and in the best interest of their policyholders, is to work in partnership with experienced lawyers who have a proven track record of investigating and generating results in the field of insurance fraud law, and together using all available techniques ranging from education of policyholders through litigation to seek successful and provable results.

III. UPDATE ON STATE OF FLORIDA PIP FRAUD INVESTIGATIONS

Since the PIP law became effective in Florida in 1972, numerous state administrations have come and gone both Republican and Democrat. Regardless of political philosophy, a theme of every recent Florida officeholder's campaign has been the need to reform the broken insurance system in Florida and battle insurance fraud. Lofty goals have yet again succumbed to little provable results.

There is new reason, however, to be cautiously optimistic regarding current efforts to battle insurance fraud in the Sunshine State. Within the past ninety days, several major national studies of prescription medication fraud, articles in the *New York Times* and mass media coverage in the state of Florida have all addressed the ongoing problems with unscrupulous medical providers, attorneys and claimants involved in insurance fraud through the abuse of PIP benefit coverage.

On August 31, 2011, the *New York Times* published a dramatic article demonstrating the severity to which the problem has reached in Florida with "pain clinics" prescribing medications mostly arising from PIP claims.⁷ Most of us are aware of the addictive problems associated with Oxycodone, which has become a national epidemic. To put it in the context of how severe the problem is in Florida, however, the *New York Times* article began by identifying Florida as long being the nation's center for the illegal sale of prescription drugs. The statistic which follows is truly amazing. The article cited statistical studies showing in the first six months of 2010, doctors in the state of Florida purchased eighty-nine percent (89%) of all Oxycodone sold to medical practitioners nationwide. Many of these addictive prescription drugs are prescribed by unscrupulous clinics in Florida, given to PIP claimants who pay nothing personally for the drugs and who in turn sell them to dealers for resale in Florida and other states. Anyone who thinks the PIP fraud problem is limited to the borders of the Sunshine State does not understand the implications of the actions going on in Florida affecting many states, and especially those in the Midwest along the I-75 corridor and the eastern seaboard along the I-95 corridor.

The *New York Times* article also pointed-out the positive efforts being taken by the state of Florida to curb these abuses. The article noted between late 2010 and mid-2011, more than four hundred clinics have either shut down or closed their doors in the state, and nearly eighty doctors had their licenses suspended for prescription drug abuse. The article pointed-out new laws passed by the Florida legislature were directly responsible for an incredible ninety-seven percent (97%) drop in the number of Oxycodone prescriptions in the first six months of 2011 versus the prior year. The article also gave a very graphic example of the extent of the problems associated with this type of fraud, noting on one major street in Fort Lauderdale, Florida the number of pain clinics in operation had fallen in the past year from twenty-nine separate clinics to only one still open in 2011.

⁷ See Appendix F: Florida Shutting 'Pill Mill' Clinics. The New York Times. August 31, 2011

Each of these are extremely positive steps in the battle against insurance fraud. Whether insurers write policies in the state of Florida or not, they are clearly being affected by these and other actions arising from the rampant Florida PIP fraud abuses. It is no coincidence accident lawyer and doctor helpline services such as “1-800-ASK-GARY,” which began in Florida, are now operating in states such as Kentucky and Minnesota as well. Service providers such as the “411-PAIN” network, which are currently running advertisements in Florida with what appears to be a uniformed Florida police officer urging people to “call 911 first, then 411-PAIN” have very clearly made their intentions known to expand their services beyond the state of Florida into other jurisdictions. Even the *New York Times* article concerning Oxycodone abuse noted the highest number of out-of-state prescriptions from the Florida-based pain clinics went to persons from Kentucky. Left unchecked, these practices will continue in the future, resulting in multiple insurance fraud claims arising throughout the Midwest and East Coast.

Many high-profile individuals also appear to be profiting from the Florida PIP and personal injury financial windfall. Plaintiff-oriented law firms, legal and medical referral services and questionable medical providers count amount the major donors to Florida election campaigns. Former Florida Governor Charlie Crist is now seen statewide in television ads promoting the personal injury services of one of Florida’s largest and best known personal injury law firms. Investigations have shown members of the Florida legislature, both current and in the past, have received large donations from those involved in the operation of questionable medical and legal services across the state, and on some occasions votes or positions on key legislation to change the PIP system have changed after such occurrences.

In one published article *The Ledger.com* in 2010 reported in May of 2007, the elderly mother of the owner of a clinic in Jacksonville involved in questionable PIP practices, purchased, at what many considered to be a highly inflated price, the home of then Florida House of Representatives Member Marco Rubio, who is now a United States Senator for Florida.⁸ Mr. Rubio purchased the home for One Hundred Seventy-Five Thousand Dollars (\$175,000.00) in 2003 and sold the home four years later to the doctor’s mother for Three Hundred Eight Dollars (\$380,000.00) in cash; more than doubling the price at a time when the Florida real estate market was beginning to weaken. At the time of the purchase, the Florida legislature was considering whether to continue the Florida law mandating drivers purchase Ten Thousand Dollars (\$10,000.00) worth of personal injury protection insurance. Although then Governor Crist and the State Senate had come out in favor of keeping the Florida PIP law in place, Representative Rubio was identified as the main holdout blocking the Bill in the Florida House. It has been asserted after the purchase of his home by the doctor’s mother, then Representative Rubio ceased his opposition, changed his position voting in favor of the Bill, and the legislation was ultimately approved and signed into law in October 2007 and the Florida PIP law continued.

⁸ See Appendix G: Restraint Message Belies Rubio’s Financial Woes. *TheLedger.com*. Anderson, Zac. September 18, 2010

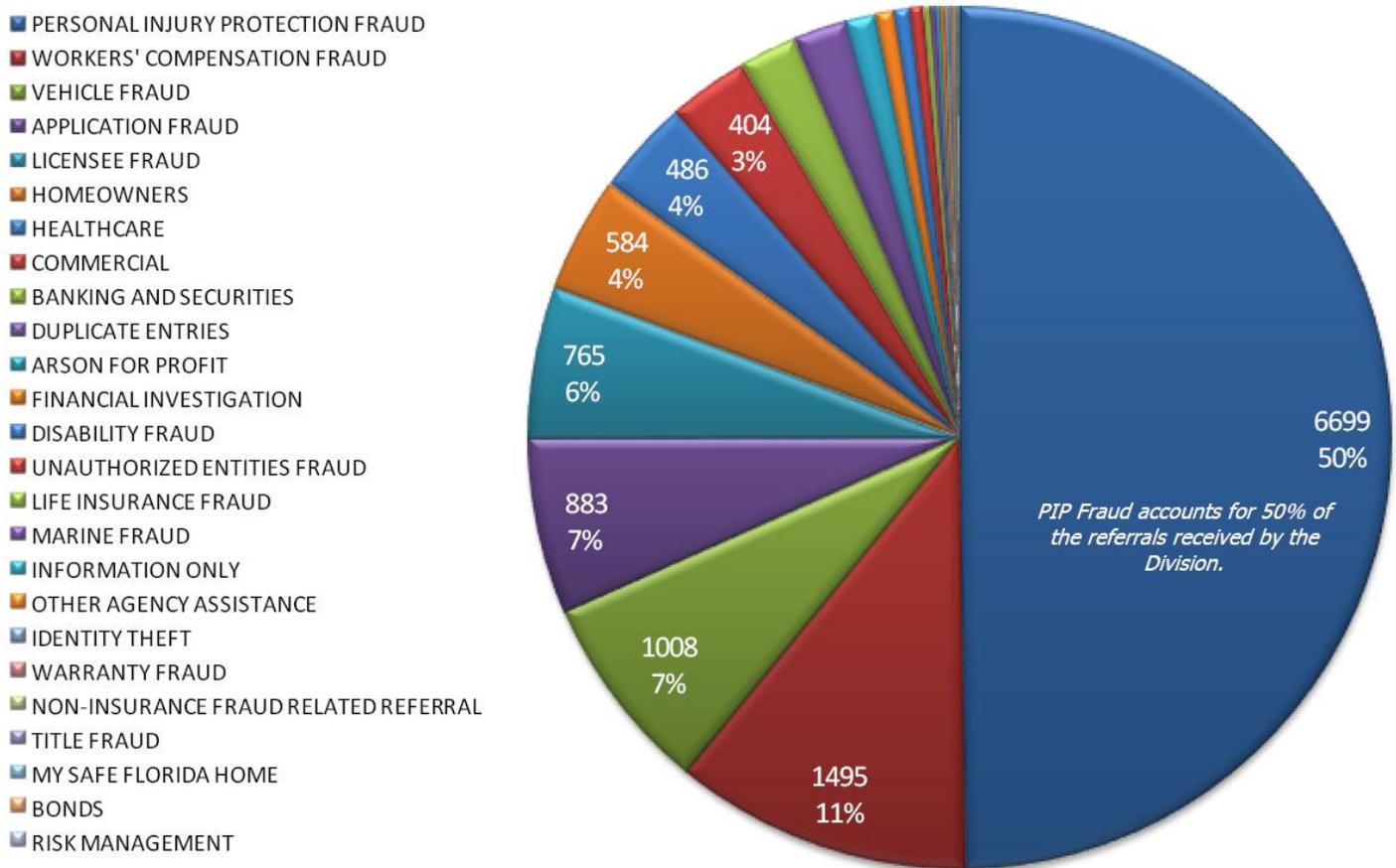
Regardless of the studies which are done, articles published or political speeches and press conferences, the duty still rests on insurers to be keenly aware of the problems facing your honest policyholders and hard-working claims personnel in dealing with insurance fraud and questionable claim activity. Insurers owe a duty to your policyholders, employees and shareholders alike to no longer sit back but instead take an active role in battling the PIP insurance fraud crisis in Florida.

Insurers who are aware of the information in this and other studies will be “ahead of the curve.” We are strongly recommending our clients consider undertaking broad-based and coordinated investigations of PIP insurance fraud in Florida if you are writing auto no fault policies in the Sunshine State. Even if not writing Florida policies, we recommend being cognizant of the issues, problems and concerns associated with Florida PIP fraud so you may identify them on claims where your insureds travel to Florida and are involved in an accident or where the unscrupulous practices taking place in Florida begin to appear in other states before the problem gets out of hand.

The encouraging thing in this process is the state of Florida does appear to be taking a much more proactive role in the investigation of insurance fraud. The Florida Department of Financial Services Division of Insurance Fraud issued its 2010/2011 Annual Report and it was no surprise the vast majority of the information in that report focused on the investigation of PIP fraud.⁹ Perhaps most telling is the following chart included in the State of Florida report.

⁹ See Appendix A: Florida Department of Financial Services Division of Insurance Fraud Annual Report. Fiscal Year 2010/2011

The Number and Percentage of Suspected Fraud Referrals Received for each Fraud Type



This chart clearly demonstrates the magnitude of the problem with PIP fraud in the state of Florida. When you consider the 2010 Census ranked Florida as the fourth largest state in the country (less than four hundred thousand people behind New York state), and when you consider in the above chart that fifty percent (50%) of all fraud referrals relate to PIP insurance fraud, it is obvious we are dealing with a major issue and problem. In like manner, the state of Florida has noted the number of total PIP fraud investigation referrals is increasing dramatically. Between September, 2009 and October, 2011, the number of PIP fraud referrals to the Florida Department of Insurance increased by twenty-one percent (21%). This figure is even more staggering when you consider the vast majority of other types of insurance fraud referrals recorded by the State of Florida actually show decreases between 2011 and 2010. In total, nearly seven thousand referrals were received by the Department of Insurance in the past year to investigate PIP insurance fraud.

While efforts statewide have been improving, real change as usual must come at the local level where the fraud is actually occurring. Progress is being seen in this regard in the state of Florida as well. The Department of Insurance's Tampa Field Office in the past year expanded

into two separate PIP investigation squads. Hillsborough County also adopted its own statutory provision to limit and attempt to curtail PIP fraud on a county-wide level.

Further down the Gulf Coast in the Fort Meyers area, the local DOI office reported over eighty percent (80%) of all the fraud complaints received through their Online Fraud Reporting Website in the entire Fort Meyers area related to PIP fraud. In the past year alone, four clinics (West Coast Chiropractic Center, Fils Chiropractic, Fort Meyers Chiropractic Center and Bay Shore Chiropractic Center) all ceased operations based upon successful prosecutions, arrests or investigations. While these actions are commendable, there remains much work to be done both in the public and private sector.

In addition to the Florida Department of Insurance, Jeffrey Atwater, the Florida Chief Financial Officer elected in 2010, has gone to great lengths to build bridges to the State Chiropractic Board, State Medical Board and Florida Bar to engage their assistance in battling insurance fraud in general and PIP fraud in specific. One of the major activities undertaken in 2011, and which will carry-over into 2012, are the attempts by Florida CFO Atwater to ban attorney referral services. Following a number of investigations, The Florida Bar finally opened an investigation into lawyer referral services, which currently number approximately seventy in operation throughout the state. The two largest providers are the “1-800-ASK-GARY” and “411-PAIN” services. An article published in September, 2011 by *Tampa Bay Online* noted “*Call center workers for the 1-800-ASK-GARY hotline refer injured accident victims to its own clinics, which are filled with chiropractors, orthopedic surgeons and other healthcare workers, and also refer callers to dozens of personal injury lawyers.*”¹⁰

Demonstrating how bad the problem has become, in a hearing conducted by The Florida Bar in September, Dr. Jeffrey Lauffer testified he spent seven years as a chiropractor and MRI technician working for Physicians Group, which is one of the clinic chains affiliated with the “1-800-ASK-GARY” network. In testifying before The Florida Bar, Dr. Lauffer testified chiropractors actually had little power or control over their own patients’ care and frequently personal injury attorneys were directing the medical care based upon the amount of available remaining insurance coverage limits under the PIP policy.

In June of 2011, The Florida Bar’s Special Committee on Lawyer Referral Services conducted hearings in Orlando, Florida. At these hearings, Captain Steven Smith and attorney Howard Pohl advised The Florida Bar Committee on criminal aspects of lawyer referral services operating throughout the state. Representative Rick Kriseman of Saint Petersburg, Florida also testified before the Committee about a bill he introduced into the Florida legislature in 2011 which failed to pass, but will be re-introduced in 2012.

As 2011 drew to a close, however, The Florida Bar failed to reach a final decision and in fact shied away from following the recommendation to ban lawyer referral services. At its

¹⁰ See Appendix H: Florida Bar Targets 1-800-ASK-GARY Service. Tampa Bay Online. September 22, 2011

meeting on November 11, 2011, the Bar's Special Committee tentatively endorsed a limited number of proposals, including requiring attorneys who join private lawyer referral services to register with the Bar, but failed to take any more significant action. The Special Committee deferred any further action until 2012.

Four days after the November meeting, Florida CFO Atwater directed a letter to The Florida Bar President, calling on The Florida Bar to ban lawyer referral services. In his letter, CFO Atwater wrote, *"this must stop, and I believe the Bar is in the best position to expeditiously institute a permanent ban against lawyer referral services."* In a very strong statement, Mr. Atwater went on to note:

*"My department has received many confidential tips regarding the incestuous interactions between the participants in these referral services. It is intolerable for a quid pro quo relationship to exist between or among lawyers and health care professionals where the physical well-being of Florida's citizens is concerned; not to mention the impact these improper relationships have on the cost of insurance premiums."*¹¹

As the year came to a close, these and other actions demonstrated an ongoing commitment from the Florida CFO's office to assist insurers in battling PIP insurance fraud. On November 10, 2011, Bloomberg News Service ran a story which quoted confidential sources as saying the "1-800-ASK-GARY" medical and legal referral service was being investigated both by the Florida Division of Insurance Fraud and by the Federal Bureau of Investigation (FBI). The very next day on November 11, 2011, the *St. Petersburg Times* reported the Florida Division of Insurance Fraud was undertaking a thorough investigation of a number of medical and legal referral services throughout the state involved in questionable PIP fraud practices.

In addition to these administrative actions, there was some progress in 2011 through the Florida State legislature as well. On July 1, 2011, Florida Statute §817.234 was amended to include additional provisions concerning false and fraudulent insurance claims. Specifically, subsection (5) of the Statute was amended to provide the following:

Any insurer damaged as a result of a violation of any provision of this section when there has been a criminal adjudication of guilt shall have a cause of action to recover compensatory damages, plus all reasonable investigation and litigation expenses, including attorneys' fees, at the trial and appellate courts.

While unfortunately this provision of the law still requires a criminal adjudication, it does afford now not only the remedy of recovering monies actually paid for the fraudulent activities, but also giving insurers the right to recover in full both attorneys' fees and "reasonable

¹¹ See Appendix I: Atwater Calls for Ban on Referral Services. The Florida Bar News. Blankenship, Gary. December 1, 2011

investigation and litigation expenses.” While the courts may ultimately be called upon to consider and interpret this Statute, the position we have taken with our clients is “reasonable investigation” expenses include all claims, SIU, management and similar overhead expenses provided they can be documented in a quantifiable format to the court. We further take the position “litigation expenses” includes all expenses of litigation, not only filing fees, but also expert witness services, CPT Code reviews and other such expenses necessary to properly adjudicate a claim for recovery.

In summary, we are at a crossroads where the investigation of PIP fraud in the state of Florida from a state perspective is better than at any point in the past four decades. Leadership in the capitol city of Tallahassee and throughout the Department of Insurance statewide is much more amenable to working cooperatively and in partnership with insurers who are truly committed to the battling of PIP insurance fraud. In the past year, our firm has worked with the Florida Insurance Fraud Education Committee and other similar organizations to build strong training programs and outreach efforts to improve the lines of communication between insurers and the State Department of Insurance. We believe involving the State Department of Insurance and its resources as an additional avenue to assist insurers in the battle against insurance fraud is a valuable and worthwhile consideration in helping to limit or eradicate these types of fraudulent claim activities. We shall continue as well to monitor legislative developments in the early part of 2012 as the legislature reconvenes, as well as actions by The Florida Bar and other state entities in the year ahead.

IV. INSURANCE CARRIERS BATTLE BACK

Many insurers are starting to battle back against the PIP insurance fraud tidal wave in Florida. More importantly, their efforts seem to be reaching success. While it is not our role as a law firm, nor our intention in this document, to espouse any political agenda or belief, it is widely known many insurers supported the election in 2010 of now Florida Governor Rick Scott and Chief Financial Officer Jeffrey Atwater. Both of these gentlemen ran on a platform of seeking major reform of the Florida PIP laws. In their initial time in office, both have attempted to follow through on those promises through well-funded studies and calls for legislative action. At the current time, it remains to be seen what result may occur in the 2012 legislative session which is currently underway.

Many insurers, however, are refusing to sit back and wait for a legislative remedy. Insurers who are at the forefront of the battle against PIP fraud in the state of Florida are utilizing the state and Federal Court systems to seek recovery and, where appropriate, monetary damages from those engaged in questionable or fraudulent practices.

In one of the most dramatic examples of an insurer taking an affirmative step to battle insurance fraud in Florida, State Farm Mutual Automobile Insurance Company and State Farm Fire & Casualty Company were named as defendants in a lawsuit filed by a group of medical providers in the United States District Court for the Middle District of Florida at Jacksonville.¹²

In this case, the plaintiffs by way of an assignment from various patients sued the State Farm entities claiming State Farm was improperly, and in violation of Florida law, failing to pay PIP benefits which were due and owing to their policyholders. State Farm countersued asserting allegations against the plaintiffs, Orthopedic Rehab Specialty Clinics, Inc. and Professional Massage Services, Inc., as well as third-party complaints against the clinic owners alleging the clinics were operating in violation of state law and committing insurance fraud. In a verdict returned on November 19, 2003, the jury found against the plaintiffs on all claims against the State Farm entities and further ruled in favor of State Farm finding the plaintiffs and third-party defendants had engaged in improper activities and practices constituting misrepresentation and deception. Most strikingly, the jury awarded zero damages to the plaintiffs on their claims against State Farm, but awarded the State Farm Companies damages against the medical providers of nearly Four Million Dollars (\$4,000,000.00).

Emboldened by its initial win in 2003, State Farm did not wait until it was sued again, and several years later filed its own lawsuit in the United States District Court for the Middle District of Florida.¹³ State Farm instituted suit in its own name and on behalf of its insureds, claiming the

¹² Orthopedic Rehab Specialty Clinics, Inc., *et al.* v. State Farm Automobile Insurance Company, *et. al.*, U.S. Dist. Court, Middle District of Florida, Case No: 03:02-CV-824-J-16HTS

¹³ State Farm Mutual Automobile Insurance Company, *et. al.* vs. Physicians Injury Care Center, Inc., *et. al.*, U.S. Dist. Court, Middle District of Florida, Case No: 6-06-cv-01757. Date of verdict December 9, 2009.

defendants had engaged in a fraudulent scheme of unnecessary treatment for soft tissue, neck and back injuries, and conspired with attorneys seeking to maximize PIP recoveries rather than seek quality medical treatment. State Farm also asserted the doctors spoliated evidence by not retaining their original notes from the patients' visits. In a jury verdict returned on December 9, 2009, the jury ruled in favor of State Farm, awarding damages against the defendants for slightly more than Three Million Eight Hundred Thousand Dollars (\$3,800,000.00).

While these jury verdicts date back several years ago, they have emboldened many other insurance carriers to take more affirmative and stronger steps forward in the battle against PIP insurance fraud in the State of Florida. While there have been no "watershed" verdicts of this magnitude since 2009, numerous insurance carriers have seen equally good results, even if on a smaller scale.

Throughout the state of Florida, more insurance carriers are now willing to aggressively pursue medical providers and even attorneys who are engaged in questionable practices. Since opening of our first office in Florida in April 2011, our firm has been privileged to provide much more detailed Proposals than set forth in this analysis laying out specific action plans for insurers to much more aggressively identify and curtail PIP insurance fraud in the state of Florida. We are currently in the initial stages of actively pursuing the first of what we anticipate to be a number of recovery efforts in both state and Federal Courts across the state of Florida seeking recovery for monies improperly billed and for injunctive relief prohibiting unscrupulous medical providers, referral services, and attorneys from engaging in similar practices in the future.

There are a number of reasons why these actions by insurers are coalescing at the current time. First and foremost, the problem has reached epic proportions which can no longer be simply ignored within the insurance industry or addressed from an underwriting or increased premium perspective. The problem of PIP insurance fraud in Florida is rampant and is costing tens of millions of dollars to any major insurance carrier writing PIP policies within the Sunshine State. Sadly, even those carriers who are not writing policies in the state of Florida are still paying the price for insurance fraud with the high number of out-of-state policyholders who travel to Florida and are involved in accidents, and also due to the large number of medical providers who are now operating in states throughout the Midwest and Northeast and engaging in the same type of questionable practices and procedures in these other jurisdictions. As long as insurance carriers continue to simply pay these claims and "look the other way," these practices will not only continue but expand.

The second effect which is also causing insurers to have success in fighting back against PIP insurance fraud is the extensive amount of media coverage which is now being devoted within the state of Florida, and even on the national level, to the problem of PIP fraud in the nation's fourth largest state. Virtually all of the newspapers within the state of Florida, most of the major television stations, and national publications including the *New York Times* have presented major print or electronic news articles on the extent of the insurance fraud problem

associated with Florida's PIP automobile insurance coverage. The effect of this of media onslaught is to educate consumers, including those who ultimately will sit on a jury, regarding the highly questionable practices being engaged in by medical providers and attorneys throughout the state. While such media coverage is not always favorable toward the interest of the insurance industry, remarkably a great deal of the more recent media coverage has focused on the high premiums Florida residents are forced to pay for automobile insurance due to the rampant fraud which is present throughout the state. This is especially true in the southern part of Florida ranging from West Palm Beach through Miami. As consumers become more educated through media coverage of the fraudulent practices being engaged in, and the higher cost those actions cause by increasing insurance premiums, the more receptive jurors will become in deciding recovery cases in favor of insurance companies.

This is not to say presentation of these cases is ever easy or recovery is an assured fact. These cases require extensive research, careful development and an aggressive plan of action... all of which should be completely thought out and in place well before the lawsuit is filed at the local courthouse.

Finally, and without addressing any type of political beliefs or philosophies, the reality as well is the leadership in Tallahassee is the best it has been in decades at being receptive to partnering with insurance carriers, hearing their concerns, and engaging in meaningful change to modify state laws and use the resources available at the state level to battle back against fraudulent providers. For good reason, many insurers were reluctant to have an open line of communication with leaders of the Department of Insurance and even the Insurance Fraud Division of the state of Florida as for many years the relationship was unduly adversarial between insurers and the state government. While any administration, individual, or political party is always subject to critique, the current office holders in Tallahassee have made it clear they do desire to work in partnership with insurance companies to aid in the investigation and battle against insurance fraud.

For these reasons, we are encouraging our clients to accept the invitation from individuals such as Governor Scott and Chief Financial Officer Atwater to become more proactive in working with law enforcement, the Division of Insurance Fraud and even the State Medical and Chiropractic Boards to share information, identify questionable practices and, where appropriate, force these individuals to cease their practices or lose state licenses. In the past year, our firm as well has taken the initial steps to build bridges with the leadership in the state of Florida and expressed our willingness as legal counsel skilled in this area of practice to aid in the battle against insurance fraud. In 2012, it is our hope to again have the privilege and honor to participate and lead training programs through the Florida Insurance Fraud Education Committee and other efforts underway throughout the state to help limit insurance fraud activities and develop a stronger foundation for insurance carriers to operate in Florida in a fair, open and honest environment.

V. OUR FIRM'S PHILOSOPHY

Since our founding in 1989, our firm has remained at all times solely an insurance services law firm. Equally so, we pride ourselves on first and foremost being trial litigation attorneys skilled in the handling of complex insurance matters, and securing successful results in trials at both the state and Federal Court level. From our beginnings in Cincinnati, Ohio, we have now grown into a law firm with six offices in four states. Additionally, in the past several years, we have handled legal matters, primarily focusing on bad faith defense and insurance fraud investigations, in thirty-eight of the fifty United States and Puerto Rico.

With this background, most of our clients would automatically believe our philosophy of partnering with insurers to solve the PIP problem in Florida would focus predominately and perhaps exclusively, on litigation and actions for recovery. We believe strongly, however, while this is a viable option, knowledgeable insurance carriers in fighting PIP fraud should be advised by their attorneys litigation is only to be used as the last resort when all other methods have failed. In this section, we discuss our philosophy of a multi-faceted approach to battling PIP insurance fraud in the state of Florida. In the section which immediately follows, we shall then detail specific examples of the multi-phase type of program we recommend to our clients to achieve the highest and best results for their policyholders and claim personnel.

We believe a combination of consumer/policyholder education, prompt distribution of information to policyholders once they are involved in an accident, partnering with state and other insurance fraud organizations, and first attempting to resolve questionable practice claims with medical providers directly are all extremely viable courses of action to be undertaken well before any litigation is ever instituted.

Many of our clients may not be aware of the fact prior to his founding this law firm, our Senior Partner, Matthew J. Smith, operated a nationally-recognized public relations firm, and was also involved for many years in the field of government relations for a number of major corporations. We believe our firm has a unique skill set in recognizing the importance and role of litigation, but seeing a much broader spectrum of the ability to use public relations, communications and the opening of doors through governmental and industry organizations to achieve a much more effective and multi-faceted battle plan to strike back against PIP insurance fraud.

Following twenty-three years of representation of insurance carriers, we also understand each insurance company is unique, and espouses different philosophies and adopts different goals through its claims process. For that reason, we equally understand it is impossible to develop a strategy plan which is "one size fits all." To truly be effective requires using a document such as this as a preliminary discussion point, and then building a specific plan of action that meets the identifiable and quantifiable concerns facing an individual insurance carrier doing business in the state of Florida, or for that matter in any other jurisdiction. Only then can a true attorney-client

partnership develop, which is going to generate results and value back to the insurance company and more importantly show value and strength to its policyholders.

The section which follows is intended to give you a broad understanding of the type of multi-faceted approach our firm advocates in battling PIP insurance fraud. We include this information as an initial step, understanding a much more detailed investigation and documentation process to identify existing problems within your own policyholder base must be identified before a definitive and final action plan may be authored or implemented.

The value to this type of approach, however, is law firms which are specifically skilled in the investigation of insurance fraud, and the handling of recovery actions bring a wealth of knowledge and skill to the insurance carrier. A proven track record and past history allow for more cost efficiencies, greater knowledge and the ability to “fast track” programs from the mere discussion and concept stages into reality and identifiable cost savings. We understand as well our clients at all times must maintain control of the entirety of the investigation process, subject to their own internal policies, procedures and approvals.

In the final analysis, our firm’s philosophy is one of partnership. This includes working closely with company management, claims personnel and underwriting to identify the specific issues and problems which are occurring, and then identify targeted and very specific action plans to address these concerns and generate results as promptly as possible. The section which follows details a multi-step approach which our firm has a proven track record of implementing with successful results. We understand, however, this is a foundation and look forward to the opportunity to partner with our existing, and potentially new, clients to be a valuable part of your company’s efforts in the battle against PIP fraud throughout the state of Florida and beyond the state’s geographical borders.

VI. A MULTI-PHASE APPROACH

No one disputes there is a vast problem with PIP fraud in the state of Florida. Insurance carriers have struggled for many years, however, to identify and implement action plans which are both effective and affordable. After more than fifteen years of focusing on insurance fraud investigations literally all across the United States, we believe our firm brings a unique perspective, skill and history to advise our clients how to effectively and efficiently battle against Florida PIP fraud.

The sections which follow detail a multi-phased plan. For those who do not know our firm, they may be somewhat surprising, in that very little actually focuses on law and litigation with a much greater emphasis on communication, education and partnerships. Insurers at the forefront of the battle against insurance fraud are realizing we need new and innovative ways to not simply “keep up,” but remain “ahead of the curve.”

The sections we outline are both incremental and chronological. They are incremental in addressing the need to reduce the total number of fraudulent PIP claims, while attempting to do so in the most time-and-cost-efficient manner possible. The phases are in chronological sequence, as they are designed to sequentially build upon the preceding actions. The incremental nature and chronology of these phases are important from a timing perspective, to ensure all information and data necessary to move forward to each next step is secured properly and fully before proceeding.

It is equally important to understand, however, the phases which follow are simply for discussion purposes only. Each insurer is unique. Insurance companies, for very good reason, have developed their own internal protocols, systems, expectations and guidelines. Our firm not only realizes that, but welcomes the diversity reflected in the more than sixty insurance carriers we are privileged to have as clients. These phases are for discussion and edification purposes, with the complete understanding a specific, detailed and fully budgeted plan is necessary to move forward.

It is our hope by providing our clients with this information we secure your interest and initial trust so you may in turn afford us the opportunity to provide you with a detailed plan to meet your company’s individual needs, together with a very detailed chronology of events to occur and a specific budget. Only then can the concepts which are discussed here become realities as actually implemented programs and procedures. We believe, however, the foundation to move forward effectively is in large part contained in the phases that follow.

A. Investigation and Documentation

Much has already been written and documented at the state level regarding Florida PIP fraud. They key in moving forward effectively, however, is first to build a similar foundation of information and documentation based upon your own internal policyholder information and claims handling practices. Quite frankly,

you will be wasting your time and resources if the time is not spent at the onset to conduct audits and review targeting the geographic areas of policy concentration, taking the time to understand how information is gathered in the claim investigation process, ensuring relevant data concerning questionable medical and legal providers is identified and shared in a usable format, and years before any litigation is even considered, making certain the correct evidence and documentation for a successful litigation outcome are being compiled. At our firm we partner fully with our clients, reviewing first the data and time-metric analysis claim information available, “data mining” your historical claim records and identifying both existing and newly recommended systems, procedures and protocols for the gathering and analysis of data necessary to building a successful program.

B. Developing the “Florida” PIP Fraud Team

There is no doubt PIP fraud in the state of Florida is negatively impacting all operations of insurance carriers from underwriting, through claims and ultimately even to accounting and personnel expenses through higher than necessary cost and increased premiums. While all aspects of the company may be affected, that does not mean everyone plays an equal role in addressing the problem.

We recommend consideration of development of a specific team charged with the responsibility of implementing a plan for each insurance company to battle PIP fraud in Florida. The foundation of that plan may contain many of the elements set forth in this document, or be revised greatly. The important thing is to identify key members from the claims organization, special investigations unit and, where appropriate, perhaps even underwriting and upper-level management. The size of this group should be manageable in number (five to seven persons), but it is vastly more important to focus on the quality and commitment of those selected rather than a mere quantitative number or positions on an organizational chart.

Once in place, we recommend at least one “face to face” meeting of this team, at which point the overall objectives and goals of the program will be developed, together with a contingent initial timeline and budget. Subsequent meetings, in all probability, may be conducted by telephone or video conferencing. This group shall also be responsible for re-assessment of the entirety of the program through the “Key Stop” process discussed further in this section.

C. Florida PIP Fraud “Whiteboard” Meeting

While this team will lead the company’s investigation and efforts to curtail PIP insurance fraud, it is equally important to include other members of the company and, quite frankly, especially those on, or very near, the “frontline” of Florida PIP claims handling. For this reason, we recommend consideration of an in-person or electronically-conferenced “whiteboard” session. Normally we recommend no fewer than twenty, but no more than fifty people participate in the proposed meeting. Ideally, the members of the Florida PIP team referenced above are present to attend. The Chair of that group starts out the meeting by explaining the commitment of the company to listening to its employees and policyholders, and undertaking, expanding or renewing (as the case may be) efforts to battle against PIP fraud in the state of Florida.

It is normally then the responsibility of our firm to lead the discussion forward. In its broadest sense, we explain to the attendees our role as legal counsel, and the confidential nature of the discussion with counsel present, even though every aspect of the work being done by the company will be very transparent in its nature. Participants in the meeting are then encouraged to speak openly and freely, sharing what they have seen, experienced and identified from their own differing perspectives concerning the issues, problems and concerns associated with PIP fraud claims being handled in Florida. Although some of this information may be redundant or already known, it forms a necessary foundation of building a broader team approach and making the people on the “frontline” aware the company does care about the issues and concerns they are seeing, and is attempting to bring forth solutions to the problems.

Having conducted these meetings previously, our firm has specific skill and expertise to lead the discussion forward and make certain it does not “wander off track.” We recommend the initial phase of this discussion take no more than sixty to ninety minutes, after which a brief recess is taken. In the second half of the meeting, we again facilitate the discussion, but on a different task. This is why we use the term “whiteboard.” While it is more difficult to do so in an electronic format, in an ideal situation we have present either an actual whiteboard or flip charts, and the group is asked to consider, regardless of timing or budgets, what they believe would be true and meaningful steps the company should take to battle back against PIP fraud. As in most groups, we normally find people at the start are reticent to speak, but when we present some initial ideas and concepts, normally discussion begins to flow rather freely.

While each of us may like to think, based upon our respective years of experience, skills and intelligence, we can identify successful programs, sometimes it is

remarkable what you will learn from your own front level staff. Not only does this discussion allow people actually handling the claims to feel their voices and input are appreciated, but surprisingly, good suggestions often come out of these discussions as well. Again, our role is to facilitate the discussion, and we anticipate this aspect of the meeting to still take no more than an additional hour to ninety minutes.

Following the conclusion of the “whiteboard” meeting, it is then important for the Florida PIP fraud team to meet briefly thereafter to discuss and analyze what has been learned in the process. Once that has occurred, it is then our role as legal counsel to take the information and suggestions presented and incorporate meaningful and positive suggestions and recommendations to form the foundation for a final Proposal to be submitted to your company.

D. Presentation of the Plan

Within thirty to forty-five days of the occurrence of the “whiteboard” meeting and follow-up discussion, a more definitive plan will then be presented to your company, addressing specific factors for consideration in the battle against Florida PIP fraud. These plans are quite comprehensive in nature, are geared to the specific goals, strategies and directives of the individual insurance carrier and do not contain lofty goals and objectives, but specific identifiable plans, projects and procedures to be implemented. Those are discussed further in a very broad sense in the phases which follow in this section.

The final Proposal contains a very detailed timeline and chronology, assigning specific tasks and responsibilities to monitor and make certain the program is meeting the stated goals, objectives and directives. The final document also contains a very detailed and exacting budget which, when approved, must be adhered to by all parties, counsel and vendors who may be involved in the project.

Finally, one of the things our firm has learned to build-in to these types of Proposals is what we call “key stops.” Key stops are placed at strategic points in the chronology, and are times at which the Florida PIP fraud team shall meet and objectively assess whether the plan is meeting the goals, objectives and directives which have been set forth, and is on budget. Only if it is agreed we are proceeding in a positive manner will the next steps of the plan be implemented. If not, the key stop provisions are invoked to either make the determination to modify or even abandon the program if it is not achieving the success, or adhering to the budget which has been previously approved. We believe the key stop concept is crucial to making certain our firm is accountable to you to deliver on the promises and representations made, and equally important to the company to make certain, in

this era of limited financial resources, results are being generated for the time, effort and monies being expended.

E. Developing Strong Partnerships

The problem with PIP fraud in Florida is so large, no single insurance carrier will ever be able to solve the problem, no matter the amount of individual financial resources or staff time devoted to the problem. For this reason, we recommend consideration be given, within the understanding of whatever guidelines individual companies may have, for building of strategic partnerships to join efforts in the battle against PIP fraud in the state of Florida. Factors for consideration include:

1. Legislative and Judicial Monitoring:

The most effective way to solve the PIP “crisis” in Florida will ultimately be through legislative change. Unfortunately, there is simply no guarantee the state legislature, due to time considerations and the influence of special interest groups, will have the time or fortitude to truly address the numerous problems associated with the Florida PIP law.

We do not recommend, however, abandoning efforts for legislative change. While we understand fully our role is to serve as legal counsel to our clients, we do request the opportunity to meet with and interface with your Governmental Relations team, or even state lobbyists, to assist them with legislative direction and change. Far too often, we have learned the claims and SIU departments are in no manner involved in, nor consulted, when matters related to crucial governmental legislation is being considered. The problem in Florida has reached such magnitude, this should not occur.

While we are mindful of our role, we believe it important for one or two members from the Florida PIP team and a representative of our firm to meet with your Governmental Relations department or state lobbyists to ascertain firsthand what is occurring regarding the current Florida legislative session and what legislative changes are under consideration.

In the past, we have also worked with our insurance carrier clients to either have direct employees of the company, or representatives from our firm, testify at hearings on pending legislation to provide legislators with firsthand knowledge and information regarding the extent of the problem at hand, and what they can do in their capacity to change the law to more effectively limit or eradicate fraudulent practices.

If you have read to this point in this document, you realize our firm has devoted quite an extensive amount of effort and time to monitor PIP fraud issues throughout the entire state of Florida. One of the services we provide to our clients in the constant monitoring of key court decisions, media coverage (both within the state of Florida and on a national level) and through our participation in organizations such as the National Society of Professional Insurance Investigators, the International Association of Special Investigation Units, the National Insurance Crime Bureau and the Florida Insurance Fraud Education Committee, we are constantly monitoring for new and important information which we are ready to share with our clients either for education purposes or, where appropriate, to include in the actual implementation of the plan to battle against PIP fraud in the state of Florida.

2. Partnering with the Florida Department of Insurance:

We also recommend carriers consider developing stronger ties with key officials, including Florida Chief Financial Officer Jeffrey Atwater and Florida Insurance Commissioner Kevin McCarty, and their respective staff personnel.

The purpose of requesting meetings with these individuals is to open clear lines of communication and respect between the state of Florida officials and the insurance carriers we have the privilege to represent. We believe your role as an insurance carrier doing business in the state of Florida makes you a valued member of the Florida insurance community. Our dealings to date with the officials in Tallahassee have demonstrated there is a new era in the Sunshine State where insurance companies are encouraged to partner with state government on key issues, and there is no more important issue pending on insurance matters in the state of Florida currently than the PIP fraud issue.

The purpose of these meetings is not necessarily to seek approval from the state for the action plan adopted by the company, but to let the state officials know firsthand the perspective of your company regarding the severity of the PIP insurance fraud problems in the state of Florida, request updates directly from the state leaders concerning what efforts they are undertaking and resources which are being committed to battle back against PIP fraud. This is also an opportunity to educate the state officials regarding, in a very broad sense, the additional efforts which your company is devoting to partner with them to battle against PIP fraud in Florida.

If you doubt the commitment of the state of Florida to battling this problem, please take a few moments to review the multiple appendices to this document. One of the most interesting documents you will find is the *Florida Department of Financial Services Division of Insurance Fraud Annual Report for fiscal year 2010/2011*. Previously in this document, we have referenced, and even included a chart from, that Report. You will find throughout the 2010/2011 Annual Report the extensive efforts which are being undertaken by the state of Florida to more aggressively move forward in the PIP insurance fraud battle.

3. National Insurance Crime Bureau:

We also recommend our clients take full advantage of their involvement with the National Insurance Crime Bureau (NICB). While our law firm has enjoyed a long working relationship with NICB, including Matthew J. Smith serving on the Governmental Relations Pillar Committee for the Restructuring of NICB, since we are not direct employees of insurance carriers, we have very little ability to control or direct NICB actions.

Since insurance companies are the sole and only source of funding for NICB, this organization should exist to serve its member insurance carriers. In that vein, we believe NICB should play a much more active role than it has done historically in the battle against insurance fraud in the state of Florida. We do not mean this to be critical, but recognizing the extent of the problem and the fact insurance carriers need all the assistance available to battle back against unscrupulous providers and lawyers, it is our opinion NICB should be playing a much more active role in partnering with its members to battle PIP fraud in Florida.

We also understand there is a great deal of realignment currently going on within the NICB organization, which may impact Florida both short term and long term. It is our understanding at the current time, the Director of Operations for NICB in Florida is Ronald Poindexter, whose office is located in Tampa, Florida and we urge our carriers to reach out to NICB in general, and Mr. Poindexter in specific. Much like the meetings we recommend with the officials from the state of Florida, we believe insurance carriers directly voicing their need for support of the NICB, and informing NICB of the efforts they are undertaking independently to battle against insurance fraud will form the necessary partnership and foundation for NICB to take a more active role in the future and assist insurance carriers in battling this problem statewide.

F. Policyholder and Claimant Informational and Educational Actions

While insurers have been distressed for decades in trying to battle against Florida PIP fraud, one key factor has often been overlooked. Unlike third-party litigation claims, where virtually anyone may be seeking recovery from your company under an insured's policy, the identifiable pool of potential claimants for PIP claims (other than passengers in vehicles) is a highly defined and pre-determined group of individuals... your policyholders. Insurers have too long overlooked this fact and the ability to have in place programs to educate policyholders, and proactively alert those who may be considering insurance fraud activities related to PIP from proceeding further. This is perhaps the most valuable tool available to insurers to fight back against the onslaught of Florida PIP fraud.

We continue to believe and have confidence it is only a small percentage of most company's policyholders who may be willing to participate in PIP fraud for purposes of securing monetary gain. Motivation for such gain may be everything from simple "greed" to the current economic times causing individuals to look at the occurrence of an accident as a financial windfall in the face of unemployment, credit card debt, or education expenses. Regardless, if these claims are fraudulent, they simply should not be paid. Informational and educational campaigns targeted to your policyholders in Florida may well be the key which causes a person involved in an accident to say "no" to the solicitation services of medical or legal providers, or to not take the affirmative step of trying to profit from an accident in which they were not truly injured.

When insureds believe they can commit fraud and not be caught by the company, they are much more likely to engage in these types of practices. This was confirmed in a study done by Accenture in September of 2010. Importantly, that study determined:

*"While 83 percent of the Americans surveyed in 2003 believed insurance companies were capable of identifying or preventing fraud, only 72 percent thinks so today. More than two-thirds of respondents (68 percent) said they believe insurance fraud occurs because people believe they can get away with it, up from 49 percent in 2003."*¹⁴

The following are sample programs we have developed for insurers, which we believe form the necessary foundation for educating and taking an affirmative step to make certain your insureds know your company is acting on their behalf, and is

¹⁴ More than Half of U.S. Consumers Say Poor Service Leads to Fraudulent Insurance Claims, Accenture Survey Finds. Accenture. September 22, 2010

identifying and taking the appropriate steps to fight against Florida PIP fraud. It is our belief these educational and promotional efforts will bolster the image of your company with your existing policyholders, and also serve as a direct deterrent to claimants who may otherwise be willing to consider or engage in PIP insurance fraud:

1. Informational Letters to Policyholders:

Your company has direct access to those who have purchased Florida no fault policies through your agency, direct marketing, or internet systems. Those carriers, in today's time, also collect e-mail addresses and frequently are now using much more efficient electronic communications to convey information to their policyholders.

We propose to our carriers who are truly interested in battling back against PIP fraud consideration be given to distributing a succinct and direct one-page letter to all of your Florida policyholders addressing your company's commitment to battle back against high insurance cost and fraudulent activity in the Sunshine State.

We frequently draft these types of letters in conjunction with appropriate company personnel for final submission to company management for approval. These letters serve a multitude of purposes, including keeping your name at the forefront of your policyholders attention, opening a line of communication to the policyholder for future marketing, but most important for our efforts, demonstrating and reminding policyholders your company is not idly sitting by and is actively engaged in the battle against PIP fraud in the state of Florida on their behalf.

We understand these letters must be carefully drafted and approved by the appropriate company personnel. We believe strongly, however, these letters, whether sent by electronic transmission or even regular mail, are extremely valuable in laying the foundation for deterring PIP insurance fraud.

2. Policy Inserts:

In addition to sending electronic or mail letters to your policyholders, we also recommend consideration be given to special policy inserts included with all policies issued in the state of Florida.

We again understand each company's logistics may be different, and in certain companies inserting information in a policy may be difficult or

impossible. Many companies, however, do have the ability to easily collate additional information into policies, either on a statewide basis or even within specific geographic areas or zip codes.

We have developed for our carrier clients highly impactful one-page inserts. Frequently these are printed on canary yellow or similarly colored stock to draw the reader's attention. These inserts are intended to notify policyholders of the company's ongoing commitment to battle insurance fraud in the state of Florida and contain information warning policyholders if they are involved in an accident, do not become the victim of fraudulent activities.

These policy inserts are a very vivid reminder to policyholders, at time of issuance of the policy and again at the time of an accident, when the policy is reviewed, your company is simply not willing to process claims without giving careful consideration to your policyholders' interest in making certain the company is only paying legitimate claims and not for fraudulent activity.

We again understand each company is unique, but our past experience has shown the value of these types of policy inserts compared to their minimal costs (assuming logistics do permit inserts to occur) are an extremely cost-efficient and highly valuable tool in the battle against PIP fraud.

3. Company Publications:

Many of our insurance carrier companies have instituted various communication tools to stay in touch with their policyholders on a broad basis or at a minimum, with their agency network. We again understand each carrier is unique, but often times we have found insurers fail to consider these existing lines of communication as a tool in the battle against PIP insurance fraud.

If your company regularly circulates magazines, newsletters, or other information to your policyholders, whether by electronic transmission or traditional mail, we recommend partnering with our firm to offer articles concerning the extent of insurance fraud in the state of Florida and the effect it has on consumers and policyholders. In such articles, we also focus on the efforts the company is undertaking to battle back against these fraudulent claims and make certain the policyholders' interests are being protected.

These articles perform a valuable educational role in advising your policyholders of the actions being taken by the company and again, serve as a deterring factor to those who may be considering participating in the type of actions described in the article.

If your company does circulate a regular magazine or newsletter to your policyholders, there is a high probability you do have such information disseminated regularly within your agency network. If that is the case, we recommend the same type of articles and information be shared within your agency network. Often times we overlook the role of agents in being an effective tool in the claims and SIU process, as they are often the “first line” with whom policyholders’ interact following in the occurrence of an accident.

If we have taken the appropriate steps to partner with our insurance carrier clients and educate their agency network regarding the extent and the problems with PIP insurance fraud, then the agent is in position to have an honest conversation with the policyholder advising them to be cautious in moving forward following an accident, and in a very positive way letting the policyholder know the company is taking a very active role in reviewing these type of claims.

We have also found these types of articles targeted to the agency market are best when they include a request to the agents to notify the carrier of any suspected or potentially fraudulent activity as part of the company’s ongoing efforts to improve its service to both its policyholders and its agents by placing in the market competitive policies priced fairly and not incurring the extra expense of paying for fraudulent claims.

4. Post-Accident Communications:

The final step in this informational process occurs when a policyholder is actually involved in an accident. When that occurs, we recommend an immediate letter be sent, either electronically or through traditional mail, to the policyholder or claimant as a warning to not become the victim twice from one accident.

These letters are, as well, carefully drafted, and are intended to express concern to the person involved in the accident, urge them if they are injured to seek high quality medical care and treatment and, if appropriate, legal representation. These letters also point out from a factual standpoint the extent of the problem of PIP insurance fraud in the state of Florida, and

provide warning information for the policyholder or claimant to not become a victim of this type of unscrupulous activity.

When we have drafted these letters for insurers, we frequently include public service information, including referral numbers and contact information for the State Department of Insurance, National Insurance Crime Bureau and other entities, together with your own company's internal reporting information to whom the individual may turn if they believe they have been improperly solicited or have observed fraudulent activity taking place as a result of the accident in which they were involved.

We believe these letters are extremely important and valuable, but also need to be drafted on an individual carrier basis, to be in full compliance with your company and claim guidelines.

5. Website Information:

Most insurers are learning quickly the value of utilizing websites to not only market, but share information with existing policyholders. As this technology becomes more integrated into the business model of insurance services we anticipate more carriers will add state or even community specific sections or links to their main web page. While we realize carriers would not be well-served to devote valuable space on their national website to the Florida PIP fraud problem, if your company is at the fore-front of this technology and has a direct website area or link for Florida-specific insurance information, we highly recommend utilizing the communication methods addressed in this section as a part of your company's electronic web-based communications as well.

A Brief Comment on Potential Liability

In the section above, we detailed specific recommendations for insurers to consider regarding letters, policy inserts and electronic communications with insureds and agents.

It is fully anticipated such information, once placed into the public marketplace, will also reach individuals beyond the intended and limited recipients, including questionable medical providers and even plaintiffs' attorneys.

It is important each of these communication tools be drafted carefully and with appropriate input from all facets of the insurance company and our firm as legal counsel. Such communications must be factual in nature and avoid any type of

derogatory references or appearances of trying to deter legitimate claims. We strongly believe this can be done in an effective and very positive manner.

To that end, we believe these types of communications are also extremely valuable should the final stage of litigation be reached. Each of these communications must be authored in such a manner so when they are produced in discovery in any litigation, they are viewed by any reasonable judge or juror as being of the highest quality, integrity, and accuracy.

When done properly, these types of communications are a valuable part of the battle against PIP insurance fraud, and also form a strong foundation for your company to be proud of in later showing a court or jury the extensive efforts your company has taken to protect its policyholders and comply with Florida law by doing everything reasonably to battle back against the PIP insurance fraud crisis.

G. Florida Law Provisions for Recovery

We cannot address a multi-phase litigation plan until first analyzing the laws of the state of Florida which are available to assist insurers in the battle against PIP fraud.

As recently as the last legislative session, the state of Florida has adopted new and expanded laws which do aid insurers in battling back against fraudulent providers in the state. This section will address some of the key statutory provisions upon which the right of recovery for an insurer may be based pursuant to Florida law.

F.S. §772.11

Florida Statute §772.11 affords an injured person, including a corporate entity, the ability to file a civil action for damages against a person (identified as an individual or business entity) that has perpetuated a theft. The statute does not require the person or corporation performing the theft to have been criminally prosecuted nor even found guilty. Based upon this statute, insurers operating in the state of Florida may assert a cause of action for theft of insurance proceeds for improperly secured monetary gain by fraudulent providers. The statute defines theft to include conduct previously known as a claim for conversion, and since establishing a claim for civil theft requires proving a conversion has taken place, it is no longer necessary to plead a separate count for conversion.¹⁵

Recovery under this statute is permitted regardless of whether the entities are prosecuted or found guilty of any criminal offense based on the fact

¹⁵ Gasparini v. Pordomingo, 972 So.2d 1053 (Fla.App. 3 Dist. 2008)

these providers obtained property (money) from an insurer with the intent to misappropriate the property and use it when they were not legally entitled to the monies based on improper or fraudulent billing.

Additionally, F.S. §772.11 provides for an award of three times (treble) the actual damages incurred or paid together with recovery of all attorneys' fees and costs, assuming the party bringing the action prevails. However, prior to filing an action for damages under F.S. §772.11, the party claiming injury must make a written demand for the treble damages amount to the person or entity allegedly liable for the damages. The liable party then has thirty (30) days to comply with the demand or the other party may then pursue the claim through litigation.

It is important to understand at the onset, however, the burden of proof to establish the underlying criminal action rests solely on the insurer in the civil proceeding absent an underlying criminal case having been prosecuted successfully. Insurers who avail themselves to this statute must prove the theft under a clear and convincing legal standard which is substantially higher than the normal recovery standard in civil litigation of a preponderance of the evidence. The clear and convincing standard, however, still remains lower than the "beyond a reasonable doubt" criminal threshold.

The statute of limitations for a civil action under Florida Statute §812.014 is five (5) years after the cause of action accrues pursuant to Florida Statute §812.035. Accordingly, it is incumbent upon insurers to make certain these claims are investigated and documented in a timely manner, or you may lose your right to certain statutory recoveries.

F.S. §627.736

Insurers have a potential have a cause of action to pursue questionable providers under Florida Statute §627.736(4)(h). This statute provides an insurer the right to recover any personal injury protection benefits paid to, or on behalf of, an insured as a result of insurance fraud if the fraud is admitted to in a sworn statement by the insured or is established in Court. It is important to note, however, only those benefits paid prior to the discovery of the fraud are recoverable. Also, a word of caution is on order in that the statute provides the *prevailing* party under this section of the law is entitled to recover its costs and attorneys' fees in any action where the insurer is enforcing its right of recovery under the statute. What this means is if the insurer is successful, they recover from the provider their

reasonable costs and attorneys' fees, but they may also be liable to the provider if the Court or jury rules against the insurer.

For an action founded on a statutory liability, pursuant to Florida Statute §95.11(3)(f), the statute of limitations is four (4) years from the date the cause of action accrues.

F.S. §501.201

The next potential theory of recovery available to insurers is under the Florida Deceptive and Unfair Trade Practices Act (Fl. St. §501.201, *et. seq.*).

The Florida Deceptive and Unfair Trade Practices Act has been widely utilized as a vehicle for both criminal prosecution and civil recovery. Specifically, Florida Statute §501.211 creates a private cause of action for violation of the Florida Deceptive and Unfair Trade Practices Act. Additionally, the civil recovery provision of the statute allows the party bringing the action to recover, in addition to actual damages, reasonable attorneys' fees and court costs.

Specifically, Florida Statute §501.204 makes it unlawful to engage in unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.

The original Act only allowed individuals involved in consumer transactions to pursue violations of the Act. However, the Act was revised and now defines a "consumer" to include any business, including an insurer.

Additionally, Fl. St. §501.203 defines "trade or commerce" to include:

"Advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated."

The Act further defines a violation of the statute to include any violation of the Act or any of the following:

(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. §41 et seq.;

(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the Federal Courts;

(c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

Pursuant to the intent of the legislature in adopting Fl. St. §501.202, Florida Courts are to liberally construe the provisions of the Act to promote the following:

(a) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair practices;

(b) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce;

(c) To make State consumer protection and enforcement consistent with established policies of Federal law relating to consumer protection.

Florida Courts broadly construe the scope of conduct that may constitute an unfair or deceptive practice and will focus on the deceptive practices arising out of the business relationship. Under Florida law, deception includes a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.

An additional advantage to pursuing a claim for violating Florida's Deceptive and Unfair Trade Practices Act is the fact it is easier for the consumer to prove a cause of action for deceptive trade practices without the higher burden of proof and the numerous defenses encountered in a common law fraud lawsuit, as discussed more fully below.

F.S. §817.234

The final statutory form of recovery will be addressed briefly as it is unlikely for any recovery to occur under the statute. Florida Statute

§817.234 makes it unlawful to commit insurance fraud. While it may seem odd that we would stay this section of the law is not available for recovery, the reasons we do so is the statutory language indicates any cause of action brought under this statute may only occur *after* there has been a conviction or pleading of guilty or *nolo contendere* by the offending party.

While this is a valuable tool to insurers, it may only be utilized after a criminal conviction or guilty plea has been secured.

FRAUDULENT AND NEGLIGENT MISREPRESENTATIONS

In addition to pursuing the statutory claims previously discussed, it is also recommended insurers avail themselves to pursue common law theories of recovery for fraudulent and negligent misrepresentations. These fraudulent and negligent misrepresentations relate to the amounts billed by medical providers and billing for services not rendered.

In Florida, to prove a fraudulent misrepresentation, an insurer must establish the following five elements:

- (1) The defendant intentionally made a false statement about a material fact;*
- (2) The defendant either knew the statement was false when he or she made it or made the statement without knowledge of its truth or falsity;*
- (3) The defendant intended the plaintiff to rely on the false statement;*
- (4) The plaintiff relied on the defendant's false statement; and*
- (5) The plaintiff suffered damages as a result of relying on the false statement.*

Conducting thorough and complete investigations of questionable providers will normally result in sufficient evidence to meet each of the above criteria. It does, however, remain a potential obstacle for obtaining relief under this cause of action in what is known as the Florida economic loss rule.

The economic loss rule is a limitation on tort claims where the damages suffered are only economic losses, which are defined as damages for inadequate value, costs of repair and replacement of defective products, or

loss of profits.¹⁶ As it relates to this Proposal, the economic loss rule applies to parties in contractual privity for matters arising out of the contract. Florida Courts have held a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.

In a case recently decided by the 15th Judicial Circuit in Palm Beach County Circuit Court, several insurance companies brought suit against various medical providers alleging fraudulent billing practices.¹⁷ The trial Court held the insurance companies were in contractual privity with the medical providers, even though the medical providers were acting under an assignment from the individual insured drivers injured in the motor vehicle accidents. The Court further held the economic loss rule barred the common law fraud claims.

This is a significant case as it is factually similar to the anticipated litigation set forth in this sections which follow. However, it is important to consider this case is only a trial Court decision and potentially may be limited only to that geographical region. The Court also importantly noted there are three recognized exceptions to the application of the contractual privity economic loss rule:

- (1) independent torts such as fraud in the inducement are not barred by the economic loss rule;*
- (2) claims for negligence in rendering professional services are not barred; and*
- (3) statutory claims are not barred by the economic loss rule.*

Many of the claims insurers will undertake investigations of concerning questionable PIP fraud activities in the state of Florida will be claims alleging statutory violations and therefore are not barred by the economic loss rule. There may also be claims asserted, however, for fraud in the inducement, which is an independent tort and focuses on the conduct occurring prior to the formation of the contract, *i.e.* agreeing to pay for services provided by the medical provider. The fraudulent statements made prior to the formation of the contract are unrelated to the events giving rise to any actual breach of the contract and are therefore an exception to the economic loss rule. Careful drafting of pleadings and development of

¹⁶ *Indemnity Insurance Co. of North America v. American Aviation, Inc.*, 891 So.2d 532, 536 (Fla. 2004)

¹⁷ *Allstate Insurance Co. et al. v. Total Rehabilitation and Medical Center, Inc. et al.*, - Decided April 1, 2011 in the 15th Judicial Circuit for Palm Beach County Circuit Court, Case No. 502004CA002497.

recovery theories provide a clear exception to the recent Palm Beach County Circuit Court ruling, and often will allow insurers to seek recovery for fraudulent billing practices.

In addition to concluding statutory claims and claims for fraud in the inducement are not barred by the economic loss rule, the Florida Supreme Court has held claims for negligent misrepresentations are not barred by the economic loss rule.¹⁸ To prove a claim for negligent misrepresentations, it must be shown:

- (1) *there was a misrepresentation of material fact;*
- (2) *the representer either knew of the misrepresentation, made the misrepresentation without knowledge of truth or falsity, or should have known the representation was false;*
- (3) *the representer intended to induce another to act on the misrepresentation; and injury resulted to a party acting in justifiable reliance upon the misrepresentation.*¹⁹

Also, while the economic loss rule may bar a common law cause of action for fraudulent misrepresentations, the Court in *Nationwide Mutual Co. v. Ft. Myers Total Rehab Center Inc.*, 657 F.Supp.2d 1279 (M.D.Fla. 2009) indicated individual defendants, such as doctors or chiropractors, may be held individually liable for fraud if the plaintiff can prove the three factors necessary to pierce the corporate veil:

- (1) *the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;*
- (2) *the corporate form must have been used fraudulently or for an improper purpose; and*
- (3) *the fraudulent or improper use of the corporate form caused injury to the claimant.*²⁰

Careful investigation often needs to be undertaken to determine whether utilizing this section of the Florida law, sufficient evidence exists to “pierce

¹⁸ *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004)

¹⁹ *Baggett v. Electricians Local 915 Credit Union*, 620 So.2d 784, 786 (Fla.App. 2 Dist. 1993)

²⁰ *Seminole Boatyard, Inc. v. Christoph*, 715 So.2d 987 (Fla.App. 4 Dist. 1998)

the corporate veil” of questionable medical providers by showing evidence to the Court the medical provider (*i.e.* the doctor, chiropractor, or even attorney) are not entitled to the protection of the professional corporation based upon their improper activities, thereby allowing the insurer to seek direct recovery against the medical provider individually for the fraud committed.

UNJUST ENRICHMENT

The final common law theory of recovery which insurers should consider is asserting claim for unjust enrichment. The elements of a cause of action for unjust enrichment are:

- (1) the plaintiff has conferred a benefit on the defendant who has knowledge thereof;*
- (2) the defendant voluntarily accepts and retains the benefit conferred; and*
- (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff.²¹*

Insurers who conduct thorough and complete investigations should be able to demonstrate to the Court where issuance of payment for fraudulent billing practices has conferred a benefit to the medical providers by way of overpayment, and the medical providers have voluntarily and knowingly accepted those overpayments as a benefit. In such cases, it would be inequitable for them to retain the benefit.

The case of *Greenfield v. Manor Care, Inc.*, 705 So.2d 926 (Fla.App. 4th Dist. 1997) is one example that survived a motion to dismiss where the complaint alleged unjust enrichment with the benefit conferred to the defendant being overcharging and overreaching by a nursing home for the services provided.

While unjust enrichment may be a viable cause of action, our firm is not aware of any insurer successfully asserting and proving this cause of action as it relates to fraudulent PIP insurance claims and obtaining a judgment. This does not mean, however, such actions are prohibited, or insurers are foreclosed, from alleging unjust enrichment against questionable medical

²¹ *Hillman Constr. Corp. v. Wainer*, 636 So.2d 576 (Fla.App. 4 Dist. 1994)

providers. We believe strongly in the years ahead, this theory of recovery will be pursued by insurers against unscrupulous medical providers.

PETITION FOR DISCOVERY

A final potential mechanism for insurers to consider and utilize as part of their investigation process is to file a Petition for Discovery. These are court filings where the relief is to specifically request from the providers in question a written report of the history, condition, treatment, dates, and costs of such treatment and why the providers claim items charged were reasonable in amount and medically necessary.

Under Florida Statute §627.736(6)(b), an insurance company is entitled to such a breakdown of information by the medical providers, and this information must be accompanied by a sworn statement indicating the treatment or services rendered are reasonable and necessary based on the injury presented.

This pre-suit mechanism allows insurers the opportunity to require questionable medical clinics, imaging centers, and similar providers to declare, as it relates to those claims the insurer can identify as potentially showing fraudulent billing practices or other improprieties, where the services rendered were billed in a reasonable amount and the services were medically necessary.

This procedure allows insurers to further build upon their investigation into the actions of these medical providers prior to actually filing causes of action for recovery and injunctive relief.

It is very important to note, however, an insurance carrier must have a reasonable basis for making such a request to the medical providers, and for filing a Petition for Discovery should it become necessary, to use that vehicle to secure necessary information.

In this section, we have only addressed statutory remedies and common law theories of recovery. One of the services our firm provides to our clients is routinely monitoring court decisions throughout Florida's sixty-seven counties as well as the state's five District Courts of Appeal, the Florida Supreme Court, and the United States District Courts for the Northern, Middle, and Southern Districts of Florida, and the Eleventh United States Circuit Court of Appeal.

We monitor these cases which are pending in the Florida state and Federal Court systems to ensure our firm and our clients remain at the forefront of availing

themselves to the latest decisions and laws in the battle against PIP insurance fraud.

Laying a firm foundation for both common law and statutory recovery is absolutely crucial before any insurer even considers the filing of litigation.

H. Multi-Phase Litigation Plan

While we recognize the value and importance of litigation both for recovery and injunctive relief, we also believe strongly this should be the final phase of any recommendation, and should only be utilized as a last resort.

Even when litigation is necessary, as you will see we recommend taking the unusual step of presenting all of the evidence to the potential defendant(s) in a final attempt to avoid litigation if at all possible. While these recommendations may seem somewhat unusual coming from a law firm skilled in litigation, we strongly believe the principles in this litigation section are well-reasoned, and are based upon years of experience in handling insurance law matters.

1. Targeted Local Recovery and Injunctive Actions:

Litigation works best when it is incremental in nature, and a proven track record of success has been identified. For that reason, we recommend working in close partnership with insurance claims and SIU professionals, together with drawing upon the resources of separate state investigations and partnering with respected insurance fraud investigation agencies, to identify the most egregious violators in the providing of questionable medical, and even legal, services to your policyholders. These claims should be investigated thoroughly and the improper practices and monies paid fully documented.

Following this process, careful review should be done of the investigation and findings and if the collective judgment of the claims department, SIU, management and independent counsel all lead to the final recommendation to proceed, then an action for recovery should be authorized for filing on a local basis within the Florida state court system in the county in which the cause of action is best venued.

Even then, we strongly recommend before the lawsuit is filed, consideration be given to requesting a meeting with the identified providers and their legal counsel. At that meeting, we encourage our clients to be entirely candid in presenting, normally via a PowerPoint presentation, the extensive investigation which has been done of the practices engaged in by

the provider, the amount of improper payments your company has identified as being the subject of the investigation, and the plan to proceed with litigation.

In these meetings, we respectfully request the provider to demonstrate where the analysis or investigation may be in error, or where facts and circumstances may not have been fully known or properly considered. We normally recommend providing a period of thirty (30) days for the provider, or their counsel, to submit further information, but make it clear if there is not substantial evidence of the investigation and sums being claimed in error, suit will be filed if the matter is not amicably resolved.

In these meetings, we recommend extending a pre-suit settlement offer to accept a designated sum for repayment while at the same meeting presenting a prepared Settlement and Cease & Desist Agreement to be signed whereby the provider agrees to cease and desist from submitting any future claims on behalf of your company's policyholders. This document makes it very clear any violations of the agreement may be cause for future litigation.

Perhaps not surprisingly, we have found these type of recoupment and cease and desist agreements are entered-into with questionable providers when substantial evidence of impropriety is presented. It is important to keep in mind many of these providers know very well the type of practices they are engaging in, and fear a public record lawsuit filed against them will bring attention to their practices by other insurance carriers or members of the general public.

More importantly, however, we believe this process demonstrates the utmost of professionalism and ethics on behalf of the insurance carrier in seeking to avoid litigation, amicably resolve any issues with the questionable provider, and acting in the best interest of your policyholders in recovering monies paid improperly and securing cease and desist agreements for future actions.

If, however, this process is not successful then the insurer does need to move forward and file litigation. The key to the successful litigation phase is making certain at the time the suit is filed the investigation is already complete and the case could be presented to the jury almost the next day. This requires a considerable amount of pre-suit investigation and having a full and complete litigation plan in place between the insurer and counsel so when suit is filed, whatever limited additional discovery may be

necessary is ready to be undertaken in a prompt and efficient manner to avoid unnecessary delay and expense in the litigation process.

Many of the concepts addressed in this subsection concerning localized litigation are also included in the additional litigation phases which follow.

2. Federal RICO Actions for Civil Recovery and Injunctive Relief

a. Analysis of the Federal RICO Act for Civil Recovery

In 1970 the United States Congress passed and then President Richard M. Nixon signed into law what has now become 18 U.S.C. §1961, *et seq.*, more commonly known as the “Racketeer Influenced and Corrupt Organizations Act.” Although originally targeted to more traditional “organized crime,” what has become known as the “RICO” Statute contains not only a criminal penalty provision but also standing for civil parties, whether individuals or corporations, to seek redress under the RICO Act for recovery against individuals and corporations engaged in improper activities.

The Federal RICO Act has been utilized by insurers to seek both recovery of monies improperly paid and injunctive relief. Examples include *Aetna Casualty Surety Company v. P&B Auto Body* (1994), 43 F. 3d 1546 (First Circuit) and litigation currently pending in the United States District Court for the Northern District of Texas at Dallas, *Allstate Insurance Company v. Chiropractic Strategies Group, Inc., et al.* (2008), ___ F. Supp. 2d ___. The underlying investigation in the Allstate case was actually handled by our Firm and the Federal RICO lawsuit co-filed by our Firm and local Texas counsel. These are, however, but two representative examples of Federal RICO actions instituted by insurers.

The United States Code sets out a four (4) year statute of limitations which applies to civil RICO actions. The statute additionally specifies four elements which must be proven by the parties seeking relief. These are as follows:

- *Existence of an enterprise effecting interstate commerce;*
- *The defendant(s) is/are associated with the enterprise;*
- *The defendant(s) participated in the conduct of the enterprise’s affairs, and*
- *The participation was through a pattern of racketeering activity.*

Section 1964 of the RICO Act provides a very strong civil remedy.

§1964. Civil Remedies (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee....

Under the United States Code provisions, “racketeering activity” is broadly defined to include a wide range of activities including engaging in fraudulent activities and misrepresentations intended for monetary gain. Such actions are interpreted under the Act as being the equivalent of “extortion” giving rise to both criminal and civil liability.

The RICO Act also incorporates Section 1957 of the United States Code relating to engaging in monetary transactions in property derived from specified unlawful activities and fraudulent activities under Title 11 of the United States Code. Improper attempts to recover monies under insurance policies fall within the broad definition and scope of “property and monetary transactions” under this Section.

The ability to recover civil damages under the RICO Statute derives from Section 1962 (as noted above) and specifically provides as follows:

§1962. Prohibited activities (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

Subparagraphs (b), (c) and (d) further amplify and expand the type of activities which are prohibited.

b. Analysis of Florida Law for RICO Act Recovery

In addition to the recovery available under the Federal RICO Act, there are also multiple theories of recovery available under the laws of the State of Florida. Although these are State law actions, they may be brought in conjunction with a Federal RICO claim and filed in a Florida

United States District Court. The Federal District Courts are granted supplemental jurisdiction over all State law claims pursuant to 28 U.S.C. §1367(a). Although this is discretionary jurisdiction, it is our opinion a Florida United States District Court would agree to hear both the Federal RICO action and the State law claims in one combined legal proceeding in the Federal Court system.

Like the Federal Government, the Florida State Government has adopted its own Racketeer Influenced and Corrupt Organizations Act under Florida Statute Sections 895.01-895.09. This was a common occurrence for states to undertake similar State RICO laws following adoption of the original law by the United States Congress. Florida was one of the first states to adopt a State RICO law in 1977 modeled after the Federal RICO law.

The Florida statute tracks in large measure the Federal statute, providing both a criminal and civil remedy for those harmed by persons engaged in a pattern of corrupt activity. Like the Federal law, the Florida law broadly construes what constitutes an enterprise including an individual acting in conjunction with a business entity. The Florida law also broadly defines “racketeering activity” including a number of statutory violations. The law specifically recognizes racketeering activity shall include theft and fraud.

The Florida law as set forth more specifically in Fl. St. §772.104, like its Federal counterpart, also provides for an award of three times (treble) the actual damages incurred or paid together with recovery of all attorneys’ fees and costs assuming the party bringing the action prevails. The Florida statute recognizes a five (5) year statute of limitations for bringing a State RICO action.

c. Use of the Federal and State RICO Provisions in the Battle against PIP Insurance Fraud

Both the Federal and civil RICO provisions cited in this section are very serious in nature, and such actions should *only* be undertaken with the utmost of prior investigation, caution, and verification. Our firm has utilized RICO actions on behalf of insurance carriers to seek recovery and injunctive relief for fraudulent practices, but in doing so, we always urge our clients to approach these claims very carefully. Where the evidence so warrants, however, both Federal and state

RICO civil causes of action are extremely viable and are powerful tools in the battle against insurance fraud in general and PIP fraud in specific. When these actions are brought properly and successfully, they result in an award not only of the damages paid, but treble (three times) those damages together with an entitlement to the recovery of all attorney's fees and costs.

The purpose of the RICO Acts (both Federal and state) is to punish wrongdoing by parties engaged in improper conspiracies to defraud. As such, the economic impact of these cases from a civil perspective is intended to punish the wrongdoer and force them to stop engaging in those practices. In addition to seeking monetary recovery through Federal and state RICO actions, we also recommend to our clients to include a claim for injunctive relief, prohibiting the defendant parties from engaging in the same or similar practices on a "go forward" basis to avoid continuation of the same, or similar, improprieties in the future.

When filing of a civil RICO action, any insurance company should be fully prepared to receive a countersuit alleging defamation, tortious interference with the business relationship between the defendants and their patients or clients, and numerous other claims for damage.

One of the provisions contained in the RICO law is what is known as a RICO Case Statement. RICO Case Statements are used by Federal Courts in conjunction with the Complaint to test the sufficiency of the allegations alleging a violation of the RICO act. The procedure requires the RICO plaintiff to supplement the Complaint with written answers propounded by the Court designed to elicit the factual basis and legal theory underlying the RICO claim. These RICO Case Statements were deemed necessary by some Federal Courts because the RICO Act was too vague for purposes of filing a civil RICO claim when a plaintiff normally only needs to plead "a short and plain statement of the claim" in other civil litigation actions. The goal of requiring the plaintiff alleging a RICO violation to be required to state the RICO case elements with specificity is to ensure the plaintiff secured the necessary facts to support the RICO action prior to filing the lawsuit rather than simply filing the Complaint and then attempting to perform discovery in the "hope" of proving a RICO violation occurred.

One of the other advantages of filing a civil RICO action is it places the matter into the Federal Court system. Filing of a RICO action in the Federal Court does not preclude an insurer from also seeking recovery under each of the sections of the Florida Statutes and all state common law theories of recovery which also are available. It is important to note RICO actions may also be filed solely in the state courts in Florida, however, in those actions, the insurer will only be relying upon the state RICO provisions rather than the Federal Act. In virtually any RICO action which would be filed in the Federal Court, we recommend to insurers consideration of invoking all other statutory claims, as well as including potential violations for other statutes including Fl. St. §817.505, which prohibits patient brokering, as well for claims for common law fraud and civil conspiracy.

If an insurer elects to file a Federal Court action for recovery and injunctive relief, there are three Federal District Courts in the state of Florida, consisting of the Northern District, Middle District, and Southern District. Venue in the proper Federal Court District will be based upon where the defendant operates its business activities or where the cause of action accrued.

In most situations for PIP violations, we recommend to carriers seeking these types of recovery actions, the action be filed against providers who operate on a state-wide level, or in a large geographic area of the state rather than in one specific locality. Doing so allows the flexibility of selecting which of the Federal District Courts in the state of Florida is the most conducive to the cause of action being filed. While each case is uniquely different, and warrants further study and determination before the appropriate Court is selected, our experience has shown a preference for filing of these causes of action in the United States District Court for the Middle District of Florida. We base this opinion upon the fact a higher number of judges in the Middle District, and normally the jury pool composition, appear to favor these types of cases brought by insurance carriers on an historic basis more so than filings in the Northern or Southern Districts of Florida. Again, we would stress, however, the importance of reviewing the specific facts, circumstances, and pleadings to be filed before making a final decision regarding the appropriate venue.

3. Litigation Summary

In this section, we have attempted to outline in very broad terms the remedies available to insurers who are interested in seeking a litigation recovery alternative for PIP fraud activities in the state of Florida. As noted at the onset, we believe litigation is a viable strategy, both for recovery and injunctive relief, but should only be undertaken after careful study and when all other reasonable attempts to solve the problems and issues at hand have been attempted.

Before filing of litigation, whether in the local Florida state courts or Federal Courts, we strongly recommend taking the unusual step of meeting with the potential defendant(s) together with their legal counsel and literally laying-out all of the information and investigation conducted to date in an attempt to amicably resolve the matter by entering into a repayment agreement and stipulation to cease and desist from any further similar practices or billings to the insurance carrier.

When, however, the facts and circumstances after a thorough investigation warrant, and when all attempts to amicably resolve the matter otherwise have been unsuccessful, we do encourage insurers to consider litigation as a viable option for recovery of improper monies paid, and to utilize the court system for injunctive relief to prohibit the parties from engaging in similar activities in the future.

To assist our clients in having a more thorough understanding of the laws available for recovery and injunctive relief in the state of Florida, attached as Appendix J, you will find a chart setting-forth all available state and Federal remedies which have been discussed in this section. We hope this information is of benefit to you as you consider the tools available to assist your company in the battle against PIP insurance fraud in the state of Florida.

VII. CONCLUSION

Our firm is proud to be of service to the insurance industry and very pleased in such a short period of time to have established a strong presence in the state of Florida. We believe Smith, Rolfes and Skavdahl is at the forefront of the investigation of PIP insurance fraud throughout the state. Our firm brings a unique proven track record of experience in serving the insurance industry in the investigation and planning of successful steps to eradicate or limit fraudulent insurance activities.

We have worked very hard over a number of years, even before opening our two offices in Florida, to be keenly aware of the problem of insurance fraud associated with the Florida PIP Statute going back nearly four decades. Our firm has the proven skill, resources and foresight to partner with insurers who are truly interested in meaningfully addressing the problem of PIP insurance fraud and securing successful results.

It is our hope this analysis and document have increased your knowledge of the scope and severity of the problem of PIP insurance fraud in Florida, but more importantly demonstrates a clear and identifiable pathway for those insurers who are truly interested in battling back to see where partnering with the correct legal services firm can bring value to the company and better service to your policyholders. We strongly believe through public and governmental relations, better informed policyholders and insurance consumers, enhanced training of insurance staff personnel and, where necessary, developing the evidence to support recovery actions and litigation as a last resort, these efforts will combine to aid our clients and their policyholders in the battle against PIP insurance fraud in the state of Florida.

We welcome your feedback, comments and analysis of the information contained in this document. We also would welcome the opportunity to meet with your claims, SIU or management team to explore more fully how a partnership with Smith, Rolfes and Skavdahl may better serve your company and your policyholders in 2012 and the years beyond, as we look to work cooperatively in the battle against insurance fraud.