

COLORADO'S NO-FAULT AUTOMOBILE INSURANCE SYSTEM RUNS OUT OF GAS; AN EXAMINATION OF COLORADO'S NEW TORT BASED AUTOMOBILE INSURANCE LAW

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Introduction

On July 1, 2003, Colorado's "No-Fault" auto insurance act expired by "sunset repeal" and the state returned to a tort based system for motor vehicle insurance. The new auto insurance requirements, as codified in HB 03-1188, are located under §§ 10-4-601 C.R.S. *et seq.* Even though the new law went into effect on July 1st, insurers are not required to issue new policies until the current coverage comes up for renewal, or unless requested by their insureds. Additionally, several provisions of the No-Fault Act will require that motor vehicle claims be concluded under its provisions (*e.g.*, the PIP IME Panel program is expected to continue until June 30, 2014¹).

Pursuant to the new law, motor vehicle owners must still maintain liability insurance in minimum amounts of \$25,000 per person for bodily injury, \$50,000 per accident and \$15,000 for property damage.² The uninsured/underinsured motorist coverage requirements are unchanged, and insurers must still offer collision coverage.³ However, insurers no longer need to offer or provide any kind of first-party "med pay," "work disability," "rehabilitation," or "substituted essential services" coverage. Instead, health insurance, disability insurance or the at-fault party (via a fault-based tort claim) will be the methods by which injured parties may recover these types of economic losses.

History

In 1974, Colorado enacted a "no-fault" auto insurance system, the "Colorado Auto Accident Reparations Act."⁴ The Act's purpose was to avoid inadequate compensation to victims of automobile accidents; to require registrants of motor vehicles in this state to procure insurance covering legal liability arising out of ownership or use of such vehicles; and to provide benefits to persons occupying such vehicles and to persons injured in accidents involving such vehicles."⁵

Under Colorado's no-fault system, PIP coverage was mandatory and provided coverage for certain medical and rehabilitation expenses from injuries sustained in an automobile accident, regardless of who was at fault. The Act imposed "threshold" limits that had to be satisfied prior to a lawsuit being filed. No person entitled to receive PIP benefits as the result of an automobile accident could recover damages for bodily injury from the owner or operator of any motor vehicle involved in the accident unless the accident caused death, dismemberment, permanent disability, permanent disfigurement, a reasonable need for medical services in excess of \$2,500, or loss of earnings for more than one year.⁶ Unless the injured person was able to meet one of the "threshold" requirements, no tort action could be brought.⁷

Since 1974, Colorado experienced a huge increase in auto insurance premiums. Colorado's auto insurance rates moved from the 37th state on the list of auto insurance costs in the early 1990s to having the 11th most expensive average premium in the country in 2002. Rates in 2002 increased by as much as 20 percent, more than twice the national average. The ballooning rates were attributed to the low threshold of \$2,500 for lawsuits and generous benefits of up to \$130,000 in medical and rehabilitation costs. In addition, the law required all "reasonable" treatments to be covered, including non-traditional treatments. Thus, consumers could collect from their own insurance company for virtually any type of medical treatment and, with such generous benefits for many treatments, and because of the low tort liability threshold, they could also go to court to collect for pain and suffering and other noneconomic damages.

Given this situation, Colorado Governor Owens called on the state legislature to either fix the no-fault system or join the other 37 states that have a tort system. Insurers and other interested parties proposed plans that included establishing medical protocols and standards for treatment based on the concept of "medical necessity" rather than "reasonable and necessary," limiting PIP coverage to conventional medical treatment with an option for consumers

to purchase additional coverage for treatments and changing the state's monetary tort liability threshold to a verbal threshold.⁸ However, the Colorado General Assembly chose to enact a tort system. This article will look at the major components of the new system, the resulting regulatory interpretations by the Colorado Division of Insurance that have occurred since July 1, 2003 and how the new law is both expected to and has affected insurance premiums for both auto and health insurance to date.

Overview of the New Insurance Law

As mentioned previously, motor vehicle owners are required to maintain liability insurance in minimum amounts of \$25,000 per person for bodily injury, \$50,000 per accident and \$15,000 for property damage.⁹ The Division of Insurance's interpretation of the relevant statutes is that owners of motorcycles must also maintain complying policies.¹⁰ Insurance companies are required to keep loss statistics as to bodily injury liability and property damage liability separately for rating purposes, and file these statistics with the insurance Commissioner each year.¹¹

Insurers must still offer uninsured/underinsured motorist and collision coverage.¹² Collision coverage must be offered without regard to fault against accidental property damage to the insured motor vehicle with another motor vehicle or motor vehicle caused by physical contact of the insured with another object or by upset of the insured motor vehicle, if the accident occurs within the United States, its territories or possessions, Canada, or Mexico. Such coverage must be offered by insurers with deductibles of \$100 or \$250, although the coverage may be offered with other reasonable deductible amounts.¹³

When an injured party brings a lawsuit seeking damages as a result of an automobile accident, the liability issues will be decided under Colorado's modified comparative negligence law. Colorado follows a system of impure comparative negligence in which a plaintiff's recovery in a tort action is not barred by his or her comparative negligence, if the plaintiff's negligence is not as great as that of the defendant, but the damages allowed are reduced by the percentage of negligence attributed to the plaintiff.¹⁴ In tort actions, the jury or the court apportions fault to each of the parties, settling parties and "any persons not parties to the action of whom notice has been given." A defendant is liable to the plaintiff only for the percentage of damages equal to that defendant's percentage of negligence or fault, except that joint liability is imposed on persons who conspire and pursue a common plan to commit a tortious act.¹⁵

Additional new statutory provisions require insurers, using new or updated credit information in insurance underwriting or rating, to notify applicants or policyholders that their credit information will be used for underwriting or rating,¹⁶ and to file rates that provide a premium reduction for drivers age fifty-five and older who complete an approved drivers education course.¹⁷ Another new section prohibits an insurer from engaging in an unfair or discriminatory trade practice in the payment of motor vehicle insurance claims for the repair of a damaged motor vehicle.¹⁸

Recent Regulatory Activity

Since enactment of the new automobile insurance laws by the General Assembly, the Colorado Division of Insurance has promulgated several regulations and issued numerous statements to assist both insurers and consumers through the transition process. Importantly, Proposed New Regulation 5-2-11 "Transition from No-fault to Tort System," is scheduled to go into effect December 1, 2003.

Regulation 5-2-11 provides detailed guidance to insurers regarding the new law. The regulation provides that all auto policies issued, written or delivered on or after July 1, 2003 must be issued, written or delivered as tort policies. Under the new law, insurers may offer policyholders the option to "convert" their no-fault policies to tort policies, however the insurer and policyholder must mutually agree to this mid-term conversion; insurers cannot require policyholders to convert their no-fault policies to tort policies until the next renewal date. Furthermore, insurers are prohibited from: (1) re-underwriting policies mid-term that convert from the no-fault to the tort system; (2) charging application fees or cancellation fees or other similar charges to insureds upon conversion of policies from no-fault to tort policies; or (3) "rolling on" additional coverages such as medical payments coverage without the insured's consent.

Regulation 5-2-11 also provides that when an insurer offers medical payments coverage, it will be primary coverage. Furthermore, for covered benefits and up to the policy limits, medical payments coverage includes any and all co-payments, co-insurance and deductibles of secondary plans. In addition, Regulation 4-6-2 "Group Coordination of Benefits" will be modified by eliminating the reference to repealed statute § 10-4-709 C.R.S., which required health carriers to coordinate benefits with no-fault auto coverage.

Another Proposed New Regulation, 5-2-12 "Concerning Auto Insurance Consumer Protections," is scheduled by the Division for an administrative hearing on December 2, 2003, together with fifteen other regulations the Division proposes to make remedial changes to in order to conform to the new auto insurance laws.¹⁹

The Division has also issued a Notice to union members insured through self-funded health insurance programs.²⁰ The Notice advises that many, if not all, self-funded health insurance programs offered to union members will not cover medical expenses due to injury in an automobile accident. This is because these self-funded plans are subject to federal ERISA laws, and are not subject to either state insurance laws or to the jurisdiction of the Division of Insurance or any other state agency.

Observations on the New System

Health insurers will raise their rates to cover the added risk of providing benefits to insureds injured in automobile accidents. In September, Colorado health insurer, Rocky Mountain Health Plans, was the first to introduce a special cost increase due to the auto insurance reform. The carrier added six percent, on top of a planned ten to twelve percent increase attributed to rising medical costs, to its rates. Other insurers foresee a rate increase of between two and ten percent.²¹

Since enactment of the new automobile insurance law, the Division of Insurance has noted an average decrease of approximately seventeen percent in auto insurance rates for the same level of coverage as under no-fault. The four largest carriers, with about fifty percent of the combined market share, show approximately a twenty-five percent decrease in their rates. Approximately eighty-six percent of consumers are purchasing optional med-pay coverage.²²

Conclusion

Despite the expected savings to consumers on their auto insurance premiums, they may end up paying more for their health insurance, which will result in no overall savings to consumers' pocketbooks. Some insureds may ultimately end up paying more for their auto insurance if they increase liability limits and add on med-pay coverages. It is widely expected that litigation, of auto accident related claims, will increase due to the elimination of no-fault coverage increasing the burden on Colorado's currently underfunded court system.²³

The outcome of Colorado's return to a tort based automobile insurance system will not be known for several years. In the interim, counsel will need to be familiar with both the new law and the repealed no-fault law, as the statute of limitations for bringing a lawsuit based on an automobile accident is three years.²⁴ Furthermore, both health and automobile insurers, as well as regulators, are expected to fine-tune their procedures in Colorado as their experience with the new system develops.

ENDNOTES

¹ This assumes the last possible day for a PIP claim will be June 30, 2004 on a policy issued June 30, 2003, with PIP benefits continuing for 10 years. See, Colorado Division of Insurance's answers to questions posed by the industry regarding Colorado's conversion from a no-fault auto insurance system to a tort system.

<http://www.dora.state.co.us/insurance/consumer/autoqains.pdf>

² C.R.S. §§ 10-4-619, 620 (2003)

³ C.R.S. §§ 10-4-609 & 10-4-621 (2002)

⁴ Laws 1973, H.B.1027, § 1.

⁵ C.R.S. § 10-4-702 (2002)

⁶ C.R.S. § 10-4-714 (2002)

⁷ *Jorgensen v. Heinz*, 847 P.2d 181 (Colo. App. 1992).

⁸ See, *No-Fault Auto Insurance*, INSURANCE INFORMATION INSTITUTE, INC. (June 2003) at <http://www.iii.org/media/hottopics/insurance/nofault/> for an excellent discussion of states' no-fault systems.

⁹ C.R.S., *supra* note 2

¹⁰ Proposed New Insurance Regulation 5-2-11.

¹¹ C.R.S. § 10-4-621 (2003).

¹² C.R.S., *supra* note 2

¹³ C.R.S. § 10-4-621 (2003).

¹⁴ C.R.S. § 13-21-111 (2003).

¹⁵ C.R.S. § 13-21-111.5 (2003).

¹⁶ C.R.S. § 10-4-616 (2003).

¹⁷ C.R.S. § 10-4-632 (2003).

¹⁸ C.R.S. § 10-4-618 (2003).

¹⁹ The fifteen regulations set for December 2, 2003 hearing are: 1-1-6 *The Elements Of Certification For Accident and Health Forms, Private Passenger Automobile Forms, Commercial Automobile with Individually-Owned Private Passenger Automobile-Type Endorsement Forms, Claims-Made Liability Forms, Preneed Funeral Contracts and Excess Loss Insurance in Conjunction with Self-Insured Employer Benefit Plans under the Federal "Employee Retirement Income Security Act"*; 2-1-10 *Motor Vehicle Self-Insurance*; 2-4-1 *Surplus Lines Insurance Issued by Nonadmitted Insurers*; 4-6-2 *Group Coordination Of Benefits*; 5-1-1 *Mass Merchandising Of Property And Liability Insurance*; 5-1-14 *Penalties For Failure To Promptly Address Property And Casualty First Party Claims*; 5-2-1 *Relative Value Schedule For No-Fault*; 5-2-2 *Renewal Of Automobile Insurance Policies - Excluded Named Drivers*; 5-2-3 *Automobile Insurance Policies Issued or Renewed prior to July 1, 2003*; 5-2-5 *Fees For Arbitrators*; 5-2-6 *Automobile No-Fault Cost Containment Options*; 5-2-7 *Voluntary Arbitration For Personal Injury Protection Disputes*; 5-2-8 *Timely Payment Of Personal Injury Protection Benefits*; 5-2-9 *Personal Injury Protection Examination Program* and 6-1-1 *Limiting Coverage*.

²⁰ <http://www.dora.state.co.us/insurance/consumer/union.pdf>

²¹ Rachel Brand: *Auto Insurance Reform is Costly*, ROCKY MOUNTAIN NEWS (August 18, 2003).

²² Testimony before the Colorado General Assembly, Transportation Legislation Review Committee, August 20, 2003.

²³ See Richard W. Laugesen: *After the Sunset – Colorado Motor Vehicle Insurance Post July 1, 2003*, THE COLORADO LAWYER, Vol. 32, No. 7 (July 2003), for an excellent discussion of probable impacts of the new auto law on different sectors. Article available at: http://www.cobar.org/tcl/tcl_articles.cfm?ArticleID=2786

²⁴ C.R.S. § 13-80-101(n) (2003).