

REGULATION 68 EFFECTIVE DATES/REVIEW OF NO-FAULT ARBITRATION AWARDS

On several occasions during the past three years, we have attempted to keep our readers informed of the content and status of the State of New York Insurance Department's recent attempts to amend the Regulations governing No-Fault claims. See "Proposed Changes to No-Fault Regulations," NYLJ, July 13, 1999, p. 3, col. 1; "More on No-Fault," NYLJ, July 11, 2000, p. 3, col. 1; "Update on Insurance Regulation 68" (Letter to the Editor), NYLJ, July 26, 2000, p. 2, col. 6); "No-Fault Regulations Update," NYLJ, September 12, 2000, p. 3, col. 1; "Court '86s' Regulation 68 . . .," NYLJ, May 8, 2001, p. 3, col. 1; "The 'New' No-Fault 'Regulation 68,'" NYLJ, September 11, 2001, p. 3, col. 1.

Given the recent (February 19, 2002) decision by Justice William Wetzel, of the Supreme Court, New York County in Application of the Medical Society of the State of New York, et al. v. Gregory Serio, as Superintendent of Insurance for the State of New York, and the State of New York Insurance Department, denying the challenge to the new Regulations and their substantially shortened time periods for filing claims, and the more recent (April 4, 2002) decision of the Appellate Division, First Department denying the Petitioners' motion seeking a stay of enforcement of the new Regulations pending the appeal from Justice Wetzel's decision, we felt it would be helpful to analyze the effective dates of the Regulation's various provisions.

In addition, we address herein a question that seems to puzzle many of our readers – what are the standards of review applicable to no-fault arbitration awards?

History of Regulation 68

To briefly recap the history of the new Revised Regulation 68, we remind our readers that this Regulation was filed on August 2, 2001 with the Department of State and published in the State Register on August 22, 2001. By its terms, Regulation 68 was to be effective as of September 1, 2001.

On August 29, 2001, however, various plaintiffs filed a lawsuit in the New York State Supreme Court seeking a stay of enforcement of the revised regulation. A temporary stay of the revised regulation was issued on August 31, 2001 by Acting Manhattan Supreme Court Justice Alice Schlesinger.

On December 5, 2001, Acting Supreme Court Justice William J. Wetzel ruled that the revised regulation should not go into effect while the legal challenge to the rules was pending.

On Tuesday, February 19, 2002, Acting Supreme Court Justice William Wetzel issued a decision upholding the State Insurance Department's promulgation of the revised Regulation 68 and denying a request that it be overturned.

On Wednesday, February 20, 2002, Appellate Division, First Department Justice David B. Saxe, granted a temporary stay of the ruling (and of the implementation of the revised regulation) until a full panel of appellate justices could consider a motion for a stay.

On April 4, 2002, the Appellate Division, First Department unanimously denied petitioners' motion seeking injunctive relief pending the appeal of Justice Wetzel's decision upholding the Insurance Department's promulgation of revised Regulation 68, and also vacated the interim stay in effect against implementation of the revised regulation. As a

result of this decision, revised Regulation 68 (the Regulation as promulgated in August 2001 to be effective on September 1, 2001) became effective as of April 5, 2002.

Accordingly, from August 29, 2001 to April 4, 2002 the prior existing Regulation 68 remained in effect, as modified by the emergency twenty-fourth amendment (which was filed and effective on September 18, 2001 and remained in effect on an emergency basis through April 4, 2002) and the emergency twenty-fifth amendment (which was filed and effective on December 31, 2001 and remained in effect on an emergency basis through April 4, 2002).

On April 11, 2002 the Department promulgated, on an emergency basis, the First Amendment to Regulation No. 68-C (11 NYCRR 65) and the First Amendment to Regulation No. 68-D (11 NYCRR 65). These two emergency regulations amend the provisions of the revised Regulation 68.

Effective Dates of Specific Provisions

As previously noted, the new Regulation is effective as of April 5, 2002. However, not all claims made on and after April 5, 2002 will be subject to the new requirements on that date. Since Subpart 68-A provides for revised endorsements with new notice provisions, those new provisions will not be applicable to claims until new policies containing the revised endorsements are issued or renewed. Thus, the new provisions establishing time frames of 30 days for written notice of claim, 45 days for submission of health care bills, and 90 days for submission of lost earnings claims can be applied only to claims under policies issued that include the new endorsement. Insurers may not add the new endorsements to existing policies prior to the expiration dates of the policies.

Rather, the new endorsements can only be issued with new policies or at the annual renewal of an existing policy issued after April 5, 2002.

Self-Insurers

A different rule applies to self-insurers because the submission of claims to self-insurers is not subject to the contractual requirements that exist in insurance policies. Regulation 68-B/Subpart 65-2, which applies to self-insurers and also provides for the new notice provisions, is applicable to all claims that result from accidents that occur on and after April 5, 2002.

Claims Practice Rules

With respect to the claims practice rules contained in Regulation 68-C/Subpart 65-3, the applicable rules will be governed by the particular endorsement that is in effect, with the following exceptions: (1) Simple interest (rather than compound interest) will be payable by insurers for overdue claims arising from accidents that occur on or after April 5, 2002; (2) the Explanation of Benefits must be provided for claims received by insurers on or after April 5, 2002; and (3) Benefits for Other Necessary Expenses may no longer be assigned for claims arising from accidents that occur on or after April 5, 2002. The NF-3 and NF-10 forms contained in the First Amendment to Regulation 68-C must be provided by insurers for claims arising from accidents that occur on or after March 1, 2002.

Arbitration

The new rule that provides the arbitrator with the discretion to resolve disputes involving amounts less than \$2,000 by written submissions only takes effect for all arbitration requests filed on or after April 5, 2002. The First Amendment to the Regulation 68-D rule that gives the arbitrator the authority to assess costs under certain circumstances is effective for all arbitration requests filed on or after March 1, 2002.

Attorneys' Fees

The new provisions that require the payment of a minimum \$80 attorneys' fee if a dispute that involves a denied claim is resolved is effective for claims received by insurers on or after April 5, 2002. The new rule that provides that if an insurer makes a non-binding offer during the conciliation process, and the offer is rejected by the applicant, the attorneys' fee is limited if the offer equals or exceeds the amount ultimately awarded by the arbitrator is effective for all arbitration requests filed on or after April 5, 2002. And, the new procedures for the enforcement of unpaid arbitration awards and for the payment of attorneys' fees for the enforcement of awards are applicable to requests for enforcement that result from arbitration requests filed with the AAA on or after April 5, 2002.

The new claims practice and arbitration rules mandated by the 25th amendment to Regulation 68 will remain in effect by means of a new emergency adoption of amendments incorporating those provisions in Regulation 68 (see "Emergency Amendment to the No-Fault Regulations . . .," NYLJ, January 16, 2002, p. 3, col. 1).

In the meantime, the appeal from Justice Wetzel's denial of the challenge to the Regulations remains pending and is scheduled to be argued during the October Term of the Appellate Division, First Department. Thus, it will be at least three to four months before a final decision can be expected on the validity of the Regulations. We will continue to keep our readers informed of developments in this important area as they occur.

Review of No-Fault Arbitration Awards

The question of the applicable standards for review of no-fault arbitration awards is one that cannot be correctly answered without first knowing whether the award at issue is the award of a lower arbitrator or of a master arbitrator. As recently explained in *Liberty Mutual Ins. Co. v. Spine Americare Medical, P.C.*, 294 AD2d 574, 743 NYS2d 144 (2d Dept. 2002), there is a difference.

When an appeal is taken to a master arbitrator from a lower arbitrator's award, a master arbitrator has the authority to vacate or modify the award based upon a ground set forth in CPLR article 75. See 11 NYCRR 65.19(a)(1). However, "the power of the master to review factual and procedural issues is limited to 'whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis' (*Matter of Petrofsky*, 54 NY2d 207, 211)." *Liberty Mutual v. Spine Americare*, *supra*. If the lower arbitrator's award has, from a factual standpoint, a rational basis, the master arbitrator must uphold it. *Richardson v. Prudential Prop. & Cas. Ins. Co.*, 230 AD2d 861 (2d Dept. 1996).

Moreover, “pursuant to 11 NYCRR 65.19(a)(4), the review powers of the master arbitrator include the power to determine if the arbitrator’s award was ‘incorrect as a matter of law.’” Thus, a master arbitrator may vacate a lower arbitrator’s award based upon an error of a rule of substantive law.

Interestingly, in *Liberty Mutual v. Spine Americare*, supra, the master arbitrator set aside the arbitration award because, inter alia, it was inappropriately based on a ground not cited by the insurer in the denial of claim.

In reviewing a master arbitrator’s award, which takes place in the setting of a CPLR Article 75 proceeding, “If the master arbitrator vacates the arbitrator’s award based upon an alleged error of ‘a rule of substantive law,’ the determination of the master arbitrator must be upheld unless it is irrational.” *Liberty Mutual v. Spine Americare*, supra. In contrast to review by the master arbitrator of the lower arbitrator’s award, “The master arbitrator’s determination of the law need not be correct; mere errors of law are insufficient to set aside the award of a master arbitrator [citations omitted]. On questions of substantive law, the determination of the master arbitrator must be upheld if . . . there is a rational basis for the determination [citations omitted].” Id.