

PROPOSED NEW NO-FAULT REGULATIONS

Although it has been quite some time since we have addressed the area of No-Fault insurance law, having devoted the vast majority of our recent columns to uninsured and underinsured motorist coverage issues, a significant and some would say radical and far-reaching proposed amendment to the No-Fault Regulations is on the horizon, which we felt should be brought to the attention of our readers.

The Superintendent of Insurance of the State of New York, pursuant to the authority granted to him by the Insurance Law, has promulgated a new set of Regulations implementing the Comprehensive Motor Vehicle Insurance Reparations Act, popularly referred to as the No-Fault law, in place and in stead of the existing Regulations, which are to be repealed (11 NYCRR Part 65 [Regulation 68]). Among the objectives and anticipated benefits of the proposed new Regulations, which are scheduled to take effect on October 1, 1999, as identified by its drafters, are those that formed the basis of the No-Fault Regulations themselves -- the rectification of many problems that were inherent in the existing tort system utilized to settle claims, the provision of prompt payment of health care and loss of earnings benefits, and the elimination or reduction of fraud. In addition, the proposed Regulations eliminate those provisions of the old Regulation that applied solely to accidents that occurred prior to December 1, 1977, as well as those provisions relating to Managed Care Coverage, which may no longer be offered. The new Regulations have been reorganized in a more logical manner to make it easier to locate the various subjects addressed therein.

The portions of the proposed new Regulations that make substantive changes to the No-Fault rules may be classified into two basic categories, both of which will be

discussed below: (A) Policy conditions; (B) No-Fault claim processing provisions: Other portions dealing with more procedural issues, such as optional arbitration procedures; mandatory arbitration procedures; and changes to No-Fault forms, will be discussed in our next column.

A. Policy Conditions

1. **Notice** -- An applicant for No-Fault insurance benefits has always been required to provide written notice of claim in a timely fashion or be subject to denial of the entire claim. The notice of claim policy provision set forth in the existing Regulations provides that: “Written notice . . . shall be given . . . as soon as reasonably practicable . . . but in no event more than 90 days after the accident unless the eligible injured person submits written proof that it was impossible to comply with such time limitation due to specific circumstances beyond such person’s control.” 11 NYCRR §65.12 (emphasis added).

The proposed new Regulations dramatically reduce the 90-day notice limitation period to a mere thirty days (30), but, simultaneously lessen the burden of proof to excuse non-compliance with that limitation from one of “impossibility” to one of “clear and reasonable justification.” Specifically, the new Regulations provide as follows: “. . . [w]ritten notice . . . shall be given . . . as soon as reasonably practicable, but in no event more than 30 days after the date of the accident, unless the eligible injured person submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.” 11 NYCRR §§65-1.1, 65-2.4.

According to the proponents of the new Regulations, the existing 90-day notice period “permits No-Fault claimants the opportunity to build up substantial health care bills

before the insurer receives notice of a claim that might enable it to fairly evaluate the extent of a claimant's injuries and the medical necessity for treatment. The reduction to thirty days would enable insurers to more effectively evaluate No-Fault claims, while still giving the claimant a reasonable period to give notice." See Consolidated Regulatory Impact Statement for 11 NYCRR 65 (Regulation 68) and the First Amendment to 11 NYCRR 64-2 (Regulation 35-c) (hereinafter referred to as "Impact Statement").

By contrast, according to those opposed to this regulatory amendment, the radical change from ninety to thirty days is "unfair and unreasonable" because, for example, "An injured pedestrian taken to a hospital may not even know the insurer's identity until after the proposed 30-day period has run. Moreover, this change would invite insurers to micro-manage and second-guess a patient's health care provider by requiring so-called independent medical examinations (IMEs) when urgent treatment has barely begun Certain medical conditions, such as herniated discs and compression fractures, may not even become apparent for six weeks or more after an accident. Thus, termination of coverage could occur before a patient's medical condition has been fully assessed. The result of denied and delayed care would be increased costs related to complications arising from the failure to provide necessary, timely treatment." (See draft of proposed letter to Governor Pataki prepared by the New York State Trial Lawyers Association, hereinafter referred to as "NYSTLA letter"). Opponents also note that a 30-day notice period is shorter even than the brief notice provisions that pertain to actions against municipalities and would, in effect, constitute an unreasonably and unjustifiably short statute of limitations that will cause the loss of valuable rights to many otherwise worthy and entitled claimants.

2. Proof of Claim; medical, work loss and other necessary expenses -- An applicant for No-Fault benefits has always been required to submit written proof of claim for health service expenses, work loss benefits and other necessary expenses, or be subject to denial of those particular claims. With respect to health service expenses, the proof of claim provision set forth in the existing Regulations provides that such proof must be submitted “as soon as reasonably practicable, but in no event later than 180 days after the date services are rendered or 180 days after the date written notice was given to the Company, whichever is later.” With respect to work loss benefits, the existing Regulations provide that such proof of claim must be submitted “as soon as reasonably practicable.” And, with respect to other necessary expenses, the existing Regulations require proof of claim to be submitted “as soon as reasonably practicable, but in no event later than 90 days after the services are rendered.” 11 NYCRR §65.12 [emphasis added].

The proposed new Regulations, in §§ 65-1.1 and 65-2.4, dramatically reduces from 180 days to 45 days the proof of claim period for the submission of claims for health care services rendered. Proponents of this change contend that “under the current 180-day period, claims for services that were rendered months before notification of such treatment was received by the insurer cannot reasonably be verified by the insurer and make it difficult for the insurer to fairly evaluate the necessity of that treatment. This change would enable insurers to more promptly examine no-fault claims.” See Impact Statement, supra. Opponents of this change, on the other hand, point out that such a radical reduction in the proof of claim time limits is inherently unfair and that the 45-day period is unreasonably short. They also note that under this provision, “Health care providers, hospitals and ultimately the injured claimant -- who has no control over the processing of bills -- may be

denied payment under this harsh rule.” See NYSTLA draft letter, supra. They also note that the 45-day period is substantially shorter than the period for such proof of claim presently allowable for Medicare and Medicaid claimants.

The proposed new Regulations, at §§ 65-1.1 and 65-2.4, also impose, for the first time, a specific time limitation for the submission of proof of claim for work loss benefits -- “as soon as reasonably practicable, but in no event, later than 90 days after the work loss is incurred.” The 90-day period for proof of claim for other necessary expenses has been maintained. Proponents of this change contend that it “would establish a reasonable fixed time period for the submission of such proof, and would enable insurers to properly evaluate no-fault claims.” See Impact Statement, supra. Opponents, of course, again note the harshness of the rule and the negative and unfair impact it will have upon claimants with valid claims.

As a palliative to claimants, the proposed new Regulations lessen the burden of proof to excuse the failure to comply with the time limitations for proof of claims from one of “impossibility” (see 11 NYCRR §65.12) to one of “clear and reasonable justification.” Those who can demonstrate a reasonable basis for non-compliance with the time requirements would be held to an “as soon as reasonably possible” standard.

Finally, although most coverages currently provide insurers with the right to conduct an examination under oath, which may be requested when a claim is suspect, no such right is expressly contained in the existing No-Fault Regulation. but see, Galante v. State Farm Ins. Co., 249 AD2d 506, 671 NYS2d 345 (2d Dept. 1998). The proposed new Regulations, at §§ 65-1.1 and 65-2.4, specifically allow an insurer to require an examination under oath when warranted. Proponents of this amendment contend that “By including the right to

examination under oath, insurers and self-insurers will be given an effective tool to conduct fraud and abuse.” See Impact Statement, supra. Opponents, on the other hand, argue that such examinations under oath “could open the door to harassment or intimidation of claimants.” See NYSTLA draft letter, supra.

B. No-Fault Claims Processing Provisions

1. **Examination Under Oath** -- Sections 65-3.5(c), (d) of the proposed new Regulations adopt the same rules for examination under oath that the existing Regulations prescribe for medical examinations requested by the insurer (11 NYCRR §§65.15(b)(3), (4)). These rules require the examination to be scheduled within thirty days of the receipt of prescribed verification forms and to be held at a place and time reasonably convenient to the insured. In addition, the insurer is required to inform the applicant that he or she will be reimbursed for any loss of earnings and transportation expenses incurred.

2. **Facsimile and electronic data transmittal of claims information** -- Section 65-3.5(j) of the proposed new Regulations adds a new provision that requires insurers that write more than 1,000 motor vehicle liability policies in New York State to establish procedures for the receipt of claims information by facsimile or electronic data transmittal. The underlying purpose of this amendment is “to enable claimants to more easily demonstrate that they have met the new notice requirements and also allow for more rapid processing of claims.” See Impact Statement, supra.

3. **Interest on overdue payments** -- Section 65-3.9(a) of the proposed new Regulations changes the method of calculating interest on overdue payments. Currently insurers are required to pay interest on all overdue payments at a rate of 2% per month

compounded and calculated on a pro-rata basis using a 30-day month. 11 NYCRR §65.15(b). The Regulations would be changed to require the payment of interest on a simple interest basis. As explained by the proponents of this change, “the penalty was introduced in the 1970's, when inflation and interest rates were much higher than they are today. This change will reduce the penalty somewhat while maintaining its effectiveness in deterring late payment of claims.” See Impact Statement, supra. Opponents contend that there is no cause or justification to reduce the penalty, which has functioned quite well in deterring late payments and wrongful denials of claims. It is interesting to note, however, that while the existing Regulation authorizes compounding of interest, the statute which the Regulation purports to implement does not. See Insurance Law § 5106(a).

4. Attorneys fees -- Section 65-3.10(a) of the proposed new Regulations changes the fees paid to the applicant's attorney when a claim is overdue or denied. Currently, insurers are required to pay the applicant's attorney's fee when a claim is overdue or denied. According to proponents of the amendment, the current attorney fee structure, by limiting the amount of the attorney's fee for collection prior to arbitration to the amount of interest on an overdue claim (subject to a maximum fee of \$60.00), encourages attorneys to file for arbitration to collect overdue bills and the higher applicable attorney's fee, rather than to communicate with the insurer in an attempt to collect those bills. The new Regulations would increase the attorney's fee payable, prior to arbitration, to 20% of the amount of the overdue bill plus any interest, albeit still subject to a maximum payment of \$60.00. Proponents suggest that “this change should encourage attorneys to settle claims with insurers prior to initiating a costly arbitration procedure.” See Impact Statement, supra. It is not at all clear, however, that this will be so given the maintenance of the

\$60.00 maximum fee. In addition, the minimum attorney's fee for a bill initially denied and subsequently paid would be increased from \$60.00 to \$80.00, under Section 65-3.10(a). According to proponents, this change will provide "an inducement for the attorney to secure a denial of claim form, which clearly defines the insurers's position." Id.

Section 65-3.10(b) of the proposed new Regulations, changes the method of collecting an additional attorney's fee paid to the applicant's attorney if a dispute is resolved in accordance with any of the optional arbitration procedures and if payment is not made by the insurer within thirty days following such resolution. The existing Regulations provide that in such instances, the fee is payable only after a complaint to the Insurance Department. 11 NYCRR §65.15(i)(22). Section 65-3.10(b) provides for the payment of additional fee after 45 days have elapsed and only after the request has been made to the insurance company rather than the Insurance Department. According to the proponents, "this change should encourage attorneys to attempt to enforce payment of overdue awards and conciliate disputes prior to contacting the Insurance Department." Id.

5. Direct Payments -- Section 65-3.11 of the proposed Regulations would change the existing Regulations, 11 NYCRR §65.15(j)(i), by limiting the assignment of No-Fault benefits to the injured person's licensed health care provider or employer. According to its proponents, this change "will result in coverage for other necessary expenses being limited to out-of-pocket expenses and should reduce abuse by those who have demonstrated an ability to exploit this component of the No-Fault benefit package." Id.

6. Explanation of Benefits -- Section 65-3.17 of the proposed Regulations has been added to require insurers to provide an Explanation of Benefits to the eligible injured

person and that person's attorney. According to its proponents, "while most insurers would likely meet the standard established, there may be some who would not. This advice should provide an effective tool to combat fraud and abuse." Id.

Although the period for public comment on the proposed new Regulations has expired, it is believed that comments and suggestions for changes that have been made by opponents to its provisions are actively being considered by the Insurance Department. It thus remains to be seen whether, in fact, the new Regulations will be enacted in their present form on October 1, 1999. We will, of course, keep you advised of developments in this area as they occur.