

**CONSUMERS UNION**  
**101 TRUMAN AVENUE, YONKERS, NEW YORK 10703 ■ 914 370-2000**

**NEW YORK PUBLIC INTEREST RESEARCH GROUP FUND**  
**107 WASHINGTON AVENUE, ALBANY, NEW YORK 12210 ■ 518 436-0876**

**COMMENTS**  
**REGARDING PROPOSED REVISIONS TO 11 NYCRR 65-4,**  
**INSURANCE REGULATION NO. 68-D**

Consumers Union and NYPIRG urge the Department of Financial Services to amend its proposed revisions to the state's no-fault insurance prompt payment attorney's fees provisions as follows:

- Delete the change that would set the threshold for attorney's fees eligibility to only those instances when a claim is both "denied and overdue," instead of the current, longstanding for eligibility based upon a payment by a carrier being "denied or overdue" [emphasis added]. We believe the proposed language conflicts with Insurance Law section 5106(a).
- Restore a reasonable minimum attorney's fees floor to deter denials of modest claims and leave intact the prospect that reasonable attorney's fees will be available in appropriate cases when an applicant's rights are vindicated.
- Address the emerging trend of preemptive litigation by carriers challenging payment submissions, which in the absence of attorney's fees will result in providers or insureds either defaulting or being forced to defend *pro se*. This carrier tactic will be promoted by the proposed regulations.
- Maintain the proposed, long-overdue increase in the maximum attorney's fees awards.

Consumers Union is the policy and advocacy division of Consumer Reports. NYPIRG is a multi-issue consumer protection organization that has fought to make the auto insurance marketplace fair, affordable and competitive and to ensure that state law and regulations provide reasonable rates of coverage, that claims are handled fairly, and that the "no-fault bargain" lives up to its promise of guaranteeing prompt access to quality medical care for drivers, passengers and pedestrians injured in car crashes.

The "no fault bargain" of the mid 1970s involved a trade off similar to the one hammered out in the Worker's Compensation system: Auto accident victims gave up the right to sue in cases that did not meet a "serious injury" threshold in exchange for "prompt payment" of essential benefits, like lost wages and medical care.

The Legislature backstopped the no-fault system by authorizing insureds or medical providers upon assignment to get attorney's fees if they were improperly denied benefits or if prompt payment was not made. Insurance Law 5106(a) entitles a no-fault claimant to attorney's fees as follows:

§ 5106. Fair claims settlement. (a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss

sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations. [Emphasis added.]

Thus, changing eligibility from being triggered by an overdue payment for a medical costs to the requirement that a claim be both “denied and overdue” appears to conflict with the statute. Moreover, the DFS change of a single word (from “or” to “and”) totally undermines this trade off, as claimants will have lost the right to sue AND will not receive prompt payment. This would seem to offer up the worst of both worlds.

Indeed, the right of a successful claimant to recover reasonable attorney’s fees is the glue that the privately run no-fault system together. Private vindication of no-fault rights is a cornerstone of the statutory scheme. DFS alone cannot possibly oversee the fair administration of millions of claims. DFS simply does not have the resources to conduct an endless number of market conduct surveys and allocate significantly more staff to police the no-fault services marketplace. Private attorneys are critical to hold carriers accountable. They get paid ONLY if they are successful—and thus have no incentive to litigate with little prospect of success—so reasonable fees are an essential element in the no-fault process.

Another troubling, foreseeable result of the proposed regulations will be that low-value claims won’t be paid. For example, a day of lost wages, a small medical bill, a relatively minor bill for a brace, cane, walker, *etc.* may go unpaid because no lawyer will take cases when 20% of the amount recovered won’t cover the legal costs.

In addition, the use of preemptive litigation by carriers must be addressed. Failure to do so will invite carriers to increase their use of affirmative litigation tactics that place injured consumers and health care providers in an untenable position.

A likely consequence of the proposed regulations is that carriers will *increase their use of affirmative litigation*, forcing claimants to either give up their rights or expend out of pocket legal costs to preserve their rights. DFS must pro-actively address this in its proposed regulations.

We believe that the proposed regulations will encourage carriers to simply sit on claims. If the insurer fails to issue a formal denial, the consumer/provider will have no basis for eligibility for attorney’s fees. In an asymmetrical marketplace where nobody gets paid, and nobody can expect to find a lawyer to represent them, the carriers are unaccountable. Worse, providers may begin to drop out of the no-fault system, thereby reducing the quality of care available. The proposed regulations may help resolve the backlog of cases, but would do so by conflicting with the letter of the no-fault statute and subverting the “no-fault bargain” of prompt payment for medical care exchanged for unfettered access to the civil justice system.

Accordingly, Consumers Union and NYPIRG urge you to amend the proposed regulations as set forth above.