

**CONSUMERS UNION**  
**101 TRUMAN AVENUE ■ YONKERS, NEW YORK 10703 ■ 914 370-2000**  
**NEW YORK PUBLIC INTEREST RESEARCH GROUP (NYPIRG)**  
**107 WASHINGTON AVENUE, 2<sup>ND</sup> FLOOR ■ ALBANY, NEW YORK 12210 ■ 518 436-0876**

**TESTIMONY OF CONSUMERS UNION & NYPIRG**  
**before the**  
**NEW YORK STATE SENATE STANDING COMMITTEE ON INSURANCE**  
**regarding**  
**NO-FAULT AUTO INSURANCE FRAUD**  
**April 26, 2011**

Consumers Union, the non-profit publisher of Consumers Reports magazine, and the New York Public Interest Research Group (NYPIRG) submit this testimony for inclusion in the official hearing record.

**Summary of Comments**

For decades auto insurers have complained about “skyrocketing” fraud, citing staged accidents and bogus medical billing as overwhelming problems. The Legislature and the Insurance Department have responded, amending the Insurance Law to require fraud fighting plans, authorizing decertification of “medical mills,” overhauling the state’s no-fault claims regulations to make them among the most restrictive in the nation, and providing state resources for fraud fighting.

Yet periodically—particularly when the investment climate is less hospitable—insurers say that despite best efforts they are stymied by wily fraudsters and laws that shield crooked health care providers, lawyers and alleged victims.

These discussions have been largely driven by industry anecdote and are belied by the profitability of New York’s auto carriers compared to those serving other states. Indeed, New York’s auto insurance companies appear to be quite healthy and profitable according to NAIC data. Moreover, these industry claims of widespread fraud have not been subject to an independent audit nor has the extent of their fraud fighting efforts been publicly examined.

Industry proposals and those contained in S.2816-A to, *inter alia*, change the prompt payment laws, could ultimately hurt policyholders who could lose access to qualified providers, not receive prompt treatment, be forced to pursue payment against carriers, or be stuck with unpaid bills for care received for legitimate injuries. Since prompt payment was part of the No-Fault *quid pro quo* that limited access to the court system, the Legislature must be *extremely careful* about changing this requirement. Further, the Legislature should be skeptical of the industry’s claims that the current system is unfair to them—especially since those claims were rejected by the Court of Appeals in the *Presbyterian* decision.

**Consumers Union and NYPIRG urge that New York should engage an independent actuary to review the claims of auto insurers with respect to the incidence of fraud, the resources they devote to fraud fighting and their profitability before proceeding with new legislation. New York also must implement the law authorizing the closure of fraudulently-run clinics and removal of the licenses of doctors and other healthcare professionals who are shown to be participating in fraud. Moreover it is time for the Legislature to level the playing field by adopting real consumer insurance protections, some of which are set forth below.**

## 1. Insurance industry profits

The bottom line is that carriers claim they are not profitable enough or at all in the New York market. Is this true? Are the fortunes of auto insurers—in a \$10 billion per year captive market (by law New Yorkers are forced to buy minimum auto insurance)—really faring less well in the state than in the past or as compared to other states? If so, is fraud the cause of this disparity?

According to data from the National Association of Insurance Commissioners (NAIC), for 2008 New York auto insurance was overall about as profitable as the national average.<sup>1</sup>

The NAIC 2008 profitability report states that \$9.8 billion in auto premiums were collected in 2008. Losses incurred were at 63.5 cents per premium dollar. The national average was 63.6. The return on net worth for New York for auto insurance was 4.4%; nationally it was 4.5%. Nationally the profit on insurance transactions average was 2.0%; in New York it was 2.1%.

New York's percent of net premiums earned and losses incurred was at 63.5% in 2008—up over the past several years but still lower than 1999 (67.5), 2000 (78.3), 2001 (74.1), and 2002 (71.4). And we remind you that the recently enacted HMO reforms require health insurers to pay out 82 cents of every premium dollar collected – a bar auto insurers have *never* been required to meet, and are not remotely close to.

The data over time suggests that the New York auto insurance situation is good for insurers and that they are crying wolf to push for changes that would make them even more profitable. The NAIC report shows these profits for personal auto insurance over the most recent decade:

### RETURN ON NET WORTH<sup>2</sup>

Year	New York	Nation
1999	6.2%	7.7%
2000	(1.1) %	2.2%
2001	1.0 %	2.0%
2002	0.5 %	4.1%
2003	12.9%	9.4%
2004	18.7%	13.3%
2005	19.8%	11.0%
2006	16.9%	12.1%
2007	9.4%	8.8%
2008	4.4%	4.5%
<b>10-Year Avg.</b>	<b>8.9%</b>	<b>7.5%</b>

<sup>1</sup> National Association of Insurance Commissioners (“NAIC”) *Report on Profitability By Line By State in 2008*. NAIC released its 2009 data in December 2010. NYPIRG has not had an opportunity to review that data.

<sup>2</sup> “The most comprehensive measure of the financial performance of the property/casualty industry is return on shareholder’s equity.” *Insuring Our Future, Report of the Governor’s Advisory Commission on Liability Insurance*, Hugh R. Jones, Chairman, April 7, 1986, p. 61.

As you can readily see, New York has been a more profitable market for auto insurers than the rest of the nation. The ups and downs of New York's auto insurance profits track, generally, the national profit cycle. This begs the question: Are New York's insurers opportunistically using the normal cycle of profits to try to ram through changes that would reduce the rights of the citizens of our state?

These numbers suggest that New York's auto insurers do not face a dramatically different environment than in the recent past, or as compared to other states, and that a carefully targeted approach that focuses on fraud prevention is warranted.

## **2. Where's the evidence of a new-wave fraud crisis?**

The insurance industry has used fraud as the bogeyman to push for various "reforms" for at least the past 15 years.<sup>3</sup> In 1998, no-fault fraud was pegged at about \$1 billion annually. Then-Assembly Insurance Committee Chair Pete Grannis had been pushing the industry to set up fraud fighting ("special investigation") units for years, but was met with stiff resistance by many in the industry and his efforts were blocked.

In the early 2000s, Governor Pataki appointed Attorney General Spitzer to coordinate state no-fault fraud fighting efforts. The local district attorneys, notably Suffolk County and Kings (Brooklyn) were heavily involved. As a result fraud dropped.

In 2005, legislation was enacted to add a new section 5109 to the Insurance Law to authorize the Insurance Department to establish standards and procedures to decertify health care providers to disqualify them from participating in the no-fault system. Apparently no regulations were promulgated nor actions taken under the Pataki, Spitzer or Paterson administrations. Unless this law is fundamentally and fatally flawed, we believe the Cuomo administration should use the current law to carry out its intended purpose.

In 2010 auto insurers renewed their fraud cries saying New Yorkers pay some \$230 million in no-fault fraud each year—notably substantially less than 25% of the claims of fraud made ten years ago. New York City government officials privately indicate that fraud fighting efforts have flagged since the previous successes.

If fraud is central to the insurance industry's argument that current laws need to be changed, this needs to be documented in detail. At this point it's anecdotal. In instances where carriers have raised fraud as a basis for a failure to make prompt payment, how have the courts ruled? Is there a clear trend showing that carriers have been warranted in withholding payment based on fraud concerns?<sup>4</sup>

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<sup>3</sup> Auto fraud rings have been operating in New York since at least the early 1990s. *See 2 Doctors and 9 Lawyers Held in Fraudulent Injury Claims*, Selwyn Raab, *The New York Times*, March 19, 1993. This article notes that in 1991 the Robert Plan complained to the Brooklyn District Attorney's office resulting in what District Attorney Hynes described as a "preliminary investigation of massive frauds of insurance companies in Brooklyn." *Also see The Poor Pay More . . . For Less*, New York City Department of Consumer Affairs, July 1992, p. 75, detailing "rampant fraud" in no-fault medical billing.

<sup>4</sup> We note that the reflexive scorched-earth tactics of carriers has led to rebukes from judges. *See, for example, Allstate Sanctioned on Defense Tactics*, Michael A. Riccardi, *New York Law Journal*, February 17, 2000 (Supreme Court, Nassau

**Consumers Union and NYPIRG recommend that New York engage an independent actuary to review the claims of auto insurers with respect to the incidence of fraud, the resources they devote to fraud fighting and their profitability before proceeding with new legislation or policies.**

Irrespective of whether fraud has increased, are carriers and law enforcement devoting the same level of resources and intensity to fraud fighting as during the years when the state apparently made progress in fraud fighting? Has fraud changed and does it need to be fought in new ways? How would any of the proposals under discussion specifically address and reduce fraud? What are the metrics and timetables for analyzing the success of these efforts—including the data that would be produced? Who will conduct the analyses? Industry? SID?<sup>5</sup>

The Insurance Department's 2009 annual report indicates it has a total of 36 staff investigators for all lines in its Frauds Bureau.<sup>6</sup> Is that a sufficient staffing level if this is indeed a \$200+ million a year problem?

### **3. New York's one-way street for insurers.**

Despite repeated attempts by the Assembly during the Pataki years to enact pro-consumer insurance reforms, it's been a one-way street for auto insurers in terms of getting legislative and regulatory changes.

For example, in 2002, Governor Pataki pushed through changes to the no-fault Regulation 68 that shortened the time an injured driver, passenger or pedestrian had to file a no-fault claim from 90 days to 30 days—the shortest time period in the nation. Reg 68 also reduced the amount of time providers had to file claims, from 180 days to 45 days. A number of other purported “anti-fraud” provisions were contained in Reg 68 as well.

As a result of these Draconian changes, insurance company payouts plummeted. A 2006 study by NYC Controller Bill Thompson found that in 2005, NYS auto insurers were paying out only 48 cents of every premium dollar collected in claims. It is arguable whether Regulation 68 reduced fraud, but it certainly appears to have reduced payouts.

Notwithstanding Comptroller Thompson's Report, in 2008, the state enacted file and use “flex rating” for no-fault, something the industry had long sought and consumer advocates long opposed. The evidence from New York's previous experiment with flex rating for auto insurance was that consumers did not benefit from rate reductions.

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County); *Allstate Concedes Rare Defeat in Bad Faith Action*, Michael A. Riccardi, *New York Law Journal*, March 9, 2001 (Supreme Court, Kings County).

<sup>5</sup> We have real concerns about the independence of the Insurance Department when it comes to policing the insurance industry. These concerns span at least three administrations, dating back to 1995. It appears that every time consumer interests are pitted against the policies that carriers advance, carriers prevail. Moreover, the setting of insurance rates and the oversight of the insurance industry lacks transparency and accountability.

<sup>6</sup> New York State Insurance Department, *151<sup>st</sup> Annual Report of the Superintendent, Calendar Year 2009*, May 14, 2010, p. 128. Accessed at [www.ins.state.ny.us/acrobat/annrpt09.pdf](http://www.ins.state.ny.us/acrobat/annrpt09.pdf).

Yet in 2010 the Legislature and Governor repealed “file and use” for health care, noting that it did not produce lower premiums. The Senate Majority’s news release touted the bill’s passage saying that “. . . the bill will enhance government oversight of the insurance industry and implement structural safeguards to protect consumers.”<sup>7</sup>

Then Senate Insurance Chair Neil Breslin said “It makes them go to the Insurance Department to get approval for rates, as opposed to just filing a rate with the Insurance Department. And unfortunately, sometimes, the insurance companies have shown that they raise them a lot more if they’re left to their own devices.”<sup>8</sup>

Assembly Insurance Chair Joseph Morelle supported the repeal of automatic insurance rate increases for health insurers in an essay for Rochester’s *Democrat & Chronicle* newspaper dated February 7, 2010. In the essay, Assemblymember Morelle noted that

In the years since deregulation prevented the New York State Insurance Department from reviewing proposed premium hikes – a process known as “prior approval” – rates have risen 81 percent, outstripping inflation and increases in real wages.<sup>9</sup>

We believe the arguments made by Chairs Breslin and Morelle in favor of reinstatement of prior approval for health care insurance rate hikes applies with equal force to mandatory auto insurance coverage and that the state should repeal file and use “flex rating” for auto insurance.

At a minimum, the Insurance Department should report back to the Legislature on changes in industry profitability and loss ratios over the last two years that flex rating has been in effect (it started on 1/1/09), and any continuing issues that affect the availability and affordability of auto insurance for particular groups of consumers, such as low-income and minority drivers. With this information in hand, the Legislature should then hold hearings to seek input from all stakeholders, including consumer organizations, to evaluate the flex rating “experiment,” and consider alternative and/or complementary ways to make insurance more affordable for consumers.”

#### **4. Concerns about mandatory arbitration.**

As consumer advocates, we have deep reservations about mandatory arbitration. These are underscored by the role SID has played in its selection, training and oversight of arbitrators. Most disturbing is that SID directed arbitrators to ignore Court of Appeals case law on no-fault cases.<sup>10</sup>

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<sup>7</sup> *Senate Majority Protects New Yorkers From Out-of-Control Health Insurance Premium Rates*, News Release dated June 7, 2010. Accessed at [www.nysenate.gov/print/57456](http://www.nysenate.gov/print/57456).

<sup>8</sup> *New York State Legislature Passes Health Care Cuts*, Kumi Tucker, *WNYT.com*, June 7, 2010. Accessed at <http://wnyt.com/article/Pstories/S1594821.shtml>.

<sup>9</sup> *New York State Should Reinstate Prior Approval on Insurance Premium Increases*, Joe Morelle, *Democrat & Chronicle* Guest Essayist, February 7, 2010. Accessed at <http://assembly.state.ny.us/mem/?ad=132&sh=story&story=35772>.

<sup>10</sup> *Shunning Arbitration of No-Fault Disputes/Identity Theft*, Norman H. Dachs and Jonathan A. Dachs, *New York Law Journal*, January 14, 2003 (citing New York Insurance Department January 11, 2000 letter to arbitrators on no-fault burden of proof).

Arbitration should be improved so that it becomes a more attractive forum, rather than mandated. Safeguards need to be in place to ensure that the arbitration forum is free from bias, follows the law and has some resort to judicial review to maintain the integrity of the forum. Special protections need to be put in place if there is any potential for cases where policyholders—as opposed to assignees of benefits—are involved in arbitration against carriers.

Consumer advocates oppose forcing consumers into mandatory binding arbitration.

## **5. Consumer reforms that should be part of any no-fault reforms**

Consumers Union and NYPIRG have pushed in the past for a number of reforms that would protect consumers, open up the process of insurance regulation, reduce fraud and promote greater competition in the marketplace. These proposals should be part of any discussion of “reforms.”

- Create an Office of Public Insurance Counsel to act as an independent advocate for consumer and small business policyholders. Texas, Florida and Michigan, for example, have public insurance advocate offices that have saved billions of dollars for policyholders in those states. Based on the track record of these offices, we have projected in the past that such an office could save New York consumers at least \$650 million a year.

- Level the playing field between insurers and consumers through a fair claims settlement law. Insurers know that they can play hardball with policyholders, refuse to pay and win the war of attrition. At the end of the day, current New York law only requires insurers to pay what they would have been required to at the beginning of the process—thus there’s typically no financial penalty for these tactics. Other states, such as California, give policyholders a private right of action and allow them to recover fully when insurers unreasonably withhold payment for valid claims.<sup>11</sup>

- Require SID to let New York drivers comparison shop online for auto insurance by comparing prices among carriers providing requested coverage in their area. This would force the marketplace to be competitive and provide consumers with a “one stop” location to consider their options for insurance.

- SID should use its regulatory authority to require insurers to disclose more about their underwriting—through geo-coded statistical data on number of policies in effect, applications received and denied, policies cancelled or terminated, claims filed, claims approved, claims denied and claims paid in dollar amounts.

We appreciate this opportunity to share our perspective on this important consumer protection issue.

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<sup>11</sup> We do not believe the Department has been sufficiently attentive to policing the industry’s claims practices. For examples of unfair claims practices, see *Allstate Sanctioned on Defense Tactics*, Michael A. Riccardi, *New York Law Journal*, February 17, 2000 (Supreme Court, Nassau County); *Allstate Concedes Rare Defeat in Bad Faith Action*, Michael A. Riccardi, *New York Law Journal*, March 9, 2001 (Supreme Court, Kings County). These cases are the exception, however, since New York’s law makes it nearly impossible to bring and prevail on such “bad-faith” claims.