



Dedicated to protecting access to quality healthcare for automobile accident victims

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The proposal to enact NYCCCA 1308 eviscerates longstanding rules of evidence on the often sharply contested issue of the medical necessity of services provided to automobile accident victims. The proposed bill would allow No-Fault carriers to submit the opinion of a paper peer review or IME doctor in the form of an affidavit in lieu of either live testimony or a sworn deposition transcript.

While this may give the illusion of facilitating expeditious adjudication on the merits, in fact, nothing could be further from the truth. The practical effect of the bill is to immunize the insurance company expert testimony from cross-examination. Unlike the doctor plaintiffs that actually treated the accident victim, the insurance company expert witnesses are not subject to the normal discovery process. The trial is the only mechanism where the truth about the slipshod, and sometimes fraudulent, manner in which these biased IMEs and paper peer reviews are generated can be exposed.

New Yorkers for Fair Automobile Insurance Reform strongly opposes the bill enacting Civil Court Act 1308 for a variety of reasons:

- The bill will cost the State of New York tens of millions of dollars by removing a large incentive for plaintiffs or insurance carriers to settle cases—namely the desire to avoid: (1) producing witnesses in court and (2) subjecting those witnesses to cross-examination. Judges will be forced to try more cases—albeit with less witnesses. There will be more trials, but ironically less ability to ferret out the truth.
- The bill will require additional judicial resources by occasioning frequent unnecessary adjournments occasioned by not knowing in advance whether the particular judge will or will not accept the affidavits offered.
- The bill will turn the civil courts into an arbitration type forum where judges will be required to resolve sharply contested factual disputes regarding medical necessity without the insight that can only come

- from the ability to evaluate the credibility of the witnesses under rigorous cross-examination.
- The vast majority of No-Fault claims are denied on the recommendation of a paper peer review doctor who reviews some portion of the patient's treatment records and then makes a recommendation regarding payment. Cross-examination of these doctors has revealed:
 - Opinions denying payment made after an incomplete review of the patient's treatment history.
 - The so-called "medical authorities" relied upon by the peer doctors do not stand for the proposition for which they are cited.
 - Much of the text of the peer report is generated, not by the doctor, but by the peer review company retained by the carrier.
 - Peer review doctors who have little or no actual experience with the underlying services.
 - Medical examination "benefit cut offs" made after a cursory examination without any review of the patient's treatment records and medical history.
 - The bill does not require prior disclosure of the affidavits, and the acceptances of the "surprise" affidavit is entirely up the vicissitudes of the judge hearing the case.

Insurance carriers are currently required to fund American Arbitration Association's No-Fault arbitration process to the tune of more than \$500.00 a filing. This bill would shield the carrier from the tough scrutiny of a trial and reward the carrier with the benefits of arbitration, all without having to bear the costs.

It is claimed that this bill is needed to avoid a time consuming and unnecessary requirement that the court sit through live expert testimony. This is simply not true. CPLR 3117(a)(4) already provides an efficient mechanism that allows a deposition transcript to be admitted into evidence provided the adverse party was given an opportunity to cross-examine. The testing of witness testimony in the crucible of cross-examination has been recognized for centuries as a powerful tool for discovering the truth. There is no reason to abandon this tool in favor of insurance carriers or their hired gun experts, at the expense of accident victims and their health care providers.

We urge the Legislature to reject this gross over-reaching, and defend one of the most fundamental rights in American jurisprudence: the right to examine the adversary's expert.

Sincerely,

Stuart M. Israel

President

NYFAIR New Yorkers for Fair Automobile Insurance Reform