NEW YORKERS FOR FAIR AUTOMOBILE INSURANCE REFORM • NYFAIR

Dedicated to protecting access to quality healthcare for automobile accident victims

Memorandum on Program Bill #288

NYFAIR is opposed to the following provisions of Program Bill #288:

1. Elimination of preclusion as a penalty for the failure of an insurer to timely notify a claimant of the reason for withholding payment of a claim.

2. Mandate of arbitration of No-Fault disputes where the amount in dispute is five thousand dollars or less.

3. NYFAIR opposes these changes to Insurance Law 5109, as drafted: Amendment of Insurance Law 5109 to vest solely in the Insurance Department the power to levy fines up to $50,000 and "decertify" providers from being paid for treating automobile accident victims; removal of the requirement that the decertification process be governed by regulations drafted in consultation with the Departments of Health and Education; elimination of any objective statement as to what minimal due process protections must exist; and the gross expansion of the basis for decertification to include rendering "unnecessary" services, or violating any provision of Article 51 or the regulations promulgated hereunder.

NYFAIR supports the following provisions:

1. Elimination of the collateral estoppel effect of No-Fault arbitration decisions on personal injury tort claims.

Preclusion:

The Preclusion Rule was designed to discourage "dilatory practices" and ensure that claims are processed promptly, thereby furthering the primary goal of the No-Fault system: Prompt reimbursement for economic loss, including payment of medical bills. The No-Fault Regulations give insurers several procedural rights and requirements. Program Bill #288 would permit insurers to indefinitely delay compliance and belatedly deny claims even though they failed to follow the procedural timelines set forth in the law. New defenses could be raised at any time, even on the eve of trial or arbitration.

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The statement in the Memorandum accompanying the Program Bill that an insurer that does not deny a claim within 30 days is precluded from asserting a defense to payment based on fraud and must pay that claim is misleading and simply untrue. Every insurer can extend the 30 day period for the payment of claims by merely requesting information, or asking the claimant or her doctor to appear for an examination under oath. Each request "stops the clock" until the information is provided. Once provided, if necessary, the insurer can ask for more information, or the examination of other people. As long as the insurer has good cause, this process can be repeated without limit. Furthermore, the failure to comply with the 30 day rule, or to timely initiate an investigation, DOES NOT preclude an insurer from asserting a defense – asserted AT ANY TIME – that the medical provider was fraudulently licensed, that the underlying accident was a staged event, that the injuries claimed were fraudulent, or that the insurance policy was fraudulently procured.

Furthermore, the proposed legislation is not limited to fraudulent claims, or newly discovered information. Instead, it allows insurers to raise new defenses unrelated to fraud, against honest claimants with legitimate claims. Thus, insurers will have no meaningful disincentive against raising any reason--at any time--for withholding payment on valid claims. The insurer should be required to inform the accident victim why the claim is not being paid. This right is afforded those seeking benefit under a homeowner's policies pursuant to Ins. Law § 3420(d). Accident victims, already stripped of the right to seek compensation for pain and suffering, should not have less rights than those seeking other insurance coverage.

The mere accrual of interest is insufficient to ensure prompt action. Before the implementation of preclusion, it was not unusual for it to take six, seven or eight months for a carrier to act on a claim. Sometimes it took years. Today, over 97 percent of claims are handled in a timely manner. For fourteen years, the Preclusion Rule has ensured that No-Fault claims are processed promptly while still permitting carriers to investigate questionable claims. On balance, the rule does much more good than harm. It should not be abandoned in the wholesale manner proposed. Program Bill #288 should not be enacted as drafted.

NYFAIR could support a limited preclusion narrowing tailored to address the real concern, without wholly eliminating preclusion, the only effective safeguard claimants have to ensure claims are processed on time.

NYFAIR's suggestion: An exception to preclusion for subsequently discovered evidence that the services were not rendered or were billed outside of the allowable fee schedule. To discourage opportunistic assertion of meritless defenses, there should be an enhanced penalty to discourage carriers from asserting baseless defenses in an effort to skirt the 30 day rule.

Mandatory Arbitration:

Simply, there is not even the allegation in the Program Bill, or its supporting Memorandum, that mandating arbitration will have any effect whatsoever on fraud. This is because, logically, no such justification exists. It is fundamentally wrong to take away the right to access the court without even the postulation of a societal good that will result there from.

Consumers already gave up the right to sue (in non-serious injury cases) in exchange for the right to receive swift and certain compensation regardless of fault. This proposal takes away the right to sue to obtain benefits wrongfully denied, which was an integral part of the original no-fault covenant.

Mandatory arbitration means no discovery, no rules of evidence, and no clearly defined legal standards. Without the rules of evidence, unreliable information is received and cannot be challenged by cross-examination. But perhaps most important of all, it means no development of case law that serves to define legal rights and duties and provides a framework of *stare decisis* to guide insurers and claimants.

Mandating arbitration for disputes below a dollar threshold is not a legitimate solution. The vast majority of disputes fall far below any reasonable cost threshold. Additionally, the amount in dispute bears no relation to the complexity of the issue is dispute, the need for discovery, the desire to have the presentation of evidence subject to the traditional rules of evidence, or the importance of the claim to the injured person or her doctor. Arbitration is a paper trial, and some disputes require real trials, regardless of the dollar value.

For many years, arbitration was the forum of choice. In the last 10 years, many have eschewed arbitration in favor of litigation. Legal commentators have attributed the flight from arbitration to Insurance Department correspondence and informal opinion letters that encouraged arbitrators to disregard decisional law.

It is difficult to imagine a fair vision of the world where it would be acceptable for the White House or the Governor's Office to direct judges as to which laws should be ignored or how cases should be decided. But that is exactly what happens in No-Fault arbitrations. An agency whose role is primarily executive (setting the rules), invades and usurps the judicial (resolving disputes) functions that should be absolutely separate. There should be a firewall between the SID's executive function of making law and judicial function of resolving disputes. Instead, SID has a long history of crossing that line, almost universally to enhance the rights of carriers and restrict the rights of claimants.

Indeed, during a June 4, 2001 hearing before the Assembly Insurance Committee, then Chairperson Alexander "Pete" Grannis observed that it was "inappropriate" for the Insurance Department to have sent letters to Master Arbitrators that expressed disagreement with specific decisions and reminding the arbitrators that they "serve at the pleasure of the Superintendent." (Tr. 64, 6/4/01, NYS Assembly Hearing).

The Superintendent of Insurance has near complete control over the arbitration process, including the hiring and firing of arbitrators, and the establishment of procedures of the organization administering the arbitration process. For good reason, the Founding Fathers established a separation of powers between the Executive and Judicial branches of government. Arbitrators hearing No-Fault disputes are essentially performing a judicial function and they should be free to decide disputes without the threat of removal by the Governor's appointee merely for following the law.

NYFAIR believes that claimants should have voluntary access to an arbitration forum that is efficient, fair, and free from the overt control of an agency that has much more contact with insurers than it does with health care providers and accident victims. Rather than force claimants into a system that is perceived as unfair and subject to outside influences, NYFAIR believes that the arbitration system should be reformed so that it once again becomes the forum of choice. Market forces will lead to greater utilization.

To accomplish this, the training, hiring and firing of arbitrators should be delegated entirely to the designated arbitration entity. To our knowledge, the New York No-Fault Arbitration forum is the only AAA administered forum where a governmental agency has a role in the selection of arbitrators. AAA and other independent alternate dispute forums are quite capable of independently handling complex international disputes, and there is no reason to believe that they will be unable to fairly adjudicate disputes between claimants and insurers. In New Jersey, the National Arbitration Forum has complete control over the training, hiring and firing of arbitrators, subject only to minimal experience requirements established by regulation. In Minnesota, arbitrators are prescreened by the Minnesota No-Fault Standing Committee, and approved by the judiciary. The American Arbitration Association provides the initial training of arbitrators, and subsequent certification is made through the State Bar Association. NYFAIR suggests that removal of Insurance Department control will go a long way towards eliminating the perception that the arbitration forum is unfair, leading to greater utilization of the forum.

NYFAIR also suggests that arbitrators be required to follow substantive law. Additionally, the grounds for appeal to a master arbitrator should be expanded to mirror the level of review that our appellate court's employ, including the power to make factual findings, and appeals should be orally argued before a panel of three master arbitrators. Out of simple fairness, the right to a *de novo* trial of a master arbitration award above five thousand dollars should be eliminated.

Applicants should have the option to obtain information and documents from the carrier prior to filing for arbitration. Currently, discovery is permitted in arbitration only upon a showing of "special circumstances." The No-Fault insurer has broad powers to obtain documents and information during the claims process. A claimant has no concurrent right. Frequently the very evidence needed to undermine the insurer's position is solely in the insurer's No-Fault file. Probative evidence such as examination scheduling letters that were returned as undeliverable, or medical records documenting the need for continued treatment, are withheld from claimants. It would not be unduly burdensome to

require insurers to make their No-Fault file available for copying and inspection prior to the filing of a demand for arbitration. Availability of these documents may avoid the filing of unnecessary arbitrations, and will ensure that arbitrators are presented with all the relevant evidence, and not only the evidence that favors the insurer's position.

The Fining and Decertification of Providers:

While we agree with the intent of the proposed legislation to curb abuses in the No-Fault system, we have several concerns with the legislation as currently crafted.

First, the proposed legislation has significantly less due process protections than presently in effect. The current 5109 required the Superintendent of Insurance (working in consultation with the Commissioners of Health and Education) to promulgate, via regulation, standards for investigating and suspending or removing the authorization to request payment for services rendered to automobile accident victims. The proposed bill does not even require the promulgation of any regulations, nor does it require the establishment of any standards whatsoever.

The current 5109 required the same or greater due process provisions as those afforded physicians investigated under Article Two of the Workers' Compensation laws and the regulations promulgated thereunder. The proposed bill requires only that the Superintendent's determination be made "after notice and hearing." There is no public policy rationale why physicians treating patients injured in auto accidents should be afforded less due process protections than those who treat injured workers.

Second, by expanding the list of punishable offenses to include medical necessity disputes, it penalizes with finality what may only be a legitimate disagreement of professional opinion. These kinds of disputes occur every day and are often motivated by a carrier's desire to avoid payment. A provider should not be subject to a $50,000 fine and loss of his practice because another provider hired by the carrier disagrees with his treatment decisions.

Third, Program Bill 288 adds a vague catch-all section that permits punishment if a provider violated any provision of the Insurance Law Article 51, or regulations promulgated thereunder. This fails to provide notice of what behavior is subject to sanction. We suggested that the specific conduct to be prohibited be spelled out.

Fourth, we are most concerned whether the Insurance Department, an administrative agency charged with the regulation of insurance carriers, is in the best position to sit in judgment of the State's health care providers. We are concerned that the Insurance Department may be far more sympathetic to the insurance carriers that it interacts with on a daily basis, than the providers charged with the responsibility for the treatment and rehabilitation of automobile accident victims.

Five years ago, the legislature enacted a law requiring the Insurance Department to promulgate regulations creating procedures to disqualify health care providers from the No-Fault system. The Insurance Department never promulgated the regulations. Given that the Insurance Department has failed to act, we suggest that Insurance Law 5109 be amended to vest such authority in the agencies in the best position to police health care professionals, the Departments of Health and Education. Each agency has pre-existing structures for the conduction of hearings, is familiar with the regulation of health care professionals, and already has the power to censure, suspend or strip professionals of their licenses. In contrast, the Insurance Department has no formal mechanism to investigate or adjudicate such charges. Additionally, it makes little sense to suspend a health care provider from the No-Fault system, but still allow that provider to treat all other patients. Consolidating such power in the agencies with supervisory power over the respective professions is both logical and efficient, and it has far greater potential to protect the public welfare.

Finally, if decertification legislation is enacted, such procedures for hearings adopted thereto must be the sole forum to determine proper licensure. It is untenable to have profit-interested insurers performing "investigations" into licensure on behalf of the SID or any other governmental body. Rather, such investigation must be performed by independent, impartial means and verifiable due process procedures. NYFAIR could support such decertification legislation enacted in accordance with the suggestions herein.