Dedicated to protecting access to quality healthcare for automobile accident victims

March 26, 2010

GEICO has proposed a bill that eviscerates longstanding rules of evidence. It would require a plaintiff seeking No-Fault benefits to submit an affidavit containing factual statements that are not currently part of the plaintiff's prima facie case. The proposed bill also allows 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 being even-handed, in fact nothing could be further from the truth. The self-serving purpose of the bill is not, as GEICO claims, to avoid having to produce the witness in court. The true agenda is to immunize the insurer's witness from cross-examination. Their hired expert witnesses are not subject to the normal discovery process and 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 and the storage and efficient recall of thousands of otherwise unnecessary documents. The bill creates a "paper chase" that masquerades as an adversarial process.
- 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

11 Grace Avenue, Suite 111 • Great Neck, NY 11021
tel. 516-829-0363 • fax. 516-829-0366
info@newyorkfair.org • www.newyorkfair.org
Stuart M. Israel, President

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 prevents the plaintiff from producing a live witness either as part of its case, or in rebuttal to challenge the carrier's case.
- The bill places a new burden on claimants by requiring the actual provider to submit an affidavit, and then requiring <u>that</u> individual to appear, at the judge's discretion and without any prior notice. For example, the plaintiff professional corporation would be required to produce an affidavit from each physical therapist who provided any treatment, and each would then have to be "on call" to offer testimony without any prior notice. These requirements apply even if the therapist is unavailable due to death, sickness, or change of employment.
- In contrast, the bill allows the carrier to produce the affidavit of anyone it chooses.

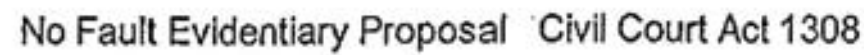
Insurance carriers are currently required to fund American Arbitration Association's No-Fault arbitration process to the tune of more than $500.00 a filing. This bill would shield the carrier from the tough scrutiny of a trial and reward the carrier with the benefits of arbitration, all without having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

GEICO asserts that this bill is needed to avoid what it claims is a costly and unnecessary requirement that it produce the testimony of live doctors to justify its refusal to pay benefits. 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



No Fault Evidentiary Proposal Civil Court Act 1308

Section 1: Medical proof in no-fault actions. A party who initiates an action for money, exclusive of interest and costs and attorney fees, which seeks reimbursement for medical treatment, testing, or supplies pursuant to section 5106 of the insurance law, shall at trial, submit the sworn statement of the licensed medical professional that rendered, prescribed or ordered the medical treatment on the issue(s) of medical necessity or a sworn statement from a representative that the claimed services had been billed in accordance with the workers compensation fee schedule pursuant to section 5108 of the insurance law.

The licensed medical professional shall affirm that no-fault benefits were duly assigned to the plaintiff, the claimed treatment, testing or supplies were rendered, prescribed or ordered by the plaintiff, medically necessary to treat accident related injuries and shall include the material facts and documents upon which the opinion of medical necessity was based; or, the representative shall include the relevant sections of the fee schedule and the material facts and documents that support the claimed services were billed in accordance with the fee schedule. Submission of such sworn statement does not create a presumption of medical necessity or provide greater deference to the treating medical professional or adherence to the fee schedule.

A party opposing said action may submit a sworn statement on the issue(s) of medical necessity or that the claimed services were not billed in accordance with the workers compensation fee schedule pursuant to section 5108 of the Insurance law. Such statement shall include the material facts and/or documents upon which that opinion was based.

A copy of the sworn statement(s) shall be furnished to all parties no later than the time the statement is submitted to the court. The sworn statement shall be accepted by the court in lieu of testimony unless, after submission of the sworn statement, the court determines that it wishes to hear testimony wherein the court shall then direct that all parties submitting a sworn statement shall have that person appear and testify in person.

This act shall take effect immediately and shall apply to all actions and proceedings commenced on or after such date and shall also apply to any action or proceeding which was commenced prior to such effective date where, as of such date, either (a) a trial of the issues has not yet commenced, or (b) the parties have not yet entered into a stipulation of settlement. This act shall expire December 31, 2016.