



Dedicated to protecting access to quality healthcare for automobile accident victims

March 28, 2011

Last winter the Insurance Industry, with the strong support of the Insurance Department, lobbied the State Legislature to change the laws governing the payment of No-Fault benefits. Crafted to benefit the Insurer to the detriment of the accident victim and her health care providers, these proposals included:

- Mandatory Arbitration for all claims under \$5,000.
- Increased Burden of Proof to require every provider to demonstrate they are properly licensed, the services were rendered, necessary, assigned and the bill mailed to the carrier.
- Preventing accident victims from assigning their claims to their doctors where the carrier asserts that there has been a policy violation. Provider assignees could not challenge the carrier's decision. Instead, the patient would be responsible for paying the doctor out of her own pocket. If the patient wanted to challenge the carrier, she would have to find her own lawyer.
- Elimination of the 30 day preclusion penalty; allow carriers to assert new reasons to deny payment at any time.
- Treatment Guidelines as the standard of care for auto accident victims.
- Insurance Department (not the Health Department or the Education Department) authority to "decertify" Providers from billing and collecting no-fault benefits. This decertification could occur if the provider engaged in a pattern of billing for unnecessary services, and would have retroactive effect for services provided but not yet paid.

In response, from February through June, the Senate and Assembly Insurance Committee conducted a series of joint meetings focused exclusively on "reform" of the No-Fault laws. Representative of the Insurance Industry, the Medical Society of the State of New York, the New York State Trial Lawyers Association, the Academy of Trial Lawyers, and New Yorkers for Fair Automobile Insurance Reform (NYFAIR) participated in the long and often heated debate. Throughout this process, while the Insurance Industry pushed its self-serving agenda aimed at maximizing profits, NYFAIR urged a fair and balanced approach that would address the legitimate concerns of the Industry while protecting accident victims' access to benefits, including access to quality healthcare.

COMPROMISE LEGISLATION:

On June 30, 2010, Assemblyman Joseph Morelle, the chair of the Assembly Insurance Committee, and Senator Neil Breslin, the chair of the Senate Insurance Committee, introduced the Automobile Fraud Prevention Act of 2010. (A11596/S8414) Despite

tremendous pressure from the Insurance Department, and the Insurance Industry, the joint bill did NOT mandate arbitration as the sole forum to challenge the denial of insurance benefits.

If enacted as drafted, the act would have:

- Preserved access to the courthouse as a possible forum for challenging denials of benefits.
- Required arbitrators hearing No-Fault disputes to follow and apply substantive law, and expanded master arbitrator review to include factual, legal and procedural errors.
- Enacted a limited rollback of the preclusion rule from Presbyterian Hospital in City of New York v. Maryland Cas. Co., 90 N.Y.2d 274 (1997), by overruling the Court of Appeals decision in Fair Price Medical Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556 (2008) to allow insurers to present evidence that the services or items billed for in a claim were not provided, even if this defense was not raised in a timely manner.
- Permitted insurers to present evidence that the services or items billed for in a claim exceeded the permissible charges, even if this defense was not raised in a timely manner.
- Extended by an additional 60 days the time for insurers to deny claims based upon lack of medical necessity.
- Required medical necessity denials to be based upon a review by a licensed provider who typically diagnoses and provides treatment for the condition under review.
- Required carriers to release a copy of the medical reviewer's report to the claimant, the claimant's attorney and the claimant's treating health care provider.
- Overruled Roggio v. Nationwide Mut. Ins. Co., 66 N.Y.2d 260 (1985) by removing the prohibition against seeking resolution of different disputes arising from the same accident in different forums (arbitration and the courthouse).
- Eliminated the collateral estoppel effect of arbitration decisions unrelated to the existence of insurance coverage on personal injury tort actions.
- Required the claimant to establish its prima facie case by submitting a verification establishing: that the claimant was licensed; the services were provided, medically necessary or supported by a prescription; an assignment was made; and the claimant authorized the particular attorney or law firm to commence the proceeding.
- Reduced certain evidentiary hurdles that made it difficult to admit documents into evidence, establish mailing, establish payments were made, and provide that the reports of the claimant's treating provider are admissible.
- Allowed for the use of deposition testimony without a showing of unavailability so long as the adverse party was afforded an opportunity to appear and participate at the deposition.

The Automobile Fraud Prevention Act of 2010 was not enacted before the legislative session ended in June. On March 11, 2011, it was re-introduced by Chairman Morelle and Senator Breslin as the Automobile Fraud Prevention Act of 2011, A3787/S3444.

http://assembly.state.ny.us/leg/?default_fld=&bn=A03787%09%09&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y

BACK TO SQUARE ONE:

Apparently the reforms contained in A3787/S3444 are not enough for the insatiable appetite of the Insurance Industry. With the start of another session, we once again hear the Industry's call for reform. Citing exaggerated "statistics" about fraudulent claims, the Industry is urging a series of changes that will have the net effect of making it as difficult as possible to collect any benefits the carrier does not pay voluntarily.

THE NEW REGULATIONS:

The Insurance Department appears poised to enact new regulations that are decidedly pro-carrier and anti-claimant. Although riddled with traps and pitfalls for accident victims and their health care providers, the regulations expand loopholes that will permit carriers to more easily avoid the payment of legitimate claims. Comments to these proposals are due April 6, 2011. In our experience, the Department absolutely evaluates the number and substance of the comments it receives as a gauge of public response to the proposals. Failure to provide numerous and forceful comments forfeits an opportunity to influence the final outcome. You can be sure the carriers are all weighing in. We cannot permit their voice to go unopposed.

THE INDUSTRY'S AGENDA:

Alarming, Assemblyman Morelle, Chair of the Assembly Insurance Committee, (the sponsor of A3787/S3444) has introduced A06286, a veritable Insurance Industry "wish list" of anti-consumer legislation. A copy is available for review at http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A06286%09%09&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y Republican Senator James Seward, Chair of the Senate Insurance Committee, has introduced a similarly horrendous bill. S02816 <http://open.nysenate.gov/legislation/bill/S2816-2011#>

If enacted, these bills would:

- Completely overrule Presbyterian and allow carriers to come up with new reasons to avoid payment at any time.
- Shift the burden of proving medical necessity to the applicant.
- Prevent aggrieved accident victims and their doctors from seeking justice at the courthouse. All disputes must be submitted to an arbitration forum under the control of the Department.
- Place unconscionable limits on the assignment of claims.
- Establish Treatment Guidelines.
- Allow the Superintendent of Insurance the exclusive power to "decertify" providers from treating automobile accident victims.

You may not realize this, but your clients and their patients are under attack by a well funded and well mobilized Insurance Industry. The Insurance Industry has managed to win the hearts and minds of the Department, and many in the legislature. Citing exaggerated claims of fraud, they are pushing for self-serving changes that will have a

devastating impact on the ability of honest accident victims to get access to quality health care.

THEIR MESSAGE CANNOT GO UNANSWERED

There can be meaningful reform of the No-Fault law that will address the legitimate concerns of the Insurance Industry, while allowing accident victims access to the insurance benefits they need, deserve, and paid for. But it will not happen on its own. We need your help. We need members to develop position statements on the various Industry proposals, to meet with policy makers and elected officials, and to provide financial support. Please provide your financial support by returning the attached form along with a donation consistent with the scope of your involvement with No-Fault, and let us know how you can help. This may be your last opportunity.



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To join New Yorkers for Fair Automobile Insurance Reform and express your concern about the regulatory and legislative changes to the No-Fault system currently being considered in Albany, please complete this form and return it along with your donations to:

New Yorkers for Fair Automobile Insurance Reform
11 Grace Avenue, Suite 111
Great Neck, NY 11021

First Name: _____ Last Name: _____

Generic Title (e.g., Health Care Provider, Concerned Citizen, Former Accident Victim, Lawyer, Representative of a Professional Association):

Email address: _____

Street Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ Fax: _____

I would like to help by providing the following:

My Donation of: \$5,000 \$1,000 \$500 \$250 \$100 \$: _____ is enclosed.

Other assistance I can provide:

Contributions or gifts to NYFAIR are not tax deductible as charitable contributions

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