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INSURANCE DEPARTMENT  
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**Circular Letter No. 4 (2011)**  
**January 12, 2011**

**TO: All Authorized Insurers Writing Motor Vehicle Insurance in New York State, Motor Vehicle Self-Insurers, and the Motor Vehicle Accident Indemnification Corporation (Collectively, “No-Fault Insurers”); All Insurers Authorized to Write Accident and Health Insurance in New York State, Article 43 Corporations, Municipal Cooperative Health Benefit Plans, and Health Maintenance Organizations (Collectively, “Health Insurers”); Rate Service Organizations; and the New York Automobile Insurance Plan**

**RE: No-Fault Intoxication Coverage; Chapter 303 of the Laws of 2010**

**STATUTORY REFERENCES: Insurance Law §§ 3216(d)(1)(G), 3216(d)(2)(J) & (K), 3221(a)(9), 3221(c), 4305(l), 4306(n), and 5103(b)(2); 11 NYCRR 52 (Regulation 62) and 11 NYCRR 65 (Regulation 68)**

The purpose of this Circular Letter is to advise no-fault insurers and health insurers: (1) of the recent enactment of Chapter 303 of the Laws of 2010 (“Chapter 303”), which amends Insurance Law § 5103(b)(2) and takes effect on January 26, 2011; and (2) that the Insurance Department, accordingly, is amending the mandatory personal injury protection endorsement set forth in § 65-1.1(d) of 11 NYCRR 65-1 (Regulation 68-A), the mandatory additional personal injury protection endorsement set forth in 11 NYCRR § 65.1-3(c), and the list of permissible exclusions for self-insurers set forth in § 65-2.3(j) of 11 NYCRR 65-2 (Regulation 68-B).

Article 51 of the Insurance Law (otherwise known as the “no-fault insurance law”) mandates that every motor vehicle owner’s liability insurance policy issued in satisfaction of the requirements of N.Y. Vehicle and Traffic Law Article 6 or 8 provide coverage for “basic economic loss,” including medical and health expenses, lost earnings, and certain other reasonable and necessary expenses, up to \$50,000 per person, for individuals who sustain injuries arising out of the use or operation of a motor vehicle in New York State.

Currently, Insurance Law § 5103(b)(2) permits a no-fault insurer to exclude from no-fault insurance coverage a person who is injured as a result of operating a motor vehicle while in an intoxicated condition or while the person's ability to operate the vehicle is impaired by the use of a drug within the meaning of Vehicle and Traffic Law § 1192.<sup>1</sup> This permissible exclusion is set forth in the mandatory personal injury protection endorsement in 11 NYCRR § 65-1.1(d), the mandatory additional personal injury protection endorsement in 11 NYCRR § 65.1-3(c), and the list of permissible exclusions for self-insurers in 11 NYCRR § 65-2.3(j). However, § 65-3.14(b)(1) of 11 NYCRR 65-3 (Regulation 68-C) states that a no-fault insurer only may exclude a person from coverage if the intoxicated or drugged condition was a contributing cause of the accident causing the injuries.

Chapter 303 amended Insurance Law § 5103(b)(2) to prohibit a no-fault insurer from excluding from coverage necessary emergency health services rendered in a general hospital (as defined in Public Health Law § 2801(10)<sup>2</sup>), including ambulance services attendant thereto and

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<sup>1</sup> Vehicle and Traffic Law § 1192 sets forth definitions for operating a motor vehicle while under the influence of alcohol or drugs and states in relevant part as follows:

1. Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol.
2. Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva made pursuant to the provisions of section eleven hundred ninety-four of this article.
3. Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition.
4. Driving while ability impaired by drugs. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.
- 4-a. Driving while ability impaired by the combined influence of drugs or alcohol and drug or drugs. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs.

<sup>2</sup> Public Health Law § 2801(10) defines "general hospital" as:

a hospital engaged in providing medical or medical and surgical services primarily to in-patients by or under the supervision of a physician on a twenty-four hour basis with provisions for admission or treatment of persons in need of emergency care and with an organized medical staff and nursing service, including facilities providing services relating to particular diseases, injuries, conditions or deformities. The term general hospital shall not include a residential health care facility, public health center, diagnostic center, treatment center, out-patient lodge, dispensary and laboratory or central service facility serving more than one institution.

related medical screening, for any person who is injured as a result of operating a motor vehicle while in an intoxicated condition or while the person's ability to operate the vehicle is impaired by the use of a drug within the meaning of Vehicle and Traffic Law § 1192. The amendment permits a no-fault insurer to maintain a cause of action against the covered person for the amount of first party benefits paid or payable on behalf of the covered person if such person is found to have violated Vehicle and Traffic Law § 1192.

For the purposes of compliance with Chapter 303, the Department interprets "necessary emergency health services" to mean services rendered to a person by or under the supervision of a physician, paramedic, or emergency medical technician to treat the onset of sudden pain or injury and to stabilize the person, provided the person is transported directly from the scene of the motor vehicle accident to the general hospital. Pursuant to this interpretation, once the sudden pain or injury is treated and the person is stabilized, (generally in the emergency room) the no-fault insurance coverage ceases. In order to facilitate timely payment, a hospital should specify what portion of the bill consists of "necessary emergency health services." If the hospital does not specify what portion consists of "necessary emergency health services," then a no-fault insurer may request this information.

Further, the bill's sponsor's memorandum in support notes that because health service providers "are sometimes not compensated for services they are required to render to stabilize their patients in emergency situations," health service providers "avoid blood alcohol and other tests for intoxication or drug use for fear they will lead to denial of compensation." As a result, the Department interprets "related medical screening" to include tests for intoxication or drug use as a necessary emergency health service.

Chapter 303 further amends Insurance Law § 5103(b)(2) to permit a no-fault insurer to maintain a cause of action against the covered person for the amount of first-party benefits paid or payable on behalf of the person where the covered person is found to have violated Vehicle and Traffic Law § 1192. While Chapter 303 does not specify who is responsible for determining that the covered person violated this section or what constitutes a violation, the bill's memorandum in support states in the summary of specific provisions that the bill "also permits insurers to recover payments that they have made for these services from the individual in the event he or she is found guilty of a DWI or DUI offense." Based on this language, the Department believes that it was the Legislature's intent that, before a no-fault insurer has a cause of action against a covered person, a court of competent jurisdiction first must find the covered person guilty of driving while intoxicated or driving while under the influence. In addition, the finding of guilt must be a final decision. A decision is not final until any subsequent appeals are resolved.

As stated previously, 11 NYCRR § 65-3.14(b)(1) states that a no-fault insurer only may exclude a person from coverage if the intoxicated or drugged condition was a contributing cause of the accident causing the injuries. The Department does not construe the amendment in Chapter 303 to provide a no-fault insurer with a cause of action against a covered person who violates Vehicle and Traffic Law § 1192 without regard to whether the intoxicated or drugged condition was a contributing cause of the accident, such as where an insured's vehicle is hit while properly stopped at a stop sign or red light. Therefore, a no-fault insurer may not recover

the benefits paid or payable on behalf of a covered person if the intoxicated or impaired condition was not a contributing cause of the injuries.

Section 52.16(c)(8) of 11 NYCRR 52 (Regulation 62) provides, in part, that a health insurance policy may limit or exclude benefits to the extent provided for any loss or portion thereof for which mandatory automobile no-fault benefits are recovered or recoverable. If a no-fault insurer brings an action against a covered person and receives a judgment to recover no-fault benefits paid on behalf of the person, then the person's health insurer may be responsible for the person's necessary emergency health services rendered in a general hospital, because no-fault insurance benefits would no longer be "recovered or recoverable." A no-fault insurer may, with the written consent of the insured, seek recovery directly from the insured's health insurer.<sup>3</sup> Moreover, Insurance Law § 3216(d)(2)(K) permits an individual accident and health insurance policy delivered or issued for delivery in New York by a commercial insurer to set forth an exclusion "for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician." Further, Insurance Law § 3216(d)(2)(J) similarly permits an exclusion "for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony." Insurance Law § 3221(c) makes both of these exclusions applicable to group policies issued by commercial insurers. However, the Insurance Law does not set forth comparable statutory exclusions for corporations licensed pursuant to Article 43 of the Insurance Law, municipal cooperative health benefit plans issued a certificate of authority pursuant to Article 47 of the Insurance Law, or for health maintenance organizations ("HMOs"). Other exclusions relevant to health insurers may apply. See, e.g., 11 NYCRR § 52.16(c)(4)(i), which provides, in part, that a health insurance policy may limit or exclude coverage for treatment arising out of participation in a felony.

Any health insurer that does not have an exclusion for intoxication or drug impairment in its policies, or any other exclusion that may apply, should accept proof of a person's claim for necessary emergency health services rendered in a general hospital (including ambulance services attendant thereto and related medical screening) that the person furnishes as soon as reasonably possible consistent with Insurance Law §§ 3216(d)(1)(G),<sup>4</sup> 3221(a)(9), 4305(l), and 4306(n).<sup>5</sup> The Department would not consider it reasonably possible for the covered person to furnish proof of loss until the no-fault insurer receives a final judgment.

Further, Insurance Law § 5103(b)(3) permits a no-fault insurer to exclude from no-fault coverage any person who is injured while committing an act that would constitute a felony. Although a violation of Vehicle and Traffic Law § 1192 could constitute a felony in certain instances, the Department construes Chapter 303 to require no-fault coverage if the only act that the person committed that constitutes a felony was operating a motor vehicle while in an

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<sup>3</sup> If an insured's health insurance policy or contract precludes assignment of benefits, then the insured may seek recovery directly from the insured's health insurer.

<sup>4</sup> Unlike Insurance Law §§ 3221(a)(9), 4305(l), and 4306(n), Insurance Law § 3216(d)(1)(G) requires that a person furnish the proof as soon as reasonably possible but in no event later than one year from the time that proof is otherwise required, except in the absence of legal capacity.

<sup>5</sup> The amendments made to Insurance Law §§ 3216(d)(1)(G) and 3221(a)(9) by Chapter 239 of the Laws of 2009, and Insurance Law §§ 4305(l) and 4306(n), as added by Chapter 239, take effect January 1, 2011.

intoxicated condition or while the person's ability to operate the vehicle was impaired by the use of a drug. An insurer still may have a basis for excluding a person from no-fault coverage pursuant to Insurance Law § 5103(b)(3) if the person is injured while committing an act that would constitute a felony, but that is separate and apart from the intoxication or impairment, such as bank robbery. Note that this construction is limited to no-fault coverage under § 5103(b)(3), and does not apply to health insurance coverage.

Insurance Law § 5105 provides for intercompany loss transfer between insurers through mandatory arbitration when "at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire." A no-fault insurer that utilizes the recovery provisions under the amended Insurance Law § 5103(b)(2) may not also use Insurance Law § 5105 if it has already recovered from the driver, since it would already have been made whole.

As per Insurance Law § 5103(b), a no-fault insurer is not required to exclude coverage for intoxication or impairment. Therefore, a no-fault insurer may continue to have the option to delete from the policy all exclusions for intoxication or impairment by the use of drugs or alcohol, which would include coverage of necessary emergency health services. However, a no-fault insurer that chooses to delete all exclusions for intoxication or impairment also deletes from the policy the Chapter 303 provision that gives it the right to maintain a cause of action against the covered person for the amount of first-party benefits paid or payable on behalf of the covered person where the covered person is found to have violated Vehicle and Traffic Law § 1192.

With respect to its effective date, Chapter 303 states that it applies to all motor vehicle insurance policies "issued, renewed, modified, altered or amended on or after" January 26, 2011.

Chapter 303 does not require a motor vehicle insurer to send a conditional renewal notice pursuant to Insurance Law §§ 3425(d)(3) and 3426(e)(1)(B), because the amendment does not effectuate a reduction in coverage under the policy.

In addition, the Department is revising the mandatory personal injury protection endorsement set forth in 11 NYCRR § 65-1.1(d) and the mandatory additional personal injury protection endorsement set forth in 11 NYCRR § 65.1-3(c). The revised endorsements are deemed approved under Insurance Law § 2307 and a motor vehicle insurer may use the endorsements after providing notice to the Department. Alternatively, a motor vehicle insurer may file the revised prescribed endorsements with the Department for approval. However, in either case, the no-fault insurer should specify whether the endorsements include language that permits the no-fault insurer to maintain a cause of action against the covered person for the amount of first party benefits paid or payable on behalf of the covered person if such person is found to have violated Vehicle and Traffic Law § 1192.

If a motor vehicle insurer does not provide notice to the Department or file the revised prescribed endorsements for approval, then any policy issued, renewed, modified, altered, or amended on or after January 26, 2011 that does not conform to Chapter 303 will, pursuant to Insurance Law § 3103(a), nonetheless be enforceable as if the policy provides the required

coverage pursuant to Chapter 303, and will be valid and binding upon the insurer. However, such a policy will not be enforceable as if the policy grants an insurer a cause of action against the covered person.

Further, Chapter 303 applies to self-insurers with respect to accidents occurring on or after January 26, 2011, and the Department is amending the list of permissible exclusions for self-insurers set forth in 11 NYCRR § 65-2.3(j) accordingly.

Please direct any questions or comments regarding this circular letter to:

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Very truly yours,

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