

## Assessment of public comments for the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D)

The Department received comments from 27 interested parties in response to its publication of the proposed rule in the New York State Register. The Department received comments from the following groups of interested parties:

- Property/casualty insurers;
- A health care provider;
- Trade associations comprised of New York State automobile insurers;
- Two coalitions comprised of consumer groups;
- A coalition of plaintiffs’ attorneys, health care providers and other interested parties;
- A coalition of attorneys representing eligible injured persons;
- Hospitals; and
- Law firms that provide legal services to various health care providers.

Comments on specific parts of the proposed rule are discussed below.

### **Proposed 11 NYCRR 65-4.6(a) (“Limitations on attorney’s fees”)**

#### **Comment**

Representatives of providers, hospitals, and injured persons, as well as consumer groups, expressed concern that the Department’s proposed amendment that would substitute “and” for “or” in 11 NYCRR 65-4.6(a) would result in many attorneys being denied attorney’s fees unless a claim was both denied and overdue at the commencement of a proceeding.

#### **Department’s Response**

The Department intended this amendment to be a non-substantive clarification that both denied claims and overdue claims submitted to arbitration or court would be eligible for attorney’s fees, and not to be interpreted as saying that a claim had to be both denied and overdue at the start of the proceeding. However,

because of the overwhelming concern and confusion regarding this non-substantive change, the Department is withdrawing this amendment.

**Proposed 11 NYCRR 65-4.6(b) (“Minimum Attorney’s Fee”)**

**Comments**

Representatives of health care providers (“providers”), hospitals, and injured persons, as well as consumer groups, strongly oppose eliminating the \$60 minimum attorney’s fee, asserting that such an amendment unduly favors insurers, will not achieve more consolidation of claims, and will have a negative impact on eligible injured persons (“EIPs”) and providers with no-fault disputes involving low monetary value claims. They proffered the following arguments to support their objection to the proposed amendment:

(1) It will be difficult for EIPs and providers to retain attorneys willing to represent them in arbitration or in court with respect to small monetary value claims if the attorney’s fee is limited to only 20 percent of the value of the claim plus interest;

(2) Providers will be reluctant to accept no-fault patients if it is difficult to retain attorneys to represent them in disputes against an insurer involving a small monetary value claim, or providers may treat patients unnecessarily in order to increase the total value of claims in dispute;

(3) Insurers will engage in the unlawful practice of improperly lowering the value of claims so as to reduce the attorney’s fees, and the Department does not have the financial resources to take effective action against insurers that engage in such unlawful practice;

(4) There is no empirical evidence that having a minimum attorney’s fee results in attorneys commencing multiple actions for related claims, and doing so is not cost effective;

(5) Courts have consistently severed consolidated cases where there are multiple EIPs and multiple accidents, and arbitration does not permit consolidation of disputes that do not arise out of the same action;

(6) The amount of time needed to arbitrate or litigate multiple claims is the same whether the issues are addressed in one action or individual actions;

(7) The Department failed to consider alternatives to the proposed rule although the proposal will have a deleterious effect on parties whose low monetary value claims may not be consolidated with other claims;

(8) Consolidation of cases is infeasible because the regulation requires a provider to bill an insurer within 45 days of treatment and to commence an action within 30 days of an insurer's denial of the claim or failure to pay within 30 days of the receipt of the bill in order to prevent interest from being tolled; and

(9) Providers and EIPs who delay filing arbitrations in order to consolidate claims will forfeit priority in scheduling hearings.

### **Department's Responses**

With respect to comments (1), (2) and (3), the Department is not persuaded by the comments that attorneys will be reluctant to represent providers, including hospitals, in disputes involving low monetary value claims. Many law firms that handle no-fault matters specialize in this area and the success of this business is based on volume; therefore, those firms are unlikely to reject a no-fault claim solely because it is of low monetary value. Additionally, the Department informally discussed this issue with a trade organization representing hospitals. That organization asserted that hospitals typically retain attorneys to handle a block of business rather than just an individual no-fault claim, and if an attorney wants to remain a hospital's legal representative, that attorney will not decline to represent a hospital in arbitration or court solely because the dispute involves a low monetary value claim.

The Department also is not persuaded that a provider, in deciding whether to treat a no-fault patient, takes into account whether the provider will be able to retain an attorney to handle a dispute regarding payment for treating that patient. Further, the Department is skeptical that an honest provider would jeopardize its license by treating a patient unnecessarily in order to bolster the monetary value of claims in the event of a dispute in order

to be able to be represented by an attorney. To do so would violate Insurance Law § 5109 and Insurance Regulation 68-E, the consequence of which would be a prohibition on demanding or requesting payment for medical services in connection with any no-fault claim. Likewise, the Department is confident that insurers are unlikely to engage in the unlawful claims settlement practice of lowering the value of claims to decrease attorney's fees because of the risk of regulatory action by the Department, and because, although provider attorneys would receive lower fees, an insurer would still incur additional costs for its legal representation at the prevailing rate, as well as assessments required to be paid to the American Arbitration Association.

With respect to comments (4), (5), (7), (8), and (9) regarding consolidation, nothing in the proposed regulation mandates consolidation of claims. The Department's intent in amending the minimum fee provision is to encourage consolidation of claims where feasible, but this does not include claims involving multiple accidents, providers, or EIPs, or where consolidation would otherwise violate or contradict any law or regulation. Further, the Department, in promulgating this amendment, considered all the alternatives that commentators suggested in response to the Department's solicitation for comments on this regulation and concluded that the provision as amended would significantly reduce the voluminous filings of low monetary value claims and curtail possible fraudulent activity in the no-fault system.

Finally, the Department finds that comment (6) is without merit because attorney's fees are based on the amount of the provider's bill and not on the time spent preparing for arbitration or a court proceeding.

### **Comment**

Insurers and trade organizations representing insurers overwhelmingly support eliminating the minimum attorney's fee. They contended that this amendment would reduce the number of individual filings of low monetary value claims made solely to generate attorney's fees, and that insurers no longer would be forced to settle such claims that they would otherwise contest but for the cost of litigating those claims. One insurer trade

organization further recommended that the regulation require providers and their attorneys to file only one action for all disputes arising out of the same accident and involving the same EIP.

### **Department's Response**

The Department agrees that the amendment is necessary to curtail the voluminous filings of low monetary value claims. However, the Department rejects the recommendation to require providers and their attorneys to commence a single action for all disputed claims arising out of the same accident and involving the same EIP, because to do so would violate Insurance Law § 5106(b), which grants an applicant the option to bring **any** dispute to arbitration.

### **Comment**

Some of the insurers and an insurer trade organization requested that the Department clearly specify the effective date of this proposed amendment, and suggested that the proposed amendment to the fee structure apply as of the date of filing of an arbitration or lawsuit, rather than the date of loss or date of service.

### **Department's Response**

Because section 65-4.6 applies to arbitrations or court proceedings, the amendment applies to all new arbitrations or court proceedings initiated on or after the effective date of the amendment, rather than to dates of service or dates of loss occurring on or after the effective date of the amendment.

### **Proposed 11 NYCRR 65-4.6(b) ("Maximum Attorney's Fee During the Conciliation Phase")**

### **Comments**

One insurer opposed eliminating the maximum \$60/\$80 attorney's fee during conciliation, asserting that to do so would result in hearings over disputes involving fees, which in turn would increase costs and prolong the resolution of no-fault claims. The insurer also opposed the proposed fee of 20 percent of first-party benefits and any additional first-party benefits, plus interest, up to a maximum of \$1,360, contending that the fee is excessive for the limited amount of work involved in filing a case for arbitration.

On the other hand, one insurer trade organization supported the proposed fee structure, asserting that this would discourage the filing of multiple no-fault claims in order to generate more attorney's fees and encourage consolidation of small monetary value claims, which would result in a more efficient no-fault system.

### **Department's Response**

The Department disagrees that the maximum attorney's fee conciliation phase should not be increased because the current maximum attorney's fee is not commensurate with the increase in the amount of work an attorney must expend upon filing and during the conciliation phase of an arbitration case as a result of a regulatory change made ten years ago requiring early submission of case documents and legal arguments in arbitration.

### **Proposed 11 NYCRR 65-4.6(d) ("Maximum Attorney's Fee")**

#### **Comments**

Representatives of providers, hospitals, and injured persons, as well as consumer groups, strongly agreed that the current \$850 maximum attorney's fee should be increased, but asserted that the Department's proposed increase to \$1,360 is insufficient to achieve the Department's objective of encouraging consolidation of claims. Those commentators suggested either increasing the maximum fee – some provider attorneys suggested increasing the maximum to \$2,000 and a hospital attorney suggested \$4,000 for hospital bills – or eliminating the maximum fee altogether.

Most insurers and insurer trade organizations opposed any increase to the maximum fee. They contended that the current \$850 maximum attorney's fee fairly compensates attorneys for the work involved in resolving a no-fault claim at arbitration or in court, and that there is no evidence that at the current fee providers would be hard pressed to find attorneys to represent them.

On the other hand, two insurers agree with the Department's amendment to the attorney's fees provisions of Insurance Regulation 68-D, asserting that those amendments should reduce the overwhelming number of low

monetary value claims filed in order to maximize attorney's fees, as well as minimize the impact that fees have on pervasive fraud in the no-fault system.

### **Department's Response**

The Superintendent, based on his knowledge and expertise in the area of no-fault law and regulation, as well as his responsibility to the public, finds that an increase in the maximum attorney's fee to \$1,360 is reasonable in order to achieve a more efficient resolution of no-fault claims that is equitable to both providers and insurers. The Superintendent also finds the proposed maximum fee to be sufficient incentive for provider attorneys to consolidate disputes where feasible, while not so exorbitant as to unduly increase transaction and litigation costs.

### **Other Comments on Insurance Regulation 68-D Regarding Attorney's Fees**

Interested parties submitted comments that were beyond the scope of changes to the regulation being implemented at this time. Accordingly, no changes to the regulation were made based upon those comments. Also, although the Department initially solicited comments on Section 65-4.6(f) of the current regulation, the Department did not propose any changes at this time, and therefore comments received on Section 65-4.6(f) are beyond the scope of changes to the regulation being implemented and are not discussed here.