

**NEW YORK STATE  
INSURANCE DEPARTMENT**

**FIRST AMENDMENT TO REGULATION NO. 68-D  
(11 NYCRR 65-4)**

**REGULATIONS IMPLEMENTING THE COMPREHENSIVE  
MOTOR VEHICLE INSURANCE REPAIRS ACT**

I, Gregory V. Serio, Superintendent of Insurance of the State of New York, pursuant to the authority granted by Sections 201, 301, and Article 51 of the Insurance Law, do hereby promulgate the following First Amendment to Part 65-4 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 68-D), to take effect upon publication in the State Register, to read as follows:

**MATTER IN BRACKETS IS DELETED  
MATTER UNDERLINED IS NEW**

Subdivision (b) of Section 65-4.2 is amended to read as follows:

(b) Procedures. (1) Initiation of arbitration.

(i) An applicant for benefits may initiate arbitration proceedings by mailing a copy of the denial of claim form prescribed by subdivision 65-3.4(c) (11) of this Part, upon which the applicant has entered the reason(s) for contesting the denial, together with a detailed listing and calculation of all incurred expenses in dispute, indicating the dates upon which the claims for incurred expenses were submitted to the insurer, to the address designated on the denial of claim form.

(ii) If there is a dispute with respect to any matter which is arbitrable pursuant to section 5106 of the Insurance Law and a denial of claim form has not been issued, the applicant may initiate arbitration by completing a [prescribed] no-fault arbitration request form [(Form AR)] and forwarding the original and one copy to the designated organization at the address designated on the form, and one copy to the insurer against which arbitration is being requested. The no-fault arbitration request form shall be prescribed by the designated organization and approved by the superintendent.

(iii) The denial of claim form or the arbitration request form shall be accompanied by a check or money order for \$40 payable to the designated organization. This filing fee shall be returned to the applicant directly by the insurer, if the applicant prevails in whole or in part.

(iv) As a condition precedent to arbitration where there is no denial of claim by an insurer, evidence of attempts to settle the dispute must be detailed on the arbitration request form.

(v) In the absence of a denial of claim form, a dispute shall be considered arbitrable if the claim is overdue as described in [subdivision (a) of section 65-3.9] section 65-3.8(a)(1) of this Part and a demonstrable attempt was made by the applicant to obtain payment or an explanation from the insurer of the continued nonpayment of the claim.

(vi) All items on the no-fault arbitration request form [(Form AR)] must be completed in full. An explanation must be provided for any omitted spaces on the form, which may be obtained, upon request, from the designated organization by writing to the address designated on the [form] Denial of Claim Form (NYS Form NF-10), which is included in Appendix 13 of this Title.

(2) Initial review by the conciliation center.

(i) The designated organization shall establish a conciliation center, which shall review all requests for arbitration and assign file numbers thereto, which shall be used by the designated organization and the parties to identify the case.

(ii) Each insurer shall designate, for each claims office used by the insurer to handle New York no-fault claims, a responsible staff member whom the conciliation center can contact to determine whether the no-fault dispute for which arbitration has been requested can be resolved without the need for arbitration. Since conciliation staff will attempt to resolve the dispute by telephone, facsimile, e-mail, or other appropriate means, the insurer's designated representative shall have the authority to bind the insurer to any agreement reached. The insurer shall notify the conciliation center of the designated representative in writing and immediately notify the conciliation center of any change in such designation.

(iii) If it appears, after review, that the dispute may be resolved without arbitration, the conciliation center will communicate with the parties and attempt through conciliation to resolve the dispute.

(a) If all the issues in dispute are resolved through the designated organization's conciliation, by the insurer agreeing to pay and the applicant agreeing to accept all or a portion of the amount in dispute, the insurer shall, in addition, return the filing fee to the applicant. If the claim was overdue, the insurer shall also pay the applicable interest.

(b) If the arbitration was initiated by use of a no-fault arbitration request form [(Form AR)] and it is subsequently established that the claim and any applicable interest and attorney fees were paid at least 20 calendar days prior to the submission of the completed [AR] arbitration request form, the filing fee shall not be returned to the applicant. In such instance, an additional \$100 service and processing fee shall be payable by the applicant to the designated organization.

(iv) If it appears to the conciliation center that the dispute cannot be resolved through conciliation within [45] 60 calendar days, the conciliation center will refer the request for arbitration as prescribed in this section and the [applicant] parties shall be so advised. The conciliation center may, however, withhold such referral pending receipt from the applicant of pertinent and available information that has been requested.

(3) Submission of documents.

(i) The applicant shall submit all documents supporting the applicant's position along with their request for arbitration. All such documents shall also be simultaneously submitted to the respondent. Following this original submission of documents, no additional documents may be submitted by the applicant other than bills or claims for ongoing benefits.

(ii) The designated organization shall, no later than five business days after receipt of the arbitration request, advise the respondent of such receipt. The respondent shall, within 30 calendar days after the mailing of such advice, provide all documents supporting its position on the disputed matter. Such documents shall be submitted to the applicant at the same time. The respondent may, in writing, request that the designated organization provide an additional 30 calendar days to respond based upon reasonable circumstances that prevent it from complying.

(iii) The written record shall be closed upon receipt of the respondent's submission or the expiration of the period for receipt of the respondent's submission. Documents submitted by either party after the record is closed shall be marked "Late".

(iv) Any additional written submissions may be made only at the request or with the approval of the arbitrator.

(v) The provisions of this paragraph shall take effect with all arbitrations filed on and after March 1, 2002.

(4) Prior to transmittal to arbitration, the insurer may make a non-binding written offer to resolve the dispute. Such offer, if not accepted by the applicant, shall be transmitted to the arbitration forum, but shall not be disclosed to the arbitrator. The parties to the dispute shall also not disclose the offer to the arbitrator.

[(4)] (5) All disputes remaining after expiration of the conciliation period shall be forwarded for arbitration.

Paragraph (3) of section 65-4.4(f) is amended to read as follows:

(3) in an award of interest, the arbitrator shall compute the amount due for each element of first-party benefits in dispute, commencing 30 days after proof of claim therefor was received by the insurer and ending with the day of payment of the award, subject to the [provision of subdivision 65-3.10(c)] provisions of subdivisions (c) and (d) of section 65-3.9 of this Part (stay of interest).

Subdivision (d) of Section 65-4.5 is amended to read as follows:

(d) Qualifications of arbitrators for a hearing held in New York State.

(1) No-Fault Arbitrator Screening Committee. The superintendent shall appoint an advisory committee composed of six members, who will review the qualifications of applicants for the position of no-fault arbitrator for hearings to be held in New York State and review the performance of the appointed arbitrators. The screening committee shall make recommendations to the superintendent pertaining to the appointment and dismissal of no-fault arbitrators. The committee shall consist of one representative of the New York State Bar Association, one representative of the New York State Trial Lawyer's Association, two representatives of the insurance industry selected by the No-Fault Optional Arbitration Advisory Committee, a nonvoting representative of the designated organization and a nonvoting representative of the Insurance Department. Tie votes shall be reported as such to the superintendent.

(2) A no-fault arbitrator shall be an attorney, licensed to practice law in New York State, with at least [10] 5 years experience which the No-Fault Arbitrator Screening Committee has determined qualifies such attorney to review and resolve the issues involved in no-fault insurance disputes. Documentation of such experience shall be submitted to, and reviewed by, the superintendent prior to the appointment of an arbitrator.

(3) All no-fault arbitrators shall be appointed by, and serve at the pleasure of, the superintendent. An arbitrator candidate shall disclose to the superintendent any circumstance which is likely to create an appearance of bias or which might disqualify such person as an arbitrator, and the superintendent shall determine whether the candidate should be disqualified. The superintendent shall forward the name of all no-fault arbitrators to the designated organization, and promptly inform the designated organization of all additions to, and deletions from, the panel.

(4) No person shall, during the period of appointment as an arbitrator, have any practice or professional connection with any firm or insurer involved in any degree with automobile insurance or negligence law. The No-Fault Arbitrator Screening Committee, subject to the approval of the superintendent, shall establish any additional qualifications for appointment as a no-fault arbitrator.

Subdivision (i) of Section 65-4.5 is amended to read as follows:

(i) Time and place of arbitration.

(1) The arbitration hearing shall be held in the arbitrator's office or any other appropriate place selected by the designated organization and, to the extent practicable, within the general locale of the applicant's residence but, in no event, more than 100 miles from such residence. The arbitrator shall fix the time and place for such hearing. At least 15 calendar days prior to the hearing, the designated organization shall mail a notice of hearing to each party. Unless otherwise agreed by the parties, the hearing shall be scheduled to be held within 30 calendar days of the date of the appointment of the arbitrator. The parties to the arbitration shall not directly contact the arbitrator at any time prior to or subsequent to the hearing, but [may submit] shall direct all communications to the designated organization [material intended for the arbitrator].

(2) Effective with arbitrations filed on and after March 1, 2002, if the applicant requests arbitration within 90 days after the claim became overdue or within 90 days after receipt of the denial of claim, the arbitration shall be scheduled for a hearing within 45 days after transmittal from the conciliation center, when requested by the applicant.

Subdivision (o) of Section 65-4.5 is amended to read as follows:

(o) Evidence.

(1) The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations.

(2) The arbitrator or an attorney of record in the arbitration may subpoena witnesses or documents upon the arbitrator's own initiative or upon the request of any party, when the issues to be resolved require such witnesses or documents.

(3) (i) For arbitrations filed prior to March 1, 2002, [Copies] copies of all documents to be submitted to the arbitrator shall be simultaneously transmitted to the other parties at least seven calendar days prior to the hearing. The arbitrator shall determine if all parties received such documents prior to the commencement of the hearing.

(ii) For arbitrations filed on or after March 1, 2002, the arbitrator shall determine if the parties provided and exchanged documents in accordance with the requirements of paragraph (3) of subdivision (o) of section 65-4.5 of this Part.

(4) If a party to an arbitration intends to introduce an expert witness at the hearing, the identity of the expert witness must be given to all parties at least seven calendar days prior to the hearing.

Paragraph (2) of section 65-4.5(s) is amended to read as follows:

(2) if due under section 5108 of the Insurance Law, pay a reasonable attorney's fee in accordance with the limitations set forth in section [65-4.7] 65-4.6 of this subpart; and

Subdivisions (t) through (z) of subdivision 65-4.5 are relettered paragraphs (u) through (aa) and a new subdivision (t) is added to read as follows:

(t) Imposition of costs.

(1) Effective with arbitrations filed on and after March 1, 2002, the arbitrator may impose all administrative costs of arbitration to the applicant or apportion the administrative costs of arbitration between the parties if the arbitrator concludes that the applicant's arbitration request was frivolous, was without factual or legal merit, or was filed for the purpose of harassing the respondent. Cases in which arbitrators impose all administrative costs to the applicant shall be excluded from the assessment calculation contained in paragraph (aa) of this subdivision.

(2) The amount of such administrative costs per case shall be established for each calendar year by the designated organization. The administrative cost shall be based upon the actual administrative costs per case in the prior calendar year. Such costs shall be paid to the designated organization and the receipt of such costs shall be used to reduce the actual expenses of the designated organization for the administration of the arbitration forum.

Subdivision (b) of section 65-4.6 is amended to read as follows:

(b) If the claim is resolved by the [Insurance Department or the conciliation center] designated organization at any time prior to transmittal to an [arbitration forum] arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited as follows:

(1) If the resolved claim was initially denied, the attorney's fee shall be \$80.

(2) If the resolved claim was overdue but not denied, the attorney's fee shall not exceed the amount of first-party benefits and any additional first-party benefits,

plus interest thereon, which the insurer agreed to pay and the applicant agreed to accept in full settlement of the dispute submitted, subject to a maximum fee of \$60.

(3) In disputes solely involving interest, the attorney's fee shall be equal to the amount of interest which the insurer agreed to pay and the applicant agreed to accept in full settlement of the dispute submitted, subject to a maximum fee of \$60.

(4) Notwithstanding the limitations of this subdivision, the insurer may, at its discretion, offer a higher attorney's fee, subject to the limitations of subdivisions (d) or (e) of this section, in order to resolve the dispute during conciliation.

Subdivision (e) of section 65-4.6 is amended to read as follows:

(e) For all other disputes subject to arbitration, subject to the provisions of subdivisions (a) and (c) of this section, the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or court, subject to a maximum fee of \$850. If the nature of the dispute results in an attorney's fee which could be computed in accordance with the limitations prescribed in both subdivision (d) and this subdivision, the higher attorney's fee shall be payable. However, if the insurer made a written offer pursuant to [paragraph 65-4.2(b)(3)] section 65-4.2(b)(4) of this Subpart and if such offer equals or exceeds the amount awarded by the arbitrator, the attorney's fee shall be based upon the provisions of subdivision (b) of this section.

Section 65-4.10(e)(1)(ii)(d) is amended to read as follows:

(d) if due, compute and pay the amount of interest for each element of first-party benefits in dispute, commencing 30 days after proof of claim therefor was received by the insurer and ending with the date of payment of the award, subject to the provisions of [subdivision 65-3.10(c)] section 65-3.9(c) and (d) of this Part (stay of interest).

I, Gregory V. Serio, Superintendent of Insurance, do hereby certify that the foregoing is the First Amendment to 11 NYCRR 65-4 (Regulation No. 68-D), promulgated by me on January 9, 2003 pursuant to the authority granted by Sections 201, 301, and Article 51 of the Insurance Law, to take effect upon publication in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed amendment was published in the State Register on July 31, 2002. No other publication or prior notice is required by statute.

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Gregory V. Serio  
Superintendent of Insurance

January 9, 2003

