INSURANCE LAW

Proposed Amendments To the No-Fault Law, Take 2

In our last column,[1] we discussed proposed legislation (S07518 and A10734) that had been introduced to the New York State Legislature in April 2010, which was aimed at improving various aspects of the No-Fault Law. We have very recently been advised that those bills are dead; the previously proposed four new statutory categories of "serious injury" and the elimination of the right of a defendant to move for summary judgment on the "serious injury" threshold issue are "off the table," and have been replaced on the legislative agenda by a new piece of proposed legislation designed "[t]o reform the automobile no-fault insurance system." After countless meetings and drafts of proposed language, with input from various interested groups and industries, on June 29, 2010, Bills S8414 (Breslin) and A11596 (Titone) (which are the same), titled the "Automobile Insurance Fraud Prevention Act of 2010," were introduced to both Houses.

The new bills contain six substantive sections, which are wide-ranging and varied, covering amendments to several different sections of the Insurance Law, and aimed predominantly, albeit not exclusively, at combating fraud associated with the no-fault system.

Insurance Law §5106

Section 2 of the bills is addressed to Ins. L. §5106 ("Fair claims settlement"). First, this section provides a modified, or partial, fix to the dilemma imposed upon insurers by the existing "30-day rule," which requires carriers to pay or deny a claim within 30 days of receipt of proof of the claim, and the decision of the Court of Appeals in *Presbyterian Hospital v. Maryland Casualty Co.*, 90 NY2d 274 (1997), which imposed the sanction of preclusion for failing to deny a claim within that 30-day period.

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Such preclusion will no longer apply in cases where the denial is based upon the defenses that: (1) the services or items billed for were never provided; (2) the fees charged exceed the schedule of permissible charges by more than 10 percent; (3) the event out of which the claim arose was "based upon an intent to defraud an insurer or self-insurer;" and (4) no applicable coverage exists for the claimed loss.

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In addition, this section allows insurers to deny a claim on the basis of "lack of medical necessity" up to 60 days after the claim becomes overdue, provided such denial is based upon a "review by a licensed provider who typically diagnoses and provides treatment for the condition under review, or typically provides the health-care service or treatment under review." Copies of such health provider's reports must be sent to the claimant, the claimant's attorney, and the claimant's treating health-care provider within 30 days of the examination or review.

This section also provides that the commencement of a court proceeding or submission of a dispute to arbitration "shall not preclude a claimant from electing to submit other disputes arising from the same instance of use of operation of a motor vehicle to the alternate forum." This represents a change from the rule established in *Roggio v. Nationwide Mut. Ins. Co.*, 66 NY2d 260 (1985), which held that a claimant denied recovery in a no-fault arbitration as to certain medical bills cannot then turn to the courts to seek recovery of later medical bills arising from the same accident. Thus, under this new proposed legislation, there is no mandatory arbitration of no-fault disputes. A claimant would not, however, be allowed to submit the same dispute to multiple forums.

Significant changes have been proposed with respect to no-fault arbitrations. No-fault arbitrators would be required "to follow and apply substantive law"; master arbitrators would be required to provide the parties the opportunity to submit written briefs; and the master arbitrator's scope of review would include "factual, legal and procedural errors."

Collateral Estoppel Effect

One of the more significant portions of the new proposed legislation pertains to the issue of the application of the principles of collateral estoppel and res judicata to the results of no-fault arbitration proceedings. This is an issue that has been around for a very long time—at least since the 1985 decision of the Court of Appeals in *Clemens v. Apple*, 102 AD2d 236 (3d Dept. 1984), affd. 65 NY2d 746 (1985), in which the courts held that a determination in a no-fault arbitration that the plaintiff's alleged herniated disc was not causally related to the subject automobile accident was binding in and preclusive of plaintiff's personal injury lawsuit to recover damages for that alleged injury from the driver of the other vehicle. Indeed, we addressed this issue almost 15 years ago in these pages, in an article titled "Time to Reconsider 'Clemens v. Apple'?"[2] in which we noted that legislation had, in fact, been proposed in 1993 and 1994 to amend Ins. L. §5106 to eliminate the collateral estoppel effect of no-fault arbitration awards.

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The most recent proposed version of the collateral estoppel rule eliminates the binding and preclusive effect of no-fault arbitrator or master arbitrator awards, except for the issue of the existence (or non-existence) of insurance coverage.

Evidentiary Considerations

Further, with respect to the arbitration or litigation of no-fault disputes, section 2 of the proposed legislation provides that in a proceeding to obtain payment of an overdue claim for medical benefits, a prima facie showing of entitlement to such benefits shall be established by filing a "verification," together with the arbitration demand or complaint, setting forth that: (1) the claimant was licensed to render the services or items provided; (2) the services were rendered and/or items were supplied by the claimant; (3) the services/items were "medically necessary" and/or properly supported by a prescription, where applicable; (4) the claimant received an assignment of benefits from the injured party/guardian or parent; and (5) the claimant authorized the particular attorney or law firm to commence the suit.

In court actions to obtain no-fault benefits, certain rebuttable evidentiary presumptions would attach to various billing and claim documents upon the submission of an affidavit establishing that such forms are business records pursuant to CPLR 4518. These include the presumptions of admissibility, validity, proper mailing, and payment and receipt.

Finally, this section allows, in court actions, the use by any party of the deposition of any person without the necessity of showing unavailability or special circumstances, subject to the right of any party to move, pursuant to CPLR 3103, to prevent abuse, "provided that the party against whom the evidence is offered had been afforded an opportunity to participate and question the witness at the deposition."

These section 2 provisions are to apply to "benefits initiated on or after the one hundred eightieth day after the act shall become a law."

Insurance Law §5109

Section 3 of the proposed legislation, addressed to Ins. L. §5109 ("Unauthorized providers of health services"), authorizes the Superintendent of Insurance to impose a civil penalty (fine) of up to $50,000, and/or to prohibit a provider of health services from demanding or requesting payment for health services rendered under the no-fault law for a period of up to three years upon a determination, after notice and a hearing, that the health services provider: (1) admitted or was found guilty of professional or other misconduct, as defined in the Education Law, in connection with health services rendered; (2) engaged in a pattern of billing for health services alleged to have been rendered but which were not, in fact, rendered (excluding good faith disputes regarding coding for health care services); (3) utilized unlicensed persons to render health services that require licensed persons; (4) utilized licensed persons to render health services when rendering these services is "beyond the authorized scope of the license of such person"; (5) unlawfully ceded ownership, operation or control of a business entity authorized to provide professional health services in this state (including psc, pllc, registered llp), to a person not licensed to render the health services which the entity is legally authorized to provide; (6) committed a "fraudulent insurance act," as defined in Penal Law §176.05; (7) has been convicted of a crime involving fraudulent or dishonest practices; or (8) has, after warning by the Superintendent, engaged in a pattern of unlawfully attempting to collect payment directly from the patient or eligible person for services rendered when such attempts violate the terms of an enforceable assignment of benefits.

These listed items are in addition to those currently set forth in the statute, which deal with such conduct as exceeding the limits of professional competence, making false statements in medical reports, soliciting claimants, and refusing to participate in investigations by the Superintendent.

These section 3 provisions are to take effect on the 180th day after they become law, provided that the Superintendent of Insurance shall immediately promulgate rules and regulations with respect thereto.

Insurance Law §5103(b)

Oddly, section 4 of the new legislation contains a provision that also appears in another bill—one that is already further along in the legislative process. Addressed to Ins. L. §5103(b) ("Entitlement of first party benefits; additional financial security required"), this section amends the exclusion from no-fault benefits applicable to a person who is injured as a result of operating a motor vehicle while in an intoxicated condition or while his ability to operate such vehicle is impaired by the use of a drug within the meaning of VTL §1192, by cutting back that exclusion.

In such cases, the insurer "shall not exclude such person from coverage with respect to necessary emergency health services rendered in a general hospital (as defined in Public Health L. §2801[10]), including ambulance services attendant thereto and related medical screening." Notably, this amendment goes on to provide that where the "covered person" is found to have violated VTL §1192, the insurer has a cause of action against him or her for the amount of first-party benefits paid or payable.

As alluded to above, this precise provision also appears in Bill S7854, which was passed by the State Senate on June 18, 2010, and by the Assembly on July 1, 2010, and is fully expected to be signed by Governor David A. Paterson in the very near future. Presumably, once S7854 is signed into law, section 4 of the new bill(s) can and will be removed (or this provision will be enacted twice).

The provisions of section 4 are to be applicable to actions commenced on or after the 30th day after they become law.

Insurance Law §5102(d)

Section 5 of the new legislation deals with the definition of a "serious injury" under the No-Fault Law. Instead of the proposed four new definitions contained in the previous proposed bills,[3] this section seeks to amend Ins. L. §5102(d) by adding two new statutory categories of a "serious injury": (1) "a complete tear or rupture of a nerve, tendon, ligament, cartilage or muscle"; and (2) "a tear, rupture or impingement of a nerve, tendon, ligament, cartilage or muscle which results in a significant impairment of a body organ, member, function or system." All of the other nine existing categories remains unchanged.

The provisions of section 5 are to take effect "immediately."

'Accidents'

Sections 6 and 7 of the proposed legislation address an interesting and important issue with respect to coverage for uninsured motorist/SUM benefits—the issue of how to treat an innocent victim of a staged, planned or intentional "accident." To place this issue in perspective, it should be noted that by the express terms of the applicable statutes and the required endorsements, uninsured/supplemental uninsured motorist coverage is not operative unless damages are caused by an "accident."[4] The courts have consistently held that injuries caused by an intentional act are not caused by "accident" and are, therefore, beyond the scope of protection afforded by the UM/SUM endorsements.

For example, in *State Farm Mut. Auto. Ins. Co. v. Langan*, 55 AD3d 281 (2d Dept. 2008), mot. for lv. to appeal dismissed, 12 NY3d 883 (2009), the claimant's decedent was struck and killed by a motor vehicle driven by an individual who pleaded guilty to murder in the second degree, after admitting that he intentionally caused the

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death by striking the decedent with his automobile. The court upheld the decedent's insurer's disclaimer of uninsured motorist benefits on the ground that the death was the result of an intentional act, and not an accident.

In addition, the court noted that a different rule applied in the context of no-fault coverage, observing that "in contexts other than a claim made under an uninsured motorist endorsement, coverage is unaffected by whether the tortfeasor acted intentionally in causing the injury, provided only that, from the standpoint of the insured, the event was 'unexpected, unusual and unforeseen' [citation omitted] and not brought about by the insured's own 'misconduct, provocation or assault.'"

In an interesting concurring and dissenting opinion, Justice William F. Mastro noted that "the overwhelming national trend" has been to permit uninsured motorist coverage in situations like this by interpreting the term "accident" from the perspective of the injured party rather than the tortfeasor. This approach is based upon "the strong public policy considerations favoring an avenue of redress for injured parties, as well as the reasonable expectations of those parties when they enter into private insurance contracts and pay premiums for first party benefits to compensate them for injuries suffered at the hands of motorists who have no available liability insurance coverage." Although nowhere stated in Justice Mastro's opinion, implicit therein is the notion that there is something inherently wrong with a system that compensates the innocent victim of a negligent uninsured defendant, but not the innocent victim of a criminal uninsured defendant.

Notwithstanding the foregoing, more recent decisions have followed the rule set out by the majority in *Langan*, supra.[5]

Section 6 of the proposed legislation amends Ins. L. §3420—the section in which the UM/SUM statutes are found—and section 7 amends Ins. L. §5202, which deals with MVAIC and its obligation to provide UM benefits under certain circumstances by adding new subdivisions that specifically define the term "covered person" to include pedestrians injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the minimum financial security required by law, any other person entitled to first-party benefits, and also "any person injured as a result of a staged, planned or intentional accident, provided that such person is not a perpetrator of or a knowing participant in the staging or planning of the accident."

The provisions of sections 6 and 7 are to take effect on the 180th day after the bill becomes a law, and are to be applicable to all new policies and policies that are renewed or modified after that date.

Status of Legislation

The latest information we have is that the Assembly bill is in the Insurance Committee, and the Senate bill is in the Rules Committee. We have no information as to whether these bills will be pulled from the committees and be put to a vote before the budget is adopted. They can still come up for consideration later in the year if the legislative leaders call the Houses back into session before year's end. Presumably, there is still time for those who wish to comment on the bills to contact their appropriate legislators.

We end this column the same way we ended our last, which discussed the prior attempt at legislative corrections of some of the ills of the no-fault system: "The goal of fixing and/or improving the current No-Fault statute is, indeed, a laudable one, which should be accomplished after careful consideration of the issues and in contemplation of fairness to both—or all—sides, including the courts." We will attempt to continue to follow this issue carefully and to keep our readers advised of all developments as they occur.

1. See Dachs, N. and Dachs, J., "Proposed Amendments to the No-Fault Law," NYLJ, May 11, 2010, p. 3, col. 1.

2. See Dachs, N. and Dachs, J., "Time to Reconsider 'Clemens v. Apple,'" NYLJ, Nov. 14, 1995, p. 3, col. 1.

3. See Dachs, N. and Dachs, J., "Proposed Amendments to the No-Fault Law," NYLJ, May 11, 2010, p. 3, col. 1.

4. See Ins. L. §3420(f)(1), (f)(2); *Kilbride v. MVAIC*, 62 Misc.2d 641 (Sup. Ct. N.Y. Co. 1970) (proof of an accident is the causa sine qua non of an uninsured motorist claim).

5. See e.g., *Travelers Indemnity Co. v. Richards-Campbell*, 73 AD3d 1076 (2d Dept. 2010); *American Mfrs. Mut. Ins. Co. v. Burke*, 63 AD3d 732 (2d Dept. 2009); *American Protection Insurance Company v. DeFalco*, 61 AD3d 970 (2d Dept. 2009); *MetLife Auto & Home v. Kalendarev*, 54 AD3d 830 (2d Dept. 2008).