



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
25 BEAVER STREET
NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Howard Mills
Superintendent

The Office of General Counsel issued the following opinion on December 22, 2006, representing the position of the New York State Insurance Department.

Re: No-Fault: Examination under Oath

QUESTIONS PRESENTED

- 1) Must a No-Fault insurer's reasonable and objective standards, used in determining whether an examination under oath of an eligible injured person or that person's assignee ("EUO") is warranted, as required under N.Y. Comp. Codes R. & Reg. tit. 11 § 65-3.5(e), be filed with the Insurance Department?
- 2) Must the insurer include in a notice scheduling an EUO the specific reason why the EUO is requested?
- 3) Must the insurer include in a claim denial the specific reason why the EUO was requested when the insurer issues a denial of benefits based upon the failure of an eligible injured person or the person's assignee to submit to a required EUO?

CONCLUSIONS

- 1) No. While N.Y. Comp. Codes R. & Reg. tit. 11 § 65-3.5(e) (Regulation 68) requires that insurers maintain standards for determining when EUOs will be requested, the regulation does not require that such standards must be filed with the Department. However, such standards are required to be made available for review by Department examiners.
- 2) No. Neither N.Y. Comp. Codes R. & Reg. tit. 11 § 65-3.5(e) or other provision of No-Fault Regulation 68 requires an insurer's notice scheduling an EUO to specify the reason(s) why the insurer is requiring the EUO.

3) No. Neither N.Y. Comp. Codes R. & Reg. tit. 11 § 65-3.5(e) or other provision of No-Fault Regulation 68 requires an insurer which denies a claim based upon a failure to submit to a required EUO to include language in the denial which states the specific reason(s) why the insurer has required the EUO.

FACTS

None presented.

ANALYSIS

1) Under N.Y. Comp. Codes R. & Regs. tit. 11, § 65-1.1(d)(2002), which prescribes the No-Fault Mandatory Personal Injury Protection Endorsement which must be included in all owners policies of motor vehicle liability insurance issued in New York, the "Conditions" section of the prescribed endorsement contains a "Proof of Claim" provision which states that:

...Upon request by the Company, the eligible injured person or that person's assignee or representative shall:

...(b) as may reasonably be required submit to examinations under oath by any person named by the Company and subscribe the same;

Under the regulation's claims practice provisions, Section 65-3.5(e) states that "[w]hen an insurer requires an examination under oath of an applicant...to establish proof of claim, such requirement must be based upon the application of objective standards so that there is specific objective justification supporting the use of such examination. Insurer standards shall be available for review by Department examiners."

Therefore, while the regulation requires No-Fault insurers to maintain such standards for Department review, so as to enable the Department to perform market conduct examinations of insurers and to evaluate the practices of insurers in requiring EUOs, there is no regulatory requirement that these standards be filed with the Department.

2) N.Y. Comp. Codes Rules & Reg tit. 11 § 65-3.5(e) requires that "[a]ll examinations under oath and medical examinations requested by the insurer shall be held at a place and time reasonably convenient to the applicant...The insurer shall inform the applicant at the time the examination is scheduled that the applicant will be reimbursed for any loss of earnings and reasonable transportation expenses incurred in complying with the request...".

Therefore, each notice scheduling an EUO issued by an insurer must include requisite language advising the person required to appear at the EUO of that person's right to reimbursement for lost earnings and transportation costs

incurred in attending the EUO, in order for such notice to be deemed effective under the regulation. However, with respect to whether an insurer must include language stating the reason(s) for requiring the EUO, the regulation contains no such requirement.

3) As referenced above in Section 65-1.1(d), the prescribed No-Fault endorsement requires that, as a condition to coverage, an eligible injured person or that person's assignee shall "...as may reasonably be required, submit to examinations under oath by any person named by the Company...".

N.Y. Comp. Codes R. & Regs. tit 11 § 65-3.8(a)(1) (Regulation 68) states that "No-Fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5 of this subpart...". Section 65-3.5(e) specifically includes an examination under oath as a verification request (in addition to being a condition of coverage as discussed above) which an insurer may require in order to establish proof of claim.

When an EUO is required and the party required to appear fails to attend a scheduled EUO, the insurer must meet its obligations under N.Y. Comp Codes R. & Regs. tit 11, § 65-3.6(b) and within 10 calendar days, contact the party from whom verification (the EUO) has been requested and not been provided, i.e. non-attendance at the scheduled EUO, in order to afford the party a second opportunity to attend an EUO. If the party fails to appear at the rescheduled EUO, an insurer may issue a denial of pending claims based upon the failure to meet the condition for coverage in not submitting to the requested EUO, as required under the prescribed endorsement. There is no requirement in the regulation that the denial must state the specific reason(s) why the insurer required the EUO.

Additionally, in accordance with Section 65-3.5(e), it must be noted that nothing in this opinion should be construed to support the conclusion that the scheduling of an EUO and subsequent rescheduling of the EUO, when the eligible injured person or the person's assignee fails to attend either scheduled examination, automatically justifies a denial in and of itself if the required party has offered a reasonable excuse for not attending the scheduled EUO and is attempting to establish, in cooperation with the No-Fault insurer, a reasonably convenient time and/or place to attend.

For further information you may contact Supervising Attorney Lawrence M. Fuchsberg at the New York City Office.