

7357

I N   S E N A T E

May 2, 2012

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Introduced by Sen. NOZZOLIO -- read twice and ordered printed, and when printed to be committed to the Committee on Insurance

AN ACT to amend the insurance law, in relation to examination under oath of covered persons pursuant to the comprehensive motor vehicle insurance reparations act

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Section 5103 of the insurance law is amended by adding a  
2     new subsection (i) to read as follows:  
3     (I) WITH REGARD TO ANY CLAIM FOR FIRST PARTY BENEFITS PURSUANT TO THIS  
4     ARTICLE, THE EXAMINATION UNDER OATH OF A PERSON CLAIMING TO BE A COVERED  
5     PERSON SHALL BE SCHEDULED BY THE INSURER DIRECTLY OR BY AN ATTORNEY  
6     APPOINTED BY THE INSURER FOR PURPOSES OF CONDUCTING SUCH EXAMINATION  
7     UNDER OATH FOR WHOSE CONDUCT AND ACTIVITY THE INSURER SHALL BE DIRECTLY  
8     RESPONSIBLE. THE EXAMINATION UNDER OATH OF A CLAIMANT SHALL NOT BE  
9     DEMANDED UNLESS AND UNTIL AN APPLICATION FOR FIRST PARTY BENEFITS HAS  
10    BEEN RECEIVED BY THE INSURER. IN ANY EXAMINATION UNDER OATH, THE CLAIM-  
11    ANT SHALL HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL. THE EXAMINATION  
12    SHALL BE CONDUCTED UPON OATH OR AFFIRMATION. THE EXAMINATION UNDER OATH  
13    SHALL BE CONDUCTED IN THE COUNTY WHERE THE CLAIMANT RESIDES OR, AT THE  
14    CLAIMANT'S OPTION, IN THE OFFICE OF HIS OR HER REPRESENTATIVE UNLESS THE  
15    CLAIMANT OR CLAIMANT'S REPRESENTATIVE AND THE INSURER AGREE OTHERWISE.  
16    THE DAY AND TIME THAT THE EXAMINATION UNDER OATH IS SCHEDULED SHALL BE  
17    AGREED UPON BY THE INSURER AND THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE.  
18    A DEMAND FOR AN EXAMINATION UNDER OATH SHALL BE IN WRITING AND  
19    SHALL BE SERVED PERSONALLY OR BY REGISTERED OR CERTIFIED MAIL UPON THE  
20    CLAIMANT UNLESS THE CLAIMANT IS REPRESENTED BY AN ATTORNEY, WHEN IT  
21    SHALL BE SERVED PERSONALLY OR BY MAIL UPON HIS OR HER ATTORNEY. THE  
22    DEMAND SHALL STATE THE PERSON BEFORE WHOM THE EXAMINATION IS TO BE HELD,  
23    THE TIME, PLACE AND SUBJECT MATTER THEREOF. WRITTEN NOTICE OF AN EXAM-  
24    INATION UNDER OATH MUST BE RECEIVED BY THE CLAIMANT OR HIS OR HER REPRESENTATIVE  
25    NOT LESS THAN FOURTEEN DAYS PRIOR TO THE EXAMINATION DATE TO  
26    BE EFFECTIVE TO REQUIRE CLAIMANT TO APPEAR. THE NOTICE SHALL ADVISE THE  
27    CLAIMANT OF THE RIGHT TO VIDEO OR OTHERWISE RECORD THE EXAMINATION. THE

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [ ] is old law to be omitted.

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1 CLAIMANT SHALL BE ALLOWED REASONABLE ADJOURNMENTS WHICH SHALL BE  
2 ACCEPTED UP TO NO LESS THAN TWENTY-FOUR HOURS PRIOR TO THE EXAMINATION.  
3 IF THE CLAIMANT TO BE EXAMINED DOES NOT UNDERSTAND THE ENGLISH LANGUAGE,  
4 UPON REASONABLE NOTICE TO THE INSURER SEEKING THE EXAMINATION, THE  
5 INSURER SHALL, AT ITS OWN EXPENSE, PROVIDE A TRANSLATION OF ALL QUES-  
6 TIONS AND ANSWERS, AND MAY USE THE SERVICES OF AN INTERPRETER WHOSE  
7 COMPENSATION SHALL BE PAID BY THE INSURER SEEKING THE EXAMINATION. THE  
8 EXAMINATION UNDER OATH SHALL BE TRANSCRIBED BEFORE A NOTARY PUBLIC  
9 COMMISSIONED TO ADMINISTER OATHS IN THIS STATE. ANY EXAMINATION UNDER  
10 OATH THAT IS NOT SO TRANSCRIBED SHALL NOT BE CITED AS THE BASIS OF ANY  
11 DENIAL OF A CLAIM FOR FIRST PARTY BENEFITS. THE TRANSCRIPT OF THE EXAM-  
12 INATION SHALL NOT BE SUBJECT TO OR AVAILABLE FOR PUBLIC INSPECTION,  
13 EXCEPT UPON COURT ORDER UPON GOOD CAUSE SHOWN, BUT SHALL BE FURNISHED TO  
14 THE CLAIMANT OR HIS OR HER REPRESENTATIVE WITHIN SIXTY DAYS OF THE EXAM-  
15 INATION. THE CONDUCT OF EXAMINATIONS UNDER OATH SHALL BE GOVERNED BY THE  
16 UNIFORM RULES FOR THE CONDUCT OF DEPOSITIONS, PART 221 OF THE UNIFORM  
17 RULES FOR THE NEW YORK STATE TRIAL COURTS. AN EXAMINATION UNDER OATH OF  
18 THE CLAIMANT MAY BE REQUESTED WHERE (1) THE INSURER SUSPECTS FRAUD  
19 PERPETRATED BY THE CLAIMANT WHICH MUST BE CLEARLY CONVEYED TO THE CLAIM-  
20 ANT OR CLAIMANT'S REPRESENTATIVE. THE INSURER SHALL SUPPLY THE CLAIMANT  
21 OR CLAIMANT'S REPRESENTATIVE WITH ANY AND ALL EVIDENCE SUPPORTING ITS  
22 CLAIM OF FRAUD NOT LESS THAN TEN DAYS PRIOR TO THE EXAMINATION UNDER  
23 OATH SO AS TO PRESERVE THE CLAIMANT'S FEDERAL FIFTH AMENDMENT RIGHT  
24 AGAINST BEING COMPELLED TO TESTIFY AGAINST HIMSELF OR HERSELF; (2) THE  
25 INSURER SUSPECTS THAT THE CLAIMANT IS RECEIVING UNNECESSARY TREATMENT  
26 WHICH SHALL BE CLEARLY CONVEYED TO THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE.  
27 THE INSURER SHALL SUPPLY THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE WITH ANY AND ALL EVIDENCE SUPPORTING ITS CLAIM THAT THE TREATMENT  
28 IS UNNECESSARY, INCLUDING BUT NOT LIMITED TO, PEER REVIEWS NOT LESS THAN  
29 TEN DAYS PRIOR TO THE EXAMINATION UNDER OATH; (3) THE INSURER SUSPECTS  
30 THAT THE TREATING PROVIDER OR FACILITY IS BILLING FOR TREATMENT THAT THE  
31 CLAIMANT IS NOT RECEIVING WHICH SHALL BE CLEARLY CONVEYED TO THE CLAIM-  
32 ANT OR CLAIMANT'S REPRESENTATIVE. THE INSURER SHALL PROVIDE THE CLAIM-  
33 ANT OR CLAIMANT'S REPRESENTATIVE WITH ANY AND ALL EVIDENCE SUPPORTING  
34 ITS CLAIM THAT THE BILLING IS NOT COMMENSURATE WITH THE ACTUAL TREATMENT  
35 RECEIVED, INCLUDING BUT NOT LIMITED TO, THE BILLS SUBMITTED BY THE  
36 TREATING PROVIDER NOT LESS THAN TEN DAYS PRIOR TO THE EXAMINATION UNDER  
37 OATH; OR (4) THE INSURER HAS A SUSPICION THAT THE CLAIM NEEDS TO BE  
38 VERIFIED FOR A REASON NOT ENUMERATED ABOVE. THE JUSTIFICATION MUST BE  
39 RELEVANT TO THE VERIFICATION OF THE CLAIM AND THE REASON MUST BE CLEARLY  
40 CONVEYED TO THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE. THE INSURER SHALL  
41 PROVIDE SUPPORTING EVIDENCE TO SUPPORT ITS CLAIM TO THE CLAIMANT OR  
42 CLAIMANT'S REPRESENTATIVE NOT LESS THAN TEN DAYS PRIOR TO THE EXAMINA-  
43 TION UNDER OATH. IF THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE WISHES TO  
44 CONTEST THE REQUEST FOR AN EXAMINATION UNDER OATH BECAUSE CLAIMANT OR  
45 CLAIMANT'S REPRESENTATIVE BELIEVES THE REQUEST TO BE PRE-TEXTUAL OR  
46 SUSPECTS ABUSE IN REQUESTING THE EXAMINATION, HE OR SHE SHALL SUBMIT AN  
47 APPLICATION TO THE DEPARTMENT FOR REVIEW WITHIN FIVE BUSINESS DAYS OF  
48 RECEIPT OF THE WRITTEN REQUEST FROM THE INSURER. NO INSURER SHALL DENY A  
49 CLAIM BASED UPON A TREATING PROVIDER'S FAILURE TO APPEAR AT AN EXAMINA-  
50 TION UNDER OATH OTHER THAN BILLS SUBMITTED BY SUCH PROVIDER, NOR SHALL  
51 IT FORM THE BASIS OF ANY LIABILITY ON THE PART OF ANY PROVIDER OR CLAIM-  
52 ANT FOR PAYMENT PREVIOUSLY MADE RELATING TO THE CLAIM IN QUESTION. IF  
53 THE TREATING PROVIDER FAILS TO APPEAR AT AN EXAMINATION UNDER OATH, THE  
54 CLAIMANT SHALL NOT BE HELD RESPONSIBLE TO THE PROVIDER FOR SERVICES  
55 RENDERED BY THAT PROVIDER. WHEN AN INSURER REQUIRES AN EXAMINATION UNDER

1 OATH OF A CLAIMANT TO ESTABLISH PROOF OF CLAIM, SUCH REQUIREMENT SHALL  
2 BE BASED ON THE APPLICATION OF OBJECTIVE STANDARDS SO THAT THERE IS  
3 SPECIFIC JUSTIFICATION FOR THE USE OF SUCH EXAMINATION. INSURER STAND-  
4 ARDS SHALL BE AVAILABLE FOR REVIEW BY DEPARTMENT EXAMINERS, AS WELL AS  
5 BY THE CLAIMANT AND HIS OR HER REPRESENTATIVE. THE SCOPE OF THE EXAM-  
6 INATION UNDER OATH SHALL BE NARROWLY TAILORED TO THE REASONS OR JUSTI-  
7 FICATION FOR SEEKING THE EXAMINATION AS SET FORTH IN THE INSURER'S WRIT-  
8 TEN REQUEST. ANY QUESTION THAT GOES BEYOND THE SCOPE MAY BE OBJECTED TO  
9 AND SUCH OBJECTED TO QUESTION SHALL BE SUBMITTED BY THE INSURER WITHIN  
10 SEVEN DAYS OF THE COMPLETION OF THE SCHEDULED AND CONDUCTED EXAMINATION  
11 TO THE DEPARTMENT TO DETERMINE IF THE OBJECTED TO QUESTION IS BEYOND THE  
12 SCOPE OF THE EXAMINATION. IF ANY QUESTION IS DETERMINED TO BE BEYOND THE  
13 LEGITIMATE SCOPE OF THE EXAMINATION AND ITS ORIGINAL WRITTEN JUSTIFICA-  
14 TION FOR THE SAME, THE CLAIMANT SHALL NOT BE REQUIRED TO RESPOND TO THE  
15 QUESTION AND CANNOT FORM THE BASIS OF A DENIAL. IF THE OBJECTED TO QUES-  
16 TION IS DETERMINED BY THE DEPARTMENT TO BE LEGITIMATE AND NARROWLY  
17 TAILORED TO MEET THE OBJECTIVES CONTAINED IN THE WRITTEN REQUEST FOR THE  
18 EXAMINATION UNDER OATH INITIALLY GIVEN BY THE INSURER WHEN THE EXAMINA-  
19 TION WAS SCHEDULED, THE EXAMINATION MAY BE RESCHEDULED IN THE MANNER SET  
20 FORTH ABOVE FOR THE LIMITED PURPOSE OF RECEIVING RESPONSES TO THE  
21 IMPROPERLY OBJECTED TO QUESTIONS, AS DETERMINED BY THE DEPARTMENT, AND  
22 RESPONSES TO OTHER QUESTIONS THAT MIGHT NATURALLY FLOW FROM THE CLAIM-  
23 ANT'S RESPONSES THAT ARE LIKEWISE NARROWLY TAILORED TO INVESTIGATE THE  
24 LEGITIMATE JUSTIFICATION FOR CONDUCTING THE EXAMINATION GIVEN IN THE  
25 INSURER'S ORIGINAL WRITTEN REQUEST, WITH THE SAME RULES FOR OBJECTIONS  
26 APPLYING AS SET FORTH ABOVE. AN INSURER SHALL NOT DENY A CLAIM BASED  
27 UPON AN OBJECTION AT AN EXAMINATION UNDER OATH UNLESS THE INSURER  
28 COMPLETES THE ABOVE OBJECTION APPEALS PROCEDURE, WINS SAID APPEAL, AND  
29 THE CLAIMANT THEREAFTER FAILS TO COMPLY WITH THE DEMAND FOR A FURTHER  
30 EXAMINATION UNDER OATH. EACH EXAMINATION UNDER OATH SHALL NOT EXCEED  
31 THREE HOURS FROM THE TIME THE FIRST QUESTION IS ASKED UNTIL THE LAST  
32 QUESTION IS ASKED UNLESS REASONABLE CAUSE EXISTS. FOR EXAMINATION  
33 CONSTRUCTED WITH THE AID OF AN INTERPRETER, THE TIME SHALL NOT EXCEED  
34 FOUR HOURS UNLESS REASONABLE CAUSE EXISTS. THE CLAIMANT OR CLAIMANT'S  
35 REPRESENTATIVE SHALL HAVE THE RIGHT TO TERMINATE THE EXAMINATION UPON  
36 THE PASSAGE OF THE ABOVE TIME LIMITS. THE CLAIM SHALL NOT BE DENIED IF  
37 THE CLAIMANT OR CLAIMANT'S REPRESENTATIVE TERMINATES THE EXAMINATION  
38 AFTER THE ALLOTTED TIME HAS EXPIRED. ISSUES OF LIABILITY RELATED TO ANY  
39 ONGOING OR POTENTIAL THIRD PARTY ACTION ARISING FROM THE SUBJECT CLAIM  
40 MAY BE ADDRESSED AT THE EXAMINATION UNDER OATH. THE EXAMINATION UNDER  
41 OATH AND ANY INVESTIGATION RELATED THERETO SHALL BE CONFIDENTIAL AND  
42 SHALL NOT BE SUBJECT TO DISCOVERY OR USE IN ANY THIRD PARTY ACTION ARIS-  
43 ING OUT OF THE INCIDENT THAT SERVES AS THE BASIS OF THE CLAIM FOR FIRST  
44 PARTY BENEFITS, AND SHALL NOT BE USED AGAINST THE CLAIMANT IN ANY SUCH  
45 THIRD PARTY ACTION. ABSENT AN ADMISSION OF FRAUD BY A CLAIMANT DURING  
46 THE EXAMINATION UNDER OATH, OR ALLEGATION OF FRAUD PERPETRATED BY THE  
47 CLAIMANT SUPPORTED BY THE TESTIMONY ELICITED AT THE EXAMINATION, THE  
48 EXAMINATION UNDER OATH ALONE SHALL NOT FORM THE BASIS OF A DENIAL OF  
49 FIRST PARTY BENEFITS. ANY DENIAL OF FIRST PARTY BENEFITS BASED IN PART  
50 UPON AN EXAMINATION UNDER OATH, INCLUDING ONE BASED ON FRAUD BY THE  
51 CLAIMANT, SHALL BE ACCOMPANIED BY ANY OTHER WRITTEN REPORTS, INCLUDING  
52 INVESTIGATIVE, THAT IN WHOLE OR IN PART FORM THE BASIS OF THE DENIAL.  
53 THE CLAIMANT AND HIS OR HER REPRESENTATIVE SHALL HAVE THE RIGHT TO  
54 CONDUCT AN EXAMINATION UNDER OATH, UPON WRITTEN REQUEST TO THE INSURER,  
55 OF ANY INDIVIDUAL, INCLUDING THE PERSON OR ATTORNEY CONDUCTING OR  
56 REVIEWING THE EXAMINATION, WHOSE REPORTS OR OPINIONS FORM THE BASIS OF

1 ANY DENIAL OF FIRST PARTY BENEFITS BASED IN WHOLE OR IN PART ON THE  
2 EXAMINATION. ONCE AN INSURER HAS DENIED FURTHER FIRST PARTY BENEFITS TO  
3 THE CLAIMANT FOR ANY REASON, IT SHALL BE BARRED FROM SEEKING ANY FURTHER  
4 VERIFICATION OF THE CLAIM INCLUDING, BUT NOT LIMITED TO, CONDUCTING  
5 MEDICAL EXAMINATIONS AND/OR FURTHER EXAMINATIONS UNDER OATH. THE DENIAL  
6 OF A CLAIM FOR FAILURE TO ATTEND AN EXAMINATION UNDER OATH SHALL NOT BE  
7 RETROACTIVE TO THE DATE OF THE CLAIM, BUT SHALL ONLY RESULT IN THE  
8 DENIAL OF ALL BENEFITS RECEIVED AFTER THE DATE OF THE EXAMINATION UNDER  
9 OATH.

10 S 2. This act shall take effect immediately and shall apply to all  
11 claims for first party benefits pending on or after such date.