# STATE OF NEW YORK

7328

2017-2018 Regular Sessions

# IN ASSEMBLY

April 24, 2017

Introduced by M. of A. TITONE -- read once and referred 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:**

Section 1. Section 5103 of the insurance law is amended by adding a new subsection (i) to read as follows:

**(i) With regard to any claim for first party benefits pursuant to this article, the examination under oath of a person claiming to be a covered person shall be scheduled by the insurer directly or by an attorney appointed by the insurer for purposes of conducting such examination under oath for whose conduct and activity the insurer shall be directly responsible. The examination under oath of a claimant shall not be demanded unless and until an application for first party benefits has been received by the insurer. In any examination under oath, the claimant shall have the right to be represented by counsel. The examination shall be conducted upon oath or affirmation. The examination under oath shall be conducted in the county where the claimant resides or, at the claimant's option, in the office of his or her representative unless the claimant or claimant's representative and the insurer agree otherwise. The day and time that the examination under oath is scheduled shall be agreed upon by the insurer and the claimant or claimant's representative. A demand for an examination under oath shall be in writing and shall be served personally or by registered or certified mail upon the claimant unless the claimant is represented by an attorney, when it shall be served personally or by mail upon his or her attorney. The demand shall state the person before whom the examination is to be held, the time, place and subject matter thereof. Written notice of an examination under oath must be received by the claimant or his or her repre-**

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

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sentative not less than fourteen days prior to the examination date to be effective to require claimant to appear. The notice shall advise the claimant of the right to video or otherwise record the examination. The claimant shall be allowed reasonable adjournments which shall be accepted up to no less than twenty-four hours prior to the examination. If the claimant to be examined does not understand the English language, upon reasonable notice to the insurer seeking the examination, the insurer shall, at its own expense, provide a translation of all questions and answers, and may use the services of an interpreter whose compensation shall be paid by the insurer seeking the examination. The examination under oath shall be transcribed before a notary public commissioned to administer oaths in this state. Any examination under oath that is not so transcribed shall not be cited as the basis of any denial of a claim for first party benefits. The transcript of the examination shall not be subject to or available for public inspection, except upon court order upon good cause shown, but shall be furnished to the claimant or his or her representative within sixty days of the examination. The conduct of examinations under oath shall be governed by the Uniform Rules For The Conduct Of Depositions, Part 221 of the Uniform Rules for the New York State Trial Courts. An examination under oath of the claimant may be requested where (1) the insurer suspects fraud perpetrated by the claimant which must be clearly conveyed to the claimant or claimant's representative. The insurer shall supply the claimant or claimant's representative with any and all evidence supporting its claim of fraud not less than ten days prior to the examination under oath so as to preserve the claimant's federal fifth amendment right against being compelled to testify against himself or herself; (2) the insurer suspects that the claimant is receiving unnecessary treatment which shall be clearly conveyed to the claimant or claimant's representative. The insurer shall supply the claimant or claimant's representative with any and all evidence supporting its claim that the treatment is unnecessary, including but not limited to, peer reviews not less than ten days prior to the examination under oath; (3) the insurer suspects that the treating provider or facility is billing for treatment that the claimant is not receiving which shall be clearly conveyed to the claimant or claimant's representative. The insurer shall provide the claimant or claimant's representative with any and all evidence supporting its claim that the billing is not commensurate with the actual treatment received, including but not limited to, the bills submitted by the treating provider not less than ten days prior to the examination under oath; or (4) the insurer has a suspicion that the claim needs to be verified for a reason not enumerated above. The justification must be relevant to the verification of the claim and the reason must be clearly conveyed to the claimant or claimant's representative. The insurer shall provide supporting evidence to support its claim to the claimant or claimant's representative not less than ten days prior to the examination under oath. If the claimant or claimant's representative wishes to contest the request for an examination under oath because claimant or claimant's representative believes the request to be pre-textural or suspects abuse in requesting the examination, he or she shall submit an application to the department for review within five business days of receipt of the written request from the insurer. No insurer shall deny a claim based upon a treating provider's failure to appear at an examination under oath other than bills submitted by such provider, nor shall it form the basis of any liability on the part of any provider or claimant for payment previously made relating to the claim in question. If

the treating provider fails to appear at an examination under oath, the claimant shall not be held responsible to the provider for services rendered by that provider. When an insurer requires an examination under oath of a claimant to establish proof of claim, such requirement shall be based on the application of objective standards so that there is specific justification for the use of such examination. Insurer standards shall be available for review by department examiners, as well as by the claimant and his or her representative. The scope of the examination under oath shall be narrowly tailored to the reasons or justification for seeking the examination as set forth in the insurer's written request. Any question that goes beyond the scope may be objected to and such objected to question shall be submitted by the insurer within seven days of the completion of the scheduled and conducted examination to the department to determine if the objected to question is beyond the scope of the examination. If any question is determined to be beyond the legitimate scope of the examination and its original written justification for the same, the claimant shall not be required to respond to the question and cannot form the basis of a denial. If the objected to question is determined by the department to be legitimate and narrowly tailored to meet the objectives contained in the written request for the examination under oath initially given by the insurer when the examination was scheduled, the examination may be rescheduled in the manner set forth above for the limited purpose of receiving responses to the improperly objected to questions, as determined by the department, and responses to other questions that might naturally flow from the claimant's responses that are likewise narrowly tailored to investigate the legitimate justification for conducting the examination given in the insurer's original written request, with the same rules for objections applying as set forth above. An insurer shall not deny a claim based upon an objection at an examination under oath unless the insurer completes the above objection appeals procedure, wins said appeal, and the claimant thereafter fails to comply with the demand for a further examination under oath. Each examination under oath shall not exceed three hours from the time the first question is asked until the last question is asked unless reasonable cause exists. For examination constructed with the aid of an interpreter, the time shall not exceed four hours unless reasonable cause exists. The claimant or claimant's representative shall have the right to terminate the examination upon the passage of the above time limits. The claim shall not be denied if the claimant or claimant's representative terminates the examination after the allotted time has expired. Issues of liability related to any ongoing or potential third party action arising from the subject claim may be addressed at the examination under oath. The examination under oath and any investigation related thereto shall be confidential and shall not be subject to discovery or use in any third party action arising out of the incident that serves as the basis of the claim for first party benefits, and shall not be used against the claimant in any such third party action. Absent an admission of fraud by a claimant during the examination under oath, or allegation of fraud perpetrated by the claimant supported by the testimony elicited at the examination, the examination under oath alone shall not form the basis of a denial of first party benefits. Any denial of first party benefits based in part upon an examination under oath, including one based on fraud by the claimant, shall be accompanied by any other written reports, including investigative, that in whole or in part form the basis of the denial. The claimant and his or her representative shall have the right to

conduct an examination under oath, upon written request to the insurer, of any individual, including the person or attorney conducting or reviewing the examination, whose reports or opinions form the basis of any denial of first party benefits based in whole or in part on the examination. Once an insurer has denied further first party benefits to the claimant for any reason, it shall be barred from seeking any further verification of the claim including, but not limited to, conducting medical examinations and/or further examinations under oath. The denial of a claim for failure to attend an examination under oath shall not be retroactive to the date of the claim, but shall only result in the denial of all benefits received after the date of the examination under oath.

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