At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January, 2017.

PRESENT:

HON. GLORIA M. DABIRI,
Justice.

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CIP PHYSICAL THERAPY, P.C., GARY TSIRELMAN, P.C.,

Petitioners,

- against -

Index No. 3118/15

BENJAMIN M. LAWSKY, SUPERINTENDENT AND DEPARTMENT OF FINANCIAL SERVICES OF THE STATE OF NEW YORK,

Respondents.

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The following papers numbered 1 to 29 read herein:

	Papers Numbered	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2	25-27
Opposing Affidavits (Affirmations)	3, 4-7	
Reply Affidavits (Affirmations)	8, 9-24	
Response to sur-reply affidavit (Affirmation)		28
Other Papers Letter from Forman, Esq., dated 3/31/16		29

Upon the foregoing papers, petitioners CIP Physical Therapy, P.C. (CIP), and Gary Tsirelman, P.C. (Tsirelman, P.C.), pursuant to CPLR article 78, challenge the revisions to 11 NYCRR § 65-4.6 promulgated by the Respondents Superintendent and the New York State Department of Financial Services on February 4, 2015. Petitioners allege that the

regulation was promulgated in violation of lawful procedure, is affected by an error of law, and is arbitrary and capricious or an abuse of discretion (CPLR 7803 [3]).[1]

Respondents, Department of Financial Service of the State of New York and Superintendent Banjamin M. Lawsky, cross-move for leave to submit a sur-reply.

CIP, a healthcare provider, and Tsirelman, P.C., a law firm representing health care providers who seek to recover first party benefits pursuant to the Comprehensive Automobile Insurance Reparations Act (1 1973, ch 13 [presently codified in article 51 of the Insurance Law and commonly referred to as the "no-fault law"]), maintain that the amended regulations governing attorneys fees in 11 NYCRR 65-4.6, promulgated on February 4, 2015, do not provide for recovery of reasonable attorney's fees and thus, violates Insurance Law § 5106 (a). Petitioners argue that the amended regulations, – eliminating a provision which required a minimum fee of $60, failing to sufficiently raise the cap on the fee to account for inflation and continuing a requirement that limits the fee to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant – precludes recovery of a reasonable fee. Respondents assert that the amendments to 11 NYCRR 65-4.6 were duly promulgated pursuant to the broad powers granted to the Superintendent to promulgate regulations relating to the Insurance Law and the no-fault law and that the Superintendent had a rationale basis for promulgating the challenged regulations. The court finds that the newly promulgated attorney fee provisions of 11 NYCRR 65-4.6 are not contrary to Insurance Law § 5106 (a), and are rationally based.

The Superintendent is vested by Insurance Law § 301 with the power to prescribe regulations interpreting the provisions of the Insurance Law and is granted the "broad power

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[1] By order of August 5, 2015 the action was converted to a proceeding pursuant to CPLR Article 78.

to interpret, clarify, and implement the legislative policy" (*Matter of New York Pub. Interest Research Group v New York State Dept. of Ins.*, 66 NY2d 444, 448 [1985] [internal quotation marks omitted]; *Ostrer v Schenck*, 41 NY2d 782, 785 [1977]). The authority to administer the Insurance Law and, in particular, the fair claims settlement process under the no-fault law, rests with the Superintendent (*LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217, 223 [2009]). The Superintendent's "interpretation [of the Insurance Law], if not irrational or unreasonable, will be upheld in deference to his [or her] special competence and expertise with respect to the insurance industry" (*id.*). In view of this deference, "'the party seeking to nullify such a regulation has the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence'" (*Matter of Big Apple Food Vendors' Assn. v Street Vendor Review Panel*, 90 NY2d 402, 408 [1997]; *Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331-332 [1995]).

Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight (*Matter of Ovadia v Office of Indus. Bd. of Appeals*, 19 NY3d 138, 144 n5 [2012]; *Matter of Industrial Liason Comm. of Niagra Falls Area Chamber of Commerce v Williams*, 72 NY2d 137, 143-144 [1988]; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). "'And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight'" (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conserv.*, 14 NY3d 161, 176 [2010] quoting *Kurcisics*, 49 NY2d at 459).

The regulations at issue were promulgated as part of the no-fault law, enacted by the State legislature in 1973, and which supplanted common-law tort actions for most victims of automobile accidents with a system of no-fault insurance (*see Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 860 [2003]; L 1973, ch 13; Insurance Law article 51). "The primary aims of this new system were to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists" (*id.*; *see also New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 585 [2011]; Governor's Mem approving L 1973, ch 13, 1973 McKinney's Session Laws of NY, at 2335). In order to encourage insurance companies to promptly pay claims relating to medical services, the legislature allowed claimants to recover interest at the rate of 2 percent per month together with reasonable attorney's fees when a claim submitted to an insurer was overdue (former Insurance Law § 675 [1]; *see LMK Psychological Servs., P.C.*, 12 NY3d at 222).[2] The initial regulation addressing attorney's fees provided that the fee be calculated based on "the reasonable value of legal work [performed] in obtaining recovery" (11 NYCRR 654.6 [g] [1]). The Court of Appeals emphasized that the fee was to be based on the reasonable value of the attorney's services, not the value of the claim (*Matter of Country-Wide Ins. Co. (Barrios)*, 43 NY2d 685, 686 [1977]).

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[2] As is relevant here, former Insurance Law § 675 (1) provided that:

> "Payments of first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained . . . All overdue payments shall bear interest at the rate of two percent per month. The claimant shall also be entitled to recover his attorney's reasonable fee if a valid claim or portion thereof was overdue and such claim was not paid before the attorney was retained."

In 1977 the legislature enacted significant amendments to the no-fault law in an effort to, among other things, contain the cost of insurance premiums, the cost of which had increased by 55 percent since July 1, 1975 (L 1977, ch 892; State Executive Department Mem. in support of L 1977, ch 892, 1977 McKinney's Session Laws of NY, at 2445, 2450). As part of these amendments, the provision of Insurance Law § 675 (1) addressing attorney's fees was amended to read: "If a valid claim or portion thereof was overdue and such claim was not paid before an attorney was retained with respect to the overdue claim, the claimant shall also be entitled to recover his attorney's reasonable fee, which shall be subject to limitations promulgated by the superintendent in regulations" (L 1977, ch 892 § 13). This language is essentially retained in the current statute which, as to attorney's fees, reads as follows: "If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations" (Insurance Law § 5106 [a]). From shortly after the effective date of L 1977, ch 892 § 13 to present, regulations promulgated by the Superintendent imposing limits on fees that may be recovered under Insurance Law § 5106 (a) and former Insurance Law § 675 (1) have been in effect.

As is relevant here, the amendments to 11 NYCRR 65-4.6 in effect prior to the February 4, 2015 effective date of the current amendment to section 65-4.6 generally provided for a minimum fee of $60 (*former* 11 NYCRR 65-4.6 [c]). With respect to overdue claims that were resolved during the conciliation phase of arbitration and prior to transmittal of the claim to an arbitrator, the maximum fee was $60 or $80, depending on whether the claim was initially denied by the insurer (former 11 NYCRR 65-4.6 [b]). For all other

claims, with the exception of claims involving certain policy issues,[3] the fee was limited to 20 percent of the amount of first-party benefits, together with interest awarded by the arbitrator or court, subject to a maximum recovery of $850 (*former* 11 NYCRR 65-4.6 [e]). The parties agree that regulations containing these same fee limitations had been effect from 1988 until the promulgation of the current regulation (Respondents' Memorandum of Law at 21; Petition at ¶ 11).

In a 2011 proceeding Tsirelman P.C. challenged the Superintendent's failure to increase attorney's fees for more than 20 years as unreasonable (*Okslen Acupuncture, P.C. and Gary Tsirelman, P.C. v James W. Wrynn, Superintendent, and Insurance Department of the State of New York*, Supreme Court, Kings County index Number 21816/11) (*Okslen*). In a so ordered stipulation dated July 11, 2013, the parties in *Okslen* agreed to hold the action in abeyance due to the Superintendent's agreement to submit the regulations at issue to public comment.[4] Following a period of public comment, the Superintendent promulgated the provisions of 11 NYCRR 65-4.6 at issue and which took effect on February 4, 2015. As is relevant here, this amendment eliminated the $60 minimum fee provision and the $60 and $80 maximum fees for claims resolved during the conciliation phase of arbitration and prior to transmittal to an arbitrator. It provided, instead, that for such claims the fee would be set at 20 percent of the total amount of first party benefits, additional first party benefits and interest awarded to each applicant in an arbitration or court proceeding, with a maximum fee $1,360 (11 NYCRR 65-4.6 [b]). For all other disputes, except those relating to policy issues,

[3] With respect to claims involving certain policy denial issues, the fee was set at $70 per hour for preparatory services and $80 per hour for personal appearances before the arbitrator or court, subject to a maximum fee of $1,400 (former 11 NYCRR 65-4.6 [d]).

[4] In an order dated January 23, 2015, the court dismissed *Okslen* as moot in light of the Superintendent's promulgation of the revised version of 11 NYCRR 65-4.6).

the new regulation retained the provision limiting the fee to 20 percent of the total amount of first party benefits, additional first party benefits and interest awarded to each applicant in arbitration or court proceeding, but raised the cap on the maximum from $850 to $1,360 (11 NYCRR 65-4.6 [d]).[5]

In challenging these provisions, petitioners initially argue that the regulations as to attorneys' fees (11 NYCRR 65-4.6) are not entitled to deference because they are contrary to the requirements of Insurance Law § 5106 (a), which authorizes the Superintendent to promulgate regulations limiting attorney's fees. The Superintendent's particular authority with respect to the fair claims process, and the history leading to the amendment adding language specifically gives the Superintendent this limiting authority. Contrary to petitioners' assertion, the cases that have addressed regulations respecting attorneys' fees, have done so under a deferential standard of review (*see Matter of Medical Socy. of N.Y.*, 100 NY2d at 863-864, 871; *Hempstead Gen. Hosp. v Allstate Ins. Co.*, 106 AD2d 429, 431 [2d Dept 1984], *affd for the reasons stated below* 64 NY2d 958 [1985]; *see also Matter of Fresh Meadows Med. Assoc. (Liberty Mut. Ins. Co.)*, 49 NY2d 93, 99 n4 [1979]). Deference is owed to the rule making authority of administrative agencies with respect to matters within their area of expertise (*see e.g. Matter of Nazareth Home of the Franciscan Sisters v Novello*, 7 NY3d 538, 544 [2006]; *Matter of Big Apple Food Vendors' Assn.*, 90 NY2d at 408; *Matter of Consolation Nursing Home*, 85 NY2d at 331-332; *Matter of Matsen v New York State Dept. of Motor Vehs.*, 134 AD3d 1283, 1285-1286 [3d Dept 2015]; *Matter of Independent Master Plumbers of Westchester County, Inc. v Westchester County Bd. of Plumbing Examiners*, 13 AD3d 374, 375 [2d Dept 2004]) and recognition given to the Superintendent's

[5] The provision addressing the fee for certain policy denial issues remains the same as that noted above in footnote 4 (11 NYCRR 65-4.6 [c]).

particular expertise with respect to insurance matters (*see e.g. LMK Psychological Servs.*, 12 NY3d at 223; *Matter of Medical Socy. of State of N.Y.*, 100 NY3d at 863-864; *Matter of New York Pub. Interest Research Group*, 66 NY2d at 448; *Oster*, 41 NY2d 782; *A.M. Med. Servs., P.C. v Progressive Cas. Ins. Co.*, 101 AD3d 53, 60 [3d Dept 2012]; *East Acupuncture, P.C. v Allstate Ins. Co.*, 61 AD3d 202, 209 [2d Dept 2009]).

Petitioners also argue that the regulations lack a rational basis and are unreasonable. Respondents in reply, provide, among other things, the comments submitted to the DFS in response to its August 21, 2013 request for public comment on 11 NYCRR 65-4.6 and in response to the July 23, 2014 notice of proposed rule making relating to revisions to 11 NYCRR 65-4.6 (Forman aff, exhibit W). In their comments, attorneys who represent health care providers uniformly asserted that the minimum fees of $60, the 20 percent limitation on the fee and $850 cap on the fee, all prevented attorneys from receiving reasonable compensation. The attorneys all emphasized that the minimum fee and the $850 fee had not kept pace with the inflation and the cost of legal services, and many requested that the minimum fee be raised to $250 and the cap raised to $2,500 (one attorney asserted that raising the fees based solely on adjusting for inflation would support a minimum fee of $120 and a cap of $1,650). Moreover, the attorneys assert that litigating no-fault claims has become more complicated and expensive because of, among other things, regulations that provide a very short time period within which to make a claim, allow insurers to condition the payment of benefits upon appearances at examinations under oath, and allow insurers to deny claims due to a health care provider's lack of a license.

On the other hand, the insurers commented, almost universally, that they opposed any increase in the cap on fees, asserting that an increase in fees would only increase excessive

litigation and fraudulent claims, leading to higher premium costs for consumers.[6] In addition, many of the insurers stated that it was not uncommon for an attorney's office to commence separate actions against an insurer involving the same no-fault claimant and medical provider for individual bills. Insurers also argued that the there had been a proliferation of actions for small monetary claims, and that this practice has pushed insurers to settle claims that may not have merit, due to the cost of defending such claims.

The respondents also argue that the Superintendent, in preparing the revised regulations, was cognizant of the large increase, during the past twenty years, in the number of no-fault claims that proceed to arbitration. Respondents provide documentation that no-fault arbitration filings averaged 8,000 to 12,000 a year from 1978 to 1994, and increased to 85,000 filings in 2001 and to 190,300 in 2014 (Forman aff, exhibits B, C and D). Despite some decrease in the number of no-fault actions filed in courts (Forman aff, exhibit W), the profusion of no-fault claims in arbitration and the overall number of no-fault actions has significantly increased (Forman aff, exhibits B, C and D). One factor contributing to the overall increase has been a significant increase in the filings of claims having low monetary value. The number of no-fault arbitration filings relating to claims for $300 or less has increased from 4,600 in 2007 (10 percent of all filings) to 39,000 (20 percent of all filings), and the number of no-fault arbitration filings for claims of $150 has increased from 1,600 filings in 2007 (3 percent of all filings) to 20,262 (11 percent of all filings) (Forman aff,

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[6] While New York Central Mutual Fire Insurance Company proposed an increase in the cap from $850 to $1,500, it would have limited the higher cap to proceedings where the amount at issue was $7,500 or more and would have retained the $850 cap for all proceedings involving disputes of less than $7,500.

exhibits B, C, D and E) .[7] This profusion of no-fault claims in arbitration has led to a significant increase in the average time it takes from filing to a hearing, despite a significant increase in the number of arbitrators appointed by the Superintendent (Forman aff, exhibits B, C and D).

The Superintendent concluded that law firms were "unbundling claims" relating to individual injured parties in order to recover multiple minimum fees, rather than the one fee they would receive if the claims were consolidated and the fee was limited to 20 percent of the total amount of the claims.[8] The Superintendent concluded that the "unbundling" of claims was also encouraged by the $60 and $80 caps on recoveries during the conciliation phase of arbitration and the overall cap of $850. Thus, in order to encourage consolidation of claim and to reduce the voluminous filings of low monetary value claims, the Superintendent decided to eliminate the minimum fee (11 NYCRR 65-4.6). The Superintendent also concluded that eliminating the $60 and $80 caps on fees during the conciliation process and increasing the maximum fee to $1,360 from $850 would encourage attorney's and providers to consolidate claims into a single actions. The Superintendent

[7] Although records submitted from the American Arbitration Association may not have been the exact records relied upon by the Superintendent in preparing the new regulations, Christopher J. Maloney, who is the Supervising Insurance Examiner in charge of the Automobile Claims Unit in DFS's Property Bureau, and who is the liaison between the DFS and the American Arbitration Association (AAA), the organization designated by the Superintendent to conduct the process of no-fault conciliation and arbitration, states, in an affidavit dated October 6, 2015, that the information provided by AAA (Forman aff, exhibits C-K) contains kind of information "regularly available to and received by the [DFS] from the AAA" (Forman aff, Exhibit B, ¶¶ 1, 4, 5).

[8] Since, as noted by repondents, 20 percent of a $300 claim is $60, the minimum fee of $60 under the old regulations was greater than the percentage recovery for any claim under $300.

submits that the consolidation of claims will result in fewer arbitration and court proceedings, and assist in reducing the backlog of pending claims.

Thus, respondents demonstrate that there is a rational basis for the amended regulation (*Matter of Consulation Nursing Home*, 85 NY2d at 331-332; *Matter of Reconstruction Home & Health Care Ctr., Inc. v Daines*, 65 AD3d 786, 787 [3d Dept 2009], *lv denied* 14 NY3d 706 [2010]; *Matter of Independent Master Plumbers of Westchester County, Inc.*, 13 AD3d at 375; *see also Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012] ["Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule"] [internal quotation marks omitted]; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]; *Hempstead Gen. Hosp.*, 106 AD2d at 429; *see also United States v Bodcaw Co.*, 440 US 202, 204 [1979] [statutes allowing for attorney's fees from an opponent are a matter of legislative grace rather than constitutional command]). While Insurance Law § 5106 (a) expressly provides for the provision of a reasonable attorney's fee, in granting the Superintendent the authority to set limits on such fees the legislation intended to balance the no-fault law's goals of encouraging insurers to promptly pay claims with other no-fault goals of containing insurance policy costs and reducing court congestion (*LMK Psychological Servs., P.C.*, 12 NY3d at 222; *Matter of Medical Socy. of State of N.Y.*, 100 NY2d at 860; Governor's Mem approving L 1973, ch 13, 1973 McKinney's Session Laws of NY, at 2335; State Executive Department Mem. in support of L 1977, ch 892, 1977 McKinney's Session Laws of NY, at 2445, 2450).

Petitioners offer the affirmations and affidavits of several attorneys who represent health care providers in no-fault proceedings and who aver that they do not submit separate claims in order to obtain the $60 fee for each related claim.

Petitioners also argue that, while the respondents demonstrate that there has been an increase in the number of smaller claims, they offer no proof, other than the comments of insurers, to support their assertion that the increase in smaller claims is a result of claim "unbundling" by no-fault law firms. Petitioners argue that any increase in small claims is a result of the 45 day time limit within which health care providers must submit claims to no-fault insurers (11 NYCRR 65-1.1 [d], 65-2.4 [c]), in combination with providing that the running of interest on overdue claims be tied to instituting a lawsuit or requesting arbitration (11 NYCRR 65-3.9 [c]).[9] However, in promulgating the rule the Superintendent "[was] not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency [the Superintendent] heads" (*Matter of Consulation Nursing Home*, 85 NY2d at 332; *see Matter of Big Apple Food Vendors' Assn.*, 90 NY2d at 408; *Jamaica Recycling Corp. v City of New York*, 38 AD3d 398, 399 [1st Dept 2007], *lv denied* 9 NY3d 801 [2007]; *see also Matter of Medical Socy. of State of N.Y.*, 100 NY2d at 870-872). The Superintendent may properly rely on the comments of insurers regarding the practice of unbundling made during the public comment process (*Jamaica Recycling Corp. v City of New York*, 38 AD3d at 399). While petitioners argue that different conclusions could have been reached as to the cause of the proliferation of smaller claims,

[9] In this regard, 11 NYCRR 65-3.9 (c) provides that, "if an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken."

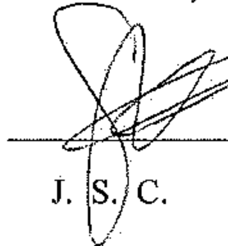
the Superintendent's acceptance of a contrary reason does not establish that his conclusion was arbitrary or capricious (*see Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1988]).

The regulations promulgated constitute a reasonable attempt to balance the competing policy goals underlying the no-fault law. Indeed, the promulgated amendments were largely favorable to attorneys in that they eliminated the low caps set on fees for claims resolved during the conciliation phase of arbitration and raised the fee cap from $850 to $1,360. When, as here, it has been determined that an agency's conclusion has a "sound basis in reason...the judicial function is at an end, and a reviewing court may not substitute its judgment for that of the agency" *(Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 513-514 [1997]; *see Matter of Matsen*, 134 AD3d at 1286). Accordingly, it is

ORDERED, that leave to submit a sur-reply is granted, and the petition is dismissed.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. GLORIA M. DABIRI
J.S.C.