

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Cancellation of Automobile Insurance Policies

Adopted Amendment: N.J.A.C. 11:3-35.4

Proposed: August 4, 2003 at 35 N.J.R. 3529(a)

Adopted: November 19, 2003 by Holly C. Bakke, Commissioner, Department of Banking and Insurance

Filed: November 19, 2003 as R. 2003 d.502, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 15e and 17:29C-7.

Effective Date: December 15, 2003

Expiration Date: January 4, 2006

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received written comments from the following: New Jersey Auto Agents Alliance, the Independent Insurance Agents of New Jersey, the Alliance of American Insurers, State Farm Indemnity Company, the American Insurance Association, the Insurance Council of New Jersey, the National Association of Independent Insurers and Lenore Madrachimov.

COMMENT: Several commenters expressed concern regarding the Department's proposed amendments to N.J.A.C. 11:3-35.4(g)1. One commenter stated that the amendments permit cancellation of an automobile policy by an insurer "if the named insured knowingly provided materially false or misleading information." The commenter suggested that both named insureds

and principal operators define the risk of the policy for insurance rating and underwriting purposes, so the amended rule should provide that the insurer is able to cancel the policy based upon improper actions of either named insureds or principal operators.

RESPONSE: The Department agrees that both named insureds and principal operators define the risk of a policy for insurance rating and underwriting purposes. However, information about the named insured, principal operators, or other risks involved is provided by the named insured as part of the application or renewal process. Thus, if the named insured knowingly provides false or misleading information about a principal operator, they would risk having the policy cancelled. Furthermore, making the addition to the rule suggested by the commenters would constitute a substantive change requiring re-proposal. The Department will monitor the manner in which the amended rule is applied by insurers and may propose additional amendments in the future, depending on the effect of the current amendment in the marketplace.

COMMENT: Several commenters expressed concern with the proposed amendments to N.J.A.C. 11:3-35.4(g) and suggested the term “misleading information” should be clarified, so that it expressly includes the failure to reveal information asked to be provided on an application or claim form. The commenters noted that this clarification will avoid litigation on this issue, because persons committing fraud often do so by trying to hide behind a wall of silence.

RESPONSE: N.J.A.C. 11:3-44.3(a) requires that certain minimum information be provided in the application, in order to rate, underwrite and issue a policy. N.J.A.C. 11:3-44.3(d) permits an insurer to cancel a policy if the information needed to determine whether the applicant is an eligible person is not supplied. The Department agrees that fraud is often committed by failing to disclose, rather than misrepresenting, material information. The Department believes,

however, that the rule as proposed, which mirrors the enabling legislation, and the provisions in N.J.A.C. 11:3-44 referenced above, adequately address such situations.

COMMENT: Several commenters expressed concern with the Department's amendments to N.J.A.C. 11:3-35.4(g), because the rule as proposed for amendment does not say anything about the common law remedy available to an insurer to void a policy for certain coverages for fraud. One commenter noted that P.L. 2003, c. 89 at section 61.2(E), states that: "Nothing in this section shall be interpreted to limit the ability of an insured to void a policy *ab initio* as otherwise provided by law." The commenters recommended that this statutory language be repeated in the rule. One commenter requested that this clarification be made so that the rule is not interpreted to take away the common law remedy.

RESPONSE: The Department has not proposed rule amendments regarding the ability of an insurer to void a policy *ab initio*. By not undertaking rulemaking in this area, the Department preserves all available remedies, including those under the common law, and does not interfere with that process.

The Department believes that the pronouncement in P.L. 2003, c.89 at section 61.2(E) is an unambiguous legislative statement, the effect of which remains undiminished following the adoption of these rules.

COMMENT: One commenter stated that the Department was wrong in proposing more rules regarding cancellation and suggested that the Department fix what already exists.

RESPONSE: The Department disagrees that it was wrong in proposing additional rules regarding cancellation. The Department is acting in accordance with, and implementing the clear intent of the Legislature as pronounced in P.L. 2003, c.89.

COMMENT: One commenter stated that serious consideration must be given as to where the responsibility falls with regard to an accident. The commenter relayed a personal incident where she was involved in a winter accident after she hit black ice and her car spun out. The commenter noted that she later learned that local governmental authorities were aware two years prior to her accident that there was a hazardous condition in that location causing six to 10 accidents when the road was wet, icy or snow covered. The commenter went on to state that it was the governmental authorities' responsibility to fix the problem, and a driver who was not aware of this hazardous condition should not be charged points for the accident.

RESPONSE: The comment is not directly related to these proposed amendments. The commenter is apparently concerned about a personal situation resulting from an accident during the winter involving black ice, which may have resulted in the assessment of insurance eligibility points. The commenter's specific concerns regarding the responsibility for accidents and the assessment of points are beyond the scope of this proposal. Rather, they relate to the standards established in other rules for the approval of underwriting rules filed by insurers.

COMMENT: The same commenter stated that the rule does not specify how the point system is justified or equals what the insurance company decides to charge. The commenter noted that every \$1,000 paid by the insurance company equals one point and, therefore, if they paid out \$3,000 you would be charged three points. The commenter went on to question how her insurance company justified paying out \$3,000 and charging her with five points.

RESPONSE: As was the case with the preceding comment, these observations relate to the standards established by the Department on the basis of which underwriting rules filed by insurers may be approved, and not to the instant proposal. The commenter has the right to request a review of the actions of her insurance carrier through the Office of Consumer Protection Services of the Division of Insurance in this Department.

COMMENT: One commenter expressed concern regarding proposed N.J.A.C. 11:3-35.4(g), in that some insurers may attempt to use the amended rule as a way to weed out undesirable risks by scrutinizing information for mistakes and alleging such information to be materially false or misleading. The commenter went on to note that, in many cases, the forms used by insurers, including, without limitation, applications and renewal questionnaires, appear complicated to the average consumer, and that, based on the commenter's experience with reviewing consumer responses, there is a distinct difference between an intentional act by a consumer and an error or omission. The commenter suggested a clarification using the word "intent" or "intentional."

RESPONSE: The Department will not amend this provision upon adoption. The language proposed by the Department tracks the language used in N.J.S.A. 17:29C-7 as amended by section 61 of P.L. 2003, c. 89.

Black's Law Dictionary, Fifth Edition, defines "knowingly" as: "with knowledge; consciously; intelligently; willfully; intentionally ... The use of the word in an indictment is equivalent to an averment that the defendant knew what he was about to do and, with such knowledge, proceeded to do the act charged." Thus, in order for the amended rule to apply, an applicant or named insured must have known that the information they provided was materially false or misleading, and consciously determined to proceed to provide that information on an

application or with respect to a claim before they did so. Clearly, applicants and insureds who provide a reasonable estimate of information without knowledge that the information is materially false and misleading would not meet this definition. The Department expects that companies will not injudiciously terminate coverage based upon an expansive construction of the language in the rule as adopted. The Department will monitor the manner in which insurers apply the amended rule, through a coordinated effort with the Office of the Insurance Fraud Prosecutor, market conduct examinations and close scrutiny of the volume and nature of any consumer complaint alleging wrongful cancellation. The Department will propose further amendments if necessary.

COMMENT: One commenter expressed support for the proposed amendment. The commenter noted that it believed that the ability of a company to cancel a policy under the circumstances as outlined in the amended rules may restore binding authority to agents, which will assist New Jersey consumers seeking insurance and reduce the number of uninsured vehicles on the roadway.

RESPONSE: The Department appreciates the support for the rule.

COMMENT: One commenter suggested that, in addition to the reason set forth in N.J.A.C. 11:3-35.4(g)1 as proposed, its text should be revised to permit cancellation (additions in boldface) “if the named insured knowingly provided materially false or misleading information, or failed to provide full and accurate information, in connection with any application for insurance, renewal of insurance, or in connection with the filing of a claim for benefits under an insurance policy....” The commenter noted that adding the underlined clause would be helpful. For example, if a named insured does not provide the information on all drivers in the household

or on any other regular operator and the company subsequently learned of this information, such a non-disclosure should be a permitted reason for cancellation. One commenter stated that, while it can be assumed that signing the application or renewal and not listing the necessary drivers in the driver information field is a materially false statement, the commenter believed that the Department should clarify that this is a specifically permitted reason for cancellation.

RESPONSE: This proposal implements Section 61 of P.L. 2003, c. 89, and adds the statutory provision contained therein as a basis for canceling coverage. The statute does not include the language suggested by the commenter. Moreover, N.J.A.C. 11:3-44.3(a) currently defines the information required to be submitted for a complete application to determine eligibility, and N.J.A.C. 11:3-44.3(d) empowers an insurer to cancel a policy based upon the failure of an applicant to disclose information necessary to accurately underwrite a policy. Under these rules, an insurer currently has the authority under certain circumstances to cancel a risk if the named insured does not provide the required information.

COMMENT: One commenter suggested that a change be included with the proposed amendment to N.J.A.C. 11:3-35.4(g)2, which allows cancellation if a named insured does not meet the approved underwriting rules of the insurer, and that this provision should be broadened to apply to all drivers, including any resident in the household or any regular operator of the vehicle, and not strictly limited to named insureds.

RESPONSE: The Department disagrees with the commenter. As amended, N.J.S.A. 17:29C-7(A)(d) now specifically states that the insurer can cancel in the first 60 days following policy issuance if the named insured does not meet its underwriting guidelines. The proposal made by the commenter is, therefore, beyond the statutory authority.

COMMENT: One commenter supported the legislative intent to increase anti-fraud tools for law enforcement agencies to combat the high level of insurance fraud in New Jersey. They stated the proposal would permit insurers to cancel policies if an insured knowingly provides materially false or misleading information in connection with any application for insurance, renewal or when filing a claim for benefits under an insurance policy. The proposal would also permit insurers to cancel policies within 60 days of issuance of the policy if the insured fails to meet the insurer's underwriting rules. The commenter believes that these two changes provide insurers additional tools to help reduce insurance fraud at the application or claim level and they support the changes.

RESPONSE: The Department appreciates the support for the rule.

COMMENT: One commenter stated that they are uncertain of the ultimate outcome of the changes that permit cancellation if there is no central tracking system to monitor misleading applications. The commenter noted that, without a central tracking system, an insured that provides materially false information or fails to meet certain underwriting rules will simply move to another insurer for coverage. The commenter noted that if other insurers are able to identify such applicants, the intended purpose of this proposal can be more fully realized, and that honest and truthful drivers will benefit from a central tracking system. The commenter urged the Department of Banking and Insurance to work closely with the New Jersey Office of Insurance Fraud Prosecutor to coordinate a central tracking system that could provide an immeasurable benefit to reduce underwriting fraud.

RESPONSE: The Department agrees that a central tracking system would be a benefit. The Department is reviewing alternate methods for insurers to acquire information on applicants that have been cancelled or nonrenewed for providing materially false or misleading information.

It should be noted that insurers have obtained information on coverage lapses from prior carriers or by obtaining copies of the notices of cancellation for both eligibility and tier rating purposes.

COMMENT: One commenter noted that the notice requirements under N.J.S.A. 17:29C-7 were changed by the new legislation. The commenter stated that the Legislature removed N.J.S.A. 17:29C-7(B) and that, under this change, insurers will be required, pursuant to N.J.S.A. 17:29C-8, to provide at least 20 days notice to policyholders on policies or coverages that are in effect less than 60 days. The commenter stated that this change in legislation will place insurers at a disadvantage and will unwittingly provide untruthful applicants coverage for a greater period of time than was intended by the Legislature. The commenter requested that the Department clarify this new notice requirement and how insurers must implement the change. The commenter noted that, in particular, it is uncertain how insurers should treat premiums paid by these applicants based upon this notice requirement, because policyholders will be granted coverage for a limited period of time simply because the notice period has not lapsed.

RESPONSE: The commenter's suggestion that the change to N.J.S.A. 17:29C-7, which the commenter believes will have the effect of requiring a 20-day notice of cancellation for someone determined to have knowingly provided materially false and misleading information and places insurers at a disadvantage since this time frame is longer than the intent of the Legislature, is beyond the scope of this proposal. Any revision to the time frame set forth in N.J.S.A. 17:29C-8 would require a statutory change.

With respect to the commenter's suggestion that the Department clarify the 20-day notice requirement and how insurers must implement the change, the Department believes the change is self-explanatory by the terms of the statute.

With regard to how insurers should treat premiums paid by these applicants, N.J.S.A. 17:29C-4.1 provides the necessary guidance regarding a calculation of any unearned premiums.

Summary of Changes Upon Adoption:

The Department is not adopting the words "or renewal" contained in N.J.A.C. 11:3-35.4(g)2 as proposed. The statute underlying the proposed amendment, N.J.S.A. 17:29C-7A(d), refers to the "issuance of the policy" and does not reference renewals. A policy renewal is not the issuance of a policy. Cancellations within the first 60 days of new policies are permitted in order to allow insurers adequate time to conduct the underwriting review, including obtaining information and confirming eligibility, most importantly in circumstances where coverage is bound prior to completion of the underwriting review. In contrast, insurers are able to initiate the renewal process, so as to conduct the underwriting review of a renewal application, well in advance of the expiration date of the policy for which renewal is sought. Further, the Department notes that the procedure for renewal applications that do not meet the insurer's underwriting guidelines is established by N.J.S.A. 17:29C-9 and N.J.A.C. 11:3-8.3.

In addition, the Department is clarifying what underwriting rules are to be applied when an insurer cancels a policy within 60 days of issuance. Proposed N.J.A.C. 11:3-35.4(g)2 referred to the underwriting rules of the insurer "then in effect." The Department is concerned that the failure to use more specific terminology in the rule may lead to improper cancellations, which would have serious consequences. The Department therefore is changing this text upon adoption

to have it read: “underwriting rules of the insurer in effect on the date of application.” Currently, N.J.A.C. 11:3-44.3, entitled “duty to provide coverage upon receipt of a completed application,” describes the parameters for underwriting a complete application submitted by an eligible person. N.J.A.C. 11:3-44.3(a) provides that the desired effective date of the policy is one component of the minimum information necessary to determine whether an applicant is an eligible person and to rate and underwrite the policy. N.J.A.C. 11:3-44.3(b) indicates that, if an eligible person applicant who submits a complete application designates the date of application as the desired effective date of the policy, an insurer must provide insurance within five business days of receipt of the application, and can bind coverage as of the date of the completed application. Thus, for companies which choose to offer this immediate binding service, these rules provide for such applications to be evaluated under the underwriting rules that are in effect on the application date. Consequently, in order to render N.J.A.C. 11:3-35.4(g) as adopted consistent with the standards for underwriting rules applicable to applications from eligible persons currently imposed by N.J.A.C. 11:3-44.3, it is necessary to change its text upon adoption as set forth above.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments are not subject to any Federal requirements or standards.

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 35 PRIVATE PASSENGER AUTOMOBILE INSURANCE
UNDERWRITING RULES

11:3-35.4 Underwriting rules for eligible persons

(a) - (f) (No change.)

(g) Insurers may file for approval underwriting rules which provide for the cancellation of coverage during the policy term under a policy insuring an eligible person if:

1. (No change from proposal.);
2. An insurer determines, within 60 days of issuance of the policy *[or renewal]*, that the named insured does not meet the approved underwriting rules of the insurer *[then]* in effect **on the date of application**.

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