INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice Insurance – General Provisions; Optional Policy Provision – Right to Consent to Settlement

Adopted New Rules: N.J.A.C. 11:27-1 and 2.

Proposed: November 1, 2004 at 36 N.J.R. 4873(b).

Adopted: June 21, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance.

Filed: June 23, 2005 as R. 2005 d. 243, with a technical change 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, 17:1-15e and 17:30D-20 (P.L. 2004, c. 17, § 15).

Effective Date: July 18, 2005

Operative Date: October 18, 2005, for N.J.A.C. 11:27-2.

Expiration Date: June 6, 2010

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received written comments from the following: Ervin Moss, MD, Executive Medical Director, New Jersey State Society of Anesthesiologists; the law firm of Pringle Quinn Anzano on behalf of ProSelect Insurance Company; Kieran E. Pillion, Jr. Vice President/General Counsel, Princeton Insurance Company and Patricia A. Costante, Chairman and Chief Executive Officer, MD Advantage Insurance Company of New Jersey.

COMMENT: One commenter noted that, with the exception of N.J.A.C. 11:1-7.1, the rules do not define the term "medical malpractice insurance." The commenter requested that the Department clarify the definition of "medical malpractice insurance" applicable to these rules.

RESPONSE: Given the presence of the definition of "medical malpractice liability insurance" in the Medical Malpractice Liability Insurance Act, N.J.S.A. 17:30D-1 et seq., at N.J.S.A. 17:30D-3(d), the Department does not believe it is necessary to include a similar definition in N.J.A.C. 11:27. The definition in N.J.S.A. 17:30D-3 would be applicable to references to "medical malpractice liability insurance" and to "medical malpractice insurance" in N.J.A.C. 11:27.

COMMENT: One commenter indicated that it is unclear whether the proposed rules apply to insurance exchanges writing medical malpractice insurance.

RESPONSE: N.J.S.A. 17:30D-20 provides, in pertinent part, that: "A medical malpractice liability insurance policy, which is made, issued or delivered pursuant to Subtitle 3 of Title 17 of the Revised Statutes in this State on or after the effective date of P.L. 2004, c. 17 may contain a provision that provides a person insured under the policy with the exclusive right to require the insurer to obtain the consent of the insured to settle any claim filed against the insured; except that, if the policy contains that provision, the insurer shall offer an endorsement, to be included in the policy at the option of the insured, providing the insurer with the right to settle a claim filed under the policy without first having obtained the insured's consent. The insurer shall establish a premium for the endorsement…." Insurance exchanges may only make, issue or deliver medical malpractice policies in New Jersey if they have been authorized by the Commissioner to do so. See N.J.S.A. 17:50-11. Thus, the rules in N.J.A.C. 11:27 will be applicable to medical malpractice policies made, issued or delivered in New Jersey by authorized insurance exchanges.

COMMENT: One commenter stated that they supported the intent of the proposed rule.

RESPONSE: The Department appreciates the expression of support for the proposal.

COMMENT: One commenter noted that proposed N.J.A.C. 11:27-2.2(b)1 requires that "the offering of the endorsement and corresponding premium discount shall be provided on the application form or in an attachment accompanying the application form." They stated that no other endorsements or discounts offered by insurers are required to be so placed and such prominent placement may unduly persuade insureds to select such endorsements or discounts. The commenter stated that such persuasion is arguably inappropriate given the insured's new opportunity to select rather large deductibles, as provided in proposed N.J.A.C. 11:27-3.2(a). (See 36 N.J.R. 4875.) The commenter further stated that it is the role of the producer to explain available endorsements and discounts that may affect premium calculations and therefore this provision seems unnecessary.

RESPONSE: The Department disagrees. By enacting Section 15, the Legislature determined that an endorsement offering the insured the option to waive their right to consent to settle is an important way for insureds to save money on premiums. To make sure that the producer, or others along the line in placing the insurance, did not fail to make it clear to the insured that this endorsement was available, the rule requires it to be on the application in some form or in an attachment accompanying the application form. The Department disagrees with the commenter that requiring this notice constitutes persuasion. The notice takes no position for or against the endorsement. It merely serves to ensure that the availability of the endorsement is made known to the insured. The insured may either accept it or decline it, knowing that there would be a premium reduction by accepting the endorsement.

Further, the Department believes that accepting the endorsement to waive the right to consent to a settlement may enable claims to be settled earlier in the process, thereby saving costs associated with the defense of claims and defense experts.

COMMENT: One commenter stated that it seems inconsistent that N.J.A.C. 11:27-2.2(b)2 references the renewal regulation, N.J.A.C. 11:1-20.2(c), confirming that the selection of an endorsement requires a renewal notice, while other regulations referencing endorsements do not also cross-reference N.J.A.C. 11:1-20.2(c).

RESPONSE: The Department believes that the ability of the insured to choose to retain the right to consent to the settlement of a claim or to give up that right is an important decision and that the renewal notice mechanism is appropriate. It is important because a decision on this endorsement will affect the premium on the policy. Moreover, the decision whether to retain or give up the right to authorize acceptance of the final resolution of a malpractice suit or claim warrants additional safeguards to ensure that the insured fully appreciates the significance of that decision.

COMMENT: One commenter stated that they are currently having their actuary review this matter to determine what, if any, rate reduction would be indicated if an insured opted to select an endorsement that removes the current “consent to settle” requirement from its company’s policies.

RESPONSE: The Department appreciates the general expression of support for the proposal. It looks forward to the rule filing by this and other carriers establishing a premium for the

endorsement, which premium shall, as prescribed in N.J.A.C. 11:27-2 and N.J.S.A. 17:30D-20, reflect a savings or reduced cost attributable to the endorsement.

COMMENT: One commenter stated they had a concern with the lack of information that would explain to the policyholder that if he elects the "option of not to settle" he places himself at risk for any amount in excess of his coverage in the case where the insurance company fights the claim. The commenter stated that with the settlement option, once the insurance company is informed that the insured is willing to settle, any amount awarded above that would be the responsibility of the insurance company. The commenter suggested that such an explanation should be required if the option of non-settlement is offered.

RESPONSE: The Department believes that the commenter is confusing the decision of whether to settle a case, which would be made in the context of a pending suit based upon a particular set of facts and which decision would be made with the involvement of the attorney assigned by the medical malpractice carrier to represent the insured on the claim, with the object of the proposed rule, which involves a decision, before the policy goes into effect, on whether the insured would retain the general right to approve the particular settlement terms of an individual lawsuit or claim**.**

In addition, the Department is mindful of the general obligation of producers when selling, soliciting or negotiating insurance to explain to prospective insureds the potential benefits and risks inherent in policy/coverage options, which would be applicable, particularly in the case of a policy option to waive a consent to settlement provision.

COMMENT: One commenter stated that N.J.A.C. 11:27-2.2(b), as drafted, requires that these proposed provisions apply to policies made, issued or delivered on or after December 4, 2004. The commenter stated that they themselves, as will other insurers, need time to develop and file required endorsements with the Department of Banking and Insurance. The commenter also stated that the enabling statute, N.J.S.A. 17:30D-20 (P.L. 2004, c.17, § 15), did not become effective until 180 days after the Medical Malpractice Liability Insurance Act's effective date, which was 30 days after its passage on June 7, 2004, that is July 7, 2004. The commenter stated that therefore this "statute" (which the Department interpreted as referring to the proposed rule), cannot become effective prior to the enabling statute's effective date of January 3, 2005. The commenter stated that furthermore, it seems that N.J.S.A. 17:29AA-6 could apply to policy form filings required by this regulation, which statute requires that insurers file policy forms for approval with the Commissioner 30 days prior to becoming effective. The commenter therefore requests that this provision, if adopted, be effective only for new or renewal policies issued after December 2005 so that insurance carriers have adequate time to develop and make required filings with the Department.

RESPONSE: The Department agrees that N.J.S.A. 17:29AA-6 could apply to policy form filings required by the statute and regulation. The Department believes that the statutory language is sufficiently clear to enable insurers to begin the process of drafting these filings and that delaying the operative date of N.J.A.C. 11:27-2 until October 18, 2005 will afford to insurers adequate time to develop and make required filings with the Department. The Department disagrees that the rules should be effective only after December 2005. Lastly, the Department disagrees with the commenter's conclusion that the enabling statute, N.J.S.A. 17:30D-20 (P.L. 2004, c. 17, § 15), did not become effective until 180 days after July 7, 2004. As is explicitly set

forth in Section 33 of P.L. 2004, c. 17, Section 15 became effective on December 4, 2004, which was 180 days after June 7, 2004, the date of enactment.

COMMENT: One commenter noted that the subchapter itself states that it "shall apply to any malpractice insurance policy made, issued, or delivered in this State… on or after December 4, 2004." The commenter stated that the comment period ends on December 31, 2004 and the Department will take additional time to prepare its response. The commenter respectfully requested guidance as to the timetable the Department expects insurers to follow in implementing the change. The commenter stated it appears that some notices will be required notifying insureds of an option to change the terms of an existing policy that may have been issued on or after December 4, 2004 but before final regulations have been adopted.

RESPONSE: Commencing on the operative date of these new rules, the requirements in N.J.A.C. 11:27-2 as adopted will apply prospectively to all newly made, issued or delivered policies. The requirements shall also apply to all policies being renewed on or after the operative date of these rules.

COMMENT: One commenter noted that under N.J.A.C. 11:27-2.1(b) and 2.2(b), this regulation requires insurers to comply on policies made, issued, or delivered on or after December 4, 2004. The commenter noted that this date has already passed and that therefore a prospective date should be substituted.

RESPONSE: Commencing on the operative date of these new rules, the requirements in N.J.A.C. 11:27-2 as adopted will apply prospectively to all newly made, issued or delivered

policies. The requirements shall also apply to all policies being renewed on or after the operative date of these rules.

Summary of Agency-Initiated Change:

In order to have it more accurately reflect the subject matter of the rules, upon adoption the heading of Subchapter 2 has been changed to "Optional Policy Provision – Right to Consent to Settlement."

Federal Standards Statement

The adopted new rules are not subject to any Federal standards or requirements. Therefore a Federal standards analysis is not required.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***, deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 2. OPTIONAL POLICY PROVISION *[;]* *-* RIGHT TO *[SETTLE]* ***CONSENT TO SETTLEMENT***

Mm15ad/INOREGS