

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice Insurance - Mandatory Deductibles

Adopted New Rules: N.J.A.C. 11:27-3

Proposed: November 1, 2004 at 36 N.J.R. 4875(a)

Adopted: April 26, 2005 by Donald Bryan, Acting Commissioner, Department of Banking and Insurance

Filed: April 29, 2005 as R. 2005 d. 167, **with a substantive 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-31
(P.L. 2004, c. 17, §§ 16 and 31)

Effective Date: June 6, 2005

Operative Date: October 18, 2005

Expiration Date: June 6, 2010

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received timely written comments from: the New Jersey State Society of Anesthesiologists, Princeton Insurance Company, and from Pringle Quinn Avanzano on behalf of ProSelect Insurance Company.

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. 11:27-1 et seq.

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-21 provides that “...Every insurer authorized to transact medical malpractice liability insurance in this State shall offer medical malpractice liability insurance policies with a deductible, at the option of the insured, in an amount of at least \$5000 per claim and up to \$1,000,000 per claim...” 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 expressed concern with N.J.A.C. 11:27-3.2 which requires medical malpractice insurers to offer a range of at least five deductible amounts, with appropriate premium reductions. The commenter requested that the Department amend this provision so that it would be effective for new and renewal policies issued after December 2005. The commenter believes that the amendment would provide carriers with sufficient time to develop and submit appropriate filings to the Department.

RESPONSE: The New Jersey Medical Care Access and Responsibility and Patients First Act, P.L. 2004, c.17 (N.J.S.A. 2A:53A-37), enacted June 7, 2004, states that sections 14 through 16 shall take effect on the 180th day after enactment, which was December 4, 2004. N.J.S.A. 17:30D-21 (section 16) requires every insurer authorized to transact medical malpractice liability insurance in this State to "offer medical malpractice liability insurance policies with a deductible,

at the option of the insured, in an amount of at least \$5,000 per claim and up to \$1,000,000 per claim..." Therefore the Department believes that, in keeping with the plain meaning and intent of the authorizing statute, it is appropriate to make these rules applicable to new and renewal policies upon the operative date of the rules. In order to provide insurers with adequate time to file the manual rules referenced in new rule N.J.A.C. 11:27-3.4, the Department has determined to delay the operative date of these new rules to October 18, 2005.

COMMENT: One commenter expressed concern that the deductible examples listed in N.J.A.C. 11:27-3.2(a)1 are actually mandates, because the last line in that section states "intermediate deductible amounts shall be interpolated accordingly." The commenter contends that N.J.S.A. 17:30D-21 provides that deductibles shall be between \$5,000 and \$1,000,000 and does not mandate any aggregate deductibles or applicable liability limits. The commenter urged the Department to provide insurers with flexibility in developing deductibles within the parameters provided by statute, so that the deductible options they offer to insureds are not hindered. The commenter suggested that the Department's proposed rules be clarified by applying the deductible options outlined in N.J.A.C. 11:27-3.2(a)1 only to medical malpractice policies for individual practitioners.

RESPONSE: N.J.A.C. 11:27-3.2(a)1 provides "examples of the deductibles which may be included in the range of five deductibles to be offered" by medical malpractice insurers. If an insurer wanted to offer other deductible options within the mandated range, it would be free to do so. If an insured wanted to purchase something between the offered deductibles then the insurer would interpolate.

The Department disagrees that these rules should apply only to individual practitioners. The Department believes that, based on the intent of N.J.S.A. 2A:53A-37 and 17:30D-21, these

rules should apply to any licensed medical practitioner or health care facility as defined by the statute.

COMMENT: One commenter requested that the Department clarify that an insurer may, as a condition of accepting a risk, apply its underwriting guidelines. The commenter suggested the following amendment to N.J.A.C. 11:27-3.2(a) (additional language in boldface):

All insurers authorized to transact medical malpractice liability insurance in this State shall offer medical malpractice liability insurance policies that include a range of at least five deductible amounts applicable to indemnity only, with the selection of the deductible to be at the option of the insured, subject to underwriting requirements of the insurer.

RESPONSE: There is no text in N.J.S.A. 17:30D-21 which would support construing that provision to require a medical malpractice insurer to offer policies that would not be subject to the insurer's underwriting rules. Consequently, an insurer should, as a condition of accepting a risk, apply its underwriting guidelines. The Department is adding the following language to N.J.A.C. 11:27-3.2(a) upon adoption to clarify that the intent of this provision is to have insurers include in the policies offered in accordance with their underwriting rules the required range of deductibles (additional language in boldface; deletions in brackets).

All insurers authorized to transact medical malpractice liability insurance in this State shall [offer] **include in their offered** medical malpractice liability policies [that include] a range of ...

COMMENT: One commenter recommended that the Department amend its rule to permit insurers to develop deductible options that may also apply to defense costs. The commenter believes that such a provision would maximize opportunities for insurers to offer reduced premiums.

The commenter suggested that N.J.A.C. 11:27-3.2(a) be amended as follows to reduce confusion regarding defense costs, permissible deductibles and policy limits (additional language in boldface; deletions in brackets)

...The offered deductibles [shall range from at least \$5,000 per claim on all policies regardless of the liability limits and up to \$1,000,000 per claim on policies with liability limits of at least \$1,000,000/\$3,000,000] shall be less than the policy liability limits.

RESPONSE: The Department does not believe that the commenter's suggested change is necessary and feels it would unduly confuse the issue. N.J.A.C. 11:13-7.3 addresses defense costs within policy limits and the charging of defense costs against deductibles and establishes how they are applied. This rule states, in pertinent part, that:

(a) No commercial insurance policy shall be issued or renewed on a form required to be filed pursuant to N.J.S.A. 17:29AA-6 which contains a provision that includes defense costs within policy limits, except as provided in this section.

1. No defense costs shall be charged against any deductible amount.

While subsections (b) and (c) of N.J.A.C. 11:13-7.3 permit the inclusion of defense costs within policy limits, they do not permit the charging of defense costs against deductibles.

The Department notes that the New Jersey Medical Care Access and responsibility and Patients First Act, P.L. 2004, c. 17 (the Act) approved June 7, 2004, was the Legislature's response to a medical malpractice liability insurance crisis in this State. The crisis created an

affordability problem for physicians who indicated that escalating premiums directly caused some of them to leave New Jersey to practice elsewhere, scale back their practices or retire from the practice of medicine altogether. If defense costs are allowed to be charged against the deductible, the Department believes that physicians would incur additional out of pocket expenses which would not be beneficial to physicians and would be inconsistent with the intent of the Act, which was to alleviate the burden of high-cost medical malpractice liability coverage of physicians. Therefore, the Department does not believe that the adopted rules (N.J.A.C. 11:27.3), nor the Department's policy on defense costs within limits as reflected in N.J.A.C. 11:13-7.3, should be changed.

COMMENT: One commenter requested that N.J.A.C. 11:27-3.5(a) be amended to clarify that an insurer may require that the insured provide “collateral for the deductible and aggregate deductible option chosen by the insured ...” (additional language in boldface). The commenter believes that, in order for this provision to be truly effective, insureds must be provided the option to collateralize the deductible and aggregate deductible. The commenter contends that, without this amendment, insurers might reject applicants that would have been accepted if the insurer had the authority to accept collateral for the aggregate deductible amount.

Another commenter stated that, under the current law, an insurance carrier that has issued a policy with a deductible is required to make payments under the policy from the first dollar of exposure and seek reimbursement from the insured after payment has been made. The commenter contends that there is an inherent credit risk under such a procedure and that the collateralization of the deductible amount is critical to maintain an insurer's financial strength for the benefit of all its insureds. The commenter stated that an insurer should not be allowed to issue any deductible policies without first receiving, before the inception or renewal date,

collateral valued at 100 percent of the annual aggregate deductible. The commenter stated that the Department's rules as proposed do not clearly provide that level of protection.

Additionally, the commenter expressed concern because it has incurred significant costs in the past to collect deductibles from insureds, who either refused or have been unable to pay. The commenter stated that if any insurer were to issue a policy before first obtaining 100 percent collateralization for the annual aggregate, it could find itself spending several times the deductible amount in litigation costs to collect payment from a recalcitrant or bankrupt insured. The commenter stated that the time and expense of such effort will ultimately be borne by insureds who make timely reimbursement of the deductibles or chose no deductible.

RESPONSE: The Department disagrees with the commenters' suggestions. N.J.A.C. 11:27-3.5 provides that acceptable forms of collateral include surety bonds, irrevocable letters of credit issued by a bank and such other forms as are deemed mutually agreeable by the insurer and insured. The Department notes that the authorizing statute and these rules are intended to address the affordability problem in the medical malpractice insurance market. Therefore, the Department does not believe that its rules governing collateral requirements should be amended in accordance with the commenters' suggestions, because doing so would cause these requirements to be more burdensome on physicians than is reasonably necessary.

COMMENT: One commenter questioned how the amount of premium reduction is calculated. The commenter stated that only insurance companies have the database to determine the amount by which a premium should be reduced. For example, if one elects to purchase a \$100,000 per occurrence policy, the commenter suggested that the Department should review any proposed reduction in premiums and approve or disapprove the discounted premiums.

RESPONSE: Pursuant to N.J.S.A. 17:29AA-1 (the Commercial Deregulation Act), companies are required to file premium reductions associated with each deductible amount, along with justification. These deductible factors will be reviewed by the Department.

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

11:27-3.2 Mandated deductible amounts

(a) All insurers authorized to transact medical malpractice liability insurance in this State shall *[offer]* ***include in their offered*** medical malpractice liability insurance policies *[that include]* a range of at least five deductible amounts applicable to indemnity only, with the selection of the deductible to be at the option of the insured. The offered deductibles shall range from at least \$5,000 per claim on all policies regardless of the liability limits and up to \$1,000,000 per claim on policies with liability limits of at least \$1,000,000/\$3,000,000. Any medical malpractice liability insurance policy that contains a provision that includes defense costs within policy limits shall conform to the standards set forth in N.J.A.C. 11:13-7.3(c).

1. (No change in text.)