

**INSURANCE  
DEPARTMENT OF BANKING AND INSURANCE  
DIVISION OF INSURANCE**

**Medical Malpractice Insurance – General Provisions; Optional Policy Provision – Right to Settle**

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

Authorized By: Holly C. Bakke, Commissioner, Department of Banking and Insurance

Authority: N.J.S.A.17:1-8.1, 17:1-15e and 17:30D-20 (P.L. 2004 c. 17 § 15)

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2004-419

Submit comments by December 31, 2004 to:

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The agency proposal follows:

**Summary**

The New Jersey Medical Care Access and Responsibility and Patients First Act (the Act) (P.L. 2004, c. 17), 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. The Act was designed to address this affordability problem by reforming three primary components of the medical malpractice system: comprehensive tort reform; changes to

New Jersey's health care system; and tightening the regulation of medical malpractice insurers. The proposed new rules implement the Act.

Proposed new Subchapter 1 contains the general, introductory provisions of the chapter, including provisions on its purpose, scope, and separability.

Proposed new Subchapter 2 rules implements section 15 (codified as N.J.S.A. 17:30D-20) of the Act.

The proposed new rules in Subchapter 2 recognize that medical malpractice liability insurance policies made, issued or delivered in this State in accordance with applicable law may contain a provision giving the insured the right to consent to the settlement of any claim. The proposed new rules require that, if such a provision is set forth in a policy made, issued or delivered by an authorized insurer, an endorsement shall be offered providing that an insured may waive the right to consent. The rules further require that where an insured on such a policy selects that endorsement, they shall receive a reduction in premium which reflects the reduced costs attributable to the endorsement. The rules further prescribe the manner in which notice of the endorsement and corresponding premium reduction is to be provided to applicants and insureds. Finally, the proposed rules require medical malpractice insurers to file an endorsement form and, when required, a manual rule.

This rule proposal provides for a comment period of 60 days, and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

### **Social Impact**

The proposed new rules should have a positive social impact on healthcare providers and practitioners by providing them with an additional means by which they may reduce their

malpractice insurance rates. This, in turn, should alleviate the problem of limited access to certain types of healthcare in some areas of the State caused by practitioners terminating or curtailing their practices as a result of onerous medical malpractice insurance premium rates. Moreover, by giving New Jersey medical malpractice insurers flexibility in the policy provisions they offer, insureds will be afforded the ability to select an endorsement that corresponds to their individual needs.

### **Economic Impact**

The Department expects that the proposed new rules will have a positive economic impact. Insurers will be able to offer options to healthcare providers and practitioners concerning the right to settle malpractice claims. In addition, if a provision requiring the consent of the insured to settle is offered by the insurer in its policy, insureds will have the option to receive a reduction in their premium by waiving their right to consent to a settlement. In accordance with the Act, the amount of the premium reduction for the endorsement waiving consent shall reflect the savings or reduced costs attributable to the endorsement.

Insurers will experience a minor expense for the preparation and filing of the endorsement with the Department and, if necessary, for the preparation and filing of the manual rule with the Department. This is usually accomplished in-house by the insurer and is a usual and expected cost of doing business.

### **Federal Standards Statement**

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

### **Jobs Impact**

To the extent that the Act provides options which, if exercised by policyholders, can reduce medical malpractice liability insurance rates, the number of practitioners choosing to retire, leave New Jersey or scale back their practices should decrease. Thus, these and the other rules implementing that Act should have a positive jobs impact on the medical community.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposed new rules together with their written comments on other aspects of this proposal.

### **Agriculture Industry Impact**

The Department does not expect any agriculture industry impact from the proposed new rules.

### **Regulatory Flexibility Analysis**

Some New Jersey medical malpractice insurers may be small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rules will impose compliance requirements on these entities. Insurers may include a provision in medical malpractice policies affording insureds the right to consent to the settlement of any claims on the policies. However, if they do so, the insurer is required to offer an endorsement, under the terms of which the insured would waive that right, and a corresponding reduction in premium if the insured elects to receive that endorsement. Insurers would have to craft the appropriate endorsement and file the endorsement form with the Department and, where required by N.J.S.A.

17:29AA-5 and N.J.A.C. 11:1-2, also file a manual rule. Compliance costs are discussed in the Economic Impact above.

The purpose of the proposed new rules is to require insurers who offer policies which include a provision giving insureds the right to consent to the settlement of malpractice claims to also offer an endorsement affording the insured the option to waive that right which, if selected, will result in a premium reduction. This purpose does not vary based upon business size. The proposed new rule will not require the services of any outside professionals because insurers can fulfill the new compliance requirements that are imposed, in the course of their normal business operations and procedures. In addition, the proposed new rules implement section 15 of the Act, which applies to all authorized medical malpractice insurers regardless of size. Accordingly, no differentiation based on business size is provided.

### **Smart Growth Impact**

The proposed new rules will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Full text of the proposed new rules follows:

## CHAPTER 27

### MEDICAL MALPRACTICE LIABILITY INSURANCE

#### SUBCHAPTER 1. GENERAL PROVISIONS

### 11:27-1.1 Purpose

The purpose of this chapter is to implement the New Jersey Medical Care Access and Responsibility and Patients First Act, P.L. 2004, c. 17 as it applies to insurers authorized to transact medical malpractice liability insurance in this State.

### 11:27-1.2 Scope

This chapter applies to all insurers authorized to transact medical malpractice liability insurance in this State and to the medical malpractice liability insurance policies issued by such authorized insurers, as more specifically set forth in the subchapters that follow.

### 11:27-1.3 Separability

If any provision of this chapter or its application to any person or circumstance is held to be invalid, the remainder of this chapter and its application to other persons or circumstances shall not be affected.

## SUBCHAPTER 2. OPTIONAL POLICY PROVISION; RIGHT TO SETTLE

### 11:27-2.1 Purpose and scope

(a) The purpose of this subchapter is to provide an option to insureds covered by medical malpractice insurance policies that contain a “consent by the insured to settle” provision to waive that provision by way of endorsement, and to require insurers to provide a premium reduction reflecting any savings or reduced costs if the endorsement providing for a waiver of the “right to consent to settle” provision is selected.

(b) This subchapter shall apply to any medical malpractice insurance policy made, issued or delivered in this State by an authorized insurer on or after December 4, 2004.

11:27-2.2 Optional policy provision; right to settle

(a) A medical malpractice liability insurance policy may provide that a person insured under the policy has the exclusive right to require the insurer to obtain the consent of the insured to settle any claim filed against the insured.

(b) If a medical malpractice liability policy made, issued or delivered in this State by an authorized insurer on or after December 4, 2004 contains a provision as described in (a) above, the insurer shall offer an endorsement, to be included in the policy at the option of the insured, providing that the insurer may settle a claim filed under the policy without first having obtained the insured's consent. The insurer shall establish a premium discount for that endorsement, which shall reflect any savings or reduced costs attributable to the endorsement.

1. With respect to new applications for coverage under policies which include a provision as referenced in (a) above, notice of the offering of the endorsement and corresponding premium discount shall be provided on the application form or in an attachment accompanying the application form.

2. If the offering of the endorsement constitutes a change in the contract terms of a policy being renewed, notice thereof and of the corresponding premium discount shall be provided to the insured in accordance with N.J.A.C. 11:1-20.2(c).

(c) An insurer authorized to transact medical malpractice liability insurance in this State that issues policies which contain the provision referenced in (a) above and offers an endorsement as set forth in (b) above shall file the endorsement with the Department of Banking

and Insurance in accordance with N.J.A.C. 11:1-2. Where required by N.J.S.A. 17:29AA-5 and N.J.A.C. 11:1-2, a manual rule pertaining to the premium reduction required when the endorsement is selected shall be filed with the endorsement form filing.

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