

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

Medical Malpractice Insurance – Prohibited Premium Increase

Proposed New Rules: N.J.A.C. 11:27-5

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-31 (P.L. 2004 c. 17, § 32)

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

Proposal Number: PRN 2004 - 422

Submit comments by December 31, 2004 to:

Douglas Wheeler, Assistant Commissioner
Legislative and Regulatory Affairs
New Jersey Department of Banking and Insurance
P.O. Box 325
Trenton, NJ 08625-0325
Fax: (609) 292-0896
Email: Legsregs@dobi.state.nj.us

The agency proposal follows:

Summary

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. 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 Section 17 of the Act, N.J.S.A. 17:30D-22. This section prohibits insurers authorized to transact medical malpractice liability insurance in this State from increasing on renewal the premium on any medical malpractice liability insurance policy because of a claim of medical negligence or malpractice against the insured, if the insured is dismissed from an action alleging medical malpractice which was based upon that claim within 180 days of the filing of the last responsive pleading in the action and where no indemnity payment had been made by the insurer on that claim. Costs attributable to defending the dismissed action related to the claim would not be considered indemnity payments.

Proposed N.J.A.C. 11:27-5.1 sets forth the purpose and scope of the subchapter.

Proposed N.J.A.C. 11:27-5.2 sets forth the definitions of terms used throughout the subchapter.

Proposed N.J.A.C. 11:27-5.3 sets forth the prohibition on a premium increase on renewal of a medical malpractice insurance policy if a civil proceeding is dismissed against the insured in the early stages where no indemnity payment was made by the insurer. It also requires that, where an increase was imposed at a prior renewal based upon a then-pending claim that was subsequently dismissed, as set forth in the rule, during the term of the subsequently renewed policy, the next succeeding renewal premium shall reflect the elimination of this claim in the calculation of the renewal premium. It also requires medical malpractice insurers to file a manual rule as to this issue in accordance with the provisions of N.J.S.A. 17:29AA-5 and N.J.A.C. 11:1-2.

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 by giving New Jersey health care providers and practitioners confidence that their premiums on renewal will not be raised because of their being named in a lawsuit which is promptly dismissed as to them. Moreover, these rules should relieve the complaints of those health care practitioners who experienced rate increases simply because they were named in a lawsuit, and not because of a determination of any culpability or wrongdoing on their part. 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.

Economic Impact

The Department expects that the proposed new rules will have a positive economic impact upon healthcare providers and malpractice insureds. As a result of these rules, such providers and insureds will not be subject to premium increases on renewal of their malpractice insurance coverage based solely on the fact that a malpractice claim was filed, provided that the action was dismissed at an early stage in the legal proceedings. Insurers will incur a minor expense 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. Insurers will also be required to absorb the costs of defending legal actions that are dismissed within the 180 day timeframe referenced in the rules. To permit insurers to increase premiums to cover such costs would frustrate the legislative intent underlying N.J.S.A. 17:30D-22. These costs are less than the cost of defending an action through the entire discovery and trial process.

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 New Jersey Medical Care Access and Responsibility and Patients First Act provides options which, if exercised by policyholders, can reduce medical malpractice liability insurance rates for health care practitioners, the number of practitioners choosing to retire, leave New Jersey or scale back their practices should decrease. Thus, this 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 will not be able to increase premiums on

renewal for medical malpractice insurance policies if certain conditions are met. Insurers, where required by N.J.S.A. 17:29AA-5 and N.J.A.C. 11:1-2, will file a manual rule with the Department. Compliance costs are discussed in the Economic Impact above.

The purpose of the proposed new rules is to enable insureds to avoid a premium increase based on a lawsuit being filed alleging medical negligence or malpractice if it is dismissed as to that insured prior to or within 180 days of the filing of the last responsive pleading. The proposed new rules 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. The purpose of these rules does not vary based upon business 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. – 4. (RESERVED)

SUBCHAPTER 5. PROHIBITED PREMIUM INCREASE

11:27-5.1 Purpose and scope

(a) The purpose of this subchapter is to prohibit increases in premiums for New Jersey medical malpractice insurance policy renewals based upon claims filed against insureds where

the insured is dismissed from a civil action based upon that claim at an early stage of the civil proceeding.

(b) This subchapter shall apply to any New Jersey medical malpractice insurance policy renewal issued by an insurer authorized to transact medical malpractice liability insurance in this State.

11:27-5.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

“Action” means a civil action commenced in a court of any State or a federal court.

“Responsive pleading” means any pleading other than a complaint recognized by the Rules governing a civil action alleging medical malpractice commenced in any State or by the Federal Rules of Civil Procedure, as applicable, wherein statements in the nature of answers or replies to allegations made against the party filing the pleading are contained.

11:27-5.3 Prohibited premium increase

(a) An insurer authorized to transact medical malpractice liability insurance in this State shall not increase the premium of any medical malpractice liability insurance policy upon the renewal of that policy on the basis of a claim of medical negligence or malpractice against the insured if the insured is dismissed from a lawsuit alleging medical negligence or malpractice based upon that claim, with no indemnity payment by the insurer, prior to or within 180 days after the filing of the last responsive pleading in the action.

(b) An insurer authorized as set forth in (a) above may increase the premium of any medical malpractice liability insurance policy upon renewal on the basis of a claim of medical negligence or malpractice against the insured which is pending at the time of renewal. In the event, however, that a lawsuit based upon that claim is subsequently dismissed as to the insured during the term of the renewed policy or a subsequent renewal and within 180 days after the filing of the last responsive pleading in the action, with no indemnity payment by the insurer attributable to that claim, the insurer shall, upon the renewal next succeeding such a dismissal, reflect the elimination of this claim in the calculation of the renewal premium.

(c) Where required by N.J.S.A. 17:29AA-5 and N.J.A.C. 11:1-2, an insurer authorized to transact medical malpractice liability insurance in this State shall file a manual rule as to this provision with the Department of Banking and Insurance for inclusion in the company's manual.