

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF INSURANCE

Unusual Hardship for Covered Claims Under the New Jersey Property-Liability

Insurance Guaranty Association and New Jersey Surplus Lines Insurance Guaranty Fund

Unusual Hardship

Proposed Amendment: N.J.A.C. 11:1-43.3

Authorized By: Thomas B. Considine, Commissioner, Department of Banking and Insurance.

Authority: N.J.S.A. 17:1-8.1, 17:15e, 17:22-6.70 et seq. and 17:30A-1 et seq.

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

Proposal Number: PRN 2010-226.

Submit comments by November 19, 2010 to:

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The agency proposal follows:

Summary

N.J.S.A. 17:30A-1 et seq. and 17:22-6.70 et seq. established the New Jersey Property-Liability Insurance Guaranty Association (“NJPLIGA” or “the Association”) and the New Jersey Surplus Lines Insurance Guaranty Fund (“NJSLIGF” or “the Fund”), respectively. The purpose of the Association and the Fund is to provide for the payment of covered claims under certain insurance policies to claimants and policyholders of any insolvent property-liability insurer or surplus lines insurer, as applicable. NJSLIGF now provides payment for covered claims mainly for medical malpractice liability insurance and property insurance covering owner occupied dwellings of less than four dwelling units.

Effective January 8, 1997, P.L. 1996, c. 156 amended N.J.S.A. 17:30A-5 and 17:22-6.72 to provide that a “covered claim” shall not include a claim filed with NJPLIGA and NJSLIGF, as applicable, after the final date set by the court for the filing of claims against the liquidator or the receiver of an insolvent insurer, unless the claimant demonstrates “unusual hardship” and the Commissioner of Banking and Insurance (Commissioner) approves treatment of the claim as a “covered claim.” In order to implement these statutes, the Department of Banking and Insurance (Department) adopted N.J.A.C. 11:1-43 to set forth the ways in which a claimant may demonstrate unusual hardship, effective December 1, 1997.

The Department is now proposing an amendment to N.J.A.C. 11:1-43.3(b) to address situations involving minors and medical malpractice liability insurance claims. Generally, the statute of limitations on the filing of a medical malpractice liability insurance claim for minors is tolled (that is, suspended) until the minor reaches the age of 18 years. From the time the claimant reaches that age, he or she has two years to file a medical malpractice action before the

statute of limitations expires. See N.J.S.A. 2A:14-2 and 2A:14-21. N.J.S.A. 2A:14-2 sets forth the statute of limitations, and N.J.S.A. 2A:14-21 tolls the statute for minors, among others. (N.J.S.A. 2A:14-2 also tolls the statute of limitations for a minor's action that has accrued for medical malpractice for injuries sustained at birth until the minor's 13th birthday.) Such a date may be beyond the bar date set by a court for the filing of claims against the liquidator or receiver of an insolvent insurer. Consequently, under the Department's current rules, a minor whose parent or guardian was not aware of a potential malpractice claim prior to the bar date set by a court as referenced above could be barred from seeking payment under an applicable liability policy. Accordingly, the Department finds it is reasonable and appropriate to amend the rules to provide an additional ground of unusual hardship in the case of medical malpractice liability insurance claims, where the claimant was a minor at the time of the issuance of the notice of the bar date for filing claims, the claimant's parent or guardian was unaware of the alleged malpractice prior to the bar date for filing claims, and the claimant is no more than 20 years of age at the time of filing the claim – that is, 18 years of age plus the two-year statute of limitations. This proposed amendment will recognize the time within which claims may be filed regarding medical malpractice liability involving minors and avoid a situation where meritorious claims could be unfairly barred from being considered a "covered claim" by NJPLIGA or NJSLIGF.

A 60-day comment period is provided for this notice of proposal, and, therefore, pursuant to N.J.A.C. 1:30-3.3(a)5, the proposal 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 amendment will have a positive social impact by enabling claimants who were minors at the time conduct occurred that resulted in a potential medical malpractice claim and who file claims that are past the bar date set by the court, and the claimant's parent or guardian was unaware of the malpractice prior to the issuance of the bar date for filing claims, to be considered a "covered claim" by NJPLIGA or NJSLIGF, as applicable. Accordingly, such claimants will not automatically lack recourse to the provider's insurance coverage where such insurer has become insolvent in the intervening period.

Economic Impact

The effect of the proposed amendment will be that claimants as described above will not automatically be denied coverage by NJPLIGA or NJSLIGF for failure to file notice before the bar date set by the court for filing claims. This will avoid a situation where such claimants are unfairly penalized. In addition, this will avoid situations where providers could have personal liability where the insurer providing coverage for the relevant period has since become insolvent. Providers should nevertheless take all prudent steps related to the continuation of applicable coverage, including purchase of GAP coverage.

The proposed amendment may increase the number of covered claims that ultimately will be paid by NJPLIGA or NJSLIGF. This, in turn, could necessitate an increase in assessment on NJPLIGA's and NJSLIGF's member insurers, which ultimately may be passed on to policyholders, or a reinstatement of the surcharge on policies covered by NJSLIGF. The Department, however, does not anticipate that the potential increase in costs to pay for additional claims that may be considered "covered claims" under the proposed amendment will be material

so as to require an increase in assessments on member insurers or a reinstatement of the NJSLIGF surcharge. In any event, the Department believes that the potential minimal costs that may be imposed are outweighed by the benefits to be achieved as outlined in the Summary and Social Impact above.

No additional costs should be imposed and no additional professional services should be required in order to comply with the proposed amendment.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendment is not subject to any Federal requirements or standards.

Jobs Impact

The Department does not anticipate that any jobs will be generated or lost as a result of the proposed amendment.

The Department invites commenters to submit any data or studies on the potential job impact of the proposed amendment together with their comments on any other aspects of the proposal.

Agriculture Industry Impact

The proposed amendment will not have any impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

A Regulatory flexibility analysis is not required because the proposed amendment does not impose reporting, recordkeeping or other compliance requirements on “small businesses,” as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. As set forth in the Summary above, the proposed amendment merely adds as an additional ground for showing unusual hardship so that a claim may be considered a covered claim in the case of medical malpractice liability insurance claims involving minors.

Smart Growth Impact

The proposed amendment will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed amendment will not have an impact on housing affordability in this State in that the proposed amendment relates to covered claims under NJPLIGA and NJSLIGF.

Smart Growth Development Impact

The proposed amendment will not have an impact on smart growth in this State in that there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey in that the proposed amendment relates to covered claims under NJPLIGA and NJSLIGF.

Full text of the proposal follows (additions indicated in boldface **thus**, deletions indicated in brackets [thus]):

11:1-43.3 Unusual hardship

(a) (No change.)

(b) For purposes of (a) above, a claimant may show unusual hardship by filing information that demonstrates any of the following:

1. – 2. (No change.)

3. The claimant was incapable of responding to the notice due to an emergent and extreme medical event or similar emergent and extreme circumstance; [or]

4. The claimant is deceased, and the claimant's estate demonstrates that the death occurred within such a time period that the representative of the claimant's estate did not have sufficient time to advise the insurer or its agent of such circumstance[.]; **or**

5. In the case of medical malpractice liability insurance claims, the claimant was less than 18 years of age at the time of the issuance of the notice of the due date for filing claims, the claimant's parent or guardian was unaware of the alleged malpractice prior to the due date for filing claims, and the claimant is no older than 20 years of age.

(c) – (e) (No change.)