

INSURANCE

DEPARTMENT OF BANKING AND INSURANCE

DIVISION OF INSURANCE

Medical Malpractice Liability Insurance

Readoption: N.J.A.C. 11:27

Proposed: July 6, 2010 at 42 N.J.R. 1307(a).

Adopted: November 29, 2010 by Thomas B. Considine, Commissioner, Department of Banking and Insurance.

Filed: November 30, 2010 as R. 2011 d.005, **without change**.

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, 17:23-20 et seq., 17:29AA-1 et seq., 17:30D-17 et seq. and 17:32-1 et seq.

Effective Date: November 30, 2010.

Expiration Date: November 30, 2015.

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) timely received written comments from ProSelect Insurance Company and The Property Casualty Insurers Association of America.

COMMENT: The commenters applauded and shared the Department's goals of ensuring medical care access and safety for New Jersey patients and the ability of the Department to ensure that medical professional liability insurers are being operated in a sound manner. The commenters generally acknowledged the benefit of certain provisions of the rules.

RESPONSE: The Department appreciates the support of its notice of proposal.

COMMENT: The commenters expressed concern with N.J.A.C. 11:27-11. The commenters noted that these rules, adopted in 2009, establish reporting requirements regarding reinsurance agreements and loss reserves established by insurers writing medical malpractice liability insurance in this State. The commenters essentially reiterated comments previously submitted by commenters when the rules were originally proposed. The commenters generally stated that the rules exceed related requirements imposed by the National Association of Insurance Commissioners (NAIC) or the companies' domiciliary states, and are unnecessarily redundant and burdensome. The commenters generally stated that, while they understand the Department's concerns, they believe that such detailed monitoring typically and more appropriately resides within the purview of the insurer's domiciliary regulator.

One commenter specifically noted that N.J.A.C. 11:27-11.3(a) requires medical professional liability insurers to file a copy of any new, renewal of or amendment to any ceded reinsurance contract no later than the earlier of 60 days after the effective date or 30 days after the execution of the agreement. The commenter stated while this was more reasonable than the originally proposed shorter time-frame, this provision nonetheless remains in conflict with SSAP No. 62, paragraph 24's "nine-month rule," which is based on reinsurance transaction time-lines recognized by the industry and the NAIC. Accordingly, the commenter recommended that the Department adjust the rule to track SSAP No. 62.

In addition, the commenter stated that N.J.A.C. 11:27-11.3(a) requires that insurers file a copy of the complete ceded reinsurance agreement and all amendments thereto with "the

reinsurance attestation maintained in accordance with the instructions for the NAIC annual statement, required pursuant to N.J.S.A. 17:23-1.” The commenter stated that this appears to require that insurers file an attestation with each reinsurance agreement, while the NAIC requires only one attestation to be filed with a company’s annual statement in connection with all of its reinsurance agreements. The commenter stated that it is thus unclear whether the Department seeks information in addition to what insurers must file with the NAIC, and if so, the commenters believed that this would be unnecessarily redundant and burdensome.

Further, the commenter stated that although the NAIC state reporting checklist does not reflect the requirement for foreign insurers, N.J.A.C. 11:27-11.4(a) requires insurers to file a copy of the actuarial opinion summary and a copy of the actuarial report. The commenter stated that neither the NAIC nor its domiciliary state requires an affirmative filing of such a report, which is typically at least 400 pages. Rather, the commenter stated that the report must be available for examination upon request. The commenter stated that N.J.A.C. 11:27-11.4(b) requires that insurers file “written justification supporting the management decision for the level of reserves selected, signed by the chief executive officer and chief financial officer.” The commenter stated that this requirement places no reliance on audited financial statements in which loss reserves are independently evaluated to determine whether they are in an acceptable range and which are filed annually with the Department. The commenter questioned this requirement as being incongruous with, and unduly burdensome in comparison to the NAIC and other states’ requirements.

RESPONSE: Upon review, the Department has determined that no change is required. The Department provided responses to the extensive comments submitted when the rules were

originally proposed. See 41 N.J.R. 1250(b). As noted in the response to this comment when originally submitted, the Department continues to believe that review of this information is reasonable and appropriate. By being proactive in the review of reinsurance agreements, the Department is attempting to avoid situations observed in the past where the purported reinsurance does not provide the anticipated coverage to the insurer when needed. If a reinsurance agreement did not actually transfer risk, as may be demonstrated by compliance with the requirements of SSAP 62 in the NAIC Accounting Practices and Procedures Manual, the ceding insurer would not be permitted to account for the reinsurance as prospective reinsurance, that is, showing a reduction in liability for the amount of reinsurance ceded. Moreover, the reporting of reinsurance as prospective reinsurance that does not actually transfer risk skews other tests to determine an insurer's financial condition, including risk based capital (RBC) tests, which are based on annual statement data. Thus, an insurer may continue to transact business, when in fact its actual financial condition is such that its writings should have been curtailed with the insurer being placed under supervision or in rehabilitation. The Department continues to believe any additional costs imposed by the rules should be minimal and that the information required either is currently required to be maintained by insurers in accordance with the instructions to the NAIC Annual Statement required to be filed with the Department annually pursuant to N.J.S.A. 17:23-1, or should otherwise be readily available.

In New Jersey, health care providers are required to maintain minimum levels of medical malpractice liability insurance. As was noted in response to comments to the original notice of proposal, the impact upon residents of this State of availability and affordability problems for medical malpractice liability insurance can be exacerbated by the volatility in rates that has existed with respect to the provision of this line of insurance. The effects of this volatility and

the cyclical nature of rates for medical malpractice liability insurance have far reaching implications with respect to public health. The Department thus believes that the costs attributable to any additional duties imposed on insurers by these rules are far outweighed by the potential benefits to be achieved through the review of this information in an attempt to ascertain the causes of and ameliorate the effects of such volatility. In addition, while the Department recognizes that the financial reporting requirements may be unique, for the reasons set forth above and in the notice of adoption of N.J.A.C. 11:27-11 in 2009, the Department believes that it is reasonable and appropriate to require that such information be provided.

With respect to the concerns regarding reinsurance attestation, the Department notes that the rules do not require that insurers provide more than what is required to be maintained by the NAIC. Moreover, as noted in the response to a similar comment in the notice of adoption of N.J.A.C. 11:27-11 in 2009, the Department recognizes that the annual statement reinsurance attestation applies to all of an insurer's ceded reinsurance contracts. However, the Department currently does not receive the attestation for foreign insurers. The Department believes that the receipt of that attestation is necessary given the potential adverse impact on public health from the disruption in the availability or affordability of medical malpractice liability insurance as set forth above. In addition, the Department notes that medical malpractice liability insurance represents either the sole line or the major line for companies writing such business. The document is an attestation that there was a transfer of risk under the agreement and that the reinsurance was properly accounted for.

Finally, with respect to the concerns regarding the filing of the actuarial reports, as noted in its response to a similar comment in the original notice of adoption, the Department believes that these requirements are reasonable and necessary given the volatile nature of medical

malpractice liability insurance rates and the significant potential impacts on public health related thereto.

COMMENT: The commenters believed that N.J.A.C. 11:27-13, which provides for the biannual reporting of information related to rate modifiers used by medical malpractice liability insurers writing physicians and surgeons coverage in this State, is burdensome and costly. One of the commenters stated that with the increased oversight granted to the Department by the enactment of amendments to N.J.S.A. 17:29AA-1 et seq. (see N.J.S.A. 17:29AA-5.1) regarding the review of rates for medical malpractice liability insurance, there should no longer be a need for this reporting on a twice-yearly basis. The commenters believed that it is reasonable to expect that the increased regulation and scrutiny of rate filings gained under N.J.S.A. 17:29AA-5.1 should provide sufficient information to by the Department.

RESPONSE: Upon review, the Department has determined not to change this provision. The Department believes it is speculative at this point and premature to conclude that all of the information currently provided under N.J.A.C. 11:27-13 will now be provided through the rate filing process established by N.J.S.A. 17:29AA-5.1 and its implementing rules. However, the Department will continue to monitor this situation, and to the extent that it determines that it no longer requires the information set forth in N.J.S.A. 11:27-13 it will either repeal or amend the rules accordingly.

COMMENT: One commenter stated that with respect to the rules proposed for readoption, it recognized that certain changes it seeks would require legislative action. However, the

commenter stated that where possible, it believed that the Department should look to streamline the rules, so as to permit the market to “work better.”

RESPONSE: Upon review, the Department has determined that no change is required. The commenter provides no specific suggestions as to modifications to the rules proposed for readoption. As noted in the notice of proposal Summary, the Department continues to believe that the rules proposed for readoption are reasonable, necessary and fulfill the purpose for which they were originally adopted.

Federal Standards Statement

A Federal standards analysis is not required because the readopted rules are not subject to any Federal requirements or standards.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C.

11:27.