

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice
Structured Settlements and Furnishing of Bonds

Proposed New Rules: N.J.A.C. 11:27-10

Authorized By: Donald Bryan, Acting Commissioner, Department of Banking and Insurance

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:30D-27 (P.L. 2004, c. 17, § 24)

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

Proposal Number: PRN 2005-239

Submit comments by September 3, 2005 to:

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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, represents 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 authority for this proposal is section 24 of the Act, which is codified as N.J.S.A. 17:30D-27. N.J.S.A. 17:30D-27b(2) provides that unless otherwise agreed to by the parties, in any judgment resulting from a medical malpractice action brought by a claimant for medical malpractice in which the noneconomic damages exceed \$1,000,000, the court shall enter a judgment ordering that 50 percent of the noneconomic damages be paid immediately, with the costs and attorney's fees to be paid from that amount. The law further provides that the remaining 50 percent of the judgment shall be paid over 60 months in the form of a structured payment agreement by any person, organization, group, or insurer that is contractually liable to pay the judgment.

N.J.S.A.17:30D-27e further requires the judgment debtor in a medical malpractice claim or the judgment debtor's insurer to post a bond or security or, as otherwise provided by the Department of Banking and Insurance (Department), assure full payment of noneconomic damages awarded. Pursuant to the Act, a bond shall not be deemed adequate unless it is written by a company authorized to do business in this State and is rated A- or better by A.M. Best Company. The Department is proposing the new rules at N.J.A.C. 11:27-10 to implement the Act.

N.J.A.C. 11:27-10.1 provides the purpose and scope of these rules.

N.J.A.C. 11:27-10.2 provides the definitions for terms used in this subchapter.

N.J.A.C. 11:27-10..3 sets forth the structured settlement bond/security requirements.

A 60-day comment period is provided on 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

These proposed new rules establish structured settlement requirements for the posting of a bond/security which will ensure the payment of a judgment by the judgment debtor or the judgment debtor's insurer to a judgment creditor. Allowing the use of structured settlements in medical malpractice cases will allow for spreading out of claim payments which should put downward pressure on rates, since companies would not have to pay the claim in one lump sum. This process may also be beneficial to insured parties because it provides a steady stream of money over a period of time, which can be used to cover the cost of their ongoing needs and recurring expenses.

Economic Impact

The proposed new rules will have a positive effect on judgment creditors. These rules establish requirements for the posting of a bond or security to ensure payment of a judgment by the judgment debtor or the judgment debtor's insurer. The Department recognizes that there may be some situations where judgment debtors or their insurers may incur costs associated with structured settlements. Such costs may arise from the requirement that the judgment debtor or their insurer post a bond or other security such as a letter of credit. The costs associated with doing so will vary depending upon the amount to be secured and the nature of the security

instrument used. This proposed new rule should also put downward pressure on rates and benefit insured parties as noted in the Social Impact Statement.

Federal Standards Statement

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

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. N.J.S.A. 17:30D-27(b)2 provides that unless otherwise agreed to by the parties, in any judgment resulting from a medical malpractice action brought by a claimant for medical malpractice in which the noneconomic damages exceed \$1,000,000, the court shall enter a judgment ordering that 50 percent of the noneconomic damages be paid immediately, with the costs and attorney's fees to be paid from that amount. The remaining 50 percent of the judgment shall be paid over 60 months in the form of a structured payment agreement by any person, organization, group, or insurer that is contractually liable to pay the judgment. Judgment debtors or judgment debtors' insurers are required to post a bond or security in order to assure full payment of noneconomic damages awarded in excess of \$1 million in medical malpractice cases. The proposed new rules set forth requirements for the posting of a bond or security by the judgment debtor or the judgment debtor's insurer, in order to assure full payment of non-economic damages awarded. The costs associated with this requirement are discussed in the Economic Impact Statement above.

The Department does not believe that insurers or the judgment debtor will need to utilize professional services in order to fulfill these requirements (that is, the drafting of the bond). The standards set forth in these rules must be applied consistently to all judgment debtors and their insurers that are required to post a bond or security. As was noted in the Summary, N.J.S.A. 17:30D-27 was enacted to provide that in any judgment resulting from a medical malpractice action brought by a claimant for medical malpractice in which the noneconomic damages exceed \$1,000,000, the court shall enter a judgment ordering that 50 percent of the noneconomic damages be paid immediately, and the remaining 50 percent of the judgment would be paid over

60 months in the form of a structured payment agreement by any person, organization, group, or insurer that is contractually liable to pay the judgment. At N.J.S.A. 17:30D-27e the legislature further provided that this debt would be secured by the judgment debtor or their insurer by the posting of a bond or security. The legislative intent to adequately secure the payment of all medical malpractice judgments as specified in N.J.S.A. 17:30D-27 would be frustrated were the Department to provide an exemption from the requirement to post a bond or other security, as set forth in these rules, for judgment debtor malpractice insurers that are small businesses. See N.J.S.A. 17:30D-27, which does not provide an exception for small businesses. Accordingly, no differentiation based on business size is provided as a result of these proposed new rules.

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:

SUBCHAPTER 10. STRUCTURED SETTLEMENTS AND FURNISHING OF BONDS

11:27-10.1 Purpose and Scope

The purpose of this subchapter is to establish the requirements that the judgment debtor or the judgment debtor's insurer shall follow in order to post a bond or security pursuant to a structured payment agreement authorized by N.J.S.A. 17:30D-27.

11:27-10.2 Definitions

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

“Commissioner” means the Commissioner of the Department of Banking and Insurance of the State of New Jersey, or his or her designee as may be permitted by law.

“Department” means the Department of Banking and Insurance of the State of New Jersey.

“Insurer” means any person or persons, corporation, partnership or company authorized by the laws of this State to transact the business of insurance in this State; except that it shall not include agencies, authorities or instrumentalities of the United States, its possessions and territories, the Commonwealth of Puerto Rico, the District of Columbia or a state or political subdivision of a state.

“Judgment creditor” means a claimant who is the recipient of an award for economic or non-economic damages, or both, that is the result of an action filed against a health care provider for medical malpractice, which award is subject to the provisions of N.J.S.A. 17:30D-27.

“Judgment debtor” means a health care provider who, as a defendant in an action brought for medical malpractice, is required to pay the claimant an award that is subject to the provisions of N.J.S.A. 17:20D-27.

“Non-economic damages” means damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.

“Structured payment agreement” means an agreement made to settle a claim or lawsuit or respond to a judgment in an action brought for medical malpractice by an injured person whereby a series of periodic payments, rather than a lump sum payment, is made over time to a claimant, in accordance with the needs of the claimant or the claimant’s family, either through the purchase of an annuity or the establishment of a trust fund, or by another means approved by the court.

11:27-10.3 Structured settlement bond/security requirements

(a) Pursuant to N.J.S.A. 17:30D-27, the judgment debtor or the judgment debtor’s insurer shall post a bond or security, in order to assure full payment of non-economic damages awarded in excess of \$1 million, or as otherwise agreed to by the parties in a medical malpractice matter. The bond or other security requirements are specified below:

1. A bond shall not be deemed adequate unless it is written by a company authorized to do business in this State and is rated A-, or better, by A.M. Best Company.

i. No bond may be cancelled or be subject to cancellation unless at least 60 days advance written notice is filed with the court and the claimant.

2. A letter of credit may also serve as security. Letters of credit shall comply with the requirements of N.J.A.C. 11:2-28.10.

3. Additionally, security deposits shall adhere to the requirements of N.J.A.C. 11:2-32, Custodial Deposits.