

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice

Structured Settlements and Furnishing of Bonds

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

Proposed: July 5, 2005 at 37 N.J.R. 2294(a).

Adopted: June 27, 2006 by Steven M. Goldman, Commissioner, Department of Banking and Insurance

Filed: June 27, 2006 as R. 2006 d. 278, **with substantive and technical changes** not requiring additional public notice and opportunity for comment (see N.J.A.C. 1:30-6.3)

Authority: N.J.S.A. 17:1-8.1, 17:1-15e and 17:30D-27.

Effective Date: August 7, 2006

Expiration Date: June 6, 2010

Summary of Public Comments and Agency Responses:

The Department of Banking and Insurance (Department) received two written comments from the following: ProSelect Insurance Company and Prudential Insurance Company.

COMMENT: One commenter stated that certain provisions of the proposal require clarification in order to avoid confusion about the application of the bond/security requirement to cover structured settlements funded with an “annuity,” as defined by the Act.

The commenter recommended that the Department’s proposed rule expressly provide that a bond or security is not required for structured settlements funded with an annuity. The commenter stated that N.J.S.A. 17:30D-27(e) provides that the judgment debtor or the judgment debtor’s insurer (that is, the medical malpractice insurer) must post a bond or security; or, as

otherwise provided by regulation of the Department, assure full payment of the non-economic damages awarded. The commenter stated that N.J.S.A. 17:30D-27(f) provides that, upon the purchase of an annuity, any “obligation of the judgment debtor shall cease.” The commenter contends that the bond/security obligation is intended to guarantee future payments of a judgment debtor or its medical malpractice insurer under a structured payment agreement. The comment stated that if these payments are assigned and funded by an annuity, then the objective of assuring payment is satisfied. The commenter believes that although this is implicit in the Act and regulation, the absence of an express exclusion may lead to confusion in practice. Therefore, the commenter requested that the Department amend its rule to address this situation. The commenter’s suggested changes follow:

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.

“Annuity” means an annuity issued by an insurer licensed or authorized to do business in this State, which is a qualified assignment under section 130 of the Federal Internal Revenue Code of 1986, 26 U.S.C. c. 130.

The commenter also suggested that N.J.A.C. 11:27-10.3(a) should be amended to include (a)4 that would provide that:

4. No separate bond or security shall be required for structured payment agreements funded with an annuity.

RESPONSE: The Department agrees with the commenter and is amending N.J.A.C. 11:27-10.2 on adoption accordingly. The Department's amendment tracks the definition of the term "annuity" found in N.J.S.A. 17:30D-27a.

The Department also agrees with the commenter's second suggestion and is amending N.J.A.C. 11:27-10.3(a) on adoption to include paragraph (a)4. This amendment is consistent with N.J.S.A. 17:30D-27f which provides, in pertinent part, that upon the purchase of an annuity, any obligation of the judgment debtor with respect to the judgment shall cease.

COMMENT: One commenter stated that N.J.S.A. 17:30D-27(e) provides that a judgment debtor or its insurer is required to "post a bond or security; or, as otherwise provided by regulation by the Department, assure full payment of the non-economic damages awarded." The commenter noted that the Department does not provide, as is permitted by statute, for an alternative to the posting of a bond or security.

The commenter stated that many insurers enter into assignment arrangements with other insurers, which assignments are formalized by using a Uniform Qualified Assignment (UQA) Form. The commenter stated that this form is sanctioned and recommended by the National Structured Settlement Trade Association (www.nssta.com), and enables an insurer to assign its periodic payment obligation to another insurer which manages and is fully responsible for making the periodic payments to a claimant pursuant to the terms of a structured settlement agreement. The commenter recommended that the Department amend its proposed rules to permit an insurer to assign its periodic payment obligation to another insurer, so long as the insurer to which the periodic payment obligation is assigned is rated A-, or better, by A.M. Best Company, or maintains a comparable rating with Standard & Poors, Moody's Investment

Services or Fitch Ratings, and the parties utilize a UQA form. The commenter suggested the following amendments (additions indicated in bold):

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 **or assign its periodic payment obligations to an insurer authorized to write insurance business in New Jersey,** 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.

2.5 An assignment agreement can only be entered between a judgment debtor and an insurer authorized to write business in New Jersey, if (a) the insurer is rated A-, or better,

by A.M. Best Company, or maintains a comparable rating with Standard & Poor's, Moody's Investor Services or Fitch Ratings and (b) a Uniform Qualified Assignment Agreement form is utilized, as recommended and approved by the National Structured Settlements Trade Association.

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

RESPONSE: Although the Department agrees with the commenter's suggested amendments, these amendments are substantive changes that require additional public notice and comment. See N.J.A.C. 1:30-6.3. Therefore, the Department will propose these amendments in the near future.

Federal Standards Statement

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

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

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.

“Annuity” means an annuity issued by an insurer licensed or authorized to do business in this State, which is a qualified assignment under section 130 of the Federal Internal Revenue Code of 1986, 26 U.S.C. § 130.

“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]* ***nonpecuniary*** losses of any kind or nature.

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. - 3. (No change from proposal.)

4. No separate bond or security shall be required for structured payment agreements funded with an annuity.