

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

**Health Benefit Plans
Prompt Payment of Claims
Denied and Disputed Claims**

Adopted Amendment: N.J.A.C. 11:22-1.6

Proposed: August 19, 2002 at 34 N.J.R. 2950(a).

Adopted: July 14, 2003 by Holly C. Bakke, Commissioner, Department of Banking and Insurance.

Filed: July 14, 2003 as R. 2003 d.328, **with substantive changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 17:1-8.1, 17:1-15e, 17:29B-4(9), 17B:17-1 et seq., 17B:30-13.1, 17B:30-23 et seq., and 26:2J-15b.

Effective Date: August 4, 2003.

Expiration Date: November 6, 2005.

Summary of Public Comments and Agency Responses:

The Department received comments from the following: Association of Health Plans; Arthur Meisel, Esq., on behalf of the New Jersey Dental Association; New Jersey Pharmacists Association and Garden State Pharmacy Owners; Delta Dental Plan of New Jersey; John Paul Dizzia, Esq.; Medical Society of New Jersey; New Jersey Council of Chain Drug Stores; AmeriHealth HMO, Inc., AmeriHealth Insurance Company of New Jersey, and AmeriHealth Insurance Company, Inc.; and Advance PCS.

COMMENT: A few commenters expressed their strong opposition to the use of extrapolation as a basis for calculating adjustments to pharmacy claims previously paid. One of the commenters stated that they oppose the extrapolation process because the

sampling process is unscientific, inaccurate and unfair; pharmacies do not always have the same pharmacists in a given pharmacy from day to day; and the burden of proof falls on the pharmacy, which requires a large amount of time and resources to refute findings, and typically the auditor does not accept these findings. The commenter added that the Department's proposed exceptions would create a loophole, thereby sanctioning pharmacy benefit managers (PBMs) as agents of private or state carriers, to inappropriately utilize extrapolation in their audits.

RESPONSE: The Department is permitting extrapolation only in five limited situations. If these limited exceptions are abused, or prove to be overbroad, the Department will modify the regulation. However, the exceptions are reasonable and appropriate on their face.

COMMENT: A few of the commenters expressed their appreciation of the Department's decision to strike a balance between the concerns of providers and carriers by permitting a limited use of extrapolation.

RESPONSE: The Department appreciates the commenters' support.

COMMENT: Three commenters stated that extrapolation should only be permitted to be used for claims disputes if the contracting parties agree to its use. One commenter requested that the Department revise its reproposal to allow, as an alternative to extrapolation, the contracting parties to contract for an audit of actual claims. According to the commenter, this is the most accurate assessment of detecting fraudulent claims.

Another commenter proposed that extrapolation be allowed to resolve claims disputes so long as there is a written agreement between the provider and the carrier each time extrapolation is to be used to resolve such a dispute. The commenter suggested the following additional exception: "6. Cases when both the provider and carrier have an agreement to use extrapolation to resolve claims disputes. The agreement must be in writing each time extrapolation is used to resolve a claims dispute."

A third commenter suggested a mutually agreed upon sampling methodology and joint review of the results prior to agreement on a settlement amount. According to the commenter, this sampling approach would still allow carriers to identify trends and root causes, and prohibition of this method of claims resolution would have a deleterious effect on a carrier's efforts to provide responsive service to their providers. The commenter suggested adding language at N.J.A.C. 11:22-1.6(f) requiring mutual agreement by a provider and carrier for using extrapolation.

RESPONSE: The Department is mindful of situations in which there may be inequalities in bargaining power between providers and carriers and, for that reason, is disinclined to permit extrapolation by agreement.

COMMENT: Two commenters expressed concern with proposed N.J.A.C. 11:22-1.6(f)1, which permits the use of extrapolation where the extrapolation, including the method, is non-binding. One commenter stated that this exception would likely be misused unless the Department makes it clear that it is intended to apply only to "non-binding processes presided over or conducted by a genuinely impartial third party."

The commenter stated that carriers often open a demand for reimbursement with a "non-binding estimate" of monies due, including figures often hundreds of times the value of the audited error, based on a six-year extrapolation back from the date of audit. The commenter added that permitting carriers to continue this practice would wholly defeat the intended purpose of the Department's original proposal.

Another commenter suggested that the Department consider deleting the exception at N.J.A.C. 11:22-1.6(f)1 because it does not appear to serve any useful purpose since none of the extrapolations are binding.

RESPONSE: If the extrapolation is non-binding, that means that its results are utilized or become effective only upon the agreement of both parties. Therefore, there is no need to regulate the terms of the extrapolation process because if that process is unfair, the aggrieved party will not agree to be bound by its results. A non-binding extrapolation may be useful in bringing about a settlement of any outstanding claims.

COMMENT: Three commenters expressed concern with proposed N.J.A.C. 11:22-1.6(f)4 and 5, which permit extrapolation where relevant records required to be maintained by a provider have been altered, reconstructed or are unavailable; and where there is clear evidence of claim fraud or abuse by the provider.

One commenter is concerned that carriers will use whatever discretion they can to make a finding of alteration, reconstruction, or unavailability, or to declare fraud or abuse, and thus use extrapolated data. The commenter is also concerned that a carrier could use extrapolated data to declare there has been "clear evidence" of fraud or abuse. Such a bootstrap use of extrapolated data to make an initial prima facie case of

fraud or abuse should not be allowed and should be deemed contrary to the intent of these regulations.

Another commenter stated that the exceptions in cases of "clear evidence of claim fraud" and where records "have been altered, etc." are redundant and do not adequately identify the quality of "evidence" needed to come within the exception. The commenter suggested that the Department require "clear evidence of a **pattern** of fraud or abuse by the provider," and that the exception be limited to audits disclosing "multiple claims containing material misstatements and/or omissions of fact . . . [.]". The commenter's suggested language for revising this exception is, "Where there is clear evidence of a pattern of fraud or abuse by the provider based on multiple claims containing material misstatements and/or omissions of fact which if known when submitted would have resulted in the denial of the claim and/or in the payment of benefits lower than the benefit paid."

The third commenter stated that these two exceptions could be construed too broadly and should be clarified to apply only when there is clear evidence of a pattern. The commenter urged that N.J.A.C. 11:22-1.6(f)4 and 5 be revised as follows (additions in boldface): "4. Where **there is clear evidence of a pattern that** records required to be maintained by the provider have been altered, reconstructed or are unavailable; 5. Where there is clear evidence of **a pattern** of **either** claim fraud or abuse by the provider." The commenter also stated that the Department might consider defining the term "pattern."

RESPONSE: With respect to the first comment, the Department agrees that only improper alterations and reconstruction of records and material unavailability of records should give rise to extrapolation. The Department has revised the proposed rule amendment to clarify its intent.

The Department disagrees that claim fraud and record alteration or unavailability are the same. For example, records may be altered to correct errors, or they may be unavailable because the record storage center burned down. Neither of those situations would constitute fraud. Regarding the comment that these two exceptions do not adequately identify the quality of evidence needed to come within the exception, the Department reiterates that it has revised the language of the rule amendment to indicate that extrapolation may be used only where the alteration of records was improper (that is, fraudulent), and where a material number of records were unavailable (that is, where the number of records remaining available is so small that no reliable basis exists upon which an adjustment of previously-paid claims can be made).

Finally, the Department disagrees that there needs to be evidence of a pattern of claim fraud before extrapolation may occur. One instance of claim fraud by the provider is sufficient to permit extrapolation by the carrier.

COMMENT: One commenter indicated that the Department's proposed exceptions at N.J.A.C. 11:22-1.6(f) for judicial and other proceedings before a genuinely impartial reviewer are plainly warranted.

RESPONSE: The Department appreciates the commenter's support.

Federal Standards Statement

A Federal standards analysis is not required because these amendments are not subject to any Federal standards or requirements.

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

11:22-1.6 Denied and disputed claims

(a)-(e) (No change.)

(f) Carrier adjustments to claims previously paid shall be based only on actual identifiable error(s) in the submission, processing or payment of a particular claims(s), and shall not be based on extrapolation, with the following exceptions:

1. – 3. (No change from proposal.)

4. Where relevant records required to be maintained by the provider have been ***improperly*** altered ***[,]*** ***or*** reconstructed ***,*** or ***a material number of such records*** are unavailable; or

5. (No change from proposal.)

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