

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
DIVISION OF INSURANCE

Medical Malpractice Liability Insurance

Structured Settlements and Furnishing of Bonds

Proposed Amendment: N.J.A.C. 11:27-10.3

Authorized By: Steven M. Goldman, Commissioner, Department of Banking and Insurance

Authority: N.J.S.A. 17:1-8, 17:1-15e and 17:30D-27

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

Proposal Number: PRN 2008-101

Submit written comments by June 6, 2008 to:

Robert J. Melillo, Chief
Legislative and Regulatory Affairs
Department of Banking and Insurance
20 West State Street
P.O. Box 325
Trenton, NJ 08625-0325
Fax: (609) 292-0896
E-mail: legsregs@dobi.state.nj.us

The agency proposal follows:

Summary

The New Jersey Medical Care Access and Responsibility and Patients First Act, P.L. 2004, c. 17 (N.J.S.A. 17:30D-27), represented the Legislature's response to a medical malpractice liability 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.

On July 5, 2005 at 37 N.J.R. 2294(a), the Department of Banking and Insurance (Department) proposed new rules to implement the provisions of the Act related to structured settlements of medical malpractice claims. The new rules, N.J.A.C. 11:27-10, were adopted on August 7, 2006 at 38 N.J.R. 3178(a). In the notice of adoption of those new rules, the Department agreed with some suggested changes submitted by commenters on the initial proposal, but noted that it could not make those changes upon adoption because they were substantive changes that required additional public notice and comment. The Department is now proposing to amend the rules on structured settlements and the furnishing of bonds with respect to medical malpractice insurance claims in accordance with the suggested changes with which it had agreed, as mentioned in the prior notice of adoption.

The Department is proposing to amend N.J.A.C. 11:27-10.3(a) to require the written consent of the judgment creditor before a judgment debtor or their insurer may assign their periodic payment obligation under a structured settlement to an insurer authorized to write business in New Jersey. Additionally, in paragraph (a)1, the proposal would amend the current requirement that a bond to secure payment must be written by a company authorized to do business in the State that is rated A- or better by A.M. Best Company. The proposed amendments would permit the use of a bond issued by a company within a comparable rating from Standards & Poor's, Moody's Investors Services or Fitch Ratings. A "comparable rating" means a rating of at least A- from Standards & Poor's, at least A3 from Moody's Investors Services, or at least A- from Fitch Ratings. The Department is proposing to amend N.J.A.C.

11:27-10.3(a)4 to also require that a company that issues an annuity to fund a structured settlement be rated A-, or better by A.M. Best Company or to maintain a comparable rating with Standards & Poor's, Moody's Investors Services or Fitch Ratings as set forth above. The proposed amendment to N.J.A.C. 11:27-10.3(b) permits an insurer to assign its periodic payment obligation to another insurer which will then be fully responsible for making periodic payments to a claimant pursuant to the requirements listed in N.J.A.C. 11:27-10.3(a), including the posting of a bond.

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 amendments should benefit insured parties by facilitating the structured settlement process, which provides a steady stream of income over a period of time that can be used to cover the cost of an injured party's ongoing needs and recurring expenses. The amendments strengthen the current bond requirements and should, therefore, have a positive impact on structured settlements and on judgment creditors by permitting a judgment debtor or the judgment debtor's insurer to assign their payment obligations to an insurer authorized to write business in New Jersey whose financial condition is adequately rated by one of the recognized rating services. These amendments will better ensure the payment of a judgment by the judgment debtor or the judgment debtor's insurer.

Economic Impact

The proposed amendments will have a positive economic effect on judgment creditors. The amendments strengthen the current requirements applicable to assignments by a judgment debtor or their insurer of its payment obligations to an insurer authorized to write business in New Jersey. Additionally, the amendments that the assignment agreement would provide for an assignment to an insurer that maintains an acceptable rating with a recognized rating service, thereby providing some assurance of the financial strength of the entity assuming the obligation to make the payments prescribed by the terms of the structured settlement agreement. The Department does not anticipate any additional costs being imposed upon insurers or insureds associated with these proposed amendments.

Federal Standards Statement

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

Jobs Impact

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

Agriculture Industry Impact

The Department does not expect any agriculture industry impact from the proposed amendments.

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 amendments merely enable 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. The assignment can only be made to an insurer that maintains an adequate financial rating with a recognized rating organization. The costs of compliance are addressed in the Economic Impact above. Insurers should be able to comply without the need for additional professional services, other than possibly the preparation and/or review of the standard assignment form by legal counsel. As the proposed amendments will provide insurers with an alternative, such as purchasing an annuity, to posting a bond or other security with respect to a structured settlement agreement, the amendments will benefit all insurers regardless of their size. In order to adequately ensure performance, the requirements concerning the minimal rating of the insurer accepting the assignment and the use of the approved assignment agreement are applicable regardless of the size of the assigning insurer or the insurer accepting an assignment. Thus, the proposed amendments provide no different compliance requirements based on business size.

Smart Growth Impact

The proposed amendments will have no impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**):

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, with the written consent of the judgment creditor, assign, as set forth in (b) below, 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 **that is** authorized to do business in this State and is rated A-, or better, by A.M. Best Company **or maintains a comparable rating with Standards & Poor's, Moody's Investors Services or Fitch Ratings. A "comparable rating," means a rating of at least A- from Standards & Poor's, at least A3 from Moody's Investors Services, or at least A- from Fitch Ratings.**

i. (No change.)

2. – 3. (No change.)

4. No separate bond or security shall be required for structured payment agreements funded with an annuity **that is issued by a company that is rated A-, or better by A.M. Best Company or maintains a comparable rating with Standards & Poor's, Moody's Investors Services or Fitch Ratings. A "comparable rating," means a rating of at least A-**

from Standards & Poor's, at least A3 from Moody's Investors Services, or at least A- from Fitch Ratings.

(b) A judgment debtor or a judgment debtor's insurer may, with the written consent of the judgment creditor, enter into an assignment agreement with an insurer that meets the requirements set forth in (a) above with respect to an insurance company that issues a bond to secure the performance of a structured settlement agreement.

DHT06-20/inoregs