

INSURANCE
DEPARTMENT OF BANKING AND INSURANCE
OFFICE OF CONSUMER PROTECTION SERVICES

Medical Malpractice Reporting Requirements

Proposed Amendment: N.J.A.C. 11:1-7.3

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

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

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

Proposal Number: PRN 2009-108

Submit comments by June 19, 2009 to:

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The agency proposal follows:

Summary

N.J.S.A. 17:30D-17 provides that any insurer or any insurance association authorized to issue medical malpractice liability insurance in this State shall notify the Board of Medical Examiners' (BME or Board) Medical Practitioner Review Panel (Review Panel) established pursuant to N.J.S.A. 45:9-19.8 in writing of any medical malpractice claim settlement, judgment or arbitration award involving any practitioner licensed by the BME and insured by any insurer or insurance association. Such information is then included in a physician profile compiled by the Board (see N.J.S.A. 45:9-22.23) N.J.S.A. 17:30D-17 further provides that the form of

notification shall be prescribed by the Commissioner of Banking and Insurance (Commissioner) and shall contain such information as may be required by the Board and the Review Panel. The Department of Banking and Insurance (Department) adopted rules at N.J.A.C. 11:1-7 to implement this statute. As noted in Bulletin No. 08-17 issued on October 28, 2008, insurers have inquired whether the notification requirements apply where payments are made pursuant to so-called ‘high/low agreements’ where there is a verdict in favor of the defendant practitioner (that is, where there is a finding or verdict of no liability on the part of practitioner). In high/low agreements, the insurer agrees to pay a specified maximum or minimum amount on behalf of the insured to the claimant, irrespective of the verdict or the amount of a damage award. Where a verdict is returned finding no liability on the part of the practitioner, the insurer nevertheless would make a payment to the claimant under the ‘low’ provision of the agreement. Under applicable Federal guidelines, payments made under high/low agreements in matters where a verdict or an arbitration ruling is rendered finding no liability on the part of the practitioner are not required to be reported to the analogous National Practitioner Data Bank. Moreover, the BME has advised the Department that it does not believe that reporting such claims to the Review Panel is consistent with the intent of N.J.S.A. 45:9-19.8. Where there is a finding or verdict of no liability on the part of the practitioner, the reporting of payments made in accordance with a ‘high/low agreement’ and their inclusion on the practitioner’s Physician Profile could be misleading, in that it would indicate that the practitioner had committed malpractice when, in fact, no finding had been made in a legal proceeding to that effect. Accordingly, the Department is proposing to amend N.J.A.C. 11:1-7.3(a)1 to provide that the requirement to notify the Review Panel of claim or settlement payments shall not apply to payments made pursuant to agreements specifying a minimum and maximum payment irrespective of the verdict

where there is a finding or verdict of no liability on the part of the practitioner. The reporting of all claim payments to the Department pursuant to N.J.A.C. 11:1-7.3(g), including payments on claims that are not to be reported to the Review Panel under the proposed amendment, will continue to be made by insurers. The Department believes that continuing to require the reporting of all claim payments, including those made under high/low agreements where a verdict is returned finding no liability on the part of the practitioner, is appropriate, in that the purpose of reporting such activity to the Department is different than that for which claims payment information is reported to the BME. The Department utilizes the information, which does not include the name or other identifying information on the practitioner or the claimant, to monitor the condition of medical malpractice liability insurers and the medical malpractice liability insurance market in this State.

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 notice is not subject to the provisions of N.J.A.C. 1:30-3.1 and 3.2 governing rulemaking calendars.

Social Impact

As set forth above, the proposed amendment will exempt insurers from reporting to the Review Panel claims payments made under so-called “high/low agreements” where there is a finding or verdict of no liability on the part of the practitioner. This should have a positive social impact in that it will eliminate the potential for misleading the public as to medical malpractice committed by practitioners, consistent with the determination of the BME and the reporting of such data nationally.

Economic Impact

The proposed amendment will have little or no economic impact on insurers. As noted above, the proposed amendment clarifies the requirements on the reporting to the Review Panel of claims paid pursuant to high/low agreements where there is a finding or verdict of no liability on the part of the practitioner. Practitioners may see a positive economic impact to the extent that records of their activities are not improperly skewed due to the reporting to the Review Panel of claims payments made where a verdict was returned finding no liability on the part of that practitioner.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendment is not subject to any Federal requirements or standards. As noted in the Summary above, there are parallel independent reporting requirements for the reporting of medical malpractice claims payments to the National Practitioner Data Bank. The proposed amendment conforms the New Jersey reporting requirements with those under applicable Federal guidelines.

Jobs Impact

The Department does not anticipate that any jobs should be generated or lost as a result of the proposed amendment.

The Department invites commenters to submit any data or studies concerning the jobs impact of the proposal together with their comments on other aspects of the proposal.

Agriculture Industry Impact

The proposed amendment will not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Statement

The proposed amendment will apply to few, if any, small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. To the extent that the proposed amendment applies to small businesses, it will apply to insurers transacting medical malpractice liability in this State that are domiciled in this State. As noted in the Summary and the Economic Impact above, the proposed amendment merely reflects the determination of the BME that the reporting of medical malpractice liability claim payments made under high/low agreements where there is a finding or verdict of no liability on the part of the practitioner shall not be reported to the Review Panel pursuant to N.J.S.A. 17:30D-17. No additional professional services will be required in order to comply with the proposed amendment. The proposed amendment provides no differentiation in compliance requirements based on insurer size. The purpose of the proposed amendment is to ensure accurate reporting of claims payments in medical malpractice liability cases for the purposes of creating accurate physician profiles on their medical malpractice liability history. These goals do not vary based on insurer size.

Smart Growth Impact

The proposed amendment will not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Analysis

The proposed amendment will not have any impact on housing affordability in this State in that it applies to reporting of claims payments to the Review Panel by medical malpractice liability insurers.

Smart Growth Development Impact

The Department believes that there is an extreme unlikelihood that the proposed amendment would evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan because the proposed amendment applies to reporting of claims payments to the Review Panel by medical malpractice liability insurers.

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

11:1-7.3 Medical malpractice reporting requirements

(a) Any insurer or insurance association authorized to issue medical malpractice liability insurance in the State shall notify the Medical Practitioner Review Panel in writing of the following:

1. Any medical malpractice claim settlement, judgment or arbitration award involving any practitioner licensed by the State Board of Medical Examiners and insured by an insurer or insurance association[;].

i. The notification requirement set forth in (a)1 above shall not apply to payments made under agreements for minimum and maximum payments irrespective of the verdict (commonly referred to as high/low agreements) where there is a finding by an arbitrator or a verdict in a civil action of no liability on the part of the practitioner;

2. - 3. (No change.)

(b) - (h) (No change.)