

ORDER OF THE OFFICE OF THE COMMISSIONER OF INSURANCE AND THE BOARD OF GOVERNORS OF THE PATIENTS COMPENSATION FUND CREATING A RULE

The office of the commissioner of insurance and the board of governors of the patients compensation fund propose an order to create Ins 17.40 (1), (2), (3), and (4), Wis. Adm. Code, relating to requiring primary insurers and self-insurers provide notice to the patients compensation fund of the filing of out-of-state medical malpractice action against insured Wisconsin health care provider within 60 days of the primary insurer or self-insurer's first notice of the filing of the action.

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ANALYSIS PREPARED BY THE OFFICE OF THE COMMISSIONER OF INSURANCE

Statutory authority: ss. 601.41(3), 655.004, 655.27(2) and 655.27(5)(a)2., Stats.

Statutes interpreted: ss. 655.27(5)(a)2. and 655.27(5)(b), Stats.

Section 655.27(5)(a) 2. of the Wisconsin statutes provides a person filing an action outside this state against a health care provider may recover from the patients compensation fund ("fund") only if the fund is notified of the action within 60 days of service of process on the health care provider or the employee of the health care provider when the rules of procedure of the jurisdiction in which the action is brought do not permit naming the fund as a party. Section 655.27(5)(a) 2. further provides the board of governors may extend this 60 day time limit if it finds that enforcement of the time limit would be prejudicial to the purposes of the fund and would benefit neither insureds nor claimants.

Section 655.27(5)(b) provides it is the responsibility of the insurer or self-insurer for the health care provider who is also covered by the fund to provide an adequate defense of the fund, to act in good faith and in a fiduciary relationship with respect to any claim affecting the fund.

In several recent cases, primary carriers have not given timely notice to the fund of the commencement of an out-of-state medical malpractice action potentially affecting the fund. In three recent cases, a primary carrier provided an ongoing defense to three insured health care providers in three lawsuits filed outside the state of Wisconsin for over two years before notifying the fund of the existence of the suits. In two of these cases, the primary carrier first provided notice to the fund only weeks before the trial date. As is typical in cases filed outside Wisconsin, the fund had no notice from any other source of the existence of the suits before the primary carrier provided the fund notice of the suits.

This rule requires primary carriers and self-insurers to give written notice to the fund within 60 days of the primary insurer or self-insurer's first notice of the filing of an action outside this state, or within 60 days of service of process on the health care provider, or employee thereof, whichever is later. The Insurance Commissioner and the Board have determined notice provided within the timeframe established by the rule is necessary to ensure the fund is able to timely investigate, respond as appropriate and defend itself against claims filed outside the state of Wisconsin that may affect the fund. The Board, on the Legal Committee's recommendation, has also determined it would never be "prejudicial to the purposes of the fund" nor would it ever impermissibly "benefit insureds or claimants" if the fund is provided its first notice of the filing of an action outside Wisconsin within 60 days of the primary insurer's or self-insurer's first notice of the filing of the action (as opposed to the 60 day from service of process on the health care provider timeframe specified in the statute) so that allowing the later of the two timeframes in the rule fully comports with the language and intent of the statute.

The rule also specifies the failure of the insurer or self-insurer to give timely notice will result in the board of governors denying fund coverage for the claim unless the primary insurer or self-insurer demonstrates, and the board finds: a) the fund was not prejudiced by the failure to give timely notice, and b) it was not reasonably possible for the primary insurer or self-insurer to give notice within the time limit. This standard of a finding of no prejudice and that it was not reasonably possible to give timely notice is patterned after a similar standard set forth in insurance statute s. 631.81, Wis. Stats. The rule establishes a fair standard for the Board to apply when reviewing the circumstances of a particular case in which a primary insurer or self-insurer does not provide notice of an action filed outside the state within 60 days of service of process on the health care provider or within 60 days of the insurer or self-insurer's first notice. The rule also provides if the board of governors denies fund coverage under s. 17.40(3) of the rule, the failure to give notice constitutes a failure to act in good faith on the part of the insurer or self-insurer in violation of s. 655.27(5)(b), Wis. Stats.

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SECTION 1. Section Ins 17.40 is created to read:

**Ins 17.40 Notice to fund of filing of action outside this state.** (1) PURPOSE. This section implements s. 655.27(5)(a) and (b) Stats. relating to the requirement that the fund be notified of an action filed outside this state within 60 days of service of process on the health care provider or the employee of the health care provider and relating to the duty of the insurer or self-insurer of the provider to provide an adequate defense of the fund and act in good faith and in a fiduciary relationship with respect to any claim affecting the fund.

(2) PRIMARY INSURER OR SELF-INSURER TO GIVE NOTICE TO FUND. A primary insurer or self-insurer for a health care provider or employee of a health care provider shall notify the fund in writing within 60 days of the insurer or self-insurer's first notice of the filing of an action outside this state alleging medical malpractice against its insured health care

provider or the employee of its insured health care provider or within 60 days of service of process on the insured health care provider or employe thereof, whichever is later. The notice shall provide at a minimum the names and addresses of the parties plaintiff and defendant, the court in which the action is filed, the case number, and copies, if available, of the complaint in the action and answer filed on behalf of the defendant provider.

(3) FAILURE TO GIVE NOTICE. If the primary insurer or self-insurer fails to give notice to the fund as required in sub. (2), the board shall deny fund coverage for the action filed outside this state unless the primary insurer demonstrates, and the board finds, all of the following:

- (a) the fund was not prejudiced by the failure to give notice as required, and
- (b) it was not reasonably possible to give notice within the time limit.

(4) FAILURE TO ACT IN GOOD FAITH. If the board denies coverage pursuant to sub. (3), then failure to give notice to the fund of the filing of an action outside this state as required in sub. (2) constitutes a failure to act in good faith on the part of the insurer or self-insurer in violation of s. 655.27(5)(b) Stats.

SECTION 2. These changes will take effect on the first day of the month after publication, as provided in s. 227.22(2)(intro.), Stats.

Dated at Madison, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, 2003.

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Jorge Gomez  
Commissioner of Insurance

<p style="text-align: center;"> <input type="checkbox"/> ORIGINAL                      <input type="checkbox"/> UPDATED  <input type="checkbox"/> CORRECTED                      <input type="checkbox"/> SUPPLEMENTAL </p> <p><b>FISCAL ESTIMATE</b> DOA-2048 N</p>	<p><b>2002 Session</b></p> <p>LRB or Bill No./Adm. Rule No. <b>Ins. 17.40</b></p> <p>Amendment No. if Applicable</p>					
<p><b>Subject</b> Relating to the reporting of claims with the Patients Compensation Fund that are filed outside the state of Wisconsin</p>						
<p><b>Fiscal Effect</b> State: <input type="checkbox"/> No State Fiscal Effect</p> <p>Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 60%; border-right: 1px solid black; vertical-align: top;"> <input type="checkbox"/> Increase Existing Appropriation                      <input type="checkbox"/> Increase Existing Revenues  <input type="checkbox"/> Decrease Existing Appropriation                      <input type="checkbox"/> Decrease Existing Revenues  <input type="checkbox"/> Create New Appropriation </td> <td style="width: 40%; vertical-align: top;"> <input type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget    <input type="checkbox"/> Yes    <input type="checkbox"/> No   <input type="checkbox"/> Decrease Costs </td> </tr> </table> <p>Local: <input type="checkbox"/> No local government costs</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%; border-right: 1px solid black; vertical-align: top;"> 1. <input type="checkbox"/> Increase Costs            <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory  2. <input type="checkbox"/> Decrease Costs            <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory </td> <td style="width: 33%; border-right: 1px solid black; vertical-align: top;"> 3. <input type="checkbox"/> Increase Revenues            <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory  4. <input type="checkbox"/> Decrease Revenues            <input type="checkbox"/> Permissive    <input type="checkbox"/> Mandatory </td> <td style="width: 34%; vertical-align: top;"> 5. Types of Local Governmental Units Affected:  <input type="checkbox"/> Towns            <input type="checkbox"/> Villages            <input type="checkbox"/> Cities  <input type="checkbox"/> Counties        <input type="checkbox"/> Others _____  <input type="checkbox"/> School Districts    <input type="checkbox"/> WTCS Districts </td> </tr> </table>		<input type="checkbox"/> Increase Existing Appropriation <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Decrease Existing Appropriation <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Create New Appropriation	<input type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input type="checkbox"/> No  <input type="checkbox"/> Decrease Costs	1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory 4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	5. Types of Local Governmental Units Affected: <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities <input type="checkbox"/> Counties <input type="checkbox"/> Others _____ <input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts
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<p><b>Fund Sources Affected</b>  <input type="checkbox"/> GPR   <input type="checkbox"/> FED   <input type="checkbox"/> PRO   <input type="checkbox"/> PRS   <input type="checkbox"/> SEG   <input type="checkbox"/> SEG-S</p>	<p><b>Affected Ch. 20 Appropriations</b></p>					

<p><b>Assumptions Used in Arriving at Fiscal Estimate</b></p> <p>The Patients Compensation Fund (Fund) is a segregated fund. The proposed rule has no fiscal effect to the Fund or GPR.</p>		
<p><b>Long-Range Fiscal Implications</b></p> <p>None</p>		
<p><b>Agency/Prepared by: (Name &amp; Phone No.)</b> PCF/Theresa Wedekind (608)266-0953</p>	<p><b>Authorized Signature/Telephone No.</b>  (608) 266-0102</p>	<p><b>Date</b> April 1, 2003</p>