

Healthcare Law Alert: Brach Eichler's Keith Roberts Provides Comments and Analysis on Proposed Bill S2053

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In our last [Alert](#) on S2053 dated January 19, we advised that the Bill had been pulled from committee for public hearing. The subject matter of the Bill, however, is likely to remain active.

We provide our commentary on the potential impact of the law, including much needed revisions if S2053 were to be adopted.

[Senate Bill 2053](#) (Bill) would give the Commissioner of the Department of Banking and Insurance (DOBI or Department) authority to investigate, temporarily suspend, and/or bar healthcare providers from demanding, requesting, or receiving reimbursement for treatment to personal injury protection (PIP) patients.

Specifically, DOBI would be given statutory authority to investigate healthcare providers who:

- May be guilty of professional misconduct, incompetence, or negligence;
- Exceeded limits of their professional competence or made a knowingly false statement or misrepresentation of material fact in a medical report;
- Solicited or employed another to solicit professional treatment, examination, or care of any injured person;
- Refused to appear before, answer questions from, or produce relevant information to DOBI, and other administrative bodies; or
- Engaged in a pattern of billing for services that were not rendered, were of no diagnostic value, or were medically unnecessary.

Major concerns. The Bill is problematic, as currently written, for two key reasons. First, it is clear that the Bill provides decision-making authority to DOBI regarding issues that require expert analysis that clearly fall within the purview of certain New Jersey State Professional Licensing Boards, such as the Board of Medical Examiners (BME or Board). Secondly, the bill also lacks important safeguards against what would appear to be a lack of robust due process for what is essentially a punitive statute seeking to suspend or bar medical providers from being eligible for reimbursement from no-fault insurance carriers.

Specialized Knowledge. The Bill vests authority with DOBI to make decisions concerning subject matter that is clearly *outside the expertise* of the administrative agency, and not within the Department's common statutory jurisdiction. For example, the Commissioner is provided unlimited authority to make determinations, as it concerns medical providers, for acts of misconduct, professional competence, improper solicitation, lack of cooperation with authorities, and patterns of inappropriate billing.

The legislature has given appropriate authority to professional licensing boards, and by way of example the BME, to promulgate extensive regulations guiding a process for license suspension or revocation of a medical doctor. Specifically, N.J.S.A. 45:1-21 provides the BME with authority, as the expert administrative agency, to determine whether a licensed physician has engaged in dishonesty, fraud, deception, or misrepresentation. The BME is also charged with the responsibility of determining a physician's negligence, malpractice, or incompetence, to include professional misconduct. The enabling statute provides the BME with requisite authority to regulate and govern conduct, to include disciplinary proceedings. Clearly, the BME has the expert authority, as it is comprised of physicians of various disciplines, and is able to make determinations concerning the science of medicine, professional misconduct, and other issues, that would obviously not fall within the expertise of DOBI.

The same reasoning rings true as it concerns vesting the Commissioner with the authority to determine whether a medical provider “exceeded the limits of his or her professional competence in rendering medical care” to injured automobile accident victims. See S2053 at 1(b)(1)(b). Again, the BME, or the appropriate licensing board, would be best suited to make such determinations and it is unclear why the bill would circumvent this process.

The Commissioner would also be given authority to make determinations concerning material misrepresentations as it concerns claims based upon the content of medical records. Yet, the BME already has regulations governing this space. Specifically, N.J.A.C. 13:35-6.5 governs the conduct of licensed physicians when documenting the findings upon examination and treatment in the patient medical record. The regulation requires that physicians maintain accurate and confidential medical records. The comprehensive regulatory guidance was adopted by the appropriate expert administrative agency. We see no reason for such expert decisions to be made solely by the Commissioner.

The bill also addresses the issue of solicitation of a person injured in an automobile accident and billing issues. Yet, the Board regulates advertising and solicitation practices of licensed physicians, the prohibition of excessive fees, as well as prohibition of kickbacks. See N.J.A.C. 13:35-6.10, N.J.A.C. 13:35-6.11, and N.J.A.C. 13:35-6.17.

Due Process. The Commissioner would have authority to suspend or bar a provider from eligibility for no-fault benefits. This is a substantial penalty that should require meaningful due process to protect the provider’s rights.

We are concerned with the proposed language that permits the Commissioner to act as the judge, jury, and only party determining penalty for what can only be reasonably described as serious discipline. Therefore, in our view, the bill should expressly reference application of the Administrative Procedure Act (N.J.S.A. 52:14B-1, et. seq.) to all proceedings initiated in accordance with the Bill. In proceedings where serious penalties would apply, the litigants should have access to a full plenary hearing before an Administrative Law Judge, at a minimum.

Importantly, it has not been established that the Department has the appropriate resources, infrastructure, and competence to make such determination contemplated in the bill. In its current form, the Bill has a major void by failing to ensure that medical providers facing the serious penalty of being excluded from no-fault insurance will receive fair due process, a comprehensive hearing, and a determination by an administrative agency with proper expert authority.

Significantly, the statute provides the Commissioner with the authority to “temporarily suspend a health care provider from demanding, requesting, or receiving any reimbursement for services, or equipment for which payment is to be made by an automobile insurance [carrier].”

The legislature has provided guidance to the professional licensing boards as it concerns a standard of review for temporary suspension. In pertinent part, Indeed, N.J.S.A. 45:1-22(g) requires that “no such temporary order shall be entered unless the application made to the board palpably demonstrates a clear and imminent danger to the public.” Here, a standard of review is not presently articulated in the Bill.

Recommendations. At a minimum, the Bill should provide an articulated standard of review for the Commissioner, which should be a high bar, in the event a medical provider would be temporarily suspended from eligibility to bill a no-fault insurance carrier.

In addition, the public policy behind the bill to deter fraud and penalize bad actors, could be achieved with an alternate approach that would both ensure due process and safeguard the public interest. In October 2010, the Department created the Bureau of Fraud Deterrence. See N.J.S.A. 17:33A-E. In conjunction with the Office of Attorney General, and Office of Insurance Fraud Prosecutor, the Department is prosecuting civil insurance fraud cases in the Superior Court of New Jersey. All of the litigants have due process rights, the ability to conduct discovery, and present evidence at a jury trial to include calling expert and fact witnesses. The Bill could permit the prosecution of claims to bar medical providers that have engaged in fraudulent conduct

when treating auto accident victims.

The approach of providing a civil cause of action is reasonable and would alleviate the concern of an administrative agency without the necessary expertise deciphering complex matters of medical necessity, clinical judgment, current procedural terminology coding, and other related issues. A statutory cause of action, however, would permit the claims to be prosecuted subject to the jurisdiction of the courts of the State of New Jersey, where all parties would have access to appropriate process, with adequate opportunity to present evidence and pursue a claim on the merit, as well as present substantive defenses.

Conclusion. It is unclear why the legislature would now act to have determinations made concerning medical provider conduct, that require expert knowledge, outside the jurisdiction of the administrative agency that is best suited to be charged with such responsibility. Due process, proper standards of review, and agency jurisdiction are all legitimate concerns when analyzing S2053.

We will continue to keep you up-to-date about any developments concerning S2053. If you would like additional information or have any questions, please contact:

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