

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF BUSINESS REGULATION
233 RICHMOND STREET
PROVIDENCE, RHODE ISLAND 02903**

IN RE: Medical Malpractice Joint Underwriting	:	
Association of Rhode Island	:	
Hospital Professional Liability Insurance	:	DBR No. 05-I-0113
	:	
(Filed May 13, 2005)	:	

DECISION

**I.
TRAVEL**

This matter came to be heard before the Department of Business Regulation ("Department") as a result of a rate filing received by the Department on May 13, 2005 ("Filing"), from the Medical Malpractice Joint Underwriting Association of Rhode Island ("MMJUA"). The filing requested an increase to MMJUA's base rates of 99.8% for Hospital Professional Liability Insurance to be effective October 1, 2005. Prior to the hearing MMJUA and the Attorney General agreed to amend this request to an increase in base rates of 70%. The overall effect of this rate change depends upon whether the particular facility is subject to the Hospital Experience Rating Plan approved by the Department effective October 1, 2004. Three of the facilities are subject to the Rating Plan and, as such, the overall premium level change for those facilities would be more than 70% as discussed below. For the remaining facilities, approval of the request would result in a 70% increase in premium. The base rates now in effect were approved effective October 1, 1995.

By order dated May 19, 2005, the Director of the Department designated Elizabeth Kelleher Dwyer, Deputy Chief of Legal Services and Paula M. Pallozzi, Chief Property and Casualty Insurance Rate Analyst, as Co-Hearing Officers in this matter. An initial pre-hearing conference was held on June 2, 2005. Appearances were entered at the prehearing conference by Genevieve M. Martin, Esq., on behalf of the Attorney General and David P. Whitman, Esq., on behalf of MMJUA. An initial prehearing order was entered requiring that all Motions to Intervene be filed no later than July 8, 2005; that all Insurance Regulation 39(9)(b) statements be filed by August 3, 2005 and that the public hearing in this matter would be held on August 15, 2005. Pursuant to R.I. Gen. Laws § 27-9-10 notice of the filing and of the hearing thereon was published on July 14, 2005 in *The Providence Journal*. No motions to intervene were filed.

On August 3, 2005, the Attorney General filed a statement in accordance with Insurance Regulation 39(9)(b). The 39(9)(b) statement provided indications of alleged deficiencies with the filing.

The Department received an e-mail from the Attorney General on August 12, 2005 at 6:48 p.m. As August 12, 2005 was a Friday the e-mail was not received by the Department until the morning of the hearing. The e-mail indicated that the Attorney General had reached "...an agreement as to the above referenced filing." On the morning of August 15, 2005 counsel for the Attorney General and MMJUA appeared without witnesses and indicated that the Attorney General and MMJUA had reached a settlement wherein the parties agreed to a 70% increase in base rates.¹ MMJUA also informed the

¹ The parties were reminded that all parties and witnesses must appear at publicly noticed hearings unless they receive prior approval from the Department excusing appearance of their witnesses. As a result of the parties decision to excuse their witnesses without authority of the Department, the hearing was continued an additional day significantly increasing costs which are ultimately passed on to consumers.

Department that during discovery it determined that the 9 to 13% impact on hospitals subject to the Rating Plan outlined in its cover letter to the filing (and, therefore, included in the public notice) was not correct.² MMJUA currently insures three hospitals which are subject to the Rating Plan. Joanne Peacock, a broker with AON Insurance Services, who was present at the hearing stated that she represented three of the hospitals. Ms. Peacock was, therefore, asked to contact her clients and inform them that they could be present the following day. MMJUA was ordered to contact the remaining hospital directly to provide the same message.

A second day of public hearing was held on August 16, 2005. Pursuant to the request of the Department, the Attorney General produced Anthony Grippa, an actuarial expert, to answer the Department's questions. MMJUA produced Scott Dodge, an actuarial expert, and Kathleen Cutler, Managing Director, Marsh USA Inc. to respond to questions from the panel. Additionally, two representatives from one of the hospitals appeared to indicate that the hospital, which had believed it was facing a premium increase of 13%, was actually facing an 87% increase from the previous year premium. No other members of the public appeared to offer comment on the filing. Attorney General Exhibits 1 through 10 and MMJUA Exhibits 1 through 16 were admitted in full without objection. The Attorney General's expert actuary appeared at the hearing and confirmed that he had reviewed the filing and found the agreement between the Attorney General and MMJUA to increase base rates by 70% as supported.

² It was represented that MMJUA had discovered this error approximately one week before the hearing. MMJUA informed the Attorney General of the error at the time of discovery. However, neither the MMJUA nor the Attorney General informed the Department of this error until the morning of the hearing. The affected insureds were not provided official notice until the Department issued an order on August 22, 2005 instructing MMJUA to give them notice. In the future the parties are instructed that upon discovery of an error in a filing the Department must be informed immediately and notification to the Attorney

The Department was extremely concerned that the affected hospitals had not received sufficient notice of the proposed rate increase. Therefore, on August 22, 2005, the Department issued an order requiring the MMJUA inform each hospital individually of the premium increase which would result from the base rate increase and other factors. The Department further ordered that MMJUA inform the hospitals that the Department would take additional public comment on September 1, 2005. Copies of these letters were provided to the Department and admitted as MMJUA Exhibits 16, 17, 18 and 19.

A hearing to take additional public comment was held on September 1, 2005. Representatives of two of the affected hospitals appeared on that date. Correspondence that was received from two hospitals prior to the hearing was marked as Public Comments Exhibits 1 and 2. The correspondence and testimony indicated that, depending upon the applicable factors, if the 70% increase in base rates were approved the affected two hospitals would receive premium increases between of 77% and 87% on October 1, 2005 in comparison to the premiums paid for the policies issued to them on October 1, 2004. Each of the hospitals in attendance indicated that they had not budgeted for an increase of this magnitude.

II. JURISDICTION

The Department has jurisdiction in this matter pursuant to R.I. Gen. Laws §§ 27-9-10. The hearing was conducted in accordance with the provisions of the Administrative Procedures Act, R.I. Gen. Laws §§ 42-35-1 *et seq.*

General does not satisfy this requirement. This is especially important where, as here, the error affects the public notice of the requested rate increase.

III. ISSUES

1. Whether the agreement of the Attorney General and MMJUA for a base rate increase of +70% is excessive, inadequate, or unfairly discriminatory for the MMJUA Hospital Professional Liability Insurance?
2. What is an appropriate effective date for the rate increase and should the rate increase be phased over time?

IV. DISCUSSION

Attorney General/MMJUA Agreement

After extensive questioning of both MMJUA and the Attorney General's witnesses, the Department has concluded that a 70% increase in base rates is actuarially justified. The Department has serious concern with some of the methodology utilized by MMJUA and the sufficiency of the data as outlined in the actuarial memorandum of findings attached hereto. These concerns would have resulted in extensive revisions to the 99.8% request. However, adjusting for those factors does not reduce the actuarially indicated rate level change below the +70% request.

MMJUA is instructed to carefully review the actuarial opinion attached hereto and to address the concerns raised therein in its next filing.

Effective Date of Increase

The MMJUA functions as the residual market for medical malpractice insurance in Rhode Island. The last increase approved for hospital base rates was effective ten years ago. From the initial prehearing through the final days of hearing, the Department expressed concern that the residual market would wait such an extensive period of time to

request a rate increase. MMJUA filed two briefs on this issue each expressing that by the mid to late 1990's it no longer insured any hospital and, therefore, "...did not ask its actuaries to review the rates charged by it for hospital professional liability insurance coverage or discuss whether a filing should be made regarding the appropriate rates for such coverage." The information developed in the hearing indicates that the MMJUA always had some insureds in this category. MMJUA Exhibit 15 indicates that in 1999, the year in which MMJUA had its fewest facility insureds, the MMJUA had 23 facility insureds. In 2002, after 4 years without a hospital insured, the MMJUA obtained two hospital insureds. This number steadily increased over the next three years to the current count of four. However, the filing was not made until 2005.

MMJUA indicated at the hearing that, in addition to reasons related to cost, it did not file for increased rates because it did not have experience with the hospitals which began rejoining the MMJUA in 2002. This argument might make some sense if the actuarial calculations in the filing were limited to the experience of the four hospitals which MMJUA has insured since 2002. However, as indicated in the attached actuarial letter, the data upon which the MMJUA places the most significance is the data of the hospitals it insured prior to 1998. That data could have been used at any time since 1998 to support increased rates even if MMJUA had no or few insured in the line of business.

The residual market exists to serve as an insurer of last resort when the market in a particular line of business is unable to provide coverage to all insureds who request it. While MMJUA's justification for delay in filing might be valid if it were a competitive carrier, it makes no sense for a residual market. As the residual market, the MMJUA is required to accept all comers when market forces change. MMJUA has no control over

this change and it would be almost impossible to predict with certainty when the change will occur. Proper operation of a residual market, therefore, requires MMJUA to keep all of its rates current. Failure to do so could actually result in the residual market becoming the carrier of choice since if the rates become similar to or lower than competitive market rates the residual market becomes a more attractive alternative. This is exactly the opposite of the proper function of a residual market.

MMJUA indicates that the cost of filing was an additional motivating factor. MMJUA points out that its' 2003 rate filing cost was \$153,000 without a full hearing. The Department is also concerned with the cost of these litigated hearings, however, cost cannot be an excuse for the residual market failing to keep rates current.

The effect of this proposed increase in base rates is compounded by the fact that MMJUA agreed with the Attorney General to a one year "cap" on the Hospital Experience Rating Plan approved in DBR 04-I-0160. Therefore, even if the base rates remained unchanged three of the hospitals currently insured by the MMJUA would receive an increase in premiums due to the "uncapping" of the Hospital Experience Rating Plan. Additionally, two of those hospitals would receive additional adverse premium impact as a result of the movement of their policies from third to fourth year claims made.

With these additional factors the one-year increase to these hospitals is significant if the increase in base rates is approved at 70% effective October 1, 2005. Three of these hospitals renew on that date. Hospital A, which paid \$540,472 for coverage from 10-1-04 to 9-30-05 will pay \$1,010,766 for coverage from 10-1-05 to 9-30-06, an increase of \$470,294. (MMJUA Exhibit 17) Hospital B, which paid \$596,397 for coverage from 10-

1-04 to 9-30-05 will pay \$1,078,308 for coverage from 10-1-05 to 9-30-06, an increase of \$537,836. (MMJUA Exhibit 18) Hospital C, which paid \$1,548,843 for coverage from 10-1-04 to 9-30-05 will pay \$2,679,777 for coverage from 10-1-05 to 9-30-06, an increase of \$1,130,934. (MMJUA Exhibit 19) These increases in premium reflect not only the 70% increase in base rates but also the impacts of 1) removing the 2004 experience rating cap, 2) the movement from 3rd year to 4th year claims made coverage for Hospitals A and B, and 3) the interaction of the experience rating plans with the base rate increase.

The final hospital is in a position similar to the other facilities affected by this request. Hospital D, along with all other facilities, is not experience rated. Under the current proposal, therefore, its' premium and that of all other facilities will increase by 70% upon renewal of their policy. Hospital D's policy renews on September 1, 2006. At the Department's request, MMJUA provided Exhibit 16 which indicates that the current premium for facilities other than hospitals ranges from \$1,230 to \$24,600. If the base rate increase is approved at 70% effective October 1, 2005, this will increase to \$2,091 to \$41,834.

The situation created by the delay is that MMJUA is asking that its insureds accept a rate increase in one fell swoop to make up for its ten years of delay. MMJUA's position appears to be that if the rate is actuarially supported, the Department must accept the timing of the increase proposed by the filer and may not take into account how that timing affects the insureds. The statutory standard which the Department must follow in its Decision is whether the rates requested are "excessive, inadequate or unfairly discriminatory." Neither R.I.G.L. § 27-9-10 nor any case law interpreting it, provides

that the Department must accept the effective date proposed by the filer. In this case, MMJUA made a decision to delay updating its rates for ten years. Nothing in R.I.G.L. § 27-9-10 prevents the Department from phasing in the rate increase over a two year period under these circumstances.

While the Department acknowledges that rates in the residual market should be adequate to cover costs, this does not mean that an extreme delay in filing should be borne by insureds in a single large increase. The alternative to this one large rate increase is to phase the rate increase in over time. The Department believes that it is proper to balance the making of the MMJUA rates adequate with allowing insureds appropriate notice of the increased rates they will be required to pay. The Department will, therefore, increase base rates by 35% for contracts issued or renewed on or after November 1, 2005. A second increase in the amount of 25.9% will be allowed for contracts issued or renewed on or after November 1, 2006. The effect of this phase in will be that the three hospitals subject to the rating plan will receive no increase in base rates included in their renewal premium on October 1, 2005, but will receive increased rates from the uncapping of the rating plan and the movement from third to fourth year claims made, if applicable, on October 1, 2005. On October 1, 2006, those hospitals will receive a base rate increase of 35%. On October 1, 2007, those hospitals will receive a further base rate increase of 25.9%. For the remaining facilities, each will receive a base rate increase of 35% on their next renewal and a further base rate increase of 25.9% on the subsequent renewal.

V. FINDINGS OF FACT

1. On May 13, 2005, MMJUA filed for a rate increase for its Hospital Professional Liability Insurance base rates. The filing was duly advertised pursuant to

the appropriate statutory provisions on July 14, 2005 in *The Providence Journal*, and public hearings were held on August 15 and 16, 2005 and September 1, 2005.

2. The filing requested an increase in base rates of 99.8%.

3. The MMJUA and the Attorney General entered into an agreement proposing to the Department that an increase of 70% in base rates be approved.

4. On August 15, 2005 MMJUA informed the Department that a calculation error had resulted in an understating of the effect of the increase in hospital base rates to those facilities subject to the Rating Plan. In reality, the agreed upon 70% increase in base rates, along with other factors such as the “uncapping” of the Rating Plan and movement from 3rd to 4th year claims made would result in increases between 70% and 87% for the four hospitals currently insured by MMJUA.

5. In consultation with its consulting actuary, the Department has determined that a base level increase of 70% falls within the range of indications and is not excessive, inadequate or unfairly discriminatory. (See attached actuarial memorandum of findings)

6. The Department finds, however, that MMJUA’s request to impose the entire base rate change at one time is not warranted given the extreme delay in filing and the adverse impact upon insureds.

7. An increase of 35% in base rates is hereby approved for use beginning November 1, 2005.

8. A further increase of 25.9% in base rates is hereby approved for use beginning November 1, 2006.

9. Any conclusion of law which is also a finding of fact is hereby adopted as a finding of fact.

VI. CONCLUSIONS OF LAW

1. The Department of Business Regulation has jurisdiction in this proceeding in accordance with R.I. Gen. Laws § 27-9-10.

2. The Director of the Department of Business Regulation has jurisdiction in this proceeding to conduct the hearing for purposes of considering whether MMJUA's proposal contained in its filing dated May 13, 2005 is excessive, inadequate or unfairly discriminatory.

3. All of the procedural prerequisites for the conduct of the hearing of this matter have been duly complied with.

4. MMJUA's request for rate relief was filed at the Office of the Director of the Department of Business Regulation in accordance with the applicable statutes and regulations pertaining thereto.

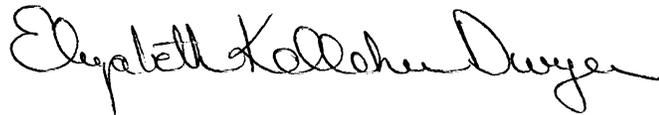
5. A base rate level change of +35% effective November 1, 2005 and +25.9% effective November 1, 2006 is not excessive, inadequate or unfairly discriminatory.

6. Any finding of fact which is also a conclusion of law is hereby adopted as a conclusion of law.

**VII.
RECOMMENDATIONS**

In accordance with the Findings of Fact and Conclusions of Law set forth above, we find that an aggregate rate level change of +35 % increase in base rates to be effective November 1, 2005 and a second separate base rate increase of 25.9% effective November 1, 2006 is not excessive, inadequate or unfairly discriminatory.

September 26, 2005



Elizabeth Kelleher Dwyer, Co-Hearing Officer

September 26, 2005



Paula M. Pallozzi, Co-Hearing Officer

ORDER AND DECISION

I, A. Michael Marques, Director of the Department of Business Regulation and Insurance Commissioner of the State of Rhode Island, having read the Findings of Fact, Conclusions of Law, and Recommendations of the Co-Hearing Officers in this matter and having satisfied myself as to their validity, do hereby adopt and accept the Findings of Fact, Conclusions of Law and Recommendations of the Co-Hearing Officers.

ENTERED AS AND ADMINISTRATIVE ORDER OF THE DEPARTMENT OF
BUSINESS REGULATION THIS 26th DAY OF SEPTEMBER, 2005.

A handwritten signature in black ink, appearing to be 'A. Michael Marques', with a long horizontal flourish extending to the right.

A. Michael Marques
Director and Insurance Commissioner
Department of Business Regulation

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.