



KEY FINDINGS OF THE NJSBA REPORT OF THE WORKING GROUP ON PROFESSIONAL MALPRACTICE

The only significant differences between New Jersey and neighboring states such as New York and Pennsylvania are longer statutes of limitations and the fee shifting provision in New Jersey case law.

New Jersey has a six-year statute of limitations, significant as compared to New York, which has a three-year statute of limitations¹ and Pennsylvania, which has a two-year statute of limitations for actions based in tort and a four-year statute of limitations for claims based in contract². New Jersey is also the only state that provides for fee-shifting in legal malpractice actions.³ None of the other 49 states permit fee-shifting and, in fact, states have specifically considered, and rejected them.⁴

Solo and small firms make up 90% of the law firms in New Jersey; the largest areas of practice generating claims are consumer-oriented areas practiced by general practitioners, such as real estate and family law.

According to a study by the American Bar Association, the largest areas of practice generating claims are plaintiff's personal injury (70%), real estate (14.89%), family law (13.51%), wills and estates (12.05%) and collection and bankruptcy (10.59%).⁵

¹ NY CPLR §214(6).

² 42 Pa.C.S.A. §5524(7); 42 Pa. C.S. §5225.

³ Saffer v. Willoughby, 143 N.J. 256 (1996).

⁴ Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman, 2014 IL 116362, 18 N.E. 3d 884 (2014); Schmidt v. Coogan, 335 P.3d 424 Wa. 2014); Horn v. Wooster, 165 P.3d 69, 75 (Wy. 2007); Kohl v. Dearborn and Kohl, 977 S.W.2d 528, 534-35 (Tenn. 1998).

⁵ American Bar Association, Profile of Legal Malpractice Claims 2012-2015, September 2016, p. 11.

New Jersey residents seeking legal advice in these areas rely upon solo and small firm attorneys, who comprise the majority of New Jersey attorneys. In 2015, there were 97,727 licensees, 35,551 of whom are engaged in practice primarily in New Jersey. While the percentage of solos in private practice may be somewhere between fifty-five percent (55%) and seventy-five percent (75%), the number of law firms with one to five members exceeds ninety percent (90%).⁶

Based on information provided by USI, a leading insurance broker that administers professional liability insurance programs for the NJSBA, NYSBA and PBA, in comparing its experience in New Jersey to that of its experience in New York and Pennsylvania, the New Jersey marketplace is underperforming and thus more costly and restrictive than in neighboring jurisdictions.

USI's Senior Vice President of the company's Professional Liability Practice observed that New Jersey's frequency of claims and routinely high payouts results in an unprofitable business for insurance carriers that ultimately leave the New Jersey marketplace. "In order for a carrier to participate in a state, they need to write their business to an underwriting profit," said Mike Mooney. "For many years in the New Jersey marketplace, carriers have not been able to write to an underwriting profit, which has led to a lack of competition. Ultimately, this results in high premiums for New Jersey attorneys."

While claim severity reported by one carrier is under the countrywide average, the number of claims is almost double the national average, including New York and Pennsylvania, despite the fact that New Jersey has fewer attorneys. The average claim cost per New Jersey attorney also exceeds the national average.⁷

At least one admitted carrier reported to NJSBA's Insurance Benefits Committee that it is seeking to shed many solos and limit small firms in its admitted profile in New Jersey because of disproportionate losses there.

While there are surplus insurers willing to insure attorneys who cannot be insured by admitted carriers, they are not subject to the same strict oversight as admitted carriers and do not always provide comparable coverage. *However, as a result of the unprofitable underwriting climate, USI reported that out of the approximately 25 insurance companies authorized to write legal malpractice coverage, only five are actually writing and renewing business in New Jersey.*

The base rate for a lawyer's coverage in New Jersey is 49% higher than New York, 23% higher than in Pennsylvania, and 33% higher than in Maryland.

USI reported that the base rate for a lawyer's coverage in NJ begins at forty-nine percent (49%) higher than NY, is twenty-three percent (23%) higher than PA and is thirty-three percent (33%) higher than Maryland.

⁶ Annual Report of the New Jersey Office of Attorney Ethics, 2015 State of the Attorney Disciplinary System Report, June 1, 2016.

⁷ CNA Malpractice Claim Information Reflecting Claims for 2006-2015.

CONCLUSION

The availability and affordability of sufficient coverage for a majority of New Jersey's attorneys is being threatened every year by the lack of insurers willing to underwrite policies in its current climate.

This impacts the ability of lawyers to practice and obtain financial protection for themselves and their clients, and may eventually lead to forcing solo and small practitioners, who often play an active role in their local communities, out of business.

Bringing the statute of limitations in line with neighboring states and eliminating the fee shifting provisions applicable to those claims will make the New Jersey marketplace more attractive to insurers and protect consumers. This will provide accessible, sufficient and affordable coverage to those solo and small firm business owners who need it most.