

**40-3411. Commencement of actions upon failure to reach settlement or obtain court approval thereof on amount to be paid from fund; defense of action; attorneys' fees; obligation of provider to attend hearings and trial and give evidence.** (a) In any claim in which the insurer of a health care provider or inactive health care provider covered by the fund has agreed to settle its liability on a claim against its insured or when the self-insurer has agreed to settle liability on a claim and the claimant's demand is in an amount in excess of such settlement, to which the board of governors does not agree, or where the claim is against an inactive health care provider covered by the fund who does not have liability insurance in effect which is applicable to the claim and the claimant and board of governors cannot agree upon a settlement, an action must be commenced by the claimant against the health care provider or inactive health care provider in a court of appropriate jurisdiction for such damages as are reasonable in the premises. If an action is already pending against the health care provider or inactive health care provider, the pending action shall be conducted in all respects as if the insurer or self-insurer had not agreed to settle.

(b) Any such action against a health care provider covered by the fund or inactive health care provider covered by the fund who has liability insurance in effect which is applicable to the claim shall be defended by the insurer or self-insurer in all respects as if the insurer or self-insurer had not agreed to settle its liability. Notwithstanding any other provision of law, the insurer or self-insurer shall be reimbursed from the fund for the costs of such defense incurred after the settlement agreement was reached, including a reasonable attorney's fee not to exceed the maximum hourly rate established by the board of governors. The board of governors is authorized to employ independent counsel in any such action against a health care provider or an inactive health care provider covered by the fund. If the primary carrier or self-insurer determines that the policy limits or the self-insured amount of basic coverage should be tendered to the fund in order to relieve itself of further costs of defense, it may do so in the manner specified by the board of governors. In the event of such a tender, the fund shall become responsible for the conduct of the defense. The board of governors may employ the attorney retained by the primary carrier or self-insurer or appoint other counsel to represent such health care provider. In any event, the board of governors shall pay attorneys' fees at a rate not to exceed the maximum hourly rate established by the board of governors. Under such circumstances, the fund shall have no liability for attorneys' fees to any attorney not so appointed.

(c) In any such action the health care provider or the inactive health care provider against whom claim is made shall be obligated to attend hearings and trials, as necessary, and to give evidence.

**History:** L. 1976, ch. 231, § 11; L. 1983, ch. 160, § 3; L. 1994, ch. 181, § 4; L. 1994, ch. 328, § 2; L. 2014, ch. 56, § 13; July 1.