



National Association of Professional Surplus Lines Offices, Ltd.

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RE: Medical Malpractice Closed Claim Reporting Model Law

Dear Mr. Bieniek:

NAPSLO previously commented regarding the unregulated nature of surplus lines and how the detailed statistical reporting envisioned by the task force is contrary to the historical regulation of surplus lines insurance. I would like to supplement those comments with this letter. This letter will address the GAO's conclusion regarding the lack of loss data and whether surplus lines data will substantially resolve the issues identified in the GAO report.

The GAO report entitled "Medical Malpractice Insurance Multiple Factors Have Contributed to Premium Rate Increases" identifies several places where additional data was desired. For Example on page 2 it states:

"comprehensive data at the national and state levels on insurer's medical malpractice claims and the associated losses prevented us from fully analyzing the composition and causes of those losses. For example, data that would have allowed us to analyze claim severity at the insurer level on a state by state basis or to determine how losses were broken down between economic and noneconomic damages were unavailable."

Even if Surplus lines insurance is included in the model bill, there will still not be any useful data regarding a break down of economic and non-economic losses. Settlements do not typically break down economic and non-economic losses. The model act does requests the "best estimate" of economic and noneconomic loss but this is simply asking for an opinion and is not likely to be useful data. The opinion could also be influenced by the reinsurance terms regarding coverage for certain non-economic losses. Some jury verdicts do segregate non-economic losses, but that information should be obtainable from the jury verdict services. In addition, data will not provide

insight into the cause of losses or rising loss costs. The data concerns objective matters. The rising loss costs could be affected by difficult venues, the declining quality of the jury pools, a changing culture in certain parts of the country, adverse insurance publicity, adverse publicity for hospitals and the medical profession, increasing willingness of plaintiffs to sue their doctors, forum shopping or other techniques of plaintiff's lawyers, the availability of expert witnesses, plaintiffs who present sympathetic cases or any number of other factors that will not be measurable. The data shows dollars, dates, and a few other items. It is not possible for the data to fully explain rising losses because many of the factors involved are not quantifiable. In addition, the data will always be incomplete because of captive arrangements, the involvement of the London market, offshore reinsurers, self insured deductibles, risk retention groups and the likelihood of 50 states adopting uniform legislation.

The report also provides on page 3 that "overall, adequate data do not exist that would allow us and others to provide definitive answers to important question about the market for medical malpractice insurance including an explanation of the causes of rising losses over time and the precise effect of tort reforms on premium rates."

It is not clear what led to the assumption that data would lead to definitive answers about causes of loss over time and the effect of tort reform. The subject matter does not naturally lead to the conclusion that data will provide answers to these types of questions. If tort reform results in reduce loss costs, then insurance rates will drop. The data regarding loss costs in tort reform states is readily available from many sources including annual statement, rate filings, data calls and the National Practitioners Data Bank. There is no reason to believe however, that an incremental amount of additional data would allow more insight to the effects of the tort reform. Tort reform may reflect a cultural shift that is not quantifiable. In addition, medical malpractice rates have been a hot issue for decades and there is data available from many sources. If the existing data is insufficient to answer the questions raised by the GAO, it is because data would not be expected to provide clear answers regarding rising loss costs. If data could provide answers regarding the cause of loss, the existing data would have been adequate. There is no reason to think that an incremental increase in the data to include additional data elements or to include additional surplus lines data would somehow clearly explain rising loss costs.

Page 5 again explains "a lack of comprehensive data at the national and state levels on claims and associated losses prevented us from fully analyzing the composition and causes of those losses at the insurer level. " Again there is no reason to think that more data will supply the answers, when the existing data failed to supply the answers. Admitted companies make rate filings that contain volumes of data. The Physician Insurers Association of America has volumes of data. The surplus lines companies report some medical malpractice data in their annual statement. Several states

have done data calls for years. Yet the GAO came to the conclusion that the existing data did not provide answers, but somehow some incremental amount of additional data would provide answers. Nowhere is it clear why or how they came to this conclusion. The fact that the answers were not apparent does not lead to the conclusion that an additional amount of data would somehow provide the answers. It is likely that the NAIC would have come to the same conclusion long ago if it logically followed that an incremental increase in the data would clearly explain the causes of rising medical malpractice losses and the reasons for rising medical malpractice rates.

The study acknowledges that a number of factors contribute to higher rates including rising paid losses, declining investment income, downward pressure on premium rates, reinsurance premium rates, hard and soft cycles, among others. Many of these factors would not be apparent from data provided by insurance companies. Hard and soft cycles are unpredictable and additional data is not going to shed light on the hard or soft cycles. Reinsurance premium is also a factor that is not going to be explained through an analysis of the primary insurer's data. Paid losses are readily apparent from all companies' data and additional data is not needed. The bottom line is that the explanations they seek will not be provided by requiring additional data elements or data from surplus lines companies.

The National Practitioners Data Bank (NPDB) requires reporting of medical malpractice loss data. It would seem that the GAO could obtain data from a source that already exists – the NPDB. Although questions were raised about the effectiveness of the NPDB data, it would seem that the better solution would be to rectify the problems with the NPDB rather than create a duplicative reporting mechanism. Creating yet another data reporting obligation is the worst possible solution.

NAPSLO would urge the task force to reconsider the scope of this project. Unless there is a clear indication that data will actually answer the questions raised by the GAO, then the scope of the project should be re-evaluated and the data elements reconstructed. The likely reason that the existing data does not answer the questions raised by the GAO is that they are not questions that are resolved through the use of data. Some qualitative and cultural analysis is needed to explain rising medical malpractice loss costs. Additional data will simply not add any more insight into medical malpractice rate increases because the explanations are not going to be provided by additional quantitative analysis.

Thank you for the opportunity to comment.

Yours Truly

Steven P. Stephan J.D., CPCU, ARe, ASLI