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Re: Researcher Access to Data on Medical Malpractice Claims

Gentlemen:

The Statistical Information Task Force (SITF) of the National Association of Insurance Commissioners (NAIC) is developing a model law to govern state insurance commissioners' efforts to collect data on closed medical malpractice claims. We write to encourage the SITF to include a provision in the model law expressly allowing academic researchers access to the data. The case for researcher access is overwhelming.

1. **Studies of closed claim data have significant potential to improve important public policies.** Policies relating to health care quality and patient safety, tort litigation, physician supply, premium regulation, fraud detection, and victim compensation all rest on beliefs about the nature and frequency of medical errors. Studies of closed medical malpractice claims can facilitate desirable policies by making the processes through which health care is delivered, errors are identified, and liability is imposed more transparent and less susceptible to partisan mischaracterization.

No one disputes the value of closed claim studies. When arguing for damages caps, limitations on frivolous lawsuits, and other tort reforms, the insurance industry and the medical community often draw on closed claim studies for support. Sometimes, they rely upon or commission studies by academics. More often, they rely on studies and reports based on proprietary data, such as data collected by the Physician Insurers Association of

America (PIAA). Because independent researchers lack access to proprietary databases, it is impossible to verify the accuracy of the claims these studies contain.

Legislators also rely on closed claim studies, in states that collect this information.

Unless academic researchers receive access to states' closed claim databases, the public debate will be skewed. It is unreasonable to expect liability insurers, health care providers, and other private parties with access to closed claim data to publish studies whose findings cut against their political objectives or economic interests. Reports prepared by states' insurance departments and other governmental entities redress this imbalance somewhat, but these reports are limited in scope and sometimes reflect elected or appointed officials' political leanings. Finally, only academic studies are subjected to peer review, which helps ensure that findings can be replicated and are based on appropriate analytical methods.

2. **The risk of harm is minimal.** Florida and Texas have long allowed researchers to study their closed claim data, and Missouri has recently opened its data to academics. Texas and Missouri anonymize their data; Florida does not. The latter fact bears emphasis: Florida's data, which are publicly available, name the health care providers who faced malpractice claims. Yet, both Florida and Texas have long enjoyed consistent increases in access to health care and vibrant physician populations.

Academic researchers have published many studies of the Florida and Texas datasets, with no demonstrated harm to anyone. In many states that collect closed claim data, insurance departments also publish annual reports periodically, again without demonstrated harm.

The insurance industry, which favors secrecy, argues that researcher access will compromise the privacy of physicians, hospitals, and other health care providers. In support, it cites a small number of published stories in which investigative news reporters used the National Practitioner Data Bank (NPDB) public use file and other sources to identify physicians who faced malpractice claims.

This gambit undermines the insurers' claim in several ways.

- Although closed claim databases have existed for decades—Florida started collecting data in 1975, Texas in 1988, and the NPDB in 1991—few news reports have used these sources to identify physicians or hospitals by name. Historically, the risk of personal identification has been low.
- Providers who were named in news reports merited scrutiny. For example, the insurance industry pointed to a series of news articles in the *Hartford Courant* that “focused on [Connecticut] doctors with 25 or more [NPDB] entries, including at least one state regulatory action, and at least \$3 million in malpractice payments.” Mike McIntire, *White Coats, Dark Secrets*, *Hartford Courant* (2000) (emphasis added). Only four practicing Connecticut physicians met these criteria. News reporters are interested in

providers who pose serious threats to patients, not in doctors or hospitals whose records are routine.

- The potential impact of the proposed NAIC model law can only be small because news reporters already have other sources, such as the NPDB, to consult. Reporters who want to identify health care providers involved in malpractice cases can consult the NPDB, NPDB-mandated reports to state medical boards, court records, grievances, jury verdict and settlement reporters, and state “report cards” on health care quality. Reporters can also purchase reports from private organizations like HealthGrades.

In sum, by showing that existing information sources enable investigative reporters to identify by name health care providers facing malpractice claims, the insurance industry *undermines* the case for keeping state closed claim data secret. The NPDB isn’t going away; nor are the many state open records laws that enable reporters to obtain records from state medical societies likely to vanish. New York and Pennsylvania will continue to publish quality “report cards,” which rank surgeons and hospitals by name according to their morbidity rates. Florida will continue to release its closed claim data as well. Clever reporters will be able to use these sources and others to identify providers with numerous malpractice payments.

The insurance industry also contends that secrecy is needed to protect health care providers’ privacy. This assertion faces several difficulties, the most obvious of which is that no privacy-based challenge has been mounted to the NPDB or to the public release of closed claim data by Florida and Texas. Nor has the insurance industry (or any other source) provided empirical evidence that public access to these databases hinders the settlement of medical malpractice claims.

Finally, the secrecy that has long enveloped malpractice payments (because providers insist on confidentiality when settling malpractice cases) is antithetical to patient safety, the improvement of which depends on mistakes being brought into the open. Most malpractice cases involve serious injuries and contain credible evidence of negligence, because cases that lack these features cannot be litigated profitably. Confidentiality agreements and other measures that cloak the resolution of malpractice claims in secrecy weaken providers’ incentives to treat mistakes as opportunities to improve. They also prevent patients from evaluating providers’ quality. Regulators should recognize a strong presumption in favor of public access.

3. **The cost of reporting to state insurance regulators is minor.** Although liability insurers claim otherwise, the cost to them of complying with the proposed model law will be small, for several reasons. First, they gather most of the information the model law covers for their own internal, claim-monitoring purposes, including the nature of the alleged the injury, the date it occurred, the location, the service involved, etc. Second, they generate much of the required information themselves or have direct access to it, such as the size of the provider’s malpractice policy, the year it was sold, the amounts paid in settlement and for defense costs, etc. Third, the federal law that created the NPDB already requires all carriers (including surplus lines carriers, as explained below) to report much of the information covered by the draft model law to both the NPDB and state medical boards. The marginal cost of adding state insurance regulators

to the list of recipients of information already in electronic format should be small. Fourth, many states, including Florida, Illinois, Maine, Massachusetts, Michigan, Missouri, Nevada, Texas, and Washington already require reporting of closed claims. Insurers bore the startup costs of reporting long ago. With a standard data format in place, the marginal cost of adding new states will be small.

The insurance industry contends that a data filing requirement will discourage surplus lines insurers from writing coverage. The existence of the NPDB makes hash of this claim. It requires all insurers, including surplus lines carriers, to file reports at the federal and state levels, yet it has not limited the availability of surplus lines coverage. Probably, this is because surplus lines carriers, like admitted insurers, already gather the relevant information in electronic format for their own purposes. The marginal cost to sending the information to the NPDB and state medical boards is minute.

A widely adopted model law might even reduce all liability carriers' reporting costs. By standardizing reporting requirements and data fields, it would permit the development of software programs to handle reporting as a routine part of carriers' ordinary record keeping. Several states, including Texas and Connecticut, already minimize this cost by allowing carriers to file electronically. The industry might also develop clearinghouses that would handle reporting for carriers, as the National Council of Compensation Insurers once handled filing requirements for workers' compensation insurers.

4. **The risk of misuse does not justify secrecy.** The insurance industry buttresses its demand for secrecy by arguing that "the results of a closed claim survey could easily be misinterpreted or misused." This criticism, which could be leveled at any empirical study, is unwarranted.

First, many claims that might be based on closed claim data are inherently contestible. Consider the common assertion that average jury verdicts have risen. The accuracy of this claim and its importance depend on whether dollar values were adjusted for inflation, whether the mix of tried cases changed over time, whether tort reforms in prior years drove relatively small claims out of the liability system, and other considerations. Data-based claims are necessarily subtle. Disagreement concerning them does not always mean that data are being misinterpreted or misused.

Second, and self-evidently, the insurance industry has no monopoly on the intelligent use of data. Academics, including analysts at independent think tanks and consulting groups, have excellent training and have produced some of the best studies of the medical malpractice system. Recognizing this, insurance carriers have sometimes hired academics to produce studies of closed claims.

Third, it is better to rely on the marketplace of ideas to identify false claims than to allow insurers to limit access to data. The producers and users of closed claim studies are many. They include insurance companies and their trade groups, consumer organizations, tort reform lobbyists, medical associations, and trial lawyers. They also include academics,

government agencies and officials, and the public. This diversity of viewpoints ensures a robust debate in which a multitude of claims will be made and evaluated.

At root, the industry's objection is that the public is too stupid to be trusted with closed claim data. The NAIC should never endorse the view that the public is best served by being kept in the dark.

5. **Carriers should report open claims.** Insurance carriers track their predicted exposures on open claims for rate-making and solvency-related purposes. These exposures are known as Incurred But Not Reported losses (IBNRs). Although insurers determine IBNRs at the claim level, in most states they report them in aggregated filings. The proposed model law would require them to report open claims individually, in the same way closed claims are reported. One state, Missouri, already requires this.. Missouri also uses information found in open claim reports to track trends in insurers' expected costs.

No evidence shows that the policy of requiring open claim reports has driven insurers from the Missouri market. To the contrary, Missouri's market is deep. This is likely because insurers gather and process information on open claims for a variety of purposes, including their own business purposes as well as compliance with solvency and rate making regulations. Nor has Missouri encountered serious compliance problems or problems with this use of open claim information in litigation, although the insurance industry predicts these effects.

The industry also contends that information about open claims has little value, partly because these claims are few in number and partly because individual loss estimates often change substantially before claims close. This assertion is specious. Many sources recognize the importance of information on open claims, including the Joint Commission for Accrediting Health Organizations (JCAHO), Donald J. Palmisano, a past-president of the American Medical Association who figures prominently in the debate over tort reform, and Daniel P. Kessler, a leading economist whose research on medical malpractice has been funded by the insurance industry. See JCAHO, *Health Care at the Crossroads* 10 (2005) ("Providing patient safety researchers with access to open claims ... could vastly improve efforts aimed at identifying worrisome patterns in care and designing appropriate safety interventions."); Michael Norbut, *Liability Study Criticized*, *Health Care News*, May 1, 2005 (quoting Donald J. Palmisano to the effect that a study of closed medical malpractice claims was flawed because it did not examine open claims); Daniel P. Kessler, *The Determinants of the Cost of Medical Liability Insurance*, Draft of 4/25/2006, p. 10 (pointing out that "actuaries generally estimate claims costs based on both closed and open claims, because open claims may be more reflective of the current claims cost environment," and disclosing financial support from the Physician Insurers Association of America (PIAA))

Unless open claims are reported and accessible, partisans will always challenge closed claims studies, arguing that they do not reflect current liability conditions.

Sincerely,

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