

To: Statistical Information Task Force
c/o Joe Bieniek, Statistical Information Manager
National Association of Insurance Commissioners

From: Brent Kabler, Missouri Department of Insurance, Financial Institutions, & Professional Registration

Re. Proposed revisions to the Medical Malpractice Closed Claim Reporting Model Law

12/27/2007

As per our last conference call, my suggested revisions follow. To reiterate our conversation during that call, I'm concerned that the current draft simply permits risk retention groups and unauthorized insurers to "opt out" of the reporting requirements. In fact, on rereading the document, the draft appears to permit all reporting entities to opt out, including licensed insurers. In the event that an entity opts out, the responsibility for reporting is conferred upon the provider. However:

1. DOI's don't typically possess jurisdiction over medical providers. Coordination with state licensing boards can be difficult, as licensing boards have other priorities, and in any event are unlikely to take disciplinary action based on failure to report, or to report accurately.
2. Providers are unlikely to be in possession of much of the required data. For example, providers probably won't have access to defense costs, other cost containment expenses, economic and non-economic portions of the total settlement, etc.

Based on my experience with collecting med mal data in Missouri, the likely result of this language will be that a very large majority RRGs and surplus lines companies will elect not to report the data, and DOIs will be confronted with the intractable problem of trying to police medical providers.

I understand that some DOIs will lack the resources to pursue a legal challenge to entities that assert a federal preemption. Hopefully, my suggested revisions afford DOIs a high degree of discretion regarding how to respond to legal challenges, while eliminating the opt out language.

Secondly, I've removed categories that include licensed insurers from this section. I strongly suspect that a DOI would have better luck enforcing reporting requirements for licensed insurers compared to medical providers.

Lastly, I've added a drafting note regarding enforcement mechanisms.

Section 4. Reporting Requirements

(A)

(4) ~~If a claim is covered by an insuring entity or self-insurer that fails to report the claim to the commissioner, the facility or provider named in the claims must report it to the commissioner after a final claim disposition has occurred due to a court proceeding or a settlement by the parties.~~

~~(a) If a facility or provider is insured by a risk retention group and the risk retention group refuse to report closed claims and asserts that the federal liability risk retention act (95 Stat. 949, 15 U.S.C. Sec. 3901 et seq.) preempts state law, the facility or provider must report all data required by this Act on behalf of the risk retention group.~~

~~(b) If a facility or provider is insured by an unauthorized insurer and the unauthorized insurer refused to report closed claims and asserts a federal exemption or other jurisdictional preemption, the facility or provider must report all data required by this Act on behalf of the unauthorized reinsurer.~~

(a) If a court of competent jurisdiction determines that any self-insurer, risk retention group, or unauthorized insurer is exempt from this Act due to a federal preemption or other cause, the facility or provider named in a medical malpractice claim must report all data required by this Act.

(b) If any self-insurer, risk retention group, or unauthorized insurer fails to report information required by this Act or asserts a federal exemption or other jurisdictional preemption, the commissioner may, at his or her sole discretion, grant a waiver from the reporting requirements of this statute.

(c) In the event that a waiver is granted under Section 4(A)(4)(b), the facility or provider named in a medical malpractice action must report all data required by this act on behalf of the self-insurer, risk retention group, or unauthorized insurer.

Drafting note: Many state insurance codes specify penalties for failure to timely file statutorily required reports, or for submitting materially incorrect data. Each state should determine the applicability of such penalties to this Act. If it is determined that the state does not possess an adequate means to police and enforce this Act, the state may want to consider inserting additional enforcement language in Section 4.