



June 23, 2008

Kevin McCarty, Chair
Property & Casualty (C) Committee
National Association of Insurance Commissioners
2301 McGee St., Suite 800
Kansas City, MO 64108-2662

Re: Medical Professional Liability Closed Claim Reporting Model Law

Dear Commissioner McCarty,

Thank you for the opportunity to comment on the proposed Medical Professional Liability Closed Claim Reporting Model Law (Model Law).

The Vermont Captive Insurance Association is the largest captive insurance association in the world and several of our pure captive and risk retention group (RRG) members provide medical professional liability coverage. The State of Vermont is recognized throughout the US as the premier captive insurance domicile in the country with more than 570 active captives of which approximately 100 provide medical professional liability coverage for healthcare providers. Vermont's reputation for excellence in the captive insurance field is built on the quality of its regulation. Vermont has a long history of applying the highest standards to the regulation of its captive insurers and it is in this spirit that we offer our comments.

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The proposed Model Law has a stated purpose of ensuring the collection of closed claim data that would allow a thorough analysis of issues related to medical liability in order to promote the “establishment and maintenance of sound public policy.”

The VCIA is concerned that the proposed Model Law would not achieve the stated purpose and would, in fact, present serious risks to hospitals and physicians who are insured by captive insurers and risk retention groups. With the creation of the Risk Retention Group legislation, Congress recognized the crisis in the availability of liability insurance and acknowledged through the LRRRA the importance of the risk retention group mechanism to address this issue. As noted in the letter submitted by Paulette Thabault, Vermont’s Commissioner of Banking Insurance Securities and Health Care Administration, this Model Law, if adopted by states and the District of Columbia, would invariably lead to litigation. That is because both unambiguous federal statutes and case law preclude the Model Law from being implemented as currently constructed. Please see The Federal Liability Risk Retention Act and the amendments of 1986; State Board of Insurance et al. v. Todd Shipyards Corporation, 370 U.S. 451 (U.S. 1962); Comino Oil, Inc. v. Phoenix Assurance Co. of New York, 1998 WL 34170721(D.V. I. 1998), all of which provide sound legal arguments against certain key aspects of the Model Law.

If the rationale for the data collection is to promote public policy that leads to reasonable pricing of medical liability insurance, again the Model Law falls short. Pricing would likely be harmed due to the time and expense of new record keeping procedures, filing of forms, modification of existing IT forms, managing compliance with HIPAA and monitoring how and to whom this data is disclosed. All of these would be necessary for RRGs to comply with the laws of various nondomiciliary states. In addition, compliance with the Model Law is clearly contrary to Federal law as RRGs are expressly exempted from many aspects of non-domiciliary state regulation. See Federal Liability Risk Retention Act (LRRRA) as amended in 1986.

A significant majority of the closed claim data information provided to the commissioners of domiciliary states by pure captives and RRGs is proprietary. The public disclosure of this information would likely compromise the ability of these insurance companies to conduct business, thereby risking the viability of an important sector of the medical liability insurance marketplace. In

other words, if the Model Law is approved by the NAIC in its current form and then widely implemented in the states and the District of Columbia it could serve to contract the operation of the very mechanism that has enhanced the availability of quality, affordable hospital and medical liability insurance. If there is any doubt about this proposition, you may want to talk to the Pennsylvania Insurance Commissioner about the valuable role played by risk retention groups when the traditional insurance market for hospital and medical liability insurance collapsed in the years 2002 – 2005.

The Vermont Captive Insurance Association supports rigorous and prudent regulation of captive insurers. As noted earlier, the State of Vermont has set the standard for such regulation. We urge the NAIC to consider the proposed compromise offered by the State of Vermont in its letter to the NAIC on this topic that would only allow the sharing of confidential information such as closed claim data with specified agreement on privilege and confidentiality between the domicile and non-domiciliary commissioners.

Thank you again for the opportunity to comment on the proposed Model Law on Medical Professional Liability Closed Claim Reporting. The VCIA is willing to provide any supplemental information that you may need in consideration of this Model Law and the critical issues raised as a result of its current structure. Your consideration of our perspective is greatly appreciated.

Sincerely,

A handwritten signature in cursive script that reads "Molly Lambert".

Molly Lambert
President