



State of Vermont
Department of Banking, Insurance,
Securities and Health Care Administration
89 Main Street, Drawer 20
Montpelier, VT 05620-3101
www.bishca.state.vt.us

For consumer assistance
[Insurance] 800-964-1784
[Securities] 877-550-3907
[Health Care Administration] 800-631-7788

July 29, 2008

Commissioner Kevin McCarty
Property and Casualty Insurance (C) Committee
National Association of Insurance Commissioners
2301 McGee Street, Suite 800
Kansas City, MO 64108-2662

Re: Medical Professional Liability Closed Claim Reporting Model Law (“Model Law”)

Dear Commissioner McCarty:

I am writing to explain Vermont’s objections to the current draft of Section 4(A)(4) of the Model Law and to urge the Committee to revise that section of the Model Law pursuant to the proposed amendment attached hereto. This proposed amendment is Option 1 of two options for amending this provision that have been submitted to the committee by Commissioner Kreidler of the State of Washington.

Vermont is the largest on-shore domicile for captive insurers, with over 500 currently active licensed captives. Certain of these captives (some of which are organized as risk retention groups) provide a method of self-insurance for medical malpractice liability for health care providers located throughout the U.S.

Vermont is proud of its reputation as the “gold standard” for captive formation and regulation, and supports the development of reporting processes to facilitate the confidential and privileged reporting of adverse events that pose risks to patient safety.

In its current form, Section 4(A)(4) of the Model Law provides that a risk retention group or captive insurer is only exempt from the reporting requirements of the act if a court of competent jurisdiction has so ruled. This structure is continued in the alternative

proposed amendment to Section 4(A)(4) (Option 2) that is being submitted to the committee by Commissioner Kreidler as noted above. Vermont strongly believes that this structure (i) ignores the current status of the law that clearly indicates that risk retention groups and captives would not be subject to reporting requirements imposed by a non-domicile jurisdiction and (ii) takes the focus of the law away from efficient data collection and puts it on unnecessary litigation regarding the authority of the enacting state to obtain information regarding closed claims from captive insurers and risk retention groups domiciled in other states.

Most captive insurance entities take care to maintain their offices, issue their policies and administer their businesses entirely within the state of their domicile, even if the risks covered may be located elsewhere. As a result, to the extent a state attempts to require a captive domiciled elsewhere to conform to its regulations, the captive will most likely argue that under the U.S. Supreme Court's ruling in State Board of Insurance et al. v. Todd Shipyards Corporation, 370 U.S. 451 (U.S. 1962), which held that the state of Texas could not apply premium tax to an insurance policy negotiated, paid for and administered entirely outside the state of Texas simply because the property insured was located in Texas, the captive should not be required to comply. See, Domino Oil, Inc. v. Phoenix Assurance Co. of New York, 1998 WL 34170721 (D. V.I. 1998) (the location of certain insured properties covered under a policy negotiated and issued elsewhere in and of itself "is not a proper nexus for assertion of taxation or regulation even [under] the most restrictive reading of due process").

To the extent that the captive is organized as a risk retention group, the federal Liability Risk Retention Act (15 USCA 3901, et seq.) ("LRRRA"), exempts such entity from any attempt by a non-chartering state to regulate, directly or indirectly, its operations beyond certain very specific requirements set forth in the LRRRA, none of which would include providing the kind of information outlined in the Model Law. See, National Risk Retention Association v. Brown, 927 F. Supp. 195 (M.D. La. 1996) (risk retention group was exempt from complying with statute that would require submission to a non-domicile state of documentation beyond what is required in LRRRA Section 3902(d)). In fact, when the predecessor statute to the LRRRA was amended to expand the scope of risks that could be covered by risk retention groups beyond products liability, the provision permitting non-domicile states to obtain information on products liability or completed operations liability losses or expenses was deleted rather than expanded. See, Risk Retention Amendments of 1986, Pub. L. No. 99-563 § 5(b)(1), 100 Stat. 3172 (1986).

Given the legal issues set out above, Vermont does not see how it could be productive to include a provision in the Model Law inviting litigation with captives and risk retention groups on these matters. The proposed language attached, which is based on the draft of the Model Law from June 2007, is a recognition that it would be much more productive to obtain the required information through the providers who, through their contractual relationships with their captive insurers or risk retention groups, can obtain such information much more quickly and with much less cost to the state. Section 4(A)(3) of the Model Law already contemplates requiring providers to report directly in certain

circumstances, and the suggested amendment would only expand those circumstances to a couple of very limited situations.

If the Committee is unwilling to make this change, then Vermont will have to regretfully object to adoption of this Model Law if and when this Model Law is submitted to Plenary for approval.

Respectfully submitted,

A handwritten signature in black ink that reads "Paulette J. Thabault". The signature is written in a cursive, flowing style.

Paulette J. Thabault
Commissioner
Vermont Department of Banking, Insurance,
Securities and Health Care Administration

cc: Commissioner Mike Kreidler
Eric Nordman
Lee Barclay

Vermont-Favored Proposed Amendment
to
Section 4(A)(4) of the Medical Professional Liability Closed Claim Reporting Model Law

Starting from the June 11, 2007, draft of the model law, add a subsection (c):

(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 claim 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 refuses 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 refuses 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 insurer.

(c) If a facility or provider is insured by a captive insurer and the captive insurer refuses 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 captive insurer.