JOINT SUBCOMMITTEE STUDYING RISK MANAGEMENT PLANS FOR PHYSICIANS AND HOSPITALS
SJR 394/HJR 704 (2005)
October 31, 2005
Richmond, Virginia

The third meeting of the second year of study of the Joint Subcommittee Studying Risk Management Plans for Physicians and Hospitals featured insurance data from the State Corporation Commission and the perspective of the Virginia Association of Defense Attorneys.

A representative of the Property and Casualty Division of the Bureau of Insurance of the State Corporation Commission (SCC) reported on: actuarial reports on rates, economist's reports on competition in the market, implications of requiring prior approval for certain specialties and closed claim reports.

Actuarial reports on rates
Exhibit One
According to the Bureau's actuaries, the rates charged by the major licensed writers of physicians' and surgeons' professional liability coverage in Virginia appear to be adequate and not excessive, which means that the premiums charged are supported by the underlying data. The Bureau's actuaries provided estimates of the average malpractice rates paid by five specialties (neurosurgery, ob/gyn, orthopedics, emergency medicine and anesthesiology) under the file and use system of rate regulation, as requested in SJR 394/HJR 704 (2005). The average rates shown are average premiums for each of the specialties and, as such, do not take into consideration factors such as the limits of insurance carried by the physician, any deductible, the location of the physician, differences in practices, and loss histories. Estimates of what the rates should be are provided as benchmark rates with a low and high estimate. Within all five specialties, the average rate paid falls within the benchmark ranges of what it is estimated the premiums would be under a prior approval system of rate regulation using only Virginia-specific loss data.

Competition in the market
The Bureau's consulting economists updated the report produced in November 2003, titled *"A Report on the Level of Competition in Virginia Relating to Medical Malpractice Insurance."* The update concludes that competition is an effective regulator of rates for physicians' and surgeons' malpractice insurance and that the rates for this class should continue to be regulated under a file and use system of rate regulation. This finding is based on the following factors: the five-year rate of return on equity earned by insurers for physicians and surgeons is 5.2%; that insurers writing physicians and surgeons medical malpractice insurance have earned negative returns on equity in two of the five years; there are 15 insurers aggressively seeking new business; and Virginia has the most favorable indicators of market concentration in the country.

Probable effects of prior-approval

SJR 394/HJR 704 also asked the Bureau to assess the probable effects on the availability and affordability of medical malpractice insurance for the five listed specialties if Virginia were to require prior approval of the rates for those specialties rather than continuing to regulate these rates under existing file and use rating laws.

In 2004, 66% of all medical malpractice insurance in Virginia was written either by companies not subject to the Bureau's rate regulatory or form approval jurisdiction (recognized risk retention groups, captives domiciled outside of Virginia, and approved surplus lines insurers), or by companies that have an approved risk purchasing group domiciled outside of Virginia where they can write Virginia business. Therefore, if a change were made to Virginia's file and use rate regulation methodology for medical malpractice insurance, the change would only impact approximately 34% of the premiums written in Virginia. Moreover, if the system were changed to a prior approval system, it is possible that those companies not currently using risk purchasing groups would quickly and easily establish an approved purchasing group and move even more business outside of the Bureau's authority to oversee premiums. Subcommittee members expressed concern about limited state regulatory control under the Federal Risk Retention Act.

It was reported that the Bureau's economists opined that changing the current file and use system to a prior approval system would have no material impact on the affordability of medical malpractice insurance in Virginia and could make medical malpractice insurance less available in the long run, particularly for physicians and surgeons.

Closed claim reports

Exhibit 2. Claims closed with indemnity payment.
Exhibit 3. Claims closed with no indemnity payment.
Exhibit 4. Average payment by specialty, Claims closed with indemnity payment.
Exhibit 5. Three-year combined Ranges of Paid Indemnity.

These exhibits do not represent every claim closed in Virginia during 2002 to 2004, as they include data only from companies required to report or that voluntarily report in order to help provide as credible a statistical picture as possible. There are sufficient numbers to provide credible summary statistics and other useful information. It is not possible to determine how many claims were made per specialty.

Subcommittee members expressed an interest in receiving detailed information on claim outcomes and were told that another level of analysis (number settled, mediated or jury verdicts) will be conducted on the data. The Subcommittee will also receive information on total premiums.

Mutual insurance company requirements

A representative of the Financial Regulation Division of the Bureau of Insurance outlined the legal and regulatory requirements for setting up a medical malpractice mutual insurance company. Mutual insurance companies are organized and owned by their

policyholders, do not issue capital stock, and have no stockholders. The original net worth of a mutual company consists only of surplus paid in by the original policyholders, or by an interested party who wishes to establish the company. At least 20 people must sign the articles of incorporation. Minimum capitalization requirements are $1.6 million for policies with contingent assessment liability and $4 million for policies without contingent assessment liability. The face value of any policy written cannot be greater than 10% of policyholders' surplus, after consideration for reinsurance. The representative agreed with observations that the 10% requirement is probably the most significant barrier because of the reserves required.

Virginia Association of Defense Attorneys

A representative of the Virginia Association of Defense Attorneys (VADA) who practices medical malpractice law stated that in the opinion of the VADA, there is still a severe medical malpractice crisis. There is no shortage of cases; $3 million in jury verdicts were rendered in July and August of this year in cases the defendants believed would clearly be defense verdicts. Medical practices that routinely treat sick patients are having trouble getting their policies renewed without paying exorbitant rates. Some are forced to obtain specialty line insurance or join hospital self-insurance groups. The medical malpractice crisis manifests itself in a number of ways, including restricting the availability of medical care, driving doctors out of business and, in some large law firms, prohibiting lawyers from defending medical malpractice cases. While every medical malpractice plaintiff is facing a family tragedy and has had a failure of expectations from the medical system, the cases are psychologically, personally and economically devastating for the physicians who are sued.

VADA supports the establishment of medical courts as a way to regularize the accountability process. The ideal medical court would have a permanent panel of judges who bring a variety of talents to the process. Medical malpractice is the only professional liability claim that sounds in tort; the remainder sound in contract and are defined by the contract between the professional and the client. Because medical malpractice claims sound in tort they have the components of duty, breach, cause and injury. Unlike other tort cases, in medical malpractice cases the duty is articulated by an expert retained by the plaintiff and it is difficult to know when there has been a breach of the standard of care, resulting in a contest of expert witnesses. The determination should be a scientific analysis rather than a contest. The scientific complexity of many cases is beyond the understanding of most juries and judges. The VADA anticipates that a medical court could remove the opportunity for advocacy regarding the standard of care. A system of medical courts would enable more money to be directed to compensation for the true victims of medical malpractice rather than to other entities.

Senator Newman reminded Subcommittee members that SB 601 (state risk-management plan) is scheduled to go into effect July 1 of 2006, and the Subcommittee must determine whether it should go into effect as is, be amended to revise the plan, implementation should be delayed, or be repealed.

Senator Newman appointed himself, Senator Norment and Delegates Albo and Athey to a work group to look at issues involving increased education of circuit court justices on medical malpractice for circuit court judges to pilot health courts. The work group will seek the input of the Supreme Court.

The Subcommittee will schedule an additional meeting in December or January.