2008 Medical Malpractice Claims Report

Department of Commerce & Insurance
November 1, 2008

2008 Tennessee Medical Malpractice Report

INTRODUCTION

In 2004, the Tennessee General Assembly enacted 2004 Tenn. Pub. Acts ch. 902 which established medical professional liability claims reporting obligations for various reporting entities. (A copy of 2004 Tenn. Pub. Acts ch. 902 is attached to this report as Appendix A.) This law was codified at Tenn. Code Ann. § 56-54-101. Pursuant to Tenn. Code Ann. § 56-54-101(a), "reporting entities" was defined to include insurance companies and risk retention groups that provide medical malpractice or professional liability insurance, as well as health care professionals and facilities lacking medical malpractice insurance. This law was passed after months of testimony and research by the Joint Tort Reform Subcommittee chaired by State Representative Rob Briley and Senator David Fowler. The Final Report prepared by the Subcommittee recommended passage of legislation that would "provide the committee with a clearer picture of the litigation and claim trends in Tennessee…" The Department of Commerce and Insurance (the "Department") provided testimony to the Subcommittee and actively participated in the development of legislation implementing the Subcommittee's recommendations.

In general, Tenn. Code Ann. § 56-54-101 requires reporting entities, on or before April 1 of each year, to provide information to the Department concerning the number of medical malpractice or professional liability claims asserted, the amount of damages alleged, any damages paid, the types of paid damages, and legal fees paid. The reporting requirements, as originally enacted, focused on the claims that were closed and pending during each calendar year.

Tenn. Code Ann. § 56-54-101 requires the Department to prepare an annual report for the Speakers of the Senate and House of Representatives summarizing this data each year beginning in 2005 and ending in 2008. The statute prescribes that the report may only contain aggregate data.

As a result of the information submitted by the reporting entities for the 2004 calendar year, the Department issued its first report in November of 2005. The report identified several issues relating additional information that should be reported and the General Assembly modified the reporting requirements in the 2006 legislative session. On May 23, 2006 Tenn. Pub. Acts ch. 744 was enacted which amended Tenn. Code Ann. § 56-54-101 to attempt to refine the information to be collected. (A copy of 2006 Tenn. Pub. Acts ch. 744 is attached to this report as Appendix B.) In general, the amendment added a requirement that reporting entities report on the cumulative amount of costs and expenses spent on pending and closed claims from the "inception date of the claim to the end of the preceding calendar year."

Where useful, this report provides not only the aggregate information for 2007, but also shows the information reported for 2004, 2005 and 2006 as a convenience to the reader.

In 2008, the Tennessee General Assembly enacted 2008 Tenn. Pub. Acts ch. 1009, effective January 1, 2009, which further refines the information to be collected next year and published in the 2009 report.

I. REPORTING ENTITIES

The information provided by this report is primarily comprised of information obtained from insurance companies writing medical malpractice insurance in this state. It is important to note that the top ten (10) medical malpractice insurance carriers account for over ninety-six percent (96%) of the total medical malpractice direct premiums written in Tennessee in 2007. To date, the Department has identified fifteen (15) insurance companies and risk retention groups that failed to comply with the statute's reporting obligations.

However, eight (8) were risk retention groups that are federally exempt from having to comply with the reporting requirement. The 2007 malpractice premiums for the fifteen (15) companies whose claim data is not included in this report totaled $4,839,510 or 2.15% of the total direct written premiums for medical malpractice insurance in this state. In addition to requiring insurance companies to report required information, Tenn. Code Ann. § 56-54-101 requires those health care facilities and professionals that are uninsured to report information about their medical malpractice claim experience. As identified in the previous reports, the Department remains unable to confirm that the information from this group is complete as it has no information concerning which facilities or professionals are, in fact, uninsured. Thus, while the Department has received information from health care facilities and has included that information in this report, it can not be determined whether the Department has received information from all of them. As such, there may be claims and costs incurred in this state that are not included in this report.[1]

II. REPORTING PERIOD

The period on which this report focuses is the 2007 calendar year. The Department required reporting entities to complete two (2) separate forms to meet their obligations under 2006 Tenn. Pub. Acts ch. 744. One reporting form solicited information regarding all medical malpractice claims closed or otherwise resolved in 2007. The second form solicited information concerning medical malpractice claims that were still considered pending as of December 31, 2007.[2] Claims identified in the information submitted related to incidents occurring between 1978 and 2007. However, only 468 of the 8,584 claims reported (5.45%) arose out of an incident that occurred prior to 2000.[3]

III. CLAIMS CLOSED AND CLAIMS PENDING

A. Total Claims Closed

The total number of medical malpractice claims reported as closed in 2007 was 3,043. This total represents claims resolved through the entry of a final court judgment, settlement with the claimant, or otherwise resolved by the reporting entity.

The following table details the numbers of claims resolved in each of these three (3) categories:

[1] As was the case in the previous reports, the Department received claims information from some health care facilities. However, just as before, the Department did not receive any information directly from any uninsured health care professionals. Until the Department is given an ability to identify this population and the uninsured health care facilities, as well as compel risk retention groups to report their information, the Department will remain unable to confirm the completeness of the information contained in these reports. Still, it is estimated that the total number of claims for this category is relatively minor compared to those that were insured during the reporting period.

[2] The Department made the forms available to reporting entities on its web site for easy access. The Department anticipates making further refinements to the forms to more accurately and clearly request the information sought under Tenn. Code Ann. § 56-54-101.

[3] Three (3) of the reported claims arise from events occurring in the 1970's, nineteen (19) of the claims occurred in the 1980's, and four hundred and forty-six (446) of the claims occurred in the 1990's.

Table 1 – Claims Closed through Adjudication, Settlement or Other Resolution

	2004 Totals	2004 Percentages	2005 Totals	2005 Percentages	2006 Totals	2006 Percentages	2007 Totals	2007 Percentages
Claims Resolved Through Judgment	6	0.25%	5	0.18%	6	0.20%	313[4]	10.28%
Claims Resolved Through Settlement	444	18.77%	461	16.31%	453	15.24%	492	16.17%
Claims Otherwise Resolved	1,916	80.89%	2,361	83.52%	2,514	84.56%	2,238	73.55%
Total Number of Claims Closed	2,366	100.00%	2,827	100.00%	2,973	100.00%	3,043	100.00%

B. Total Claims Pending

Pending claims are claims filed in 2007 or in prior years which were still unresolved as of December 31, 2007. It was reported that there were 5,541 claims pending as of December 31, 2007.

IV. DAMAGES AND COSTS

A. Total Damages Asserted by Claimants

The total damages asserted in lawsuits for the claims reported as adjudicated, settled or otherwise resolved in 2007 was $19,231,374,390. The total damages asserted other than by lawsuit for the claims settled or otherwise resolved in 2007 was $57,025,925.

The total damages asserted in lawsuits for pending claims in 2007 were $20,892,278,494. The total damages asserted other than by lawsuit for pending claims in 2007 was $898,715,092.

B. Total Settlements & Judgments

The following table details the amounts reported to have been paid in damages in 2007 for claims adjudicated, settled or otherwise resolved:

[4] This figure includes judgments for the defendant. The corresponding number in the reports for previous years did not include judgments for the defendant. Note also that this number does not include three (3) judgments where the parties resolved the matter through settlements referenced in FN5 and FN6.

Table 2 – Amounts Paid In Damages for Claims Settled, Adjudicated or Otherwise Resolved

	2004 Totals	2004 Percent-ages	2005 Totals	2005 Percent-ages	2006 Totals	2006 Percent-ages	2007 Totals	2007 Percent-ages
Total Damages Paid by Settlements	$108,333,535	98.2%	$119,091,990	95.15%	$100,223,337	95.29%	$116,691,921	92.45%
Total Damages Paid by Judgments	$1,958,648	1.8%	$6,075,724	4.85%	$4,951,459	4.71%	$9,533,574	7.55%
Total Damages Paid	$110,292,183	100.00%	$125,167,714	100.00%	$105,174,796	100.00%	$126,225,495	100.00%

C. Judgments

In all, it was reported that there were three hundred sixteen (316) court judgments in 2007. It was reported that three hundred nine (309) of these judgments resulted in favorable rulings for the defendant where no damages were awarded to the claimant.[5] Seven (7) judgments were entered in favor of the plaintiff. Instead of paying pursuant to judgment, two (2) of these were paid pursuant to settlements.[6] The following table details the five (5) judgments paid in 2007 and the amount and types of damages awarded in each case:

Table 3 – Total Damages Awarded By Final Court Judgment

Judgment Amount	Date of Occurrence	Damages Claimed in Lawsuit	Type of Provider	Compensatory Damages	Non-Economic Damages	Punitive Damages
$148,000	1996	$5,000,000	Provider-Medical & Osteopathic	$150	$147,850	$0
$222,000	1996	$0	Provider-Medical & Osteopathic	$150	$221,850	$0
$350,000	2002	$600,000	Hospital	$350,000	$0	$0
$3,500,000	1998	$0	Provider-Medical & Osteopathic	$1,204,560	$1,795,440	$500,000
$5,313,574	2000	$16,000,000	Institution-Hospital	$0	$0	$0

[5] In accordance with a high-low agreement reached by the parties in advance of trial, a settlement payment was made to the claimant after trial even though the judgment was for the defendant. As such, the judgment for the defendant is counted in the first sentence of Paragraph C, and the amount paid is included in Table 2 as damages paid by settlement.

[6] One was paid in accordance with a high-low agreement reached by the parties in advance of trial. The other was settled after trial in light of issues for appeal. As such, these judgments for the plaintiff are counted in the first sentence of Paragraph C, and the amounts paid are included in Table 2 as damages paid by settlement.

D. Claimants' Counsel

2006 Pub. Acts ch. 744 amended Tenn. Code Ann. § 56-54-101 to require claimants' attorneys to report fees and expenses received in relation to their representation on medical malpractice claims. The following table details the monies paid to claimants' counsel:

Table 4 – Total Fees Paid to Claimants' Counsel on Claims in 2007[7]

Fees paid to Claimants' Counsel for Closed Claims	Other Legal Expenses Collected by Counsel for Closed Claims	Average Amount of Settlements Paid to Claimants' Counsel	Average Amount of Judgments Paid to Claimants' Counsel
$44,060,460	$1,845,555	29.45%	32.12%

Of the reported claims, the majority of attorneys reported contingency agreements of thirty-three percent (33%) of the total damages. However, the range for fee agreements was from zero percent (0%) to sixty-five percent (65%).

E. Total Defense Costs and Expenses Paid on Claims

The total defense costs reported to have been paid during 2007 was $78,633,644. For purposes of comparison, the total defense costs reported as being paid during 2004, 2005 and 2006 was $25,613,584, $61,768,804 and $67,027,197, respectively. The following table details the expenses paid by reporting entities on claims that were paid in 2007 for both closed and pending claims:

Table 5 – Total Amounts Paid in Defense Costs on Claims in 2007

	Fees Paid to Defense Counsel	Expert Witness Fees	Court Costs	Deposition Costs	Other Legal Fees
Pending Claims	$ 47,375,611	$ 4,023,521	$ 68,349	$ 1,006,630	$ 2,905,511
Closed Claims	$ 19,109,681	$ 1,680,116	$ 80,477	$ 296,490	$ 2,087,258
Total	$ 66,485,292	$ 5,703,637	$ 148,826	$ 1,303,120	$ 4,992,769

The total defense costs that have been paid by reporting entities on all claims that were either closed in 2007 or pending as of December 31, 2007, during the entire pendency of all such claims was $187,018,987. The following table details these defense costs:

Table 6 – Total Amounts Paid in Defense Costs on Claims from Inception to Year End

	Fees Paid to Defense Counsel	Expert Witness Fees	Court Costs	Deposition Costs	Other Legal Fees
Pending Claims	$ 100,986,426	$ 8,255,748	$ 135,589	$ 2,374,831	$ 6,237,152
Closed Claims	$ 57,586,127	$ 5,175,594	$ 152,188	$ 1,275,916	$ 4,839,416
Total	$ 158,572,553	$ 13,431,342	$ 287,777	$ 3,650,747	$ 11,076,568

[7] The numbers used for this chart are completely derived from numbers reported by claimants' counsel. Despite efforts by the Department to encourage the reporting by claimants' counsel, not all such attorneys filed reports with the Department. According to the insurance reporting entities, approximately 348 lawyers represented claimants that received money in 2007. Only 155 attorneys reported receiving fees in 2007. Thus the information reported is based on the information the Department did receive from the reporting attorneys. It should be stressed, however, that this was the second year that the law required claimants' counsel to file reports.

V. TOTAL PAYMENTS MADE IN 2007

The following table details the total amounts paid on all claims in 2007, both closed and pending. It is presumed that all legal fees to claimants' counsel, which were not reported, would be included in the amount of damages paid by the reporting entity.

Table 7 – Total Amounts Paid on Pending and Closed Claims

	2005 Totals	2005 Percentages	2006 Totals	2006 Percentages	2007 Totals	2007 Percentages
Total Defense Costs	$ 61,768,804	29.56%	$ 67,027,197	38.92%	$ 78,633,644	32.61%
Total Damages Paid by Settlement	$ 141,082,277	67.53%	$ 100,223,337	58.20%	$ 153,004,743	63.44%
Total Damages Paid by Judgment	$ 6,075,724	2.91%	$ 4,951,459	2.88%	$ 9,533,574	3.95%
Total Payments	$ 208,926,805	100.00%	$ 172,201,993	100.00%	$ 241,171,961	100.00%

VI. 2007 DIRECT PREMIUM WRITTEN

The total direct medical malpractice premiums written in 2007 in Tennessee by insurance companies and risk retention groups were $224,933,040. This total was determined from their 2007 annual financial statements. These premiums were for policies that may produce claim payments of unknown amounts in the future. Claim payments made during 2007 usually relate to policies and their corresponding premiums from previous years.

VII. NEXT STEPS

The Department will work with the insurance industry and the other reporting entities as it relates to the 2009 Medical Malpractice Claims Report required by the 2008 Tenn. Pub. Acts ch. 1009, "The Tennessee Medical Malpractice Reporting Act", effective January 1, 2009.

APPENDIX A

CHAPTER NO. 902

HOUSE BILL NO. 3252

By Representatives Briley, Beavers, Brenda Turner

Substituted for: Senate Bill No. 3252

By Senator Fowler

AN ACT to amend Tennessee Code Annotated, Title 56, relative to reports on medical malpractice claims.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 56, is amended by adding the following as a new appropriately designated section:

56-__-___

(a) The following shall submit to the department of commerce and insurance a report relating to claims for medical or professional malpractice as set forth herein. Anyone required to report hereunder shall be referred to as a "reporting entity":

(1) Every insurance company or risk retention group providing medical malpractice or professional liability insurance to a Tennessee health care institution licensed under title 68;

(2) Every insurance company or risk retention group providing medical malpractice or professional liability insurance to any of the following Tennessee health care professionals licensed pursuant to title 63:

(A) Podiatrists

(B) Chiropractors

(C) Dentists

(D) Medical and Osteopathic Physicians

(E) Nurse Practitioners

(F) Optometrists

(G) Psychologists

(H) Pharmacists

(I) Physician Assistants

(J) Professional Counselors

(K) Marital and Family Therapists

(L) Clinical Pastoral Counselors

(M) Licensed Clinical Social Workers; and

(3) Every health care institution, or professional listed in subsection (2), except the state and those employed by the state, who does not maintain professional liability insurance.

(b) The report shall be filed on or before April 1 of each year beginning April 1, 2005 and shall cover the preceding calendar year.

(c) The initial report filed shall provide the following:

(1) The number of claims made and the amount of damages asserted, if known, other than claims set forth in lawsuits, listed by type of provider and an indication of specialty if any;

(2) Lawsuits filed and damages claimed therein, listed by type of provider and an indication of specialty if any;

(3) The amount paid on claims, with a separate list of amounts paid by settlement and amounts paid pursuant to a judgment. To the extent possible, the information submitted pursuant to this item should identify separate amounts paid for punitive, compensatory and non-economic damages; and

(4) With regard to each claim reported under subdivision (3), the reporting entity shall also list separately, if available, expenses, including attorney fees paid to defense counsel, the portion of any settlement or judgment received by claimant's counsel, expert witness fees, court costs and deposition costs. Counsel for claimants asserting claims covered by this section shall provide information about fee arrangements to facilitate reporting required by this subdivision (4).

(d) The second and subsequent reports filed pursuant to this section shall contain, in addition to the information set forth in subsection (c), information identifying those claims that are the subject of settlement or judgment which were contained in a prior report as a pending claim.

(e) The claims reports filed pursuant to subsections (c) and (d) shall include information as to the date of occurrence that is the subject of each claim and the claimant's social security number.

(f) The department of commerce and insurance shall submit an annual report to the speaker of the senate and the speaker of the house of representatives summarizing the information submitted pursuant to this section. Such annual report shall be submitted on or before September 1 of each year beginning September 1, 2005. Any report shall contain aggregate data only and shall not identify any individual entity or health care provider. The annual report compiled by the department shall aggregate

total settlement and judgment to all health care providers in connection with a single occurrence, provided that such report shall not contain any claimant's social security number.

(g) The information submitted to the department of commerce and insurance pursuant to this section shall be used solely for the purpose of analyzing trends in health care liability claims. Provided however, the information received pursuant to subdivision (c)(3) of this section and any subsequent reports concerning the specific information required by subsections (d) and (e) of this section that pertains to judgments and settlements paid as to any medical and/or osteopathic physician and/or dentist shall be sent to the department of health, division of health related boards and the provisions of subsection (h) of this section shall apply to such reports.

(h) The information submitted to the department of commerce and insurance pursuant to this section shall be confidential, shall not be subject to public inspection, shall not be subject to discovery, subpoena or legal compulsion for release to any person or entity, and shall not be admissible in any criminal civil or administrative proceeding.

(i) Nothing in this section shall be construed to prevent parties to a liability claim or legal action from entering into a settlement of that claim on a confidential basis. Any such agreement shall be mutually binding on all parties by the terms of the agreement, with the exception that any party required to report under this act shall do so and such reporting shall not be considered a breach of any confidential settlement agreement.

(j) The commissioner of commerce and insurance is authorized to promulgate rules to effectuate this section.

(k) The commissioner of commerce and insurance is authorized to enforce the provisions of this act against any entity required to report hereunder, including any health care institution or professional listed in subdivision (a)(2) that does not maintain insurance. Such enforcement power shall be to the same extent the commissioner may enforce this section against insurers required to report hereunder.

(l) The commissioner of commerce and insurance may levy a civil penalty in the amount of one hundred dollars ($100) per day upon a reporting entity that fails to comply with this part.

SECTION 2. Any cost incurred by the department of commerce and insurance associated with the implementation of SECTION 1 shall be paid out of existing reserves of the insurance division of the department of commerce and insurance.

SECTION 3. Tennessee Code Annotated, Section 56-3-111, is amended by deleting subsections (a), (b) and (c) in their entireties and substituting instead the following new subsections (a), (b) and (c):

(a) Insurance companies providing insurance coverage against civil liability for the death or personal injury of any person as the result of negligence or malpractice, in the rendering of professional services by a licensed physician, either doctor of osteopathic medicine or doctor of medicine, or by a licensed dentist shall report to the state board of medical examiners or state board of osteopathic examination or the state

board of dentistry any settlement of a claim or judgment, sealed, confidential or otherwise, of five thousand dollars ($5,000) or more which arises out of a claim of negligence or malpractice on the part of an insured physician or dentist as distinguished from administrative matters. Such report shall be made within thirty (30) days of the settlement or judgment and shall contain only the following information:

(1) The name and address of the licensed physician or dentist;

(2) The name and address of the plaintiff;

(3) The name of the patient, if different from the plaintiff;

(4) The name and location of the court in which a claim was filed, if any;

(5) The amount of any judgment or settlement; and

(6) The identity of the insurance company and the person filling out the report.

(b) The reports shall be confidential, shall not be subject to public inspection, shall not be subject to subpoena or used as evidence in any legal proceeding, civil or criminal. Provided however, the reported judgments and settlements contained in the reports, except those that are ordered sealed or to remain confidential by a court of competent jurisdiction, may be used to fulfill the requirements of the Consumer Right to Know Act of 1998 but may not be used to initiate or prosecute any administrative proceeding before the board for licensing health care facilities.

(c) No insurance company, official, or other person authorized by an insurance company to issue such reports shall be liable for filing reports in accordance with this section, so long as the report is not disclosed to anyone other than authorized personnel of the state board of medical examiners, state board of osteopathic examination or the state board of dentistry, or the reported judgments and settlements contained in the reports, except those that are ordered sealed or to remain confidential by a court of competent jurisdiction are used to fulfill the requirements of the Consumer Right to Know Act of 1998.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. This act shall take effect upon becoming law, the public welfare requiring it. Sections 1 and 2 of this act shall be void on September 30, 2008.

PASSED: May 20, 2004

JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

JOHN S. WILDER
SPEAKER OF THE SENATE

APPROVED this 7th day of June 2004

PHIL BREDESEN, GOVERNOR

APPENDIX B

CHAPTER NO. 744

SENATE BILL NO. 3165

By Bryson

Substituted for: House Bill No. 3599

By Sargent, Odom

AN ACT to amend Tennessee Code Annotated, Section 56-54-101, relative to malpractice claims reporting.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 56-54-101, is amended by inserting the following language as a new subsection (f) and appropriately redesignating the existing subsections accordingly:

(f) The report filed pursuant to subsection (g) in 2006 for the 2005 calendar year, and for all subsequent reporting years, shall also include the amounts paid for all damages and defense expenses in the categories listed in subsection (c), subdivisions (3) and (4), from the inception date of the claim until the end of the preceding calendar year. The intent of this subsection is to provide complete payment information over the entire time period of each claim's duration.

SECTION 2. Tennessee Code Annotated, Section 56-54-101(e), is amended by deleting the period at the end of the subsection and by inserting the language “only to the extent that the claimant’s Social Security number is available to the reporting entity.”

SECTION 3. Tennessee Code Annotated, Section 56-54-101, is amended by adding the following language at the end of subsection (d):

In addition, reporting entities shall resubmit any report(s) not containing the information required by subsection (f) by July 1, 2006.

SECTION 4. Tennessee Code Annotated, Section 56-54-101(c)(4), is amended by deleting the language “the portion of any settlement or judgment received by claimant’s counsel,” and the sentence “Counsel for claimants asserting claims covered by this section shall provide information about fee arrangements to facilitate reporting required by this subdivision (c)(4).”

SECTION 5. Tennessee Code Annotated, Section 56-54-101(c)(4), is further amended by adding the following sentence at the end of such subdivision: “With regard to each amount paid on claims reported under subdivision (c)(3), the reporting entity shall also list the name of each attorney representing the claimant.”

SECTION 6. Tennessee Code Annotated, Section 56-54-101(c), is amended by adding the following language as a new, appropriately designated subdivision:

( ) Counsel for claimants asserting claims covered by this section shall provide information about fee arrangements to the Department of Commerce and Insurance. Such information must include the portion of any settlement or judgment received by claimant's counsel. For the purposes of the levying of civil penalties under subsection (l), counsel for claimants who are required to submit the information outlined in this subdivision (c)( ) shall be considered reporting entities under this section.

SECTION 7. Tennessee Code Annotated, Section 56-54-101(f), is amended by replacing the word "September" with the word "November".

SECTION 8. This act shall take effect upon becoming a law, the public welfare requiring it.

PASSED: May 8, 2006

JOHN S. WILDER
SPEAKER OF THE SENATE

JIMMY NAIFEH, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 23rd day of May 2006

PHIL BREDESEN, GOVERNOR