2005 Medical Malpractice Claims Report

Department of Commerce & Insurance
October, 2005

Introduction

In 2004, the Tennessee General Assembly adopted Public Chapter 902 which established medical professional liability claims reporting obligations for various reporting entities. Examples of defined reporting entities included insurance companies, risk retention groups, and certain health care professionals and facilities lacking medical malpractice insurance. Public Chapter 902 was enacted after months of testimony and research by the Joint Tort Reform Subcommittee chaired by Senator David Fowler and Representative Rob Briley. 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 & Insurance (the "Department") provided testimony to the Subcommittee and actively participated in the development of legislation implementing the Subcommittee's recommendations. A copy of Public Chapter 902 is attached to this report as **Appendix A.**

In general, Public Chapter 902 requires reporting entities to provide information to the Department concerning the number of medical professional liability claims asserted, the amount of damages alleged, any damages paid, the types of paid damages, and legal fees paid. The first reports from reporting entities were due to the Department on April 1, 2005.

Pursuant to Public Chapter 902, the Department is to prepare an annual report for the Speakers of the Senate and House of Representatives summarizing this data each September beginning in 2005 and ending in 2008. The Department's report may only contain aggregate data in order to protect the confidentiality of the specific data filed by each reporting entity.

I. REPORTING ENTITIES

The Department sent letters to insurance companies that wrote any form of professional liability insurance in this state, and to a list of licensed health care facilities received from the Department of Health, notifying the entities of their obligations to report under Public Chapter 902. It is important to note that the top 10 medical malpractice insurance carriers account for over 87% of the total medical malpractice direct premiums written in Tennessee in 2004. To date, the Department has identified 15 reporting entities which have failed to comply with these reporting obligations and is pursuing appropriate legal action.[1] The 2004 direct medical malpractice premiums for the reporting entities who failed to comply ranged from only $2,609 to $3,554,963. Therefore, the Department received data indicative of the vast majority of medical malpractice premiums sold in this state.

Only those health care facilities and professionals that are uninsured were required to report individually under Public Chapter 902. Although the Department has no information concerning which facilities or professionals are uninsured, the Department worked closely with the Department of Health, the Tennessee Hospital Association (THA), the Tennessee Medical Association (TMA), and others to educate uninsured health care professionals and facilities concerning their reporting obligations. The Department did not receive any reports from uninsured health care professionals, but did receive several reports from uninsured facilities, including hospitals and nursing homes.[2]

II. HEALTH CARE PROFESSIONALS

All of the reporting entities did not report the license numbers of health care professionals and facilities involved in the particular medical malpractice claims. The Department attempted to obtain this information from the reporting entities but was informed that the reporting entities did not collect that information within the normal course of business. Accordingly, the Department will forward all submitted license

[1] Public Chapter 902 authorizes the Commissioner of Commerce and Insurance to levy civil penalties in the amount of one hundred dollars ($100) per day upon a reporting entity that fails to comply with the statute. Tenn. Code Ann. § 56-54-101 (l). Five of the fifteen (15) reporting entities who failed to comply with Public Chapter 902 are classified as risk retention groups (RRGs); therefore the Commissioner's ability to levy civil penalties upon these five RRGs may be preempted under the federal Risk Retention Group Act. Because several large carriers filed on behalf of groups of insurance companies without specifying the exact number of insurance companies, the Department is unable to provide an exact figure on the numbers of insurance companies who reported data. However, the Department has reconciled the reports with the entities who reported direct medical malpractice premiums with the NAIC and found only 15 deficiencies.

[2] The Department understands that some health care professionals, specifically physicians, are required to obtain medical malpractice insurance as a condition to maintaining privileges at health care facilities. Accordingly, it is believed that some health care professionals are covered by the reports submitted by the insurance companies. However, the Department was unable to obtain information as to which other licensed health care professionals identified in Public Chapter 902 are uninsured. Because the Department must report data only in the aggregate, a breakdown of the reporting entities which were uninsured health care facilities is not provided in this report.

information to the Department of Health as required by Tenn. Code Ann. § 56-54-101 (g). The Department will work with the reporting entities to improve the reporting of this license information in future years.

The reporting entities also do not classify claims pursuant to uniform set of specialty definitions. The Department is working with the entities to revise the reporting form to better identify medical specialties involved in reported claims.

III. REPORTING PERIOD

The reports received by the Department were separated into two categories: (1) medical malpractice claims closed/resolved in 2004, and (2) medical malpractice claims newly filed/pending in 2004. These claims originated from events occurring between 1968 and 2004. A copy of the report forms developed by the Department are attached hereto as **Appendix B**. The reporting forms are also available on the Department's website at www.tennessee.gov/commerce/insurance. The Department anticipates modifications to these forms to further refine the collected data.

IV. CLAIMS CLOSED

A. Total Claims

The total number of medical malpractice claims closed/resolved in 2004 was 2,366.

B. Settled Claims v. Final Judgment

Only six of the 2,366 claims closed resulted from a final court judgment. See **Table 1** below. Thus, 2,360 claims were closed without a trial court final judgment. The Department did not receive information concerning the timing of settlements in relation to the status of legal proceedings.[3]

TABLE 1

	Total	Percent (%)
Claims closed	2,366	100
Settlements	2,360	99.75
Judgments	6	.25

[3] The Department is working with the reporting entities to better identify if and when a lawsuit was filed for each closed claim in order to determine the impact of the filing of a lawsuit, and the relationship between legal expenses and the amount of claims closed once litigation has commenced.

V. DAMAGES

A. Total Damages Asserted in Lawsuits[4]

The total damages asserted in lawsuits for the 2004 claims closed totaled $6,737,569,106.

B. Total Settlements & Judgments

The total damages paid on claims closed by the reporting entities in 2004 was $110,292,183. The total damages paid through judgments was $1,958,648. The remaining $108,333,535, which amounts to 98.2% of the total damages, was paid through settlements. Thus, the total damages paid accounted for approximately 1.8% of the total damages asserted in lawsuits.

C. Average Settlement and Judgment

The computed average settlement for the 2,360 settlements in 2004 amounted to $45,904 per closed claim. The Department further reviewed these settlements, and determined that only 444 or 19% of the settlements resulted in some payment of damages. Removing these claims from the total claims closed, the Department computed the average settlement amount of $243,994 for cases where any damages were paid. See **Figure 1** for a breakdown of the settlements involving payment.

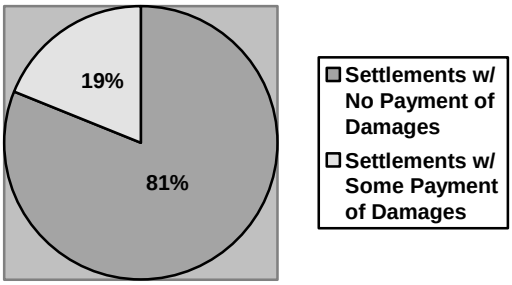

FIGURE 1

Due to the small number of judgments (only 6), the Department did not believe it would be statistically valid to compute an average. However, given the Subcommittee's interest in the amount of medical malpractice judgments, the six judgments are listed below in **Table 2.** As discussed above, the Department did not receive the type of specialty for the five physician judgments listed below; thus, all physician providers are listed below as "Medical/Osteopath Physician". The Department is working with the

[4] Numerous lawsuits filed did not specify any amount of asserted damages. The Department is working with the reporting entities to identify the exact amount of lawsuits that did not specify any amount of asserted damages in future reports.

reporting entities to obtain a more direct correlation between the premiums and type of physician specialties for future years.

TABLE 2

Judgment Amount	Damages Claimed in Lawsuit	Type of Provider	Date of Occurrence
$1,600,000	**Unspecified**	**Medical/Osteopath Physician**	**2000**
$160,000	**$4,500,000**	**Medical/Osteopath Physician**	**1994**
$121,150	**Unspecified**	**Medical/Osteopath Physician**	**1997**
$74,999	**$1,350,000**	**Medical/Osteopath Physician**	**1996**
$ 1,999	**Unspecified**	**Medical/Osteopath Physician**	**2003**
$ 500	**$750,000**	**Hospital**	**2002**

C. Punitive, Economic & Non-Economic Damages

Reporting entities did not identify damages paid due to final judgments by punitive, economic and non-economic damages. Due to the Department's duty to only provide aggregate data, we are unable to provide more specificity on the types of damages awarded. The Department was informed by many reporting entities that most settlements do not specify the types of damages paid.[5]

VI. PENDING CLAIMS

Based upon the reports, the Department estimates that there are 5,255 pending medical malpractice claims.

VII. LEGAL FEES AND EXPENSES

A. Claimant's Counsel

Very few reporting entities provided information concerning the amounts paid to claimant's counsel, although it is presumed that these amounts were included in the total damages paid on claims closed. Due to this lack of data, the Department is unable to provide the total amount paid to claimant's counsel on an aggregate basis.

[5] The Department is working with the reporting entities to refine the tracking of this data in future reports.

B. Defense Counsel and Expenses

Similarly, all reporting entities did not provide a breakdown of legal fees paid to defense counsel on claims closed in 2004. However, the reporting entities did provide the total legal defense expenses paid on claims closed in 2004, which includes legal fees to defense counsel, depositions, expert witnesses, court costs and any other legal expenses. The total defense legal fees paid in 2004 by the reporting entities was $25,613,584. A comparison of these total defense legal fees paid in relation to the total paid damages on claims closed is reflected below in **Figure 3**.

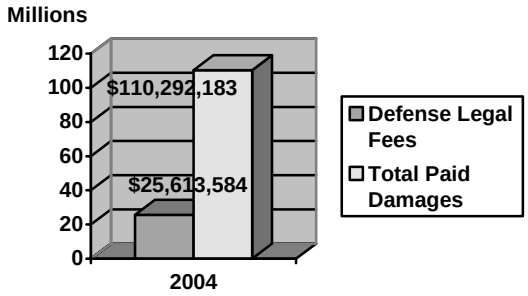

FIGURE 3

VIII. TOTAL PAID CLAIMS

A. Total Paid Claims

In order to understand the complete costs of medical malpractice claims, the total paid damages must be added to the total legal fees. It is presumed that all legal fees to claimants' counsel, which was not reported, would be included in the total damages figures. Accordingly, the total costs and damages paid by the reporting entities in 2004 was $135,905,767. The total damages of $110,292,183 accounted for 81.2%, and the defense legal fees of $25,613,584 accounted for 18.8% of this figure. See **Figure 4** below.

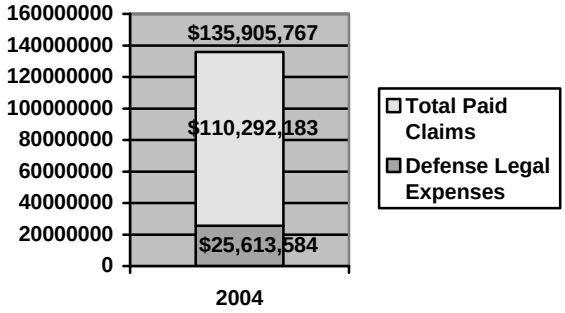

FIGURE 4

B. Medical Malpractice Premiums and Reserves

The total direct medical malpractice premiums written in 2004 in Tennessee by the reporting entities was $327,329,574. The Department is unable to identify the amount of premiums written on the specific claims which closed in 2004, which in some cases date back over 30 years. The Department is exploring the correlation between the premiums, incurred but not reported liabilities (IBNR), and reserves for the reporting entities.

The Department has calculated the reserves or "direct losses unpaid" for the reporting entities as filed on the Tennessee page of their 2004 annual financial statement. These reserves totaled $730,939,191.[6] **Figure 5** reflects the comparison between these reserves and the total amount of paid claims closed by the reporting entities.

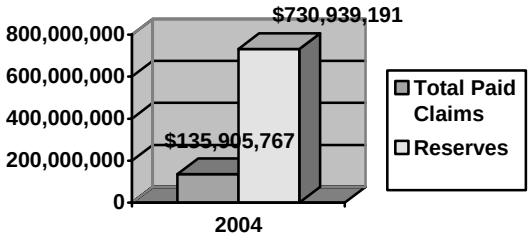

FIGURE 5

IX. NEXT STEPS

The Department will continue to work with the reporting entities to revise the reporting form and to provide specific directions to the reporting entities about how to properly fill out the forms to ensure uniformity of responses. Specific changes to be included in the reporting form for future years will enable the Department to obtain additional data concerning:

(1) the individual health care providers and facilities involved in the claims by specialty and license or other identifier numbers;
(2) the amount and definition of active and inactive claims;
(3) a determination of whether or not a lawsuit was filed, and the timing of the filing for each closed claim;
(4) the number of lawsuits that did not specify any amount of asserted damages;

[6] The loss adjustment expenses (LAE) of the reporting entities are not available on a statewide basis, and therefore are not included in the above reserves figure. Financial information from reporting entities such as the uninsured health care facilities, which do not charge malpractice premiums or report reserves to the Department as do other insurance companies, are not included in this section.

(5) the identification of paid damages by punitive, economic and non-economic damages;

(6) the amount of legal fees and incurred expenses paid to claimant's and defense counsel; and

(7) any additional information requested by the General Assembly.

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

Closed Claims - Information for Tennessee Only

Type of Entity Reporting ***Select One***

Enter Total Number of Tennessee Claims

Type of Health Care Professional	Date of Occurrence	Claimant's Social Security Number	License Number	Assserted Damages (other than set forth in lawsuits)	Damages Claimed by Lawsuits	Amount Paid by Settlements	Amount Paid by Judgment	Punitive Damages Paid	Compensatory Damages Paid	Non-Economic Damages Paid	Total Damages Paid	Deductible Amount	Attorney Fees Paid to Defense Counsel	Portion of Settlement or Judgment Received by Claimant's Counsel	Expert Witness Fees	Court Costs	Deposition Costs	Other Legal Fees	Total Legal Expenses	Grand Total Claims Paid
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