12

M E M O R A N D U M

TO: Chris Muirhead, Chairman, Health Care Commission
George Bryce, Health Care Commission Member
Diane Harrop, Director, Health Care Commission

FROM: Ken Vines, Insurance Commissioner

DATE: June 19, 2003

RE: Medical Malpractice Insurance Study - House Bill 261

The purpose of this memo is to outline my view of how the study mandated in House Bill 261 might be completed. The study must be submitted to the legislature by October 15, 2003. The following represents my thoughts on the study and I welcome input and suggestions from you and others on the commission.

STUDY REQUIREMENTS

House Bill 261 contains a list of items which the study is to accomplish and these items, obviously, must be the basis of the study. My reading of the bill reveals the following areas for study:

1. The feasibility of establishing a joint underwriting association comprised of all insurers authorized to underwrite casualty insurance in Wyoming, for the purposes of providing medical liability insurance on a self-supporting basis.

2. The impact of such an association on the current Wyoming market for medical liability insurance.

3. The rate and reserve fund requirements necessary for such an association to remain solvent.

4. The level of necessary policyholder participation in such an association.

5. The feasibility of revising and using the medical liability compensation account provided by W.S. 26-33-101 through 26-33-111 as the joint underwriting association.

6. The feasibility of establishing a provider owned mutual insurance company to provide health care liability insurance including mechanisms for providing state assistance to start such a company.

7. The feasibility of establishing a provider liability risk retention group.

8. The ability of the state to act on a stop-gap basis in establishing any of the alternatives mentioned in the bill to ensure the availability of health care services to Wyoming residents in the event of an emergency.

Paragraphs 1 to 4 relate to establishing a joint underwriting association. Review of these items will require actuarial expertise. The bill requires the association to be self-supporting. I assume this means no state funds will be used to set up or operate the association. An actuary will be needed in order to determine what rates the association will have to charge and the amount of reserves it will have to establish in order to pay claims.

One issue raised by the law in regard to this association is that it is to be composed of all insurers authorized to underwrite casualty insurance in Wyoming. Medical malpractice insurers tend to be niche companies. In other words, they tend to only write medical malpractice insurance and not other casualty insurance. The Doctors Company and OHIC fall into this category. Conversely, most companies writing casualty insurance do not write medical malpractice insurance. Are these companies going to be willing to be part of a joint underwriting association which deals with products they don't even write? Are they expected to contribute financially to an association which provides insurance they don't write? Will this cause them to rethink doing business in Wyoming? This issue affects several hundred companies licensed in Wyoming.

Another issue with regard to this type of association relates to the cost of the insurance provided by the association. Would this entity be able to offer lower rates than existing companies? Rates must be actuarially sound in order to cover future claims. Therefore, any rates established by the association might be similar to what current insurers are charging. The issue is how this association would be able to offer lower costs to physicians and hospitals.

Paragraph 2 specifically asks for a study of the impact on the current medical liability market. This will obviously require contact with the current malpractice providers such as OHIC and The Doctors Company to determine their reaction to being members of such an association and whether such requirement would cause them to reconsider their participation in the Wyoming market. This would probably have to be done by a survey. The issue here is that the current companies offering the product would be directly competing with the new association. What would be their reaction to this direct competition? The current market needs to be maintained in order to promote competition.

Paragraph 4 specifically calls for a review of "policyholder participation requirements". I am not sure if this relates to policyholders contributing to the association in some way such as through assessments, or whether this relates to the number of policyholders needed to participate in order to establish a viable association. This item could also relate to requirements for policyholders to qualify for a policy from the association. Whatever the exact meaning, this will be part of an actuarial and/or insurance consultant review.

Paragraph 5 requires a review of W.S. 26-33-101 et seq. which was passed in 1977, but was never implemented. Again, I believe actuarial review is necessary to determine whether this law could be amended to meet the requirements of a joint underwriting association. It would clearly have to be updated significantly as the dollar figures used in 1977 are inadequate for 2003. Further, this law requires a surcharge on physicians and it would have to be determined if this is appropriate or something that would deter physicians from using the association.

Paragraphs 6 and 7 ask about the feasibility, respectively, of establishing a provider owned mutual insurance company or a liability risk retention group. It is not clear to me what we can say about these entities, because the ability to create these entities already exists in law. Liability risk retention groups are authorized under federal law and states have little regulatory authority over these entities. A provider owned (captive) insurance company can be created under certain states' laws. Wyoming does not have a captive insurance company law so it is doubtful such a company could be formed in Wyoming. It could be formed in another state and licensed in Wyoming as a nonresident company. I do note that the section of the law referring to a captive insurer speaks of mechanisms for providing state assistance to start such a company.

Paragraph 8 relates to having one of the entities discussed above act as an insurer of last resort in the

event of an emergency situation where liability insurance is not available to physicians and hospitals. I assume this would be a situation where one or more of the current medical malpractice insurers fails or withdraws from the state thereby causing a crisis in the availability of medical malpractice insurance. This study could be completed in connection with the actuarial review done with regard to the items in Paragraphs 1 through 4. I believe this is an important part of the study as legislators have indicated they want some sort of mechanism in place to handle a crisis situation.

COSTS

The cost of a consulting actuary will not be certain until the actuary can be given detailed directions and provide a specific estimate. During the legislative session, I contacted the Department's consulting actuary and asked for a ballpark figure with regard to this type of job. He estimated anywhere from $10,000 to $20,000 for such a project. I note that his hourly rate for work performed for the Department on insurance company examinations is $180.

It may also be necessary to employ a management consultant familiar with these types of associations for general insurance advice on their set up, costs and operation. Additional consulting fees for insurance management expertise are difficult to estimate at this time. However, according to the Department's consulting actuary, the cost would be similar to, or more, than the actuarial consulting fees.

Another issue with regard to costs is whether an RFP is needed in order to obtain bids prior to hiring a consultant or whether the commission can directly hire such a consultant without going through the bid process. It is my understanding that this was being checked on through the Attorney General's Office. I assume that the commission budget will fund the consultant services.

SUMMARY

I suggest a report structured along the following lines

1. A review of Wyoming's current medical malpractice market, including the level of competition in the market.

2. An actuarial review of what level of rates and reserves are necessary in order to establish a solvent underwriting association in Wyoming. Would these reserves and rates be substantially different (lower) from those used by current insurers in the market?

3. The effect on the current Wyoming market in the event an underwriting association is established, including the possibility of insurers withdrawing from the market if an association is established. Will the direct competition of an underwriting association drive out current insurers in the market?

4. A discussion of alternatives to an underwriting association such as risk retention groups and captive insurers. State funding of a captive insurer needs to be addressed.

5. A discussion of establishing an underwriting association as an insurer of last resort and/or for use in the event of an emergency in availability of medical malpractice insurance.

6. Recommendations to the legislature, prioritized from most to least likely to address medical malpractice insurance concerns.

In order to accomplish the report, I believe, at a minimum, the services of a consulting actuary will be needed. The actuary will need to have specific experience and expertise in liability insurance. It is doubtful that such an actuary exists in Wyoming. The only Wyoming actuary I am aware of is the one employed by Blue Cross Blue Shield of Wyoming, who deals with health insurance issues. There are actuaries in other states that are experts in the medical malpractice area.

An issue the commission needs to decide in this regard is what professionals this joint underwriting association will cover. The statute just refers to medical liability insurance. Does the association have to cover all health care providers or is it just for physicians and hospitals? If you include other health care providers such as dentists, optometrists, chiropractors, and others, the actuarial work becomes much more complicated. Limiting the association to physicians and maybe hospitals would make the actuarial work easier.

I suggest that a general insurance industry consultant may also be necessary to complete this study. The consultant would deal with issues related to what is actually needed to set up and operate an underwriting association. This would include policy forms, claims processing, staffing and underwriting issues. Some actuarial consulting firms may be able to provide both types of consultants.

Finally, we probably need to do some surveys regarding certain issues. Such surveys would most likely be directed to physicians and hospitals and to the current medical

malpractice insurers in the Wyoming market. These would survey the likelihood of physicians and hospitals using the joint underwriting association and what effect such an association would have on the current insurers in the market.

If you have questions, please contact me at your convenience. I look forward to working with you on this project.

ORIGINAL HOUSE BILL NO. 0261 ENGROSSED

ENROLLED ACT NO. 90, HOUSE OF REPRESENTATIVES

FIFTY-SEVENTH LEGISLATURE OF THE STATE OF WYOMING
2003 GENERAL SESSION

AN ACT relating to insurance; requiring the Wyoming health care commission with the support of the insurance commissioner to conduct a study to establish a joint underwriting association for purposes of providing medical malpractice insurance; imposing study and reporting requirements; providing for an effective date.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1

(a) The Wyoming health care commission with the support of the Wyoming insurance commissioner shall conduct a study on the feasibility of establishing a joint underwriting association comprised of all insurers authorized to underwrite casualty insurance in Wyoming for purposes of providing medical liability insurance on a self-supporting basis. The study shall investigate the impact of the association upon the current market for medical liability insurance, shall review rate and reserve fund requirements necessary for association solvency and shall evaluate necessary policyholder participation requirements. The study shall also:

(i) Evaluate the feasibility of revising and using the medical liability compensation account provided by W.S. 26-33-101 through 26-33-111;

(ii) Evaluate the feasibility of establishing a provider owned mutual insurance company to provide health care liability insurance including mechanisms for providing state assistance to start such a company;

(iii) Evaluate the feasibility of establishing a provider liability risk retention group; and

(iv) Evaluate the ability of the state to act very rapidly on a stop-gap basis in establishing any of the alternatives considered pursuant to this section in the event a sudden emergency requires immediate state action to ensure the availability of health care services to Wyoming residents.

(b) On or before October 15, 2003, the Wyoming health care commission and the insurance commissioner shall report study findings to the joint corporations, elections and political subdivisions interim committee and the joint labor, health and social services interim committee. The report shall include consideration of all the options set forth in subsection (a) of this section and shall include recommendations on the feasibility of establishing a joint underwriting association in Wyoming for purposes of providing medical liability insurance.