

**A REPORT TO THE LEGISLATIVE COUNCIL AND
THE SENATE AND HOUSE COMMITTEES
ON INSURANCE AND COMMERCE
OF
THE ARKANSAS GENERAL ASSEMBLY
(AS REQUIRED BY ACT 1007 OF 2003)**

**ANNUAL STUDY OF MEDICAL MALPRACTICE
INSURANCE MARKET IN ARKANSAS**



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REPORT TO THE LEGISLATURE ON ACT 1007 OF 2003 ANNUAL STUDY OF MEDICAL MALPRACTICE INSURANCE MARKET IN ARKANSAS

INTRODUCTION AND BACKGROUND MATERIAL

Act 1007 of 2003 requires the following:

(a) The Insurance Commissioner shall conduct an annual study of malpractice insurance rates in Arkansas and report the findings to the Legislative Council and the chairs of both the House and Senate Interim Committees on Insurance and Commerce.

(b) The study shall include:

(1) Any findings regarding any changes in medical malpractice rates;

(2) Any other finding that is relevant to malpractice insurance rates; and

(3) Any recommendations in respect to any law relating to medical malpractice insurance.

Arkansas has a “competitive rating law” for the medical malpractice line, Ark. Code Ann. §§ 23-67-501 *et seq.*, which is cumulative to any applicable provisions found in §§ 23-67-201 *et seq.*, §§ 23-67-509. Rates are approved or disapproved within sixty (60) days after the date of filing, Ark. Code Ann. § 23-67-506(d). The Commissioner is required to use standards for rates promulgated in Ark. Code Ann. § 23-67-502 in determining whether to approve or disapprove a filing. Ark. Code Ann. § 23-67-502 requires that rates shall not be excessive, inadequate or unfairly discriminatory; however, the Commissioner may approve an excessive rate if failure to approve the rate may tend to substantially lessen competition in the Arkansas malpractice insurance market, Ark. Code Ann. § 23-67-506(e).

There are two common misconceptions about the role of the Legislature and Insurance Department regarding insurance rates. The first misconception is that either entity has the ability to control market exits of companies. There is no statutory authority to compel an insurer to provide medical malpractice insurance coverage; furthermore, any law requiring an insurer to do business in Arkansas would be disruptive to the entire marketplace, spilling over into other lines of insurance.

The second misconception concerns the Department’s oversight of rates. Medical malpractice rates must be filed at least sixty (60) days prior to the proposed effective date for use in the state. The Department has broad authority to review how the rate is distributed among insureds according to factors that might predict future losses; we cannot, however, disapprove an overall rate unless it is actuarially “excessive, inadequate or unfairly discriminatory.”

Definitions

- “Excessive:” A rate becomes excessive when the loss ratio (losses, including adjustment expenses and operating expenses, divided by premium paid) drops to a point which results in the insurance company earning an excessive amount of profit.

- “Inadequate:” A rate is inadequate if it will lead to immediate solvency problems or has the potential for long-term solvency implications in that it may not provide sufficient funds to pay future claims, the costs of adjusting those claims and operating the business.
- “Unfairly Discriminatory:” All insurance discriminates among various risks. There is “fair,” i.e., “legal” discrimination, and “unfair,” i.e., illegal discrimination. “Unfair” discrimination basically means not treating similar risks the same in rates and coverages.

Overall base rates for an insurer are determined by the application of actuarial expertise to the standards set forth in the applicable state law.¹ To this amount is added an expected amount for adjusting claims, distribution or sales expenses, administration, taxes and fees, and defense costs.

An individual insured’s rates are normally established by applying discounts and credits or surcharges/debits to a base rate. Under our law those discounts, credits or surcharges/debits must be such that they “...measure differences among risks that can be demonstrated to have a probable effect upon losses or expenses.”²

¹ 23-67-209. Rating criteria.

(a) Due consideration must be given to past and prospective loss and expense experience within and outside this state, to catastrophe hazards and contingencies, to events or trends within and outside this state, to loadings for leveling rates over a period of time, to dividends or savings to be allowed or returned by insurers to their policyholders, members, or subscribers, and to all other relevant factors. All submissions for rate changes or supplementary rate changes must include this information with Arkansas’ experience shown, as well as companywide experience for the past five (5) years for the class of business which this filing affects. The determination of the weighting of credibility assigned to Arkansas must be fully explained. If, within a particular class, the data is not sufficiently credible for Arkansas or companywide, and common classes are grouped together for rate-making purposes, all class codes utilized in developing credibility shall be shown as an exhibit in the filing, with Arkansas’ experience for each class affected shown separately. If significant trends within the state are utilized, a narrative describing the basis of the trend must be included.

(b) Risks may be classified in any reasonable way for the establishment of rates, except that no risks may be grouped by classifications based in whole or in part on race, color, creed, or national origin of the risk.

(c) The expense provisions included in the rates to be used by any insurer shall reflect the operating methods of the insurer and its actual and anticipated expense experience.

(d) The rates may contain provisions for contingencies and an allowance permitting a reasonable profit. In determining the reasonableness of the profit, consideration must be given to all investment income attributable to premiums and to the reserves associated with those premiums and to loss reserve funds.

23-67-503. Rating criteria.

(a) A malpractice insurer shall consider past and prospective loss experience solely within this state.

(b)(1) If insufficient experience exists within this state upon which a rate can be based, the malpractice insurer may consider experience within any other state or states that have similar claim costs and frequency.

(2) If sufficient experience from any other state is not available, the malpractice insurer may use nationwide experience.

(c) In its rate filing and records, the malpractice insurer shall provide detailed information on the data supporting the experience it is using.

(d) When experience outside this state is considered, as much weight as possible shall be given to state experience.

² 23-67-210. Rating plans.

(a) Rates may be modified to produce premiums for individual risks in accordance with filed rating plans which establish standards for measuring variations in hazards or expense provisions. Those standards may measure differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The modification shall apply to all risks under the same or substantially the same circumstances or conditions.

23-67-506. Review of filings.

... (e) Notwithstanding subsection (d) of this section, the commissioner may approve an excessive rate if he or she finds that the failure to approve the rate may tend to substantially lessen competition in the Arkansas malpractice insurance market.

Typical characteristics used to measure those differences may include:

- Medical specialty involved, including multiple practice characteristics
- Claims defense and history of paid claims and amount of payment
- Exposures - number of patients
- Emergency room practice
- Length of time in practice
- Location of practice
- Implementation of risk management practices
- Staff size and training
- Continuing education
- Board Certification

The most basic factor affecting availability for an individual seeking medical malpractice coverage is whether they meet the underwriting criteria of the insurer. Some underwriting concerns include:

- Professional sanctions
- Nursing home affiliation
- Willingness to implement risk management procedures
- Type of claims - severity and certainty of negligent conduct

FINDINGS

No filings affecting the various lines comprising medical malpractice insurance were made with the Arkansas Insurance Department during this past reporting period by an existing company actively seeking new business.

Each filing is subject to the normal rate review for excessive, inadequate, or unfairly discriminatory levels, as well as the other statutory requirements set forth in Ark Code Ann. §§ 23-67-201 *et seq.* and §§23-67-501 *et seq.* Filings that trigger concerns about excessive or inadequate rates or that contain significant increases are referred to an actuary. While the companies provide actuarial justification as part of the filing, the Department's actuary may require additional supporting documentation as a part of his review.

Impact statements regarding the affect of Act 649 of 2003 are filed pursuant to Bulletin 2-2003 that was promulgated as a result of the passage of the Act, which dealt with certain procedural and substantive issues in the state's tort system.

Since the last report there have been no rate filings with effective dates within the time period covered by this report. Arkansas has 87 companies reporting premium for 2016 which are listed in Exhibit "A".

Our reviews of prior rate filings in past reports have indicated existing rates for the market are

adequate and do not create statutorily excessive rate levels. We have found nothing in prior filings that resulted in unfair discrimination between similar risks. When a filing is received it is reviewed to assure compliance with with Ark. Code Ann. §§ 23-67-201 *et seq.* and §§ 23-67-501 *et seq.* at the time of filing.

The aggregate market's losses ratio, including defense, cost containment, commissions, taxes and fees, for Arkansas for 2016 was 78.41%. The pure loss ratio was 40.01%.

The ratios above are for the entire market of including technical and allied support, in addition to physicians, surgeons and hospitals, and may include adjustments made by companies that had no premium in 2016

A point to note is that for the coverages of most concern – physicians, surgeons, and hospitals – loss ratios have continued to remain favorable. Most companies continue to use rates filed prior to 2014.

Loss adjustment expenses and the cost of defense are significantly higher in the medical malpractice line than in other lines of insurance. A significant portion of medical malpractice premiums is derived from the cost to investigate and defend claims (even when a claimant abandons a claim or loses in court). Due to the nature of the claim, expert witnesses are needed (which are other medical professionals) and highly specialized litigation may be required. Sometimes the cost of defending a claim can equal or exceed the amount paid in judgments or settlements. Providing a defense is both an obligation of the insurance company and a benefit to the insured medical provider.

CONCLUSION

Since the passage of Acts 1007 and 649 of 2003, the number of filings for companies actively writing insurance in the medical malpractice market slowed but new offerings have become available in recent years. Loss experience for the entire market has generally decreased to where it is often more in line with other liability lines; when you consider loss adjustment, selling and operating expenses of the writing companies.

Due to the specialized nature of litigation in this area, claims investigation, adjustment and defense costs are, on average, substantially higher than for other liability lines. The effects of Act 649 of 2003 have encouraged new entries into the market. The impact statements of existing writers still express a very conservative approach to the Act's long-term effect.

Repeal of all or a portion of Act 649 of 2003 in a future legislative session would make Arkansas less attractive to those companies providing medical malpractice coverage to Arkansas's medical community. Arkansas has seen more interest by insurers in the market since the passage of the Act; however, Supreme Court cases have struck down significant parts of this Act. It remains to be seen whether this will have any significant effect on the growth of the medical malpractice market or malpractice insurance rates in Arkansas.

Submitted: August 1, 2017

Exhibit A

NAIC	Company Name	25054	Hudson Ins Co
22667	Ace Amer Ins Co	37079	Hudson Specialty Ins Co
20699	Ace Prop & Cas Ins Co	27960	Illinois Union Ins Co
24856	Admiral Ins Co	NAIC	Company Name
13677	Affiliates Ins Recip a RRG	25445	Ironshore Specialty Ins Co
11710	Allied Professionals Ins Co RRG	12203	James River Ins Co
16624	Allied World Specialty Ins Co	38920	Kinsale Ins Co
24319	Allied World Surplus Lines Ins Co	14444	LAMMICO RRG Inc
19720	American Alt Ins Corp	33138	Landmark Amer Ins Co
10232	American Assoc Of Othodontists RRG	19437	Lexington Ins Co
20427	American Cas Co Of Reading PA	19917	Liberty Ins Underwriters Inc
19380	American Home Assur Co	10725	Liberty Surplus Ins Corp
11598	Applied Medico Legal Solutions RRG	43656	Louisiana Med Mut Ins Co
21199	Arch Specialty Ins Co	42617	MAG Mut Ins Co
13565	Arkansas Mut Ins Co	11843	Medical Protective Co
10717	Aspen Specialty Ins Co	12754	Medicus Ins Co
26620	AXIS Surplus Ins Co	37974	MT Hawley Ins Co
39462	Berkley Assur Co	20079	National Fire & Marine Ins Co
22276	Berkshire Hathaway Specialty Ins Co	36072	National Guardian RRG Inc
12260	Campmed Cas & Ind Co Inc	19445	National Union Fire Ins Co Of Pitts
10472	Capitol Ind Corp	15865	NCMIC Ins Co
10328	Capitol Specialty Ins Corp	33200	Norcal Mut Ins Co
19348	Capson Physicians Ins Co	35114	NORCAL Specialty Ins Co
11825	Care RRG Inc	12189	Oceanus Ins Co A RRG
15989	Catlin Specialty Ins Co	44121	Oms Natl Ins Co Rrg
14388	Cherokee Guar Co Inc a RRG	44105	Ophthalmic Mut Ins Co RRG
18767	Church Mut Ins Co	14260	OrthoForum Ins Co RRG
28665	Cincinnati Cas Co	10222	PACO Assur Co Inc
10677	Cincinnati Ins Co	13714	Pharmacists Mut Ins Co
39993	Colony Ins Co	14460	Podiatry Ins Co Of Amer
31127	Columbia Cas Co	36234	Preferred Professional Ins Co
20443	Continental Cas Co	33391	ProAssurance Ind Co Inc
34495	Doctors Co An Interins Exch	10179	ProAssurance Specialty Ins Co
11714	Emergency Physicians Ins Exchange RR	11811	Professional Security Ins Co
35378	Evanston Ins Co	11515	QBE Specialty Ins Co
35157	Fair Amer Ins & Reins Co	44776	StarStone Specialty Ins Co
10801	Fortress Ins Co	25143	State Farm Fire & Cas Co
37362	General Star Ind Co	33049	State Volunteer Mut Ins Co
37532	Great Amer E&S Ins Co	26387	Steadfast Ins Co
16691	Great Amer Ins Co	14026	Sunland RRG Inc
25224	Great Divide Ins Co	34487	TDC Specialty Ins Co
11941	Green Hills Ins Co RRG	23280	The Cincinnati Ind Co
26808	Hallmark Specialty Ins Co	12915	Urgent Care Assur Co RRG Inc
11832	Health Care Industry Liab Recip Ins	13196	Western World Ins Co
34452	Homeland Ins Co of NY		