

Fiscal Estimate Narratives

OCI 3/3/2014

LRB Number	13-4246/1	Introduction Number	SB-609	Estimate Type	Original
Description Authorizing out-of-state risk retention groups to provide health care liability insurance					

Assumptions Used in Arriving at Fiscal Estimate

This fiscal impact report will review the impact on OCI as well as the impact on the Injured Patients and families Compensation Fund.

Background

Under existing laws, a risk retention group (RRG) is allowed to operate in Wisconsin and offer medical malpractice coverage. However, under the Injured Patients and Families Compensation Fund (the Fund) that coverage does not meet the Fund coverage requirements. This means medical providers using an RRG would not be covered under the Injured Patients and Families Compensation Fund.

This legislation would change that status. The proposal includes a definition of "insurer" that by definition would make applicable any provision within Ch. 655, Stats., (the Fund statutes that describe requirements for medical malpractice insurers) to RRGs. Under the federal Liability Risk Retention Act of 1986 (LRRRA), a non-domestic RRG is exempt from "any state laws, rules, regulations or orders . . . which regulate, directly or indirectly the operation of risk retention groups." 15 USC 3902 (a) (1). LRRRA precludes Wisconsin from enforcing any provision contained in the proposed bill or through the definition contained within Ch. 655, Stats., unless the RRG's home state has the same requirement for a RRG. In short, there is no legal mechanism for the State of Wisconsin to enforce the proposed statute and all affected provisions under federal law. When similar provisions were enacted in Louisiana a RRG successfully sued the commissioner of insurance asserting preemption of federal law violations.

Fiscal Impact

From an OCI perspective, there are two potential impacts: premium tax and regulatory costs.

From a premium tax standpoint, RRGs would be subject to the surplus lines taxes which stand at 3%. Medical malpractice insurers are subject to a separate tax which is both reciprocal and retaliatory. This means that if the medical malpractice insurer's state of domicile's tax rates are higher, Wisconsin collects higher taxes. If medical malpractice insurer's tax rates are lower, Wisconsin collects lower taxes. This rule provides Wisconsin domiciled insurers with a lower tax rate in other states. The premium taxes for medical malpractice insurance vary nationally between one-half of a percent (0.5) to 7.6 percent.

Since the premium tax payments vary and we have no estimate on the amount of business likely to be written by RRGs, the fiscal estimate is indeterminate on the amount of taxes.

As stated above, the LRRRA prohibits states from regulating the operations of RRGs. Therefore, from a fiscal standpoint this legislation will have no fiscal impact on OCI.

This bill potentially creates a number of significant fiscal issues for the Injured Patients and Families Compensation Fund (Fund). As previously stated, the legislation provides for the inclusion of non-domestic risk-retention groups (RRGs) in the definition of an insurer under 618.43 (1) (a) 2 Wis. Stat. and requires the commissioner to approve the RRG.

One issue for the Fund relates to the structure of the RRG. RRGs are required to be member groups and the members are part of the governing structure of the RRG. This allows the members to participate in their defense against any medical malpractice suits brought against them and to determine the RRG's strategies in litigation. The Fund specifically prohibits this because the interest of the medical provider in protecting their reputation is at odds with the financial interests of the Fund. It is important to note that the Fund in Wisconsin is the only fund with no upward limit on medical malpractice payments. This means that this conflict of interest could result in a significant fiscal impact on the Fund.

Another issue relates to the financials of a RRG if it becomes insolvent. Under federal law, RRGs cannot be covered by a state's guaranty fund in the case of liquidation. Because of this issue, if an RRG becomes insolvent or is placed into liquidation, the Fund, the covered provider and the injured consumer all stand exposed. The Fund provides excess medical malpractice coverage to Wisconsin health care providers and ensures that funds are available to fully compensate injured patients and their families. Currently the Fund does not pay until after the first million dollars is paid by the primary insurer. If an insurer becomes insolvent, the Wisconsin Insurance Security Fund would cover up to \$500,000 for any claim under a policy issued by a licensed insurer that has been placed into liquidation. Although not a full million dollars, it does ensure that there is primary coverage for defense and some level of coverage in the event of an insolvency. If a RRG were to be placed into liquidation, the Fund would need to bear not only the jury award or settlement amount but also all defense costs and interest for the claim.

It is important to note that some states where RRGs are domiciled have separate, less rigorous financial requirements for RRGs than for their domiciled insurers. The federal law precludes Wisconsin from treating equally the financial condition of RRGs compared to insurers. For example Wisconsin does not permit an insurer to use a letter of credit as proof of initial funding capital where many states allow a RRG to use a letter credit. The proposed legislation does not and cannot limit access to only those with the healthiest financial condition and long history writing medical malpractice. This not to say that all RRGs are inadequately capitalized but the limited regulation in some states makes the issue of insolvency a concern.

The Fund cannot adjust fund fees based upon a provider's insurer. The net result is that providers with coverage obtained from an insurer may subsidize the providers who obtain coverage from an insufficiently funded RRG that later becomes insolvent. To calculate the potential exposure to the Fund would require knowing in advance how many RRGs will become insolvent, the number of providers who were covered by those RRGs multiplied by the frequency of those providers being sued and the range of financial awards given.

Long-Range Fiscal Implications