



Wisconsin
LOOKING to
Open Its Doors
to MedMal RRGs

by Karrie Hyatt

Since 1990, risk retention groups (RRGs) offering medical professional liability insurance have not been allowed to operate in the state of Wisconsin. A 1989 amendment to the state's patient compensation fund law barred non-admitted insurers, including RRGs from offering med mal. The law was challenged in the late 1990s, but for the twenty four years that it has been in effect, RRGs have not been able to offer medical professional insurance in the state. However, during the last state legislature session, an amendment to that law was introduced into the House of Representatives and state Senate.

History

In July 1990, amendment Section 655.23 of Wisconsin state law went into effect. (Section 655 is also called the *Health Care Liability and Injured Patients and Families Compensation Act*.) The amendment was primarily a financial responsibility law that required healthcare providers to purchase medical professional insurance from Wisconsin-licensed insurer and to participate in the state's Injured Family and Patient Compensation Fund.

Patient compensation funds have been adopted by 13 states and originated during the 1970s in reaction to the fast growing premiums in the medical malpractice sector. The funds work as a form of excess insurance and are meant to protect healthcare providers, and their patients, from the whims of the insurance market. Healthcare providers pay an annual fee, usually through their insurer, to underwrite the fund. Patient compensation funds vary from state to state, with some states requiring participation and some states making participation voluntary.

Wisconsin's Injured Family and Patient Compensation Fund has mandatory participation for healthcare providers. In order to participate in the fund, medical professional carriers must be admitted carriers in the state. So, RRGs and other non-admitted carriers are barred from insuring healthcare providers. There are no RRGs domiciled in that state.

OMIC vs. Wisconsin

In 1996, Ophthalmic Mutual Insurance Company (A RRG) (OMIC) challenged the state's fiscal responsibility law by filing a lawsuit in the U.S. District Court for the Western District of Wisconsin against then-Wisconsin Insurance Commissioner Josephine Musser and the patient compensation fund. OMIC, a Vermont-domiciled risk retention group that began operations in 1987, is sponsored by the American Academy of Ophthalmology to provide medical professional liability, and other coverages, to the association's members.

The lawsuit sought to establish pre-emption of Section 655.23 by the *Liability Risk Retention Act* (LRRRA). As a federal law, the LRRRA pre-empts state insurance department regulation of RRGs, allowing them to operate across state lines. However, according to Section 3905(d) of the Act, "nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities." Which, according to documents filed by Wisconsin at the time, gave the state authority "to regulate how health

care providers can prove financial responsibility... A non-domestic RRG's right to sell insurance in Wisconsin arises from a federal preemption of state law. Wisconsin's right to define what 'financial responsibility' means for its health care providers arises from an explicit congressional decision to NOT preempt state law."

Both the District Court and later the U.S. Court of Appeals for the Seventh Circuit decided in favor of Wisconsin.

Current Efforts to Change the Law

While very new when Wisconsin's law was passed, in the intervening 24 years risk retention groups have proven themselves to be a valid and valued form of insurance mechanism for tens of thousands of insureds. With well over 200 companies, many of those having been in business for ten or more years, RRGs have come a long way in both reputation and reach.

Currently, Wisconsin is the only state that does not allow RRGs to cover medical professional liability, but efforts are underway to change that.

"Twenty-five years ago, Wisconsin closed the door to RRGs by preventing medical malpractice policies sold to physicians by RRGs from meeting the Wisconsin Injured Patients Compensation Fund 'proof of insurance' requirement. Wisconsin is the only state in the nation with such a restriction," said Wisconsin State Representative John Nygren, who introduced legislation during the last session to amend Section 655.23 to allow RRGs to operate in the state. "Assembly Bill 808 and Senate Bill 609 were proposed to modernize Wisconsin's statutory framework by authorizing an insurance policy sold by an RRG to suffice as the "proof of insurance" required for participation in

the Fund, without requiring the RRG to be licensed in Wisconsin, consistent with the federal *Liability Risk Retention Act*.”

In 1998, after OMIC lost their legal case against Wisconsin, the company decided to pursue a more diplomatic approach to doing business in the state and has often been in contact with the Wisconsin Office of Commissioner of Insurance (OCI) seeking ways to find a mutually agreeable solution. According to Paul Weber, vice president of Risk Management and Legal for OMIC, “Prior to 2012, we most recently had meetings with the OCI in 2007. At that time, they were unwilling to compromise on making any change.”

Still, OMIC continued to look for a reasonable solution, rather than bringing further litigation, that would allow them and other med mal RRGs to operate in the state. Then, “In 2012, OMIC was contacted by the leadership of the Wisconsin Academy of Ophthalmology and was asked to approach the Wisconsin Office of Commissioner of Insurance and seek legislation to change the law so they could be insured by OMIC,” continued Weber. “OMIC is sponsored by the American Academy of Ophthalmology to provide MPL insurance to its members. Wisconsin is the only state that OMIC cannot provide MPL to Academy members. They are being denied the same right that their colleagues in every other state have.”

OMIC then partnered with Preferred Physicians Medical Risk Retention Group (PPMRRG) to pursue a legislative correction. “At this time, these avenues – ongoing discussions with OCI and legislation – seem like the best uses of our resources [rather] than trying to re-open litigation,” said Tim Padovese, CEO of OMIC. “In that regard, we are continuing to reach out to other MPL RRGs... and

other captive insurance organizations that would be interested in this legislative/collaborative strategy rather than an adversarial approach.”

The New Legislation

Assembly Bill 808 and Senate Bill 609 both aim to amend Section 655.23 of the Wisconsin statute to allow for risk retention groups to operate as any other admitted carrier providing medical malpractice. While med mal RRGs would still be non-admitted carriers, the bill would allow for them to be treated as admitted carriers as long as they have registered with the insurance department and been approved to operate.

Once the RRG has been approved to do business in Wisconsin, Assembly Bill 808 states that, “any such risk retention group is subject to all the requirements under the health care



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liability provisions of the statutes that apply to other insurers that provide health care liability insurance coverage under the health care liability provisions of the statutes, including policy approval by the commissioner, assessments for the peer review council, mandated payment of specified costs in the settlement or defense of claims, and reporting requirements related to claims paid." The proposed legislation does not make it clear whether or not RRGs would participate in *Wisconsin's Injured Family and Patient Compensation Fund*. However, it would likely be a requirement.

The bipartisan legislation was sponsored by twelve Representatives and three Senators. According to Representative Nygren, the leading author of Bill 808, "While the legislation did not pass before the legislature adjourned in April, it did receive a public hearing in both the Senate Health Committee and the Assembly Insurance Committee, and it was recommended for passage by the Senate Committee."

Opening Up the MedMal Market

Representative Nygren is in full support of what the proposed legislation could do for the medical professional liability market in the state. "AB808/SB609 would lead to increased competition in the highly concentrated medical malpractice insurance marketplace and lower costs. By allowing RRG's to do business in Wisconsin, physicians would have more options and greater access to medical malpractice insurance products," said the Representative. "RRG's have a solid track record of offering affordable coverage to physicians, and they are able to offer more specialized products which can lead to better patient safety and outcomes, and fewer claims."

As OMIC already offers medical malpractice to its members in 49 states and the District of Columbia, Weber believes it would be a huge benefit to Wisconsin members of the American Academy of Ophthalmology. If the legislation gets signed into law, "It would open up a market to over 150 ophthalmologists that are very interested in buying our insurance."

A survey of Wisconsin Academy of Ophthalmology members conducted in 2012 found that 77% supported amendments to the state law that would allow OMIC to operate so that they would have the option of purchasing insurance from the RRG. Commenting on the survey, Weber said that "More than 80% [of responders] felt that OMIC's efforts to help maintain or improve patient safety in their practices was particularly important in considering."

The Legislative Future

Despite the support the legislation is receiving in the Wisconsin legislature, the future of both bills is unclear. "The bill will likely resurface during the 2015 legislative session and its chances of it becoming law are uncertain at this point," commented Representative Nygren.

However, OMIC is more positive about the outlook of the legislation, "We think the legislation is strategically well positioned to gain traction in the 2015 legislative session," said Padovese. "Our lobbyist and legislative sponsors... are continuing to reach out to the OCI working on mutually agreeable statutory language change." ■

Karrie Hyatt is a freelance writer who has been involved in the captive industry for nearly ten years. More information about her work can be found at: www.karriehyatt.com.



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