



Institute of Actuaries of Australia

XVth GENERAL INSURANCE SEMINAR

Evolution of the Industry

Tort Reform Annual Report

Geoff Atkins

Copyright © Geoff Atkins 2005



Introduction

- This paper suggests how an Annual Report on specific tort reform can help governments and the community get better outcomes from legislative changes.
- Florida Medical Malpractice reform in 2003 is used as a case study.



The Florida background

- An insurance crisis in med mal led to tort reform in 2003.
- The tort reform bill (Senate Bill 2D of 2003):
 - imposed caps on non-economic damages
 - changed some rules on ‘bad faith’ actions against insurers
 - extended immunity in some situations
 - amended pre-litigation and litigation processes
 - changed rate filing rules for insurers, and required refiling to account for the tort reforms
 - upgraded patient safety requirements for health care facilities
 - changed licensing rules for health care professionals
 - changed disciplinary procedures
 - made some changes to the no-fault scheme for birth-related neurological injury.



Legislating for the annual report

- The legislation requires the Office of Insurance Regulation (OIR) to:
 - prepare an annual report
 - by 1 October each year
 - available on the Internet
 - analysing:
 - the ‘closed claim database’
 - financial reports submitted by insurers
 - rate filings
 - loss (claim) trends.



Outline of the first annual report

- The legislation was effective 15 September 2003, with the non-economic loss caps applying only to claims occurring after that date. The first annual report was published on 1 October 2004 – not long after.
- The main conclusions of the report were:
 - it is too early to tell the impact of the tort reform law
 - constitutional challenge of the cap is a major issue and it will not be determined for at least a year and possibly three or four
 - insurer profits are low but improving
 - premium rate increases should moderate
 - the trend to lower policy limits and ‘going bare’ will continue.



Outline of the report

- The national market:
 - med mal industry overview – the crisis
 - the top insurers, market shares and growth
 - industry and company loss ratios and profit
 - prior year claim development
- The Florida market:
 - top insurers, market share and specialisation
 - company loss ratios, profit and capital ratios
 - how premiums are determined



Outline of the report (cont'd)

- Analysis of Closed Claim Database:
 - number closed by severity
 - delays occurrence to report and settlement
 - spike in reported claims in September 2003
 - average size by severity
 - non-economic damages are 70% to 80% of total claim cost
- The Issue of Constitutionality:
 - the tort reform law applied:
 - non-economic caps to claims *filed after* 15 September 2003
 - all other changes fully retrospective



Outline of the report (cont'd)

- A variety of past cases on constitutional validity of new laws (including some workers' compensation cases) indicates:
 - 'procedural' rights may be changed retrospectively
 - 'substantive' rights cannot be changed retrospectively, meaning 'injury date' is the critical date.
- Actuaries and insurers worked on the assumption that the caps and immunity would only apply to *injuries occurring* after 15 September 2003, despite what the law says.



Outline of the report (cont'd)

- On 22 April 2004, the first Court finding was made that retrospective capping and immunity is unconstitutional. It appears that nobody is terribly bothered by this.
- On 30 August 2004, the first (known) case was filed claiming that the capping of non-economic damages is unconstitutional in all respects.
- The arguments in the filed complaint run for several pages with my highlight being:
 - this law “is a hodgepodge logrolling form of omnibus legislation...”



Outline of the report (cont'd)

- A trial court ruling (possibly by jury) and appeals to the Florida Supreme court are necessary before the issue will be known. This could take one to four years.



Who does the Annual Report?

- The OIR, as a state regulator in the US:
 - is like a mixture of APRA and the MAA
 - it authorises insurers, but also regulates products and premium rates.
- The OIR has contracted preparation of the Annual Report:
 - currently prepared by Deloitte Consulting (the actuarial practice)
 - along with a local lawyer.
- Deloitte also prepared the ‘official’ costings that were used for benchmarking the new rate filings.



Some early experience from the Florida Annual Report

- It forces a disciplined process of collecting relevant information.
- It highlights the legal developments and the impact on insurers and premiums.
- Upgrading the claim database to include Open Claims is a critical development.
- It establishes a continuity of information from crisis to reform to outcomes.
- It highlights areas that need refinement – and probably annoys all the stakeholders.
- While the details are different, we would recognise most of the sentiments!



How could it work in Australia?

- I don't see us having a national report on tort reform.
- There are too many jurisdictional issues and complexities.
- A State could easily include this mechanism in tort legislation, covering one or more of:
 - public liability
 - medical indemnity
 - CTP
 - Workers compensation.
- Perhaps the NSW Government could consider it when it (finally) gets asbestos legislation sorted out with James Hardie.



How could it work in Australia?

- Would a State Government have the jurisdictional power to collect and publish the information?
- Would stakeholders actually welcome the continuing attention and objective information or would they find it a threat?
- Would the Government rather it be forgotten about than kept in the spotlight?



Some comparisons with the ACCC Reports

- I have found the ACCC reports somewhat disappointing.
- Dealing only with availability of insurance and premium rate changes.
- Relatively high level and superficial.
- Compare the IAAust tort reform working party assessment for scope.



Concluding Remarks

- I have a dream ...
 - a principled approach to tort reform
 - clearly articulated objectives
 - timely and relevant information
 - a commitment to making it work properly for all stakeholders
 - the courage to publish an objective analysis and hold the players to account
 - an Annual Report on the tort reforms ...
- Thank you to Kevin Bingham of Deloitte US
- The web reference is:
http://www.floir.com/LegislativeAffairs/2004_reports_studies.htm