Nebraska Department of Insurance
Guidance Document
IGD - - B4

Title: Out-of-State Health Care Providers Using Telemedicine to Treat Patients in Nebraska, Excess Liability Fund Coverage Option

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With the growing usage of telemedicine as a way to increase access to medical care in Nebraska, medical malpractice carriers and physicians have requested that the Nebraska Department of Insurance (NDOI) develop a method for out-of-state providers to qualify for the Excess Liability Fund (Fund).

Excess Liability Fund Background:

The Fund provides a layer of coverage for health care providers that take the steps necessary to qualify for the Fund:

> (1) First, the health care provider will purchase insurance coverage in the amount prescribed at NEB. REV. STAT. § 44-2824(1)(a), currently $500,000 for each occurrence, with an aggregate liability amount of $3,000,000 for hospitals and their employees or an aggregate liability amount of $1,000,000 for physicians or certified registered nurse anesthetists and their employers, employees, partners, or limited liability company members.
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> (2) Second, the health care provider will submit proof of coverage to the NDOI , along with payment of the Fund surcharge[2],

When a medical malpractice claim is brought against a Fund-qualified health care provider, the total amount recoverable under Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801, et. seq from any and all health care providers and the Fund for any occurrence is capped at $2,250,000.[4] If a health care provider fails to qualify, the Act does not apply, and the health care provider is subject to liability under doctrines of common law - the Act does not affect the patient's remedy.[5] Additionally, patients can elect not to come under the provisions of the Act, even if the health care provider is

[2] Neb. Rev. Stat. § 44-2824(1)(b).
[4] Neb. Rev. Stat. § 44-2825(1).
[5] Neb. Rev. Stat. § 44-2821(1).

Fund qualified.[6] Fund-qualified health care providers give patients notice that the provider has qualified under the Act and that patients are subject to the Act unless they file a refusal to be bound by the Act with the Nebraska Director of Insurance.[7] Specifically, the notice must be posted in the health care provider's "waiting room or other suitable location."[8] If a qualified health care provider does not see patients in his or her office but instead interacts with patients exclusively through telemedicine, then the "other suitable location" would be through the same method of communication used to provide telemedicine.

Telemedicine Coverage:

The Nebraska Legislature created the Fund with the intent to serve Nebraskans and limits telemedicine Fund coverage to serving patients physically located in Nebraska.[9]

If a physician located outside Nebraska provides medical services to a patient located in Nebraska, assuming all other statutory requirements for Fund coverage are met, those services will be covered by the Fund, if: (i) the physician has taken all steps to legally practice medicine in Nebraska, (ii) the physician has taken all steps to qualify for the Fund, including the purchase of a compliant policy and the payment of the associated surcharge, and (iii) in the event of a dispute involving the provision of medical services, the court adjudicating the dispute applies all relevant Nebraska law, including but not limited to the statute of limitations at NEB. REV. STAT. § 44-2829(1) and the statutory cap at NEB. REV. STAT. § 44-2825(1).

Like any other policy used to qualify for the Fund, a policy covering telemedicine that is used to meet a health care provider's financial responsibility requirement must be filed with and approved by the Director through the NDOI's regular filing system, and must contain a provision substantially similar to the following: "Pursuant to NEB. REV. STAT. § 44-2836(4), to the extent this policy is used to meet this health care provider's financial responsibility requirement under the Nebraska Hospital-Medical Liability Act, any provision in this policy attempting to limit or modify the liability of the insurer contrary to the provisions of sections 44-2801 to 44-2855 shall be void." This can be accomplished through an endorsement, and a sample is provided below for insurers to use as a template.

The premium for the qualifying policy attributed by the carrier to Nebraska coverage will be used to calculate the Fund surcharge. Therefore, proof of coverage for a policy that covers multiple states must delineate the premium for Nebraska exposure. If there is no separate Nebraska charge, or the Nebraska allocated premium is unreasonably inadequate, the entire premium will be used as the basis for the Fund surcharge.

SAMPLE ENDORSEMENT LANGUAGE:

Under NEB. REV. STAT. § 44-2836(4), to the extent this policy is used to meet this health care provider's financial responsibility requirement under the Nebraska Hospital-Medical Liability Act, any provision in this policy attempting to limit or modify the liability of the insurer contrary to the provisions of §§ 44-2801 to 44-2855 shall be void. This includes, but is not limited to, the requirement for underlying coverage at § 44-2827 ("Such insurance shall be in the amount of five hundred thousand dollars per occurrence and, in cases involving physicians or certified registered nurse

[6] Neb. Rev. Stat. § 44-2821(2).
[7] Neb. Rev. Stat § 44-2821(4).
[8] Id.
[9] Neb. Rev. Stat. § 44-2821

anesthetists, but not with respect to hospitals, an aggregate liability of at least one million dollars for all occurrences or claims made in any policy year shall be provided. In the case of hospitals and their employees, an aggregate liability amount of three million dollars for all occurrences or claims made in any policy year shall be provided") and the definition of "occurrence" at § 44-2813 ("Occurrence shall mean the event, incident, or happening, and the acts or omissions incident thereto, which proximately cause injuries or damages for which reimbursement is or may be claimed by the patient or his representative").

Questions regarding this guidance document should be directed to the Legal Division at 402-471-2201.