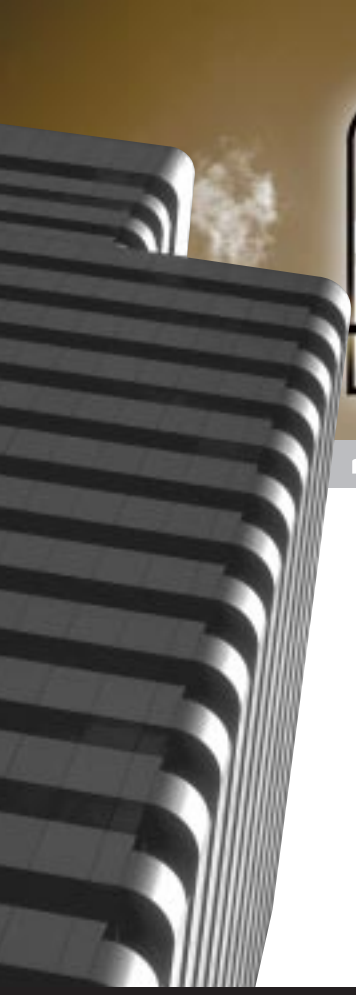
FRONT LINE

MEDICAL MALPRACTICE INSURANCE NEWS



RICK'S CORNER

Buying Medical Malpractice Insurance 1999 Style.

Take a second and picture yourself walking up the front steps of the hospital, black bag in hand, about to make your daily rounds. Just before you reach the door, a whispery voice beckons from the shadows, "Hey doc! Wanna buy some malpractice insurance—cheap?"

While this scene is a bit far fetched, it's closer to reality than you might imagine. During my 20 plus years of helping physicians and surgeons buy malpractice insurance, I've never seen so many insurance carriers hustling for a slice of the malpractice premium pie. When I started my career, only a handful of underwriters were even willing to look at a doctor's application, much less compete on a price basis. Today, nearly 100 insurance companies are battling it out in the price arena for all classes of healthcare medical malpractice coverage. All too many are offering deals that are just too good to last. Think twice about buying your malpractice insurance solely because they are the low price bidder. Here's why.

As a result of the prolonged bull market, many insurance carriers have realized unprecedented returns on their investment portfolios. Despite experiencing negative underwriting results in virtually every class of insurance, the industry at large has accumulated vast amounts of surplus which is not being fully utilized. The fact that the majority of doctor owned non-profit carriers have amassed so much surplus despite steady increases in medical malpractice claims frequency and severity over the past eight years has captured the attention of many commercial carriers. Despite the negative trend, they find the business attractive because of the time it takes to settle claims. The longer they hold on to the money reserved to pay losses, the more investment income they earn.

Its the old law of supply and demand thing. When supply exceeds demand, prices go down. When prices are forced down by competition, it then becomes a game to see who will blink first. Like poker players, only those who have the staying power will survive the game. Some have already been forced out. Let's look at some of the calamities.

Physicians Interindemnity Trust (PIT) was organized in 1986 by California doctors as an incorporated interindemnity arrangement to process, defend and indemnify against medical malpractice claims made against the Trust's members. Each PIT member was required to make an initial monetary contribution, pay quarterly fees and be personally responsible for monetary assessments made to pay claims and operating expenses. The members only expected to be assessed if the earnings on their contributions and their quarterly fees were insufficient to meet the Trust's obligations. The Trust, that was placed into involuntary bankruptcy, got into financial difficulty after fewer than a fifth of its 700 + members paid less than a third of a $28 million levy.

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QUOTABLES

"He who won't be counseled can't be helped."

~ Benjamin Franklin

Volume 1, Number 3
Fall 1998

BY ANDREW A.

Using the Word:

Apologies in Medicine

A recent Reuters article states that physicians have an ethical obligation to tell their patients about significant mistakes they have made.[1] They may also have a legal obligation as well. In Roberts vs. Francis, the Eighth U.S. Circuit Court of Appeals held that the Doctrine of Fraudulent Concealment applied in a case in which a doctor allegedly failed to tell a patient that he removed the wrong ovary.[2] Under the Fraudulent Concealment Doctrine, any statute of limitations defense a physician or healthcare entity puts forth is tolled i.e. there is no statute of limitations if a plaintiff can prove fraud or intentional concealment.

"A simple expression of sympathy does not equate (to) an admission of liability, it shows your true concern for the situation."

If this was not enough, malpractice cases where fraud is proven, can lead to punitive damages against the defendant physician. Punitive or "punishment" damages can run into the millions, and as a matter of public policy are not covered under one's professional liability policy. In California, the provisions of MICRA (the Medical Injury Compensation Reform Act of 1975) will probably not apply to an intentional act of concealment or fraud.[3,4]

From a positive point of view, providing an apology may prevent a physician from being sued.[5] Most physicians do not apologize or say they are sorry for fear of admitting liability. However, "A simple expression of sympathy does not equate (to) an admission of liability, it shows your true concern for the situation."[6] But there are two ways to apologize: one method is to offer your sympathy as one human being to another, without admitting liability. The other method is to second guess one's self or beat one's self up in front of the patient or family. The latter goes like this, "I'm sorry this happened to your mother-you know, if I only would have ordered this lab test . . . Or used this surgical approach . . . Then this would not have happened!"

After the apology, the physician should concentrate their communications on the medicine: What you and the healthcare team will be doing for the patient.

What if the patient or family asks you directly if you errored. Then you must both ethically and legally under the Doctrine of Fraudulent Concealment, answer the questions honestly and objectively as possible.

We know from the medical literature that 32% of patients who sued their obstetricians stated that physicians would not talk openly and that 48% of the patients, in this same study, stated that they were prompted to sue their doctors because they perceived their physicians as attempting to mislead.[7]

Is the converse true? Can patient-physician communications act as a loss prevention tool which can help prevent physicians from being sued? My next column will address this question.

Andy Oppenberg is Vice President, Director of Medical Education for O'Mara & Associates: a National Healthcare Risk Management Consulting Firm based in Los Angeles.

This article does not provide legal advice or opinions. It is presented to promote learning and discussion concerning risk management and loss prevention matters. Specific legal answers to questions should be sought from competent counsel.

1 Reuters, December 2, 1997

2 Roberts v Francis; No. 97-1434 (8th U.S. Cir 1997)

3 CPLH: California Physicians Legal Handbook, California Medical Association, San Francisco, 1997 p.20-57

4 California Statute of Limitations (Medical/Healthcare). Code of Civil Procedure (CCCP) 340.5

5 Oppenberg AA, Adverse Outcome: What Do You Do?, California Physician Magazine, Feb. 1992 p.44

6 IBID

7 Hickson GB, Claron, EW, Githens PB, Sloan FA. Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries., JAMA 1992; 267:7359-1363

Is California really the bell weather state?

	CA Average Large Loss*
1991	$ 997,343.00
1992	$ 734,665.00
1993	$ 623,131.00
1994	$ 818,400.00
1995	$ 957,717.00
1996	$ 840,219.00
1997	$ 870,523.00

*MIEC Large Loss Study

For a complete copy of MIEC's Large Loss Study (12 pages), please call or write HCP attention Ruth Ann Saine at (714) 990-4430 or email us at HEALTHPROS@aol.com

Medical Malpractice Leading Writers

COMPANY/GROUP	1997 DIRECT PREMIUMS
CNA Ins Group	$ 408,539
St Paul Companies	401,363
MLMIC Group	329,798
Health Care Indemn	265,746
Medical Protective	230,710
Amer Inter Group	208,251
Doctor's Co Ins Grp	203,726
Illinois St Medical	196,101
MMI Companies Grp	167,044
Medical Int-In Ex Grp	163,858
Frontier Ins Grp Inc	149,171
PHICO Ins Co	146,804
Medical Assur Group	143,479
Norcal Mutual Ins Co	140,069
Princeton Ins Cos	135,903
Top 15 Cos.	**$3,290,562**
Total U.S. Cos.	**$5,861,608**

Best's Review, Property/Casualty Edition–July 1998 Best Company–used with permission

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1999 Style

Arizona based National Association of Plastic Surgeons and ICA/National Company of American in Texas were forced to close their doors because they couldn't pay the claims against their policyholders.

Ohio's largest medical malpractice insurer, PIE Mutual Insurance Co., was taken over by the State late last year when regulators determined that its liabilities exceeded its assets by $246 million. PIE insured over 18,000 of Ohio's 34,000 licensed physicians.

Pennsylvania's Insurance Commissioner obtained a court order in January, 1998 to liquidate PIC Insurance Group Inc. PIC only wrote medical malpractice insurance for Pennsylvania practitioners. It stopped issuing new policies in January, 1996 and stopped renewing existing policies in November, 1996.

The list goes on and on. Glacier General, Mission, Physicians Reliance, Prime and 21st Century are but a few of the names. In most cases, the common theme among these failures was "price." Simply put, they relied upon their "low prices" to attract policyholders and failed because they didn't charge enough premium to pay their claims. More bluntly, doctors who believed they were buying quality but didn't check closely discovered, all too painfully, that you get what you pay for. The enchanting perfume of low premiums was overwhelmed by the stench of unsatisfied claims that financially hurt thousands of practitioners who didn't wonder why they were getting such a bargain until it was too late.

Remember, we buy insurance because of the sense of security and peace of mind we get from believing we have protected ourselves from financial ruin. Conceptually, insurance is fundamentally a simple devise. In return for the payment, known as a premium, underwriters promise to assume certain risks and pay the losses we may incur. When carriers cannot keep their promises because they are bankrupt, we not only suffer financially, we feel betrayed.

One problem is that medical malpractice is an exceptionally difficult risk to quantify and therefore price. Because the practice of medicine is constantly evolving and plaintiff lawyers are forever expanding the boundaries of accountability for less than perfect results, underwriters are unable to accurately predict claims frequency and severity. The methods used by underwriters to determine the amount of premium required to pay expected losses are somewhat analogous to the practice of medicine. Although rooted in the science of mathematics/medicine, the survival of the insurance company/patient depends upon the artful skills of the underwriter/physician. If they set their rates too low, they risk bankruptcy. If they set them too high, they can't sell their policies to price conscious shoppers. Those who make the wrong decision will either fail or be forced out of the market. Either way, their policyholders suffer the consequences.

The question is, with so many carriers competing for your business, how do you choose the one right for you? The best way is to rely on the advice of a competent insurance broker that specializes in medical malpractice and your financial advisor. When selecting your broker, look at the individual's qualifications closely. Just because he/she may be affiliated with a big name brokerage doesn't mean he/she has the skills needed to do a competent job. Same with your financial advisor.

Here are some of the more important things you should know when looking for an underwriter. We'll look at selecting an insurance company first, and trust and other funding mechanisms a little later. Expect your broker to obtain the information you need and to help you and your advisor interpret it.

You can obtain an accurate profile of the organizational history and financial operating results of most insurance companies from A.M. Best, Moody's and Standard and Poors. In addition to providing a wealth of information, these organizations also rate the carriers based upon management, claims paying ability, and financial size. Ask your broker and financial advisor to interpret the reports for you.

Remember, size alone is not a governing factor. Just because the numbers are big doesn't mean a carrier can't have financial problems. Don't even consider those carriers that are either not rated or rated as marginal performers.

Find out how each carrier's expense and loss ratios compare to industry averages during each of the last five years. Your broker can obtain a listing of all of the carriers writing malpractice insurance in your state. Be concerned about those carriers with loss and loss expense ratios significantly below industry averages. The ratios don't necessarily indicate that the carriers may be charging too much for their policies. Rather, they may mean that the carriers have not set aside enough reserves to pay their claims. You may be surprised to learn that there is little difference between the ratios of commercial carriers and non-profit doctor owned companies. Contact your state's department of insurance or trusted broker and ask if the carriers being considered are admitted to

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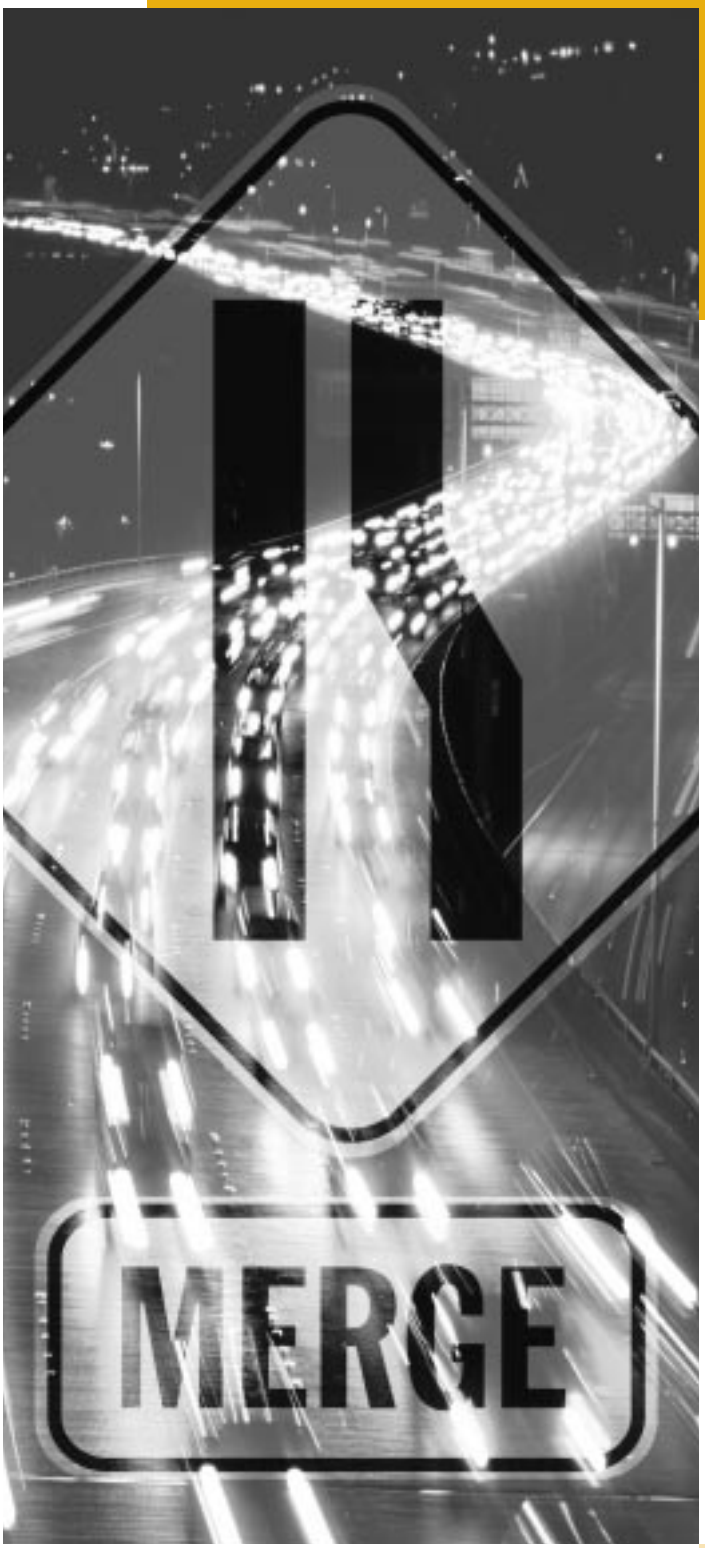
How prepared are you for the changes affecting malpractice insurance?



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1999 Style

do business in the state. If not, you won't be protected by the state's guarantee fund if the carrier goes broke. Find out if they are in good standing or have been subject to any disciplinary proceeding during the past five years. Are any of them on the commissioner's watch list?

Compare the rates offered for your specialty by the carriers you have selected. If there is a significant difference, find out why. Exceptionally higher rates may indicate the carrier doesn't insure a sufficient number of doctors in your specialty to obtain the spread of risk needed to properly calculate rates. All other things being equal, go for the price.

If you are currently a member of an interindemnity trust or are considering joining one, its going to be difficult for you to get the information you need. Generally, trusts are not subject to state insurance laws and regulations. Rather, they are typically subject to the corporate laws governing non insurance and banking organizations. As such, they are not held to the same degree of operational and financial accountability as are insurance carriers. Although trusts periodically provide their members financial reports, they are not subjected to the high level of scrutiny by state regulators and other outside observers. Virtually all have the right to asses their members if the trust corpus is inadequately funded. Given the unlimited liability exposure and pattern of Med–Mal Co. failures, the peace of mind and security offered by trusts may be illusionary.

A number of risk retention groups have been organized to provide malpractice insurance for selected specialties under the Federal Risk Retention Act of 1986. The purpose of the Act was to increase the availability of the third party liability insurance to industry groups that find it difficult to obtain coverage in the open market. Risk retention groups fundamentally operate the same as insurance companies but without the same degree of regulation. Few are subject to guarantee funds of the states they operate in. Most rely heavily on reinsurance to minimize the amount of risk they retain. Because it is difficult to obtain scrutinized operating and financial information, caution is the word.

A final word of advice. Try to build a long term relationship with your broker and financial advisor. Create a three to five year plan designed to keep you fully advised of the financial health of your underwriter and developments in the market place. Last, reduce losses through active risk management and remember that insurance is for unexpected accidental loss. Retain cost of expected losses, and buy insurance above that amount. The market is fast paced and constantly evolving. Caveat emptor!

RECREDENTIALLING:

"For all those physicians who don't like all the self-assessments, surveys, checklists and measuring sticks, medicine still offers an escape hatch. If you think being professional means total freedom, go into private practice."

Henry Ford Clinic, Thomas Royer, Chairman
Medical Economics, May 1995

Trivia Q&A

QUESTIONS

1. Name three recently failed medical malpractice carriers.

2. Which of the following wrote the most medical malpractice premiums in 1997?

A. SCPIE B. St. Paul C. Doctors' Company D. CNA

3. What is the dollar cap in California for medical malpractice pain and suffering awards?

Answers on back page.

Trivia

ANSWERS

1. P.I.E. Mutual Co., National Association of Plastic Surgeons, Physicians Interindemnity Trust.
2. D. CNA.
3. $250,000.

This newsletter is for general informational purposes only. It is intended to provide a limited overview of the market and to provide thought provoking ideas for our readership to consider when arranging for risk transferal programs and insurance.

INSURANCE: The contractual relationship which exists when one party, for a consideration agrees to reimburse another for loss caused by designated contingencies. Dealer has twenty-one; you lose.

"Please let us know if you have any suggestions or items of interest for upcoming newsletters. Your input is valuable to us."

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