

FRONTLINE

M E D I C A L M A L P R A C T I C E I N S U R A N C E N E W S

Physicians employed by managed health care organizations that are struggling to survive financially are at risk of losing more than just their employment. They may lose their life's savings!

Spurred by complaints of cut backs in services leveled by patients' rights groups and lawmakers, regulators are increasing their efforts to weed out financially troubled MCOs. Many industry observers are predicting that the recent bankruptcies of FPA Management, Inc. and MedPartners Provider Network may just be the beginning of a major shakeout. The storm flags have been hoisted and physicians employed by MCOs are urged to take heed.

Because MCOs typically assume responsibility for protecting their employed physicians against malpractice claims, physicians covered by partial self-insured plans and/or claims-made policies are at the greatest risk. The most critical question facing these physicians is how will they be protected after bankruptcy. It is a bit naive to believe that regulators or bankruptcy trustees will be able to provide any assurance adequate funds will be available to settle malpractice claims of self funded plans. If there isn't enough money to fund self-insured plans or

continue to pay claims-made insurance premiums, and/or deductible risk, injured patients will find the compensation bag empty. Their only source of recovery may well be their treating physicians' personal assets.

RICK'S CORNER

FPA and MedPartners Bankruptcies Raise New Concerns Over Claims-made Malpractice Insurance

Physicians fortunate enough to be protected by "occurrence" type policies aren't faced with the same problems as those covered by self-insured funds or "claims-made" policies. They have the security of knowing their occurrence policies will protect them against claims filed long after their policies expire. Self-insured funds typically purchase stop-loss insurance that will respond when the amounts of individual claims and the total of all claims exceed designated amounts. Typically, medical malpractice insurance is written on a claims-made basis.

Whether written on a primary (first dollar) or stop-loss basis (partial self funded), claims-made policies are designed to only provide protection against claims that arise out of services performed after a specified date, commonly referred to as the "retroactive date", and asserted prior to a policy's expiration date. The danger arises when claims-made coverage is either involuntarily not renewed with the same carrier or is dropped altogether. To assure no gap in protection occurs between a policyholder's original retroactive date and the effective date of the replacement carrier's policy, a claims-made insured generally has two choices. By regulatory fiat, "admitted" underwriters must offer their insured the right to purchase an endorsement or separate policy that extends the amount of time allowed to report claims after the policy's termination date. Therefore, the policyholder may elect to purchase "tail" coverage from the retiring carrier, or buy "prior acts" coverage from the new carrier.

The greatest insult occurs when the MCO must be liquidated and there
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QUOTABLES

"When a thing has been said and said well, have no scruple. Take it and copy it"

~ Anatole France



La Niña Can't be Blamed for RAISING the TEMPERATURE of Medical Malpractice Insurance Premiums

By Rick Mortimer

Just like the effects of *el niño* and *la niña*, the medical malpractice insurance market place is heating up or cooling down depending upon where you are in the jet stream of commerce. If you are a CEO, CFO or risk manager for a large health care provider organization, it's highly likely that your malpractice underwriter is putting the heat on to raise your insurance costs. If you're an underwriter, it's a good bet that you're caught in an eddy that is tearing at you to maintain market share while jerking you into the reality that if you don't increase your rates, you may drown in an ever deepening sea of red ink.

It doesn't take Doppler Radar to see that the malpractice insurance market place is treading in tumultuous waters. Just take a look at A.M. Best's ranking of the top 20 pace setting medical professional liability insurance carriers published in Best's July, 1998 and July, 1999 Property/Casualty editions of Best's Review. With 65.8% of the \$6.038 billion market, the 1998 combined adjusted loss ratio for the top 20 deteriorated by 1,220 basis points compared to 1997 (up from 57.9% to 70.1%) and damaged the top 20's bottom lines by almost \$485 million. Taken as a whole, 1998 direct premiums rose by a paltry 300 basis points (up from \$5.862 billion in 1997) while the industry's adjusted loss ratio rose 1,420 basis points (from 54.9% to 69.1%). The \$176 million premium gain was offset by an increase of over \$954 million in incurred losses.

It's noteworthy that while 17 of the 1997 top 20 remained on the 1998 list, only Health Care Indemnity (4th) and NORCAL (14th) were ranked the same. Zurich Insurance Group-US (18th), ProMutual Group (19th) and Physicians Protective (20th) didn't make the 1998 top 20 cut. Professionals Group Inc. (18th) and HUM Group (19th) and MICOA Group (20th) made the 1998 list.

CNA gave up a whopping 1.8% market share (down from 7% to 5.2%) and dropped in rank from 1st to 3rd place on a reduction in premiums from \$406.5 million to \$311.2 million. Its adjusted loss ratio increased from 65.9% to 76.1%.

Although St. Paul reduced its market share from 6.8% to 6.1% and premiums from \$401.4 million to \$367.6 million, it moved up in rank from 2nd to 1st place. Its loss ratio deteriorated by climbing from 77% to 86.5%.

Frontier dropped from 11th to 13th place and gave up a .2% market share (down from 2.5% to 2.3%) as the result of a reduction in premiums from \$149.1 million to \$139.2 million. Frontier's loss ratio increased drastically from a marginal 78.6% to an overwhelming 156.9%.

While AIG dropped from 6th place to 7th, it increased its writings from \$208.3 million to \$225.3 and market share from 3.6% to 3.7%. Unfortunately, its growth was stunted by mounting losses that drove its loss ratio from an already unacceptable 99.6% to 124.3%.

SCPIE stepped up from 17th to 16th place but lost market share (2.1% down to 2%) on a modest gain in writings from \$122.2 million to \$124.4 million. More importantly, its loss ratio dropped from an already profitable 51% to an unbelievable 17.7%.

Significantly, several of the larger writers, including CNA, St. Paul, Frontier, AIG and SCPIE announced in 1998 that they were tightening their underwriting criteria and/or raising rates. Frontier added, they would be strengthening their loss reserves.

What makes CNA, St. Paul and AIG relatively unique in the group is their diversified writings. Respectively they only receive 3.1%, 6.5% and 2% of their total premium income from medical malpractice policies. Frontier gets 19.5%. Twelve of the other 16, including SCPIE, receive between 80% and 100% of their income from medical malpractice. Five of the 12 have adjusted loss ratios exceeding 70%. The point is, those carriers that are diversified can afford to lose market share because they can easily utilize their capital elsewhere. Those that have not opened their doors to other classes of insurance are the most vulnerable. They must make it on their malpractice writings or fail.

While all this statistical stuff may seem pretty boring, the signs are clear. When you boil it all down, we have essentially the same \$6 billion market we've had for several years. One reason premiums are being held down (which is causing loss ratios to climb) is simply because there are too many carriers with too much under utilized capacity competing for a share of this stagnant market.

The question is, how much longer can, not will, this group of leading underwriters withstand the stench of underwriting losses that is overwhelming the allure of the premiums? Those that don't take appropriate action may risk joining Physicians Inter-indemnity Trust and PIE on the bankruptcy list.

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MEDICAL MALPRACTICE: Leading Writers By Line 1998-1997

Source Best's Review Property/Casualty Editions July 1998, July 1999"

	1998					1997				
	MKT SHR	RANK	PREMIUM	ADJ LR	LOSSES	MKT SHR	RANK	PREMIUM	ADJ LR	LOSSES
St. Paul Companies	6.1	1	367,552	86.5%	317,932	6.8	2	401,363	77.0%	309,050
MLMIC Group	5.5	2	334,655	-4.9%	(16,398)	5.6	3	329,798	-30.2%	(99,599)
CNA Ins. Companies	5.2	3	311,154	76.1%	236,788	7.0	1	406,539	65.9%	267,909
Health Care Indemnity	4.6	4	280,213	75.1%	210,440	4.5	4	265,746	65.6%	174,329
Medical Protective						3.9	5	230,710	64.4%	148,577
Doctors Co. Ins. Grp.	4.6	5	277,660	61.0%	169,373	3.5	7	203,726	75.6%	154,017
GE Global Ins. Group	4.0	6	239,612	60.5%	144,965					
Amer Intern Group	3.7	7	225,318	124.3%	280,070	3.6	6	208,251	99.6%	207,418
Med Intl Ins Ex Gr.	3.5	8	213,771	84.0%	179,568	2.8	10	163,858	84.6%	138,624
PHICO Group	3.5	9	212,469	58.1%	123,444	2.5	12	146,804	48.7%	71,494
MMI Companies Group	3.5	10	208,325	73.1%	152,286	2.8	9	167,044	66.8%	111,585
Illinois St. Medical	3.0	11	179,597	60.8%	109,195	3.3	8	196,101	49.3%	96,678
Med Assur Group	2.5	12	150,551	24.6%	37,036	2.4	13	143,479	-18.4%	(26,400)
Frontier Ins. Grp. Inc.	2.3	13	139,169	156.9%	218,356	2.5	11	149,171	78.6%	117,24
Norcal Mutual Ins. Co.	2.2	14	131,428	43.2%	56,777	2.4	14	140,069	54.2%	75,917
Physicians Rec Insrs	2.1	15	124,388	116.1%	144,414	2.3	16	135,100	82.5%	111,458
SCPIE Companies	2.0	16	123,509	17.7%	21,861	2.1	17	122,235	51.0%	62,340
Princeton Ins. Cos	2.0	17	123,248	41.4%	51,025	2.3	15	135,903	44.4%	60,341
Zurich Ins Group - US						1.8	18	106,777	103.1%	110,087
Professionals Gr Inc	1.9	18	114,543	104.9%	120,156					
ProMutual Group						1.7	19	100,519	104.8%	105,344
HUM Group	1.8	19	108,632	86.5%	93,967					
Physicians Protective						1.7	20	99,480	69.4%	69,039
MICOA Group	1.8	20	108,249	52.3%	56,614					
TOTAL	65.8		3,974,043	70.1%	2,785,804	65.8		3,852,673	57.9%	2,230,698
MKT	100.0		6,037,973	69.1%	4,172,239	100.0		5,861,608	54.9%	3,218,023
REMAINDER	34.2		2,063,930	67.2%	1,386,435	34.2		2,008,935	49.1%	987,325

Talking: The Ultimate Malpractice Prevention Tool

By Andrew A. Oppenberg, MPH, DFASHRM*

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
1998	\$ 890,917.00

*MIEC Large Loss Study

For a complete copy of MIEC's Large Loss Study (11 pages), please call or write HCP attention Ruth Ann Saine at (800) 435-6565 or e-mail us at: info@hcp-insurance.com

1999 Best Premium Review

COMPANY	1998 DIRECT PREMIUMS (000)
St Paul Companies	367,552
MLMIC Group	334,655
CNA Ins Companies	311,154
Health Care Indemn	280,213
Doctors' Co Ins Grp	277,660
GE Global Ins Group	239,612
Amer Intern Group	255,318
Medical Int-In Ex Group	213,771
PHICO Group	212,469
MMI Companies Group	212,469
Illinois St. Medical	179,597
Medical Assur Group	150,551
Frontier Ins Group Inc	139,169
Norcal Mutual Ins Co	131,428
Physicians Rec Incrs	124,388
SCIPIE Companies	123,509
Princeton Ins Co	123,248
Professional Gr Inc	114,543
HUM Group	108,632
MICOA Group	108,249
Top 20 Cos.	\$ 3,974,045
Total U.S. Cos.	\$ 6,037,973

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In my last Frontline article, I posed the question: "Can Patient-Physician Communications act as a Loss Prevention tool which can prevent Physicians from being sued."¹ The answer is a resounding Yes— Not only for physicians, but for all members of the Healthcare team.

I know you have heard it time and again from Healthcare Risk Managers, Insurance Brokers and Malpractice Attorneys to be nice to your patients and you and your organization won't get sued. But more importantly, I know that as Healthcare business people you and your physicians want something more tangible to hang your hats on, then the aforementioned opinions based on anecdotal "gut level" observations. Therefore, I offer the following as a brief and selected medical literature review which you can use with your staff, including physicians, to lend credibility to the concept that talking with your patients (not at your patients) can prevent malpractice suits:

- In 1989 Adamson and colleagues, (including myself), showed that there was a relationship between patient satisfaction and malpractice claims experience across specialty lines²
- We also reconfirmed this concept in 1997 with regard to surgeons with high and low malpractice suits³
- In 1992 Hickson, Clayton and colleagues, showed that communications issues, or lack thereof, between Obstetricians and patients were a stimulus in filing malpractice suits⁴
- Levinson, Roter and others in 1997 showed that primary care physicians and surgeons with a caring and compassionate beside manner are less likely to be sued⁵
- In a Case Study Paper which I recently co-authored with Virshup and Coleman⁶ our view regarding the 1991 Harvard Medical Practice Study,⁷ in which 98% of patients with an iatrogenic injury did not sue their physicians, was based on other reasons including good communication skills, or as stated in the case study: "A bad result even one related to negligence is not by itself either sufficient or necessary for patient to sue their doctor."⁶

What are the other reasons that I referenced in the above case study and what role, if any, does the doctrine of informed consent play? My next Frontline column will address these issues.

**Andy Oppenberg is President of Asclepius Healthcare Consultants, a nationally based Company that focuses on clinical risk management, patient safety, physician loss prevention education and continuing medical education. Andy is a Distinguished Fellow of the American Society for Healthcare Risk Management with over 18 years of clinical risk management experience. He may be reached at (818) 832-8526 or at andyormcme@earthlink.net This article is presented to promote learning and discussion concerning healthcare risk management issues. Answers to specific legal questions should be sought from competent legal counsel.*

Notes related to this article can be found on back page

Who's Going to Pay When HFCA Comes Calling???

By Scott A. Satterfield

As the government's zero tolerance goal intensifies for "waste, fraud and abuse", more and more healthcare providers and ancillary healthcare vendors are scrambling to determine if they have insurance in place that will pay once the government knocks on their door.

The answer is not a simple one.

Traditionally, healthcare providers have purchased medical malpractice insurance, directors & officers liability insurance and managed care errors & omissions liability insurance to protect against claims that may arise. Unfortunately, these policies are ill equipped to respond in the event of a Medicare investigation and subsequent civil fines and penalties.

Medical malpractice policies have recently responded with a defense only endorsement that responds to various disciplinary proceedings, but still fails to adequately provide for the catastrophic event that insurance is designed for. A \$25,000 defense only endorsement only goes so far. It fails to consider that more than one disciplinary proceeding can arise from a single act. With managed care waste, fraud and abuse investigations increasing in frequency, a medical malpractice claim can become a "standard of care" issue to HCFA, which violates your capitation agreement. This may prompt an investigation. These types of claims are already occurring.

D&O and E&O liability insurance only provides defense coverage in a best case scenario. Generally, these policies exclude the type of claims that are brought under the Federal False Claims Act (FFCA). Because the definition of fraud has been reduced to a lower standard through the FFCA, (actual knowledge, deliberate ignorance and reckless disregard, with no intent to defraud necessary), most policies will not provide any coverage, **including defense**, if an action is brought under this Act.



Enhancements can be made to some of these policies that may allow them to respond to an allegation. However, there are few remedies in these insurance policies. Slight modifications, that are generally free, might provide for the defense of a claim.

Policies specifically addressed to protect against investigations brought by HCFA as a result of billing errors are available. Besides specifically addressing the fraud definition in the FFCA, they provide coverage for settlement, judgment and civil fines and penalties as prescribed in the FFCA. ©1999 Scott A. Satterfield

Scott A. Satterfield represents Carpenter Moore Insurance Services, Inc. in San Francisco. He is the Program Administrator for BillingShield-Physicians Billing Errors & Omissions. Scott has been an insurance broker for over 16 years and has extensive experience in professional liability for healthcare providers. Scott can be reached at (415) 433-1001.

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*The Root of Risk Financing
and Insurance Information*

La Niña

Now is the time to exercise extra caution in selecting an underwriter. Solvency is the key. Even though a carrier may appear to have adequate capital, look closely at its loss and operating ratios. If they are marginal, probe the carrier's operating strategy. Find out what it is doing to turn an underwriting profit besides raising your premiums. You need to feel comfortable that your carrier will be there when you need it the most.

If you are a large group buyer, don't base your buying decisions solely on price. Many carriers are willing to take on large risks that they know are under priced just to capture market share. When losses exceed premiums they invariably blame everyone but themselves for the red ink. If you know the underwriter has under priced your account, beware. Budget for higher premiums and start thinking about negotiating multi year rate locks.

The bottom line. Most buyers can still purchase their medical malpractice insurance from financially secure carriers below the actuarial cost of risk and associated expenses. Given the number of carriers in the market place, it is likely that they will be able to do so for a considerable time in the future. History has taught us, however, that we don't reward market leaders by paying their requested higher prices. The more the market churns, the more unstable it becomes. Anyone who was around during the 1975-76 malpractice crisis knows what happens when underwriters either price themselves out of, or leave, the market because they can't make a profit. The warning signs are all there.

The question is, will buyers read them and take the necessary steps to create long term risk financing plans with their carriers or jump at the lower premium offers. Many will take the lower premium offers. Thus, we continue to perpetuate the cyclical pricing nature of this industry.

Rick Mortimer is Executive Vice President of HealthCare Professionals' Insurance Services of Brea, California, specializing in medical malpractice insurance and alternative risk funding mechanisms for large group practices and integrated health care delivery systems.

Now is the time to exercise extra caution in selecting an underwriter. Solvency is the key. Even though a carrier may appear to have adequate capital, look closely at its loss and operating ratios.

Trivia Q&A QUESTIONS

- 1. What company bought Medical Protective?**
- 2. What top 20 company had to increase reserves by over \$100 million last year?**
- 3. What company recently went public?**

Answers on back page.

Concerns

isn't enough money to pay for tail coverage or supplement its self-insured fund to pay claims reported in the future.

Physicians are urged to find out as much as they can about the type of malpractice funding mechanism that their employers have in place. They need to check the terms of their employment agreement to determine who is responsible for obtaining and paying the premium for tail coverage upon termination of their contract. Even physicians who were previously employed by a currently troubled MCO should check their terminated agreements while recognizing the value of the contract is directly portioned to the value or lack of its signatory.

Physicians interested in learning more should obtain a copy of The American Medical Association's publication "Medical Professional Liability Insurance: The Informed Physician's Guide to Coverage Decisions." The guide provides suggestions for questions which physicians should ask about malpractice protection provided by someone else. Due to the complexity of the issues, physicians are encouraged to seek the advice of a malpractice insurance specialist and their personal attorney before its too late. As the saying goes; an ounce of prevention is worth a pound of cure!

For a copy of an expanded paper (1,800 words) on this subject, contact Ruth Ann Saine at HealthCare Professionals' Insurance Services (800) 435-6565 or e-mail: info@hcp-insurance.com

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Notes from article "Talking: The Ultimate Preventive Malpractice Tool"

¹ Oppenberg, A.A. Using the "A" Word: Apologies in Medicine, Frontline Mar 98

² Adamson TE, Tschan JM, Gullion DS, & Oppenberg AA Physician Communication Skills: A Complex Relationship. West J Med 1989;150:356-360

³ Adamson TE, Baldwin DC Jr, Sheehan TJ, Oppenberg AA Characteristics of Surgeons with High and Low malpractice Rates. West J Med 1997; 66:37-44

⁴ Hickson GG, Clayton EW, Githens PB, et al Factors that Prompted Families to file Malpractice Suits after Perinatal injuries. JAMA 1992; 267:359-363

⁵ Levinson W, Roter D, Mullooly JP et al Physician-patient communication: the relationship with malpractice claims among primary care physicians and surgeons. JAMA 1997;277: 553-559

⁶ Virshup BB, Oppenberg, AA, & Coleman MM, Strategic Risk Management: Reducing Malpractice Claims Through More effective Patient-Doctor Communications. Am J Med Quality 1999 Jul/Aug ;14(4):153-159

⁷ Locialo AR, Lawthers AG et al Relation between malpractice claims and adverse events due to negligence results of the Harvard Medical Practice Study III. N Engl J Med 1991;325:235-251

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.

“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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Trivia

A N S W E R S



1. GE
2. Frontier added \$149 million
3. MIIX