

Not-so-obvious considerations for professional liability insurance

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September 1, 2005, was the 2-year anniversary of the effective date of the Texas medical malpractice tort reform laws. These provisions are primarily set forth in Section 74.001 et seq. of the *Texas Civil Practice and Remedies Code*. Available and affordable professional liability insurance for health care providers was a primary reason behind the drive to pass this legislation. Now that this legislation with its damages caps is in place, additional professional liability insurance carriers have made, or are considering making, a return to the Texas market. New competition in this area of business will hopefully result in better premium rates. Since health care providers may now have more insurance carriers to choose from, I wanted to take this opportunity to mention some not-so-obvious factors to consider when selecting a professional liability insurance carrier.

In simplest terms, professional liability insurance provides a policyholder two benefits. First, this insurance provides a specific amount of money (the insurance policy "limits") from which to pay a settlement or adverse judgment in a professional liability claim. This benefit is referred to as "indemnity," or the "duty to indemnify." Second, this insurance pays for legal representation in the context of a health care liability claim. This is referred to as the "duty to defend." The duties to indemnify and defend are universal in professional liability policies.

Many times, in determining which insurance and carrier to select, health care providers look only at the limits offered and the premium required to obtain those limits in making their final decision. However, they may also want to consider some particulars about additional coverage, the scope of duties and benefits provided under the policy, the insurance company itself, and the manner in which the company handles professional liability claims. Serious problems can arise in each of these areas that can make a health care liability claim even worse than imagined.

REPRESENTATION IN CASES OF THE STATE BOARD OF MEDICAL EXAMINERS

Coverage for legal services in connection with proceedings of the State Board of Medical Examiners is a third benefit of insurance that is not universal. The Texas State Board has become much more aggressive in investigating medical care provided by Texas-licensed physicians. Thus, coverage for legal services in connection with such proceedings is a real, tangible benefit that should be considered.

POLICY PROVISIONS RELATED TO SETTLEMENT

Insurance policies may require the policyholder's consent to settle a professional liability claim or may allow settlement without such consent or even over the policyholder's objection. Beware: some policies that provide the right of consent to settle also contain a "hammer clause." According to this provision, if the company wants to settle a claim but the policyholder does not consent and the claim is later settled or a judgment rendered in a greater amount, the policyholder is responsible for attorneys' fees and indemnity payment in excess of what the claim could have been resolved for at that earlier time. Also determine if the policy is a "wasting policy." A "wasting policy" is one in which the limits of liability for a settlement or judgment are reduced by the amount of legal costs and expenses incurred during the course of the defense.

POLICY PROVISIONS REGARDING LEGAL COUNSEL AND EXPERT WITNESSES

Investigate how the company handles choice of legal counsel if a claim is filed. The policyholder may have the right to select counsel, the company may reserve that right, or the company may offer access only to certain firms or attorneys or may exclude certain firms or attorneys from being retained as counsel. The last thing a health care provider wants when named in a liability claim is to learn that the insurance company will not allow access to the desired legal counsel.

In addition, determine what restrictions, if any, the company places on the counsel's ability to retain or utilize expert witnesses to assist in the defense of a claim. For example, some companies may place an arbitrary limit on the hourly or total amount that they will pay to utilize other health care professionals as expert witnesses.

PARTICULARS ABOUT THE INSURANCE COMPANIES

In evaluating insurance companies, one of the first considerations is whether the company is subject to the provisions and protections of the Texas Insurance Code. If it is not, it may not have to obtain state approval before raising premium rates, and policyholders may not have certain rights of redress provided

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for in the code if they have a dispute over the services provided. Further, the company may not have to abide by the capitalization requirements required of insurance companies in Texas.

Investigate the company's financial strength and capitalization. Nothing is worse than to pay premiums and later find that the company has been placed into receivership by the state, at best significantly reducing coverage. Also look into the premium history of the company: specifically, the history of the premium increases that the company has made, requested, or received. Find out if other costs are required to maintain coverage. For example, some companies have the right to make and request "assessments," or some other form of payment, during the policy period depending on the results of claims made against or paid on behalf of its policyholders. These issues may not be of sufficient concern to choose another company, but knowing about them beforehand limits surprises.

PARTICULARS ABOUT HOW THE INSURANCE COMPANIES HANDLE CLAIMS

The last important area to investigate is how "physician friendly" the carrier is in handling claims. Some carriers look out for their insureds' interests better than others. Colleagues and attorneys who defend health care liability claims are good resources for this information and may provide more candid answers than the company itself.

First, inquire about the claims personnel. What is their experience in handling health care liability claims? How long have they been with the company? Do they have a local office? How accessible and responsive are they to questions and inquiries from

their policyholders? The answers to these questions will provide some insight into the professionalism of the claims staff and their ability to help health care providers navigate the litigation process once a claim is filed. A colleague or attorney may even be able to provide names and contact information of claims personnel; interested health care providers can then discuss questions with the person or persons who may be involved if a claim is filed.

USING A CONSULTANT TO NEGOTIATE INSURANCE OPTIONS

Large practice groups, in particular, may want to consider using an independent consulting agency to help with investigating insurance carrier options. These services can be especially helpful in efforts to remove certain problematic or undesirable policy provisions (for example, the "hammer clause") or to add rights beyond those provided for in the policy language, such as the right to select counsel. Again, the goal of these efforts is to map the landscape for how claims will be handled as much as possible before a claim arises. In that way, health care providers will be as comfortable as possible and not surprised when their conduct, livelihood, and reputation are being defended.

CONCLUSION

When the benefits and services of professional liability insurance are needed, health care providers face stressful and serious circumstances. Thus, they are wise to ensure that the benefits and services obtained will meet their needs when the time comes. If questions about the carrier or the policy provisions are not addressed before coverage is obtained, it may be too late to address them when the need for services arises.