In Brief:

What Every Physician Should Know About Malpractice Insurance

By

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Depending on the employment arrangement, a malpractice insurance policy may be owned by the physician, or if the physician is an employee, the employer may be paying for the coverage. There are also hospitals that either partially or fully self-insure their employed physicians.[1] There are two main types of policies a physician can be covered by, claims-made and occurrence. A physician should be aware of the type of policy they have, and the ramifications if they change insurance carriers, jobs, locations, or retire.

Claims-Made Malpractice Insurance

Claims-made insurance provides malpractice coverage only for incidents that both occurred, and were reported while insured with an insurance carrier. Both the incident and the filing of the claim must happen while the policy is in effect. If a physician changes insurance carriers, leaves the state or retires, thereby terminating a claims-

made policy, the insured physician is not covered for any suits filed later unless tail coverage is purchased. Tail coverage protects the physician for malpractice suits filed after the insurance was terminated for incidents that occurred during the time the physician was insured. If it is not purchased, the physician could be held personally liable for any judgements. An employed physician should inquire as to whether an employer who pays for a claims-made policy for the physician will pay for the tail coverage when employment ends. This can be expensive as tail coverage can cost from 200% to 300% of a year's premium. This may be a significant financial issue for a physician who wants to move to a new position that results in a change of malpractice insurance carrier, or move to a different state.[1]

Another option rather than buying tail coverage is buying prior acts coverage, also known as nose coverage. Nose coverage may be offered by the new insurance carrier the physician is switching to. This will cover the physician for any litigation filed after termination of the previous insurance company's claims-made policy. Purchasing nose coverage is typically less expensive than buying tail coverage.[2]

Occurrence Malpractice Insurance

The other type of malpractice policy is an occurrence insurance policy which provides lifetime coverage for incidents that occurred while the policy was in effect, regardless of when the claim is filed. An occurrence policy typically has a more expensive yearly premium than a claims-made policy, but no tail coverage is required when terminating the insurance.[2]

Statute of Limitations

The statute of limitations to file a malpractice suit varies by state, but is typically two to three years from when the injury is discovered in adults. If a surgeon leaves a surgical sponge in a patient the statute of limitations would typically start when the error was discovered, not when the surgery was actually done.[3]

In minors, the statute of limitations may be much longer than for adults, and is different from state to state. In some states the statute of limitations deadline only first starts after the minor's 18th birthday, making exposure to pediatric malpractice suits potentially as long as two decades.[4,5]

Consent-To-Settle Clause [1]

A consent-to-settle clause may be part of a malpractice policy, which specifies that a claim can't be settled without the written consent of the insured physician. This may be

an important aspect of the policy as the physician's and insurance company's interests might not always be aligned. There may also be times where a hospital's interests and the physician's interests may not be the same when both are being sued. Some insurance carriers may prefer to settle a malpractice suit that may not have much merit because the cost of defending it may exceed the amount of a negotiated settlement. The insurance company also may feel that the jury will be sympathetic to the patient based on the clinical outcome, and not wish to risk higher damages at a trial. However, any settlement must be reported to the National Practitioner Data Bank, which potentially can adversely affect a physician's insurance status, ability to participate in a managed-care group, and application for hospital privileges.

The consent-to-settle clause is beneficial to have in a policy, but physicians should be aware of the so-called hammer clause that may be contained in some policies accompanying a consent-to-settle clause. The hammer clause goes into effect if the physician refuses the insurer's settlement recommendation, and chooses instead to go to trial. If the trial results in a monetary award higher than the settlement recommendation, the physician must pay the amount over the settlement recommendation price. For example, If the insurer wanted to settle a claim for $250,000, and at trial damages are assessed at $600,000, the insurance company will only pay $250,000, and the physician who insisted on the trial must pay the difference of $350,000 to the plaintiff.

Policy Limits [1]

Most typical physician malpractice insurance policies offer coverage of $1 million/$3 million, but higher coverage amounts are also available. In a $1 million/$3 million policy, one million dollars is the maximum amount the insurance company will pay per each claim during the policy period, which is typically one year. Three million dollars is the maximum amount the company will pay for all claims during the same policy period. A physician can be held personally responsible for any payment of monetary damages in excess of the insurance policy limits.

Statistics about Malpractice and Malpractice Insurance

Malpractice premiums for physicians may vary with place of practice and specialty. The litigiousness of the area, state malpractice regulations, the history of local juries and judges regarding high priced verdicts, a community trend to favor plaintiffs or defendants, and the individual liability risk of the doctor's medical specialty may all contribute to differences in malpractice premiums.

In 2020, according to an American Medical Association (AMA) research paper, an internist would pay $8,274 in Los Angeles, $15,900 in New Jersey, $33,852 in Long Island, and $51,345 in Miami for a $1million/$3 million malpractice coverage policy. General surgeons would pay $41,775 in Los Angeles, $60,810 in New Jersey, $154,056 in Long Island, and $205,380 in Miami, for the same $1million/$3million coverage.[6] As can be seen, paying for tail coverage would be very expensive for a claims-made policy, especially for general surgeons from Florida.

Malpractice insurance is much less expensive in Los Angles than other areas in the AMA database. Part of this may be due to California's malpractice laws. In California, there is a maximum cap of $250,000 for non-economic damages in any successful medical malpractice suit. This includes pain and suffering, physical impairments, or a loss of the enjoyment of life or companionship.[7]

Likelihood of a Physician Getting Sued for Malpractice [8]

There is AMA data from 2016 that approximately 34% of all physicians have been sued for malpractice. In the over 55 years of age group, 49.2 % have been sued once and 28% sued two or more times. In doctors 55 years of age or older, grouped by specialty, 76.7% of OB/Gyns, 75.7% of general surgeons, 72.2% of emergency physicians, 67.4% of surgical subspecialists, 53.5% of radiologists, 51.4 % of family practitioners and anesthesiologists, 45.6 % of internists, 43.1% of internal medicine subspecialists, 27.9% of pediatricians and 23% of psychiatrists have been involved in malpractice litigation at least once during their career.

50.1% of general surgeons and 44.1% of OB/GYNs have been sued two or more times,. Those specialties had the two highest percentages of multiple malpractice suits in that AMA data.

Malpractice Litigation Outcomes [9]

In an AMA research paper reviewing data from 2006 to 2015, it was found that 68.2% of all medical professional liability claims were either withdrawn, dropped, or dismissed. 23.3% of claims were settled. 1.2% were settled by alternative dispute resolution (arbitration or previous contractual agreement). 7% of claims went to trial, of which 87.1% were won by defendant physicians, and 12.9% won by plaintiffs.

The average payment was $341,015 for settlements, $1,121,815 for plaintiff verdicts and $256,596 for alternative dispute resolution.

The average expense for the insurance company for defending withdrawn, dropped or dismissed claims was $30,475. The average expense to the insurance company of going

to trial (not including judgments paid to the plaintiff) ranged from $191,341 to $262,141. From a financial point of view, it may be more advantageous for an insurance company to settle a claim rather than pay for the expenses of a trial.

Conclusion

Every physician should be aware of which type of malpractice liability insurance they have, and what options are available to them if they do get sued. While a consent-to-settle clause is beneficial to have, physicians should also determine if their policy also has a hammer clause which makes it more difficult to go against an insurance company's decision to settle a claim. Malpractice premiums vary widely in different geographic areas, as well as by specialty. When looking to change jobs or move to another state, the expense of tail or nose coverage may need to be considered. Physicians whose employers are the payors of their claims-made malpractice policy or self-insure, should be cognizant if the employer will cover claims that are filed after they leave employment.

Author's Note: There are hospitals and medical centers that have a formalized error communication and resolution process which can reduce the litigation and settlement costs of medical errors. If you wish to learn more about this process it is discussed at the link below in the FibonacciMD blog article, **The Medical Apology, Is It a Good Idea?,** for which *AMA PRA Category 1 Credit(s)™* are available.
https://www.fibonaccimd.com/post/the-medical-apology-is-it-a-good-idea

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